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In

CHANCERY OF NEW JERSEY.

Between:

Harry H. Weinberger and
Benjamin A. Hartstein,
Complainants,
and

Max Goldstein, *et als.*,
Defendants.

Transcript of testimony taken in the above entitled cause before Nicholas W. Bindseil, a Master in Chancery of New Jersey, at his office, Prudential Building, Newark, New Jersey, on Friday, December 5, 1924, at 2:30 P. M.

Appearances:

Mr. Harry H. Weinberger and Mr. Merritt Lane for complainants.
Mr. Wilbur A. Heisley for defendants.

It is stipulated and agreed by and between the counsel for the respective parties that the testimony of the witnesses may be taken stenographically and afterwards reduced to typewriting. The signatures of the witnesses to their said testimony being waived.

HARRY LOEB sworn for complainants.

Direct-examination by Mr. Weinberger:

Q. You are a practicing lawyer of this state? A. I am.

Q. And have been how long? A. Since 1908.

Q. Do you know the Paterson Glass Company? A. I do.

Q. The personnel of that company? A. Yes.

Q. And did you have occasion to act as their attorney? A. I did.

Q. You filed a lien claim, did you not? A. I did.

Q. I show you what purports to be a certified copy of the lien claim, and ask you whether or not that is a lien which you filed in their behalf? A. It appears to be.

Q. Have you an agreement bearing date December 4, 1923? A. In my possession?

Q. Yes. A. I have.

Q. Will you produce it, please? A. (Producing paper.) This is the original agreement.

Mr. Weinberger: I offer in evidence the certified copy of the lien claim of the Paterson Glass Company, a corporation of the State of New Jersey, against Max Goldstein, as builder and owner, and Harry H. Weinberger, Benjamin A. Hartstein, *et als.*, mortgagees.

Marked Exhibit D1.

Q. This agreement, bearing date December 4, 1923, marked D1, has been in your possession since the date of execution? A. Yes, sir, and exclusively in my possession.

Q. And in its present form? A. Yes, sir.

Mr. Weinberger: I offer the agreement in evidence.

Marked Exhibit D2.

"AGREEMENT, Made and entered into this Fourth day of December, 1923.

BETWEEN Herman Simon and Isadore Simon, partners trading as Simon Brothers, A. Levinson, L. Bohn, Joseph Feld Co., Inc., S. S. Robinson, New Jersey Fire Escape and Railing Co., Van Houten and John Grunstra, partners, trading as Van Houten and Grunstra, L. Rabinovitz and J. Schmidtt, partners trading as Rabinovitz and Schmidtt, Albert Paskevic, Benjamin Levine, Melis and Antuzzi, partners trading as Melis and Antuzzi, Israel Turak, Paterson Glass Company, Belmont Lumber Company, Sam Goldberg and Yellow Pine Lumber Company, Inc., parties of the first part,

AND Samuel Slaff and Samuel Eichenbaum, of Passaic, New Jersey, parties of the second part.

WHEREAS, the parties of the first part hereto constitute all of the creditors having furnished either labor or material or both on the four-story brick building now in course of construction located at Nos. 72 to 78 Jefferson Street, Passaic, New Jersey, which property is now owned by one Max Goldstein.

WHEREAS, it is desired herewith, that all of the said parties of the first part shall asisgn

and transfer all of their right, title and interest to said building of Max Goldstein, which they have by reason of having furnished labor or material or both, and those of the parties of the first part who shall not yet have completed their contracts for the completion of their work on said building shall proceed to complete said building upon the terms and conditions hereinafter expressed.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants herein contained, and of the sum of One Dollar each to the other in hand paid, the receipt whereof is herewith acknowledged, it is expressly covenanted and agreed as follows:

1. That the parties of the first part hereto do hereby assign, transfer and set over unto the said Samuel Slaff and Samuel Eichenbaum, the said parties of the second part, all their right, title and interest in said property by reason of having furnished any labor or material or both so that whatever lien claim interest, right or liability of any kind that they may have against the said building shall be and the same hereby is assigned, transferred and set over unto the said Samuel Slaff and Samuel Eichenbaum, the said parties of the second part hereto.

2. That those creditors among the parties of the first part hereto, who shall not yet have completed their contract heretofore entered into between them respectively and the said Max Goldstein, shall, and they hereby covenant and

agree that they will proceed expeditiously and with all possible dispatch towards the completion of their work to the end that the said property shall be promptly finished in accordance with their respective contracts entered into as aforesaid.

3. That those parties of the first part who shall have labor or material to supply to said building which shall not be embraced in their contracts with the said Max Goldstein shall proceed to furnish the necessary labor or material or both requisite to complete the said building, and that such parties shall be preferred creditors, in that they shall be paid from the first moneys that come into the hands of the parties of the second part hereto, except Samuel Goldberg, Rabinowitz & Schmidt, and New Jersey Fire Escape and Railing Co.

4. This agreement shall not become binding and effecting unless and until there shall be deposited with Harry Loeb Five Thousand Dollars to assure those of the parties of the first part referred to in the preceding paragraph hereof that they will be paid promptly upon the completion by each of the creditors of their respective work.

5. The parties of the first part shall be paid on account of their debts a pro rata dividend quarterly, provided that in case any mortgages shall be raised on said property that said parties of the first part shall be paid pro rata from the proceeds of said mortgages immediately. It is mutually understood and agreed herewith

that the pro rata dividends referred to above shall be construed to mean that each creditor shall receive an amount equal in percentage to that received by all the remaining creditors up to that time.

6. Lawful interest shall be paid upon the debts of the parties of the first part, the said interest to be computed from the date of the completion of the building and shall be paid semi-annually, provided there be sufficient income from the building to meet the payment of said interest.

7. That it is further understood and agreed that when Samuel Slaff shall have received an amount equal in proportion to that received by the other creditors hereto, not less than 76% of $27,000.00 Dollars, that he shall simultaneously therewith deliver duly endorsed for cancellation the bond and mortgage made by Max Goldstein and wife to him in the sum of $35,000.00, which mortgage is now of record against the said property.

8. Said Samuel Slaff herewith agrees and binds himself that he will procure an extension for the payment of the mortgage of $15,000.00, made by the said Max Goldstein to the Superior Finance Corporation for a period of three months from the present expiration thereof.

9. The parties of the second part shall furnish a bond in the sum of $100,000.00, conditioned upon the faithful performance and compliance by them with the terms, stipulations and conditions expressed in this agreement.

10. It is understood and agreed that the object and intention on the part of the parties of the first part in granting and conveying unto the parties of the second part their entire interest as expressed in Paragraph 1 of this agreement is to obviate, eliminate and extinguish any interest or claim that the said parties of the first part may have in the Jefferson Street property above referred to by reason of their lien claims, so as to vest a complete fee simple interest in the said parties of the second part.

11. The parties of the second part further agree that they will render an accounting quarterly of the rents and profits and disbursements of said property to any committee representative of the parties of the first part hereto and permit an inspection of all books, accounts, vouchers and other documents that may be maintained and kept by them concerning said property.

12. That the amount due each of the parties of the first part hereto as creditors of the said Max Goldstein on account of their respective contracts for the erection of said property are as set forth in Paragraph 17 hereof.

13. It is expressly covenanted and agreed that in the event that there shall be any breach or failure to comply with any of the terms and conditions of this agreement or of the terms and conditions of a bond of indemnity of even date herewith given by the parties of the second part to the parties of the first part or any

of them, that then and in such event the parties of the first part shall have the right to file a lien against the property above described, anything to the contrary herein contained notwithstanding, provided however, that in the event that any lien shall be filed by any of the parties hereto, that all right and recourse of the parties of the first part or any one of them upon the said bond shall be extinguished, and the parties of the second part shall be thereby released and discharged from any and all liability by reason of having entered into said bond.

14. And it is further understood and agree that at no time shall the said parties of the first part be barred from instituting action against Max Goldstein, the owner of said premises described herein, and in the event of any deficit that may result to them after final payment is made by the said parties of the second part on the funds collected by them and division made in accordance with this contract.

15. And it is herewith further understood and agreed that the within contract and all other contracts, bonds and agreements simultaneously herewith executed are to be held in escrow by Harry Loeb and Joseph A. Feder, which said papers shall be deposited by them in a vault in the Service Trust Company of Passaic, New Jersey, it being expressly understood, however, that the creditors may at any time make inspection thereof and have reference thereto.

16. It is expressly agreed that Samuel Eichen-

baum one of the parties of the second part hereto shall not be liable in any wise or manner by reason of the failure of Samuel Slaff to comply with the terms and provisions of Paragraphs 7 and 8 of this agreement.

17. Name	Amount
Simon Brothers	$1,300.00
A. Levinson	13,000.00
L. Bohn	2,200.00
Joseph Feld Co.	182.25
S. S. Robinson	871.00
New Jersey Fire Escape Co.	3,250.00
Van Houten and Grunstra	375.00
Rabinovitz and Schmidtt	7,000.00
Albert Paskevic	7,750.00
Benjamin Levine	400.00
Melis and Antuzzi	1,500.00
Israel Turak	375.00
Paterson Glass Co.	990.00
Belmont Lumber Company	829.43
Sam Goldberg	9,396.00
Yellow Pine Lumber Co.	7,563.75

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above mentioned.

YELLOW PINE LUMBER CO.
By Samuel Slaff
SIMON BROS.
By H. Simon
A. LEVENSON
L. BOHEN
JOSEPH FELD CO.
S. S. ROBINSON

N. J. FIRE ESCAPE & RAILING CO.
By B. S. KARPINSKY
VAN HOUTEN & GRUNSTRA
By JOHN GRUNSTRA
RABINOWITZ & SMITH
By L. RABINOWITZ &
J. SCHMIDT
ALBERT PASKEWIC
BENJ. LEVINE
MELIS & ANTUZZI
MELIS ANTUZZI
ISRAEL TURAK
PATERSON GLASS CO., INC.
GERALD GREEN, Secy.
BELMONT LUMBER COMPANY, INC.
By FEDER & RINZLER
SAMUEL GOLDBERG
SAMUEL SLAFF
SAMUEL EICHENBAUM

Signed, sealed and delivered
in the presence of
Isidore Grossman

(Endorsed): AGREEMENT. Between Herman Simon, *et als.*, and Samuel Slaff, *et al.* Dated: December 4th, 1923. Harry Loeb, Counsellor at Law, Lawyers Building, Passaic, New Jersey.

Q. I call your attention to the fact that this agreement bears date December 4, 1923, and ask you whether the signature appearing thereon, to

wit, "Paterson Glass Company, Inc., Gerald Green, Sec'y"—and ask you whether or not that is the same Paterson Glass Company whom you represented and for whom you filed a lien claim? A. Yes, sir.

Judge Heisley: Is there a subscribing witness to the agreement?

The Witness: Mr. Grossman.

Judge Heisley: I don't object on the ground that the subscribing witness is not produced.

Q. Do you know of the fact that on the twenty-ninth of November, 1924, Harry H. Weinberger was served by leaving a summons and complaint at the offices of Weinberger & Weinberger, in the People's Bank building, in the case of Paterson Glass Company versus Max Goldstein, *et als.*? A. No, sir.

Q. You do not know that? A. No, sir.

Q. Did you deliver to the Sheriff, or any person, in November, 1924, summonses and complaint? A. I did not.

Q. Did you deliver to any person or persons summonses and complaint in this matter at any time in November, 1924? A. No, sir.

Q. When in 1924 did you deliver summonses and complaint to any person or persons? A. Oh, I don't know whether it was in November, 1924, but my recollection is that I delivered the summonses and complaints and copies that I then had to Mr. Green, for delivery to Judge Heisley.

Q. You don't know when in November that

was, if it was in November? A. It is within a month or two past.

Q. So that from the time that you filed the lien, until this last month or two, you did nothing in connection with this lien claim suit?

Judge Heisley: I would like to state generally this objection. Counsel is trying to show that there was not diligent prosecution of this suit. I object to the evidence on the ground that that is a question to be determined by the Circuit Court of Passaic County; it is a question of fact upon which we are entitled to have a jury, and it cannot be attacked collaterally as it is being attacked, or attempted to be attacked in this suit.

A. After the lien claim was filed, I delivered a copy thereof, together with the original, for service, to the Sheriff of Passaic County, and I think that in the early part of December, 1923, the owner of the building, Max Goldstein, was served.

Q. So that there cannot be mental reservation of any kind, will you state on this record whether you delivered any summonses and complaint to be served on Harry H. Weinberger or Benjamin A. Hartstein, or any other of the defendants except Max Goldstein?

Judge Heisley: Same objection.

A. I did not.

Q. Thereafter this agreement of December 4, 1923, was executed, as you already testified, is that correct, and delivered to you and held in

escrow by you in accordance with the terms of the contract, is that correct? A. Yes, sir.

Q. Did you do anything in connection with the lien claim filed in behalf of the Paterson Glass Company after the execution of the contract, until you delivered the summonses and complaint to Mr. Green? A. I did nothing after the agreement was executed.

Q. And was it in pursuance of the request of your client, or an understanding had by and between you and your client, the Paterson Glass Company?

Judge Heisley: Objected to as leading, also as incompetent.

Mr. Weinberger: I make a formal statement on the record, that Mr. Heisley was not to be a party to this examination; he voluntarily appeared; that this examination is for the purpose of taking such evidence as the defendant on the rule to show cause, allowed by Vice Chancellor Foster, desired to have taken, and the leading question, which is objected to, we submit is not leading, because it is predicated upon testimony taken from the lien claimant's attorney.

A. The understanding was plain, that the agreement was to terminate the litigation; that was the understanding among all the creditors that participated in the negotiations.

Judge Heisley: I object to the answer on the ground that he is contradicting the

written terms of the agreement, and the agreement speaks for itself.

Q. And was it in pursuance of that understanding that you refrained from further prosecuting the particular lien claim in question?

Judge Heisley: Yes.

Q. Did you represent any other of the persons whose names appear in this contract, D2? A. I presume it may be said that I represented all of them in framing this agreement. I had the assistance of Mr. Joseph Feder, who represented Samuel Goldberg, a large creditor, and I want to qualify that statement, in saying that I represented these people only in the sense that I helped to draft the agreement, but I did not represent them in any litigation.

Q. So that you were engaged, as I understand it, by all of the creditors whose names appear on there, together with Mr. Feder, in the preparation of this particular contract and seeing to its execution? A. I would not say that I was specifically engaged by the creditors; the creditors came into the office and they entered into the general discussion, and the negotiations that ensued, which culminated in the agreement; except as you gather impliedly that I represented them; otherwise, not, because I charged them no fees for making that agreement. At that time I had no retainer from the creditors, except as I said, before that the creditors came in and requested Mr. Feder and myself—Mr. Feder having come in during the latter part of the negotiations, if my recollection serves me

rightly, and I incorporated the ideas in that agreement.

Q. You were paid by the creditors, were you not? A. I was paid by Slaff and Eichenbaum, you might say, as representing the creditors.

Q. You say these various parties whose names appear upon that contract, entered into the discussion of the various terms which finally were embraced in the contract? A. Yes, sir.

Q. And they all signed it in your presence? A. No, that is the reason that Mr. Grossman signed it. Some of them signed in my presence, but I delegated Mr. Grossman to undertake to get the rest and be sure that he saw everybody sign it, so that he would be competent to be a subscribing witness for every one of the signatures.

Q. And the subscribing witness, Mr. Grossman, is the gentleman who— A. He, I think, is connected with Simon Brothers, the electricians.

Q. Will you state whether or not Mr. Harry H. Weinberger and Benjamin A. Hartstein ever talked or discussed or had anything to do with you with regard to the preparation of the contract marked Exhibit D2?

Judge Heisley: I object to the question on the same ground I stated before, that it is immaterial and it is seeking to attack the record collaterally.

Mr. Weinberger: Which record do you refer to?

Judge Heisley: It is seeking to attack collaterally the lien suit of the Paterson Glass Company.

Q. Mr. Loeb, have you a stipulation which was signed by the firm of Weinberger & Weinberger and yourself in the foreclosure proceeding in the cause entitled Harry H. Weinberger and Benjamin A. Hartstein vs. Max Goldstein, *et als.*? A. I signed such a stipulation, I think.

Q. Do you happen to have the stipulation here? A. (Producing paper.)

Q. I show you the stipulation bearing date May 19, 1924, and ask you who prepared that stipulation? A. I did.

Q. And it was executed by the firm of Weinberger & Weinberger and yourself, is that correct? A. Yes.

Q. Will you state to the court for whom you signed that stipulation? A. I signed it for Messrs. Slaff and Eichenbaum.

Q. Will you please look at the stipulation? A. I mean I signed it at their request. What do you mean?

Q. Whom did you appear for? A. Apparently here I put down "Solicitor of defendants Max Goldstein, Lena Goldstein, his wife, Samuel Slaff, Fannie Slaff, his wife, Samuel Eichenbaum, Anna Eichenbaum, his wife, Superior Finance Corporation, Paterson Glass Company," but this stipulation was really procured at the request of Mr. Slaff and Mr. Eichenbaum, and I think putting in the other names was an inadvertence; there was no harm done in doing it. I simply got the time extended, but wasn't retained to appear for them.

Q. You appeared for the Paterson Glass Company? A. Not in the foreclosure suit.

Q. Were you not their attorney at that time? A. I suppose I would be their general attorney, but I was not their attorney in this litigation.

Q. You were never given the subpoena to file an answer by Mr. Green of the Paterson Glass Company? A. I am testifying now from my recollection of some months past, and if I can recall, Mr. Green did come into the office and discussed the subpoena with me, and I advised him then that I did not think an answer should be filed, because the amount of his interest did not warrant him to contest the foreclosure. His claim was $990, and the amount of the mortgage interests were probably $100,000, in rough figures, and furthermore, I thought that the fact that Messrs. Slaff and Eichenbaum were handling the situation as provided by that agreement, it wasn't necessary, and for that reason an answer was not filed, and I never was retained to file an answer.

Mr. Weinberger: I offer the stipulation, dated May 19, 1924.

Marked Exhibit D3.

Complainants' Witness, Harry Loeb, Direct

"In

CHANCERY OF NEW JERSEY.

Between:	
Harry H. Weinberger and Benjamin A. Hartstein, Complainants, and	On Bill, &c. Stipulation.
Max Goldstein and Lena Goldstein, his wife, *et als.*, Defendants.	

It is stipulated, consented and agreed by and between the solicitors for the complainants herein and solicitor for the defendants mentioned below, that the time to answer, plead or make any objection to the bill of complaint herein, shall be and the same is hereby extended to July 20th, 1924; it being expressly understood and agreed that progress on the completion of the building shall proceed so that the building shall be entirely completed by July 1st, 1924, and in the event that the said building shall not be completed by July 1st, 1924, that then and in such event the complainants may proceed with the foreclosure and the defendants shall have twenty days from July 1st, 1924, to file such answer, plea or make such

objection to the bill of complaint as they may be advised.

Dated, May 19th, 1924.

WEINBERGER & WEINBERGER,
Solicitors of Complainants.

HARRY LOEB,
Solicitor of Defendants,
Max Goldstein, Lena Goldstein, his wife, Samuel Slaff, Fannie Slaff, his wife, Samuel Eichenbaum, Anna Eichenbaum, his wife, Superior Finance Corporation, Paterson Glass Company, a New Jersey Corporation."

(Endorsed): "In Chancery of New Jersey. Between Harry H. Weinberger and Benjamin A. Hartstein, Complainants, and Max Goldstein and Lena Goldstein, his wife, *et als.*, Defendants. On Bill, &c. Stipulation. Harry Loeb, Solicitor of defendants, Lawyers Building, Passaic, N. J."

Q. Mr. Loeb, in the course of the negotiations which culminated in the drafting of the agreement, marked Exhibit D2, bearing date December 4, 1923, had you occasion to draft other agreements which were in fact rejected, before you— A. Yes, absolutely.

Q. How many different agreements were drawn?

Judge Heisley: Objected to as being immaterial.

A. Mr. Green and Mr. Slaff and Mr. Eichenbaum could refresh me on the details, but I do remember that I prepared a complete agreement once, and then Mr. Feder came in and I had to do the whole thing over again, and the reason that I remember that detail is my irritation at having to do it over again, because it was a voluminous agreement. There is an entire new page in that agreement, in consequence of Mr. Feder's entrance into the matter.

Q. Will you point out that page? A. Certainly. You will notice here, Mr. Weinberger, that these are numerically numbered in typewriting, and then we took out a page, and this (indicating) was put in.

Q. The page next to the schedule, is that right? A. Yes. I would say paragraphs written in figures, numbers 14, 15 and 16, I don't remember about the other pages, and I don't think it is material, but it was redrafted.

Q. In whose behalf were they prepared? A. He represented Samuel Goldberg. It was the object and intention of both of us to see that all the creditors got a square deal, as far as we could.

Judge Heisley: I object to the testimony, as the agreement speaks for itself, and cannot be changed or modified.

Q. Mr. Loeb, did you draw any of the contracts between Mr. Slaff, Mr. Eichenbaum and Simon Brothers and Samuel Goldberg; were they prepared in your office? A. I don't remember; the only one I have any recollection

of—there was a contract between Slaff and Eichenbaum and Bohen, and Mr. Slaff can refresh my recollection, he would know better; Mr. Slaff says no, and I guess he is right and would know. If you show me the papers, I can tell. A contract is produced before me by Judge Heisley, purporting to be between Samuel Slaff and Samuel Eichenbaum with Simon Brothers, dated May 16, 1924. I state that I do not think I prepared this contract, because the typewriting seems to be different than my own, or the typewriting in my office, but it might have been shown to me.

Q. Have you the bond? A. Yes.

Q. Will you produce that? A. Yes, sir (producing same).

Q. I show you what purports to be the bond, and ask you if the name appearing thereon as subscribing witness, is yours? A. Yes.

Bond offered in evidence and marked. Marked Exhibit D4.

"Know All Men By These Presents, that we, Samuel Slaff and Samuel Eichenbaum, parties of the first part, all of Passaic, New Jersey, are jointly and severally bound unto Herman Simon and Isadore Simon, partners trading as Simon Brothers, A. Levinson, L. Bohn, Joseph Feld Co., Inc., S. S. Robinson, New Jersey Fire Escape and Railing Co., Van Houten and John Grunstra, partners trading as Van Houten and Grunstra, L. Rabinovitz and J. Schmidtt, partners trading as Rabinovitz and Schmidtt, Albert Paskevic, Benjamin Levine, Melis, and Antuzzi,

partners trading as Melis and Antuzzi, Israel Turak, Paterson Glass Company, Belmont Lumber Company, Sam Goldberg, and Yellow Pine Lumber Company, Inc., parties of the second part, in the sum of

One Hundred Thousand ($100,000.00) Dollars, dated the Twenty-first day of December, 1923.

The condition of this obligation, is such, that whereas, the parties of the second part were the creditors of Max Goldstein, who have furnished labor or material or both on the building at Nos. 72-78 Jefferson Street, Passaic, New Jersey, and were thereby entitled to file liens against said property.

Whereas, the said parties hereto relinquished and waived their right to liens against said property to said Samuel Slaff and Samuel Eichenbaum, upon the terms and conditions expressed in a certain agreement bearing date December 4, 1923, between the said parties of the second part and said Samuel Slaff and Samuel Eichenbaum, in consideration that the latter will administer the said building with all due regard for the interest of the said parties of the second part.

Now, the said Samuel Slaff and Samuel Eichenbaum, do covenant:

1. That they will receive and collect all the rentals and profits of said building and pay all charges and disbursements imposed upon said property.

2. That they will faithfully comply with the terms and conditions expressed in a certain

agreement bearing date December 4, 1923, with the parties of the second part hereto, and also that certain agreement between the parties of the first part and one Max Goldstein.

3. That they will sell and convey said property for any sum not less than the sum of $181,000.00, One Hundred Eighty-one Thousand 00/100 Dollars.

4. That upon the compliance by said Samuel Slaff and Samuel Eichenbaum of the terms and stipulations set forth in this bond and in the said agreement referred to above, that this bond of indemnity shall thereupon become null and void, anything to the contrary contained herein notwithstanding.

SAMUEL SLAFF (L. S.)
SAMUEL EICHENBAUM (L. S.)

Signed, sealed and delivered
in the presence of
Harry Loeb."

(Endorsed): "Bond Samuel Slaff, *et al.*, to Herman Simon and Isadore Simon, partners trading as Simon Brothers, *et als.* Dated, December 21, 1923. Harry Loeb, Counsellor at Law, Lawyers Building, Passaic, New Jersey."

Q. You have had that bond in its present form since its execution? A. Yes, sir.

Q. Mr. Loeb, do you recall when the foreclosure proceedings were first instituted? A. Your foreclosure proceedings?

Q. Yes. Sometime in May, 1924? A. Yes, I know it was after the lien claim was filed.

Q. Of the Paterson Glass Company? A. Yes, and it must have been before July, so I think May must be right.

Q. Do you know of your own knowledge whether or not the creditors held several meetings from time to time after the foreclosure was instituted?

Judge Heisley: Objected to as immaterial and as not binding upon the Paterson Glass Company.

A. I will say this, that some of the creditors would come in from time to time.

Q. Were there regular meetings called and held after the foreclosure was instituted? A. I don't know whether regular meetings were held, I know that creditors would come in from time to time and discuss matters pertaining to this transaction in my office. I would probably go in another room and leave them to discuss it.

Q. I am speaking of meetings called by the creditors, in which the Paterson Glass Company, Mr. Slaff, Mr. Eichenbaum and the various names appearing on the contract D2, participated in, and which you attended? A. I cannot recall now.

Q. Isn't it a fact that you sent out notices from your office? A. I did, but I don't remember that date, except that I happen to have a copy of a letter bearing date March 25, 1924, addressed to one creditor, and on the back is endorsed the names of a number of creditors to whom copies of this notice was sent, but if any others were sent, I don't recall, and I haven't a copy. This is dated March 25, 1924.

Q. Do you know whether there were any other meetings after the foreclosure, is my question? A. There might have been.

Q. Do you know whether or not you attended any of them? A. In the sense that if they were held in my office, I was in and around.

Q. Do you know whether the Paterson Glass Company participated? A. I don't remember. Mr. Green would know that better than I.

Q. Was there a meeting held in pursuance of the notice which you sent out in March, 1924? A. I think so.

Q. Was a notice sent to the Paterson Glass Company of that meeting? A. I do not think so, for the reason that this letter complained of the delay in the completion of the building, and the desire of Messrs. Slaff and Eichenbaum was to get the creditors to complete the building. The Paterson Glass Company was not notified, because their work had been completed, and there was nothing for them to do.

Q. So that it was only sent to those creditors who were in default and had not done their work. A. I don't know whether they were in default, but that was sent to the creditors who had something further to do with the completion of the building. If you want, I can read the letter; it speaks for itself.

Q. Have you the letter here? A. Yes, sir.

Q. Will you produce the letter which you sent out? A. (Producing same.) Yes; there might have been others, but I don't remember now.

Q. You mailed these letters to whom? A.

My stenographer mailed those letters to the creditors shown there on the back.

Judge Heisley: I don't care if there was such a letter sent out; I don't waive my objection to its materiality. This appears to be nothing but a paper typewritten, unsigned, and it does not appear that the witness knows actually of his own knowledge whether it was sent out or how it was sent out; it does not profess to be a copy of anything.

Mr. Weinberger: He said it had been sent by him, and sent to those people on the back.

The Witness: I am very confident that that letter was—an original of this letter, to Mr. A. Levenson, 34 Wickham Street, Passaic, New Jersey, was dictated by me to my stenographer; that she, for it is her business, mailed this letter and an original copy of this letter to each of these creditors, the New Jersey Fire Escape and Railing Company, and the persons on the back.

Judge Heisley: I don't insist on the production of the original, but I make the objection that it is wholly immaterial and irrelevant to this inquiry.

Mr. Weinberger: I offer this letter in evidence, together with the endorsements on the back.

Marked Exhibit D5.

"March 25, 1924.

Mr. A. Levenson,
34 Wickham Street,
Passaic, New Jersey.

Dear Sir:

This letter is to give you notice that an important meeting will be held at my office on Wednesday evening (March 26th, 1924), at Eight P. M., to take final action upon the completion of the building, at No. 72 to 78 Jefferson Street, Passaic.

It has been reported to me that certain of the creditors whose duties it was under their agreement to proceed with the completion of their work, have failed to do so, as result of which the progress and completion of the building have been seriously delayed.

This meeting is called primarily for the purpose of notifying those creditors that unless they proceed on Thursday morning with their particular work, that other mechanics and material men will be hired, and the additional expense thereof will be deducted from their respective accounts.

It is important that you be present at this meeting, that you may be advised as to the situation in order that your interest may be safeguarded and protected.

Yours very truly,

HL/JET."

(Endorsed): "Mailed a copy of letter to following people (March 25, 1924): N. J. Fire Escape & Railing Co., 118 First St., Passaic, N. J. Messrs. Rabinowitz & Schmidt, c/o Mr. L. Rabinowitz, 420 Lafayette Ave., Passaic, N. J. Mr. Israel Turak, 153 Columbia Ave., Passaic, N. J. Mr. Samuel Goldberg, 95 Ascension St., Passaic, N. J. Mr. Louis Bohen, 110 Hamilton Ave., Passaic, N. J. Mr. A. Levenson, 34 Wickham St., Passaic, N. J."

Q. Will you give us the names of the persons to whom this letter was mailed? A. This letter, I presume, was mailed to Mr. A. Levenson, New Jersey Fire Escape & Railing Company, Messrs. Rabinowitz & Schmidt, Mr. Israel Turak, Mr. Samuel Goldberg, Mr. Louis Bohen, and then it says Mr. A. Levenson, but that is the same one.

Q. Mr. Loeb, did you personally, in behalf of Messrs. Slaff and Eichenbaum, have occasion to notify the various persons whose names appear on the contract, Exhibit D2, to go ahead and proceed with the work?

Judge Heisley: I object as being incompetent and immaterial.

A. Except as I did in conformity with the letter, D5, and on other occasions.

Q. Were you ever requested to file any answer in behalf of any of the creditors who signed the contract D2, in the foreclosure proceedings? A. No.

Q. Mr. Loeb, you have already testified that

all of the creditors whose names appear on the contract, Exhibit D2, were apprised of the foreclosure proceedings, and that you requested the stipulation for the extension?

Judge Heisley: I object on the ground that he has not said any such thing; he said distinctly that he did not notify the Paterson Glass Company.

A. The creditors were apprised, not by me, of the foreclosure, but they knew it, but it was a matter of common knowledge, but I don't remember them all; there are some of those creditors I haven't met personally.

Q. Which creditors did discuss the foreclosure with you; give us their names? A. It was discussed between Mr. Green and myself, possibly on one or more occasions, I cannot remember exactly how many, Mr. Slaff, Mr. Eichenbaum, and possibly the others might have heard it, I don't know whether—I didn't discuss it with the others personally.

Q. Did Mr. Goldberg discuss it with you? A. There might have been some discussion, I don't recall. I don't pretend to remember at this time what discussion there was.

Q. Didn't Mr. Goldberg tell you and Mr. Eichenbaum and Mr. Slaff that he wouldn't go on with the work on account of the foreclosure, that he wasn't crazy to do more work on the building with a foreclosure pending? A. Now, that you refresh my recollection on it, I think that there was some discussion with Mr. Goldberg along those lines, but I don't remember the details.

Q. And isn't it a fact that because of the foreclosure proceedings Mr. Slaff and Mr. Eichenbaum personally signed a contract with Simon Brothers? A. I don't know that they signed any contract with Simon Brothers.

Q. You do not know that? A. I may have been informed about it, but I don't want to state under oath facts obviously that I am not sure of. Slaff and Eichenbaum would know those things more clearly than I would.

Q. How about Bohen? A. That I remember, because I prepared the agreement between Slaff and Eichenbaum and Louis Bohen.

Q. What is his name? A. Bohen.

Q. Mr. Loeb, when you signed this stipulation May 19, 1924, wasn't that after you had a meeting with all of the creditors, and at their request that you came and asked that this stipulation be signed? A. Oh, no, this was at the request of Messrs. Slaff and Eichenbaum that we were preparing the stipulation. The reason that the stipulation was asked was, that there was no intention on the part of Messrs. Slaff and Eichenbaum to file an answer or contest the foreclosure, but there was a doubt in their minds as to how much money you prayed for in your bill. Mr. Slaff told me, and I knew that, too, that the mortgage of record I think was $80,000, but Mr. Slaff had been informed, I think by Mr. Goldstein, that the amount that was really due you was, I think, $65,000, and that if a stipulation was gotten from you, that you admitted that there was $65,000 due, then no further proceedings were to be had.

Complainants' Witness, Harry Loeb, Cross

Q. Wasn't that after a creditors' meeting was held in your office? A. If it was, I don't recall it; it might have been; I don't attempt to remember every detail over a year ago.

CROSS-EXAMINATION by Judge Heisley:

Q. Mr. Loeb, is it not a fact that upon the filing of the lien claim for the Paterson Glass Company, you caused to be issued a summons on that lien claim, addressed to the builder and the owner, and to all the mortgagees of record, and gave that summons and copies to the Sheriff of the County of Passaic? A. I have answered that on direct-examination; I said that my recollection is now that I delivered the original summons and complaint and copies for service upon the owner of the building, Max Goldstein.

Q. Did you not deliver any copies for the mortgagees? A. I do not think so.

Q. What was your object in making the mortgagees parties defendants, claiming that your client, the Paterson Glass Company, had a prior lien to the mortgagees, and yet not having these mortgagees served? A. When I delivered the summons and complaint to the Sheriff, I gave the Sheriff copies for the owner, feeling then that I would want to apprise the owner that a lien claim had been filed against this building. I felt then that this matter ought to be settled, and by delivering summons and complaint to the owner, that would be instrumental in getting him to realize the gravity of his situation.

If it turned out that we could not make a settlement, I would then have proceeded expeditiously with the suit as the statute provides, but it worked out, as I thought, because Goldstein got in touch with the other creditors, and the creditors began coming to the office; negotiations were entered into; we had numerous discussions; I think the discussions lasted for some days, and finally the negotiations culminated in the agreement of December 4, 1923. So that when that agreement was entered into, I felt in my mind, and I am confident that all the creditors felt then, that we had avoided the expense of litigation, we were through with litigation.

Q. Is it not true, then, that your reason for not serving the mortgagees, and your reason for not proceeding further with the lien claims, was because there had been signed this agreement of December 4, which you thought would eventually result in their all getting their money? A. Absolutely, and everybody felt that way, too.

Q. And did Slaff and Eichenbaum feel that way? A. Absolutely; they all felt confident. Every one of them that signed it felt confident that when they entered into that agreement, they were settling their troubles. Mr. Goldberg, I remember particularly, was very reluctant to sign this agreement, and he got hold of his attorney, Mr. Feder, and finally he was brought in to sign.

Q. You know that in the agreement it is provided that a bond shall be given, and that bond has been offered in evidence? A. Yes.

Q. And by the terms of that bond, Eichenbaum and Slaff were to sell the property for not less than $18,000? A. Yes.

Q. Or mortgage it? A. Yes.

Q. In May, 1924, you knew that that had not been done, didn't you? A. That the property had not been sold?

Q. Yes. A. Yes.

Q. And had not been mortgaged? A. And that a new mortgage had not been procured.

Q. Why did you not then proceed with your mechanic's lien suit; was it because you still believed that Slaff and Eichenbaum would go on and fulfill the contract, and eventually by that means get the money for your clients? A. Yes.

Q. Was there any other reason? A. No, I had entire confidence in Messrs. Slaff and Eichenbaum in their ability to handle the situation. I want to say now—

Q. Wait a minute. Now, I notice in this Exhibit D5, that as late as March 25, 1924, the creditors were invited to have meetings, weren't they? A. Yes.

Q. What was the general object in inviting them to a meeting; was it to go on and complete the building so it could be sold? A. I understood then in a general way that Messrs. Slaff and Eichenbaum were having difficulty in getting the building completed, and this letter was to apprise those creditors, whose duty it was to proceed with the completion of the building, to do so. May I refresh my recollection by that letter?

Judge Heisley: Yes.

A. (Continuing.) A meeting was called primarily for the purpose of apprising the creditors that the building must be completed.

Q. Was that the wish of the creditors generally and of Eichenbaum and Slaff? A. I presume that was everybody's wish, because the final salvation of all the creditors depended upon the expeditious completion of this building.

Q. So what could be done with it, sold or mortgaged? A. So that the moment that the building would be completed, you could go to a mortgagee and say, "Here is a building worth a quarter of a million dollars; how much mortgage will you give me?" With the proceeds of that mortgage let us pay the encumbrances off, like Weinberger and the others.

Q. Then the object of these meetings was for the purpose of enabling Eichenbaum and Slaff to sell the building for no less than $181,000, which would be sufficient to pay all the bills, or mortgage it; is that right? A. The object of the meeting was to get the building finished; everyone wanted that building finished.

Q. And the object of having it finished was so it could be sold or mortgaged for the purpose of raising the money for the creditors? A. That would follow as a logical conclusion.

Q. This was in March? A. Yes.

Q. The building was not completed until along in the summer sometime? A. I don't know when it was completed.

Q. It wasn't completed, if at all, until sometime after that? A. Positively not, otherwise the letter would not have been written.

Q. When you say—and I am not criticising you—when you say that these people had tentatively assigned their lien claims to these two men on December 4, 1923, and that this building was not completed and hadn't been sold or mortgaged along in the following summer, why did you not then proceed with your lien suit and also file an answer for the Paterson Glass Company? A. I had a strong conviction in the summer that Messrs. Slaff and Eichenbaum would handle the situation, because they were in the same boat—to use the vernacular—that all the other creditors were in, and if that building were not completed, or if any damage resulted in consequence of that fact, they would be in the same state of jeopardy that all the others were in.

Q. Did you not know that Slaff had not taken a mortgage upon the property which he claimed was prior to the lien of these lienors? A. No.

Q. Is it true, then, that your failure to proceed with the lien claim and to file an answer attacking the priority of the Weinberger-Hartstein and the other mortgages was due to the fact that you believed that because of the agreement of December 4, 1923, and of what Slaff and Eichenbaum told you of their intention, that it would be impolitic or unwise for you to file the lien and to attack the mortgages? A. Yes, but I will also add by saying that my understanding was, and everybody's was, that when we entered into that agreement, that terminated the litigation.

Q. I am not asking for that. A. But we have got to go back to that agreement.

Q. I don't ask you to consider the agreement. A. Then there is no use of asking me.

Q. I want to know if it is not true that your excuse, if you have any, for not proceeding with the lien claim, or not filing an answer attacking the validity of these several mortgages, was because you believed, because of the signing of the agreement, and because of what Eichenbaum and Slaff told you as to their intention, that your client stood a better chance of getting the money through them and through this agreement, than it would by prosecuting the lien claim or attaching the foreclosure? A. Absolutely, but I do want to add this—

Judge Heisley: Why do you want to add—

Mr. Lane: He is entitled to add.

A. (Continuing.) I want to say that my clients did not intend that I should proceed with the lien claim. I want to bring that out, Judge Heisley.

Q. Did the Paterson Glass Company give you any instructions about not serving summonses upon the mortgagees? A. They did not give me any instructions about not serving summonses on the mortgagees.

Q. Is it not a fact that you were instructed to file the lien claim, and that your serving Goldstein, the owner, alone and failing to serve the mortgagees, was entirely on your own initiative, and you did so because you believed from the agreement—prospective agreement, and from what Slaff and Eichenbaum said they intended to do with the property, that your

client stood a better chance of getting their money by not prosecuting the lien claim? A. No, sir, I did not do it on my own initiative; I would not assume such a responsibility.

Q. What do you understand you did not do on your own initiative? A. I mean to go ahead and take upon my own responsibility stopping a lien claim suit, unless I knew, and it was intended that that agreement should be in lieu of further litigation; no one anticipated that there would be any necessity for any further litigation, when that agreement was executed.

Q. You thought and you all thought then that you were going to get your money that way? A. Yes, my clients never dreamed that I should ever proceed with the lien claim, and I never dreamed it.

Q. I am not asking you what you dreamed. A. I put it so strong, because that is my honest conviction.

Q. The failure to serve summonses on the mortgagees was a matter done entirely on your own initiative, and you did not discuss that feature of the case with the Paterson Glass Company, is that right? A. It was intended that litigation should stop when that agreement was made.

Q. You don't answer my question. A. It was no use going on and making more expense. Another thing I should bring out—

Judge Heisley: I suggest—you are a lawyer—should answer my question.

The Witness: I want to put myself on record as I want my position clear in this matter.

Judge Heisley: So do I.

Mr. Weinberger: Go ahead with your answer.

Q. You do say, however, that you never discussed with the Paterson Glass Company or its representatives the advisability of either serving or not serving the mortgagees with summonses in the lien suit? A. I have a recollection that when Mr. Green came to me with the subpoena in the foreclosure suit, we discussed the question then, and we felt then that in the interest of economy, there should be no litigation. We realized then that Mr. Green's claim was $990, and that the burden of going on with a litigation of this character was entirely out of proportion to what he might get out of it.

Q. Won't you say yes or no to this question: The failure to serve the summons in the lien claim was not because the Paterson Glass Company told you not to serve the summons? A. No, they did not specifically tell me not to do it.

Q. It was Slaff and Eichenbaum who got you to sign this stipulation as solicitor for a great many people, giving you additional time to answer; is that right? A. Yes; they didn't get me to sign for the other people; that was inadvertence putting in the other people; they didn't whom I got it for, as long as I postponed the day to answer.

Q. You still at that time were in doubt as to the advisability of filing an answer for the Paterson Glass Company, isn't that right? A. I I wasn't.

Q. You didn't think you should file an answer? A. No, I didn't.

Q. You mean to say you acted in good faith? A. Yes.

Q. And you did not file an answer because you thought even as late as last summer— A. Yes.

Q. —that this agreement would eventually be carried out, and they would get their money; isn't that right? A. Yes, I had confidence in that fact.

Q. Didn't Slaff and Eichenbaum tell you that? A. I don't remember whether they specifically did; I am giving my feeling at that time, that I felt they could handle the situation.

Q. You said that the contract was signed by Slaff and Eichenbaum after the foreclosure was started? A. I don't remember; if they will tell me that it was after, I will agree that it was; I don't remember of my own knowledge.

Q. The foreclosure bill was filed on May 8? A. But I know that they obligated themselves personally in that contract to pay Bohen, because he wouldn't do the work, unless they did, and Bohen happened to be a client of mine.

Q. And did they obligate themselves personally to pay, or to pay it out of the first moneys? A. No; if my recollection serves me right, they were to pay it personally if they didn't get it out of the building; they got an extension of time, two or three years—maybe one year, if they couldn't get it out of the building; the exact time, I don't remember.

Q. You have recently signed a substitution of attorney, substituting me in your place in the lien suit, have you not? A. I think about a month ago.

RE-DIRECT EXAMINATION by Mr. Weinberger:

Q. What is the date of that substitution? A. Mr. Heisley can help me out. I would say within a month.

Q. Will you produce a bill from the Sheriff with regard to the lien claim summons which was issued against the owner? A. Yes.

Q. How much was that bill for? A. $4.12.

Q. That was for service upon what defendant? A. Upon the owner, Max Goldstein.

Q. And was the summons and complaint returned to you at the time that that bill was sent you? A. Yes.

Q. Was that bill paid by you? A. Certainly.

Q. Was the summons and complaint ever filed by you? A. No, sir.

Q. And why is it that you never filed the summons and complaint? A. I have already answered that, by saying that the agreement was the end of it, so far as I was concerned.

Q. Judge Heisley asked you with regard to the Slaff mortgage. You were about to answer your understanding of the Slaff mortgage with regard to priority over the other lien claimants, or other mechanics; what have you to say about that? A. I understood, and I think we all did, that Mr. Slaff was coming in with the creditors with regard to his mortgage; in other words, he was not making himself a preferred claimant to the amount of his mortgage, but that he was coming in just like every other creditor.

Judge Heisley: The agreement says so.

Complainants' Witness, Samuel Slaff, Direct

SAMUEL SLAFF sworn for complainants.

Direct-examination by Mr. Weinberger:

Q. You are connected with the Yellow Pine Lumber Company? A. Yes.

Q. And are the Samuel Slaff who is referred to in the agreement bearing date December 4, 1923, Exhibit D2? A. Yes, sir.

Q. What officer are you in that company? A. President.

Q. How long have you been in that company? A. Thirteen years.

Q. How long have you lived in Passaic? A. Twenty-five years.

Q. You are the Samuel Slaff who is one of the grantees named in a certain deed made by Max Goldstein? A. Yes.

Q. In pursuance of the agreement Exhibit D2, dated December 4, 1923, did you and Mr. Eichenbaum take possession of that building? A. Yes.

Q. Prior to the execution of that contract, were there negotiations which finally led up to the signing of the contract? A. Yes, sir.

Q. And where were those negotiations had? A. Two meetings were held in the Hebrew Institute in the Y. M. H. A.

Q. Who was present at those meetings? A. All the creditors that signed this agreement.

Q. What was discussed there?

Judge Heisley: I object on the ground that it is irrelevant, and that anything which preceded that agreement is immaterial, because the agreement speaks for

itself, and the conversation must be presumed to be embodied in the subsequent written agreement.

A. The meetings were held for that reason, how to proceed with the building, and to try to get a mortgage or sell the building, when completed.

Q. The agreement was finally drawn? A. Yes.

Q. And was there a bond given accompanying that agreement? A. Yes.

Q. You executed the bond with Mr. Eichenbaum? A. Yes.

Q. And that was delivered to Mr. Loeb, was it? A. Yes, sir.

Q. Thereafter did you proceed to carry out the terms of the contract? A. We did.

Q. Was the money which is referred to in that agreement paid? A. Yes, sir.

Q. And was that money used for the completion of the building? A. Yes, sir.

Q. What difficulties did you encounter with regard to the completion of the building? A. The people that agreed to complete the building did never carry out their contract.

Q. Who were they? A. Goldberg, Rabinowitz and Schmidt, the New Jersey Fire Escape & Railing Company—

Judge Heisley: I object to this on the ground that it is wholly immaterial and irrelevant, and should be settled on final decree or in the mechanics lien suit.

Mr. Weinberger: We submit it is prop-

er, on the ground that the Court has no jurisdiction to entertain the application made by the claimants to interpose defences in the foreclosure suit now pending, on the ground that none of the claimants present such claims as entitle them to consideration in this court, and on the further ground that the claimants are fictitious and fraudulent, in so far as their application under the mechanic's lien law is concerned.

A. (Continuing.) —Simon Brothers, Bohen—

Mr. Weinberger: You may refer to the contract.

A. (Continuing.) —and Levenson.

Q. Give us all the names of those who did not— A. (After examining Exhibit D2.) I have given them all.

Q. I am speaking of all the men that were in default and did not complete. A. Oh, all the names; pardon me. (After examining D2.) Joseph Feld did not deliver any sand, and Levine did not put up any lath on the building; Turak did not dig out the rear of the ground, in the rear of the yard, and Melis and Antuzzi did not perform their work on the tile and marble. That is about all.

Q. What did you have to do after you encountered this situation?

Judge Heisley: Same objection.

A. We had to call meetings and notify them that they should proceed with their work.

Q. And where were those meetings called? A. Two meetings were held in Harry Loeb's office—

Q. He is the attorney who was just on the stand preceding you? A. Yes—and three meetings were called in Mr. Eichenbaum's office, and one or two more meetings were called either in Eichenbaum's office or in Mr. Loeb's office, but I presume it was in Mr. Eichenbaum's office.

Q. What was discussed at those meetings? A. First it was discussed why they don't go to complete the building; they said that the building is under foreclosure and they will not go to work and put in a nail there. After, when we discussed a little bit further, they said, if we will get a stipulation from Mr. Weinberger that he will not go on with his foreclosure for a month, then they will go and complete the building, and we should raise the money on mortgage and pay Mr. Weinberger off, and Mr. Eichenbaum and myself did go to Mr. Weinberger, and he did agree that he would not go on with the foreclosure.

Q. Who are the men that you refer to as "they"? A. All these claimants what are on the contract.

Q. In other words, all of the parties whose names appear upon the agreement marked Exhibit D2? A. Yes.

Q. The contract of December 4 were the ones you refer to as "they"? A. Yes.

Q. After you obtained the stipulation and the agreement with Mr. Weinberger to hold off on the foreclosure, what happened then with regard

to the work of the creditors; did they proceed? A. They did not.

Q. What was the trouble and what did they do? A. I have no idea.

Q. Why didn't they proceed, do you know? A. I don't know why they didn't.

Q. Who didn't proceed? A. The carpenter.

Q. Who was he? A. Goldberg; mason, Rabinowitz & Schmidt; Levine, the lather; New Jersey Fire Escape & Railing Company, the iron men, and Bohen, the painter.

Q. What action, if any, did you take? A. Went over to Mr. Loeb and told him about it and asked him that he should give a notice to that effect.

Q. Was notice actually served on these men? A. Yes.

Q. On whom was notice served? A. On the different parties; Mr. Loeb served them.

Judge Heisley: Unless he knows, he has no knowledge and cannot say.

Q. Do you know whether they were in fact served? A. Yes, I do.

Q. How do you know? A. We talked to the people after a while. They said, "This notice will not help; we will not go on with the work, because the building is under foreclosure."

Q. They went back to the excuse of the foreclosure? A. Yes.

Q. What did you eventually do in order to have that building completed? A. We had to hire different men.

Q. Whom did you hire? A. I don't remember exactly.

Q. I want to ask you first, did Mr. Goldberg do any work at all on that building after December 4? A. He did.

Q. Will you state to the Court what happened when he did do work, as far as payment was concerned? A. Mr. Goldberg did not go to work on this building until a $2,000 payment would be given, which our agreement calls for.

Q. Did he receive that payment? A. He did.

Q. What else was done? A. And then he done his work, about two or three weeks, and he said that he is completed, he won't do any more work.

Q. Did you pay him? A. We did pay him $2,000.

Q. Did you pay him any other money for any other work he did there, when he did it? A. Yes.

Q. Did you receive a receipt for that work? A. Yes.

Q. To whom was that receipt delivered? A. To Mr. Eichenbaum and myself.

Q. Will you produce the receipt, please? A. (Receipt produced.)

Q. Is this the same Sam Goldberg who has since filed a lien claim against this building? A. Yes, sir.

Mr. Weinberger: I offer in evidence the receipt bearing date March 14, 1924, for $252.50.

Marked Exhibit D6.

Judge Heisley: No objection.

Q. I call your attention to the fact that that

receipt—the bill is made out and the receipt which is noted thereon is "paid," made out to Slaff and Eichenbaum; are you one of the persons named in that bill? A. Yes.

Q. Aside from the work done there and paid for, did he do any other work on that building, at your request or Mr. Eichenbaum's? A. He did not.

Q. Was that the last work that was done at your request or Mr. Eichenbaum's on that building? A. This was the last.

Q. I call your attention to the fact that the bill bears date March 14, 1924, is that correct? A. Yes, that is correct.

Q. Mr. Slaff, with regard to all bills that were contracted after the agreement of December 4, 1923, by whom were they contracted, after this agreement? A. By Slaff and Eichenbaum.

Q. And by whom were they paid, if paid? A. By Slaff and Eichenbaum.

Q. Have you receipts for all the work that was done at your request and paid for by you? A. Yes, sir.

Q. If a contract for any work was given out, by whom was that contract entered into? A. By Slaff and Eichenbaum.

Q. Have you all the receipts here? A. Yes.

Q. For the various work that was done? A. Yes, sir.

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

Q. I call your attention to a bill of Rabinowitz & Schmidt, masons and general contractors, bearing date October 8, 1924—

Judge Heisley: I object to this evidence on the same ground as given before; it is wholly immaterial and irrelevant; that this is the issue involved in the lien suit, and cannot be tried in this way.

Q. —and ask you whether they are the same persons who have since filed a lien claim against the building in question? A. Yes.

Q. I ask whether that work was ordered by you and paid for by you and Mr. Eichenbaum? A. Yes.

Judge Heisley: My objection may go to this whole line of testimony without repeating it every time?

Mr. Weinberger: Yes.

Mr. Lane: If there is any objection to the form of the question, it should be specified.

Judge Heisley: Yes.

Mr. Weinberger: I offer in evidence bill of Rabinowitz & Schmidt, dated October 8, 1924, in the sum of $240.20.

Marked Exhibit D7.

Q. What is the amount of the bill? A. $240.20.

Q. Was there any other work done by Rabinowitz & Schmidt at your request or Mr. Eichenbaum's request since this receipted bill of October 8, 1924, or the date when it is receipted? A. No, sir.

Q. Was there any other work which you ordered, or Mr. Eichenbaum ordered since the agreement of December 4, 1923, aside from that work which appears in Exhibit D7? A. No.

Q. Was there any other work done on that building by Rabinowitz & Schmidt, so far as you know, since December 4, 1923? A. Yes, it was done in December, right after this contract was signed, some plastering work was done, and in May and June, they did some patchwork.

Q. Was that all paid for? A. Yes.

Mr. Lane: Was there any other work since December, 1923, done by Rabinowitz & Schmidt on that building, except what is covered by that bill?

The Witness: Under a contract, which was done in June and July, but not done for us.

Q. Was there any other work done by Rabinowitz & Schmidt on that building since December 1923, not covered by that bill? I understand you to say there was some work done in June, 192—? A. Four.

Q. Patchwork? A. Yes.

Q. Was there any other work than that done? A. There was done one pier, I guess, in October.

Q. Of this year? A. Of this year.

Q. Will you state the circumstances under which you found out that that was done? A. One morning we came to the building to see whether the painter did some work; we found that Goldberg is busy putting up one partition and Rabinowitz is busy putting up a pier, and I saw some bricks lying there; I asked him, "What is that for; who ordered the brick"; Rabinowitz said he did. I say, "At whose request?" "Oh, we got to do that to put up for the plumbing work." I say, "Mr. Goldberg, how you come to put up this

work?'' I say, ''We hire another carpenter to do it, a man named Mr. Cohen to do the work and complete the building.'' He said, ''I am going to do one partition; I will not make all the coal bins and wood sheds; I am going to do just one wall, and I will be through; I won't be in the way.'' And they left.

Q. So that in October, 1924, Mr. Goldberg, put up what? A. A partition in the cellar.

Q. How big a partition is that? A. I presume about 20 feet one way and by about 20 feet the other way.

Q. You have been in the lumber business how long? A. Thirteen years.

Q. Have you been a contractor? A. Yes.

Q. Putting up buildings? A. Yes.

Q. How many buildings have you had occasion to put up? A. About one hundred and fifty.

Q. Will you state what the value of that work was that was done there on that partition?

Judge Heisley: I object as being immaterial. It is the subject of the lien suit.

A. About five or six dollars.

Q. Was that ordered by you or Mr. Eichenbaum? A. No, sir.

Q. How long prior to that had he done any work? A. About six months.

Q. Had you engaged someone to do the work that he was supposed to do, in the meantime? A. Yes.

Q. Whom had you hired? A. A man named Mr. Cohen, and paid him for it.

Q. Have you the bill here? A. Yes.

Q. Will you produce it? A. Yes.

Q. Do you know how Goldberg came to be there? A. I know how he came, by telling me that he is going to file a lien.

Q. How did he come to be there? A. To do the work.

Q. You say that he came there to file a lien, because he is going to file a lien; did he say that to you? A. Yes.

Q. What did he say? A. He said he sees no further defects in his work, and getting the money, he is going to file a lien on the property. I said to him, "Is that the reason you come to finish the work, or to do the work?" He said, "I will tell you later, I am not ready to talk now."

Q. How about Rabinowitz & Schmidt; what did they do there? A. The same way.

Q. What did they put up? A. Just a little pier about three feet high and 12 x 12, the bricks were laying there.

Q. Was the pier any part of the building under the plans and specifications in the contract? A. Not at all.

Q. It was not part of the contract? A. No, it is not necessary; we will take it off; it is only in the way.

Q. Who ordered that pier to be built? A. Nobody.

Q. Did you order it? A. Not at all; it is not necessary; we will take it out.

Q. How much would the value of that be? A. About a dollar for labor.

Q. Mr. Slaff, how long prior to that time had he done any work there? A. About six months.

Q. And that was the work that was done on the building which you had paid for? A. Yes.

Q. And received the receipt from him in writing? A. Yes.

Mr. Weinberger: I offer the bill of S. Cohen, for $158, dated November 13, 1924, in evidence.

Marked Exhibit D8.

Q. Were Rabinowitz & Schmidt and Goldberg some of the contractors who, under the agreement of December 4, 1923, were obligated to do certain work? A. Yes.

Q. Had they ever finished the work that they were obligated to finish under that agreement? A. No.

Q. Either of them? A. No.

Q. Did you hire anyone to finish Rabinowitz & Schmidt's work? A. We did.

Q. Whom did you hire? A. A man named Chanin.

Q. Have you a receipt for the work done there and does that show the work that was done? A. Yes.

Mr. Weinberger: I offer in evidence the Chanin bill, amounting to $35, dated September 12, 1924.

Marked Exhibit D9.

Q. What work did Chanin do; do you recall? A. The plastering work, patching work.

Q. Where? A. Down in the cellar, all through the hallway, and in fact, all through the building.

Q. Have you the checks in payment of these various bills? A. We have.

Q. Whose checks were given in payment? A. Mr. Eichenbaum and Slaff's.

Q. Did you order any bricks of Mr. Paskewic? A. No, sir, we didn't need any.

Q. There were delivered by Paskewic certain bricks there? A. I don't know.

Q. Did you ever at any time direct anyone in your behalf to order any bricks from Paskewic? A. No, sir.

Q. Mr. Slaff, you mentioned the fact that there were 2,000 brick delivered there sometime in November or October of 1924; is that correct? A. That is what I presume there is delivered.

Q. Are there bricks there? A. They are there.

Q. Did you order the bricks put there? A. No, sir.

Q. Where were they delivered? A. Down in the cellar.

Q. Where are they now? A. Down in the cellar.

Q. And that was by one of the lien claimants in this suit? A. Yes, Rabinowitz & Schmidt.

Q. Is that a client of Mr. Heisley's? A. Yes.

Q. Is Mr. Paskewic a client of Mr. Heisley's, too? A. Yes, all of these claimants are clients of Mr. Heisley.

Q. Did Mr. Paskewic deliver any bricks under the agreement of December 4, 1923, at all? A. No, sir.

Q. Did he ever deliver any bricks at your request at any time after December 4, 1923? A. No.

Q. Was there any necessity for any bricks to be used in that building after December 4, 1923? A. No, the building was to be occupied at that time, already.

Q. Simon Brothers are lien claimants in this suit; did you enter into a written contract with Simon Brothers? A. Yes.

Mr. Weinberger: May I trouble you for that?

(Mr. Heisley produces the paper.)

Mr. Weinberger: I offer in evidence the contract between Slaff and Eichenbaum and Simon Brothers, bearing date May 16, 1924.

Marked Exhibit D10.

Q. What have you to say as to whether or not Simon Brothers completed the work in accordance with the contract bearing date May 16, 1924, Exhibit D10; did they complete it? A. They did not.

Q. Did they do any work other than this particular contract work, the part which they did do, since the agreement of December 4, 1923? A. They did not.

Q. Did you hire anyone else to complete that work? A. We did, yes.

Q. Whom did you hire? A. Mr. Katz.

Q. Have you bills showing work done, and a receipt showing payment? A. Yes.

Q. I show you a bill bearing date October 16, 1924, made to Slaff & Eichenbaum, from Katz & Wittie, for $216.62; did you have that work completed? A. Yes.

Q. And was that bill paid? A. Not yet.

Mr. Weinberger: I offer that bill in evidence.

Marked Exhibit D11.

Q. When was the last work done by Simon Brothers under the contract of May 16, 1924? A. In June, 1924.

Q. Have you given all the lien claims? A. Yes.

Q. With regard to the brickman, Paskewic, did you ever at any time put any order in for any brick to anyone from the time of that contract, December 4, 1923, down to this date? A. I did not.

Q. With regard to the roofer, Ac-Tin-o-Lyte Roofing Company, were they one of the creditors under the agreement of December 4, 1923? A. Yes.

Q. And all these creditors whom you refer to as having done work there, and who filed lien claims, are parties to this contract of December 4, 1923? A. Yes.

Q. Will you state whether or not you ever directed the Ac-Tin-o-Lyte Roofing Company to do any work on the roof? A. We did.

Q. When? A. July, 1924, and in June, 1924.

Q. What kind of work did they do? A. One to patch up on the old building.

Q. What old building? A. 82 Jefferson Street.

Q. Is that next to the new building in question? A. Yes.

Q. What was the amount of work done there? A. The amount of the work $28.88.

Q. That is the old building? A. Yes.

Q. And did you order any work on the new building? A. I have got it written, the old building was $19.75, and on the new building he did work in June.

Q. What work did he do? A. Patching up there.

Q. At whose request? A. At my request.

Q. How much was the bill? A. $28.88.

Q. Did you receive a bill for it? A. Yes, I did.

Q. And to whom was the bill charged? A. To Eichenbaum & Slaff.

Q. To whom was the bill charged on the old building? A. To Goldstein.

Q. The old building? A. (After examining bill.) To Eichenbaum.

Q. And both of those jobs were ordered by you and Mr. Eichenbaum? A. Yes.

Q. Aside from this patchwork was there any work done by the Ac-Tin-o-Lyte Roofing Company at your request or that of Mr. Eichenbaum? A. No, sir.

Q. Was it done at anybody's request? A. No, he didn't have any work to do there, the roof was completed before December 1, 1923.

Mr. Weinberger: I offer in evidence the bill of the Ac-Tin-o-Lyte Roofing Company dated July 23, for $48.63.

Marked Exhibit D12.

Q. Were all of these persons who have filed lien claims, parties—were they at the meetings held with regard to the prosecution of the completion of the buildings and likewise the fore-

closure proceedings that were instituted? A. Yes, sir.

Q. Was there any work done? A. Yes, there was marble work and tile work.

Q. Did the New Jersey Fire Escape and Railing Company file a lien? A. Yes.

Q. Have they done any work on that building at your request? A. Yes.

Q. What work did you order? A. We ordered what the bill says, 9 beams.

Q. Referring to bill of what date? A. October 30, 1924.

Q. Who ordered that work? A. I did.

Q. Was it done? A. Yes, sir.

Q. Was it paid for? A. Not yet.

Q. How much is the amount of the bill? A. $145.

Q. To whom was the bill charged? A. To Samuel Slaff.

Q. Did they get a written order for that work? A. Yes.

Mr. Weinberger: I offer in evidence the bill of the New Jersey Fire Escape Railing and Construction Company, dated October 30, 1924, for $145.

Marked Exhibit D13.

Q. Was that the only work that you ordered them to do since the agreement of December 4, 1923? A. Correct.

Q. Did they do any other work there in pursuance of the contract of December 4, 1923? A. They did.

Q. When? A. In April, 1924. They hung the

fire escapes and put up all iron ladders on the building according to the tenement house law.

Q. Did they complete that work? A. Yes.

Q. At that time? A. Yes, at that time.

Q. After that was there any other work done except the work called for in Exhibit D13? A. Not to my knowledge.

Q. Did you order any, or did Mr. Eichenbaum, so far as you are concerned? A. No.

Q. Was that work which was done under the bill of October 30, D13, any part of the contract of December 4, 1923, or was that extra work? A. That is extra work.

Q. Mr. Slaff, when you and Mr. Eichenbaum had this deed of conveyance made to you, you were a creditor, were you not, of Goldstein's? A. The Yellow Pine Lumber Company was.

Q. Your company was? A. Yes.

Q. To what extent? A. To the amount of about six or seven thousand dollars.

Q. And the amount of money which was due to each one of the creditors at that time was fixed, was it, or was that moneys which would grow due? A. Yes, it was.

Q. Were those moneys that were already due then, or become due? A. Would become due when they complete the building.

Q. So that item appearing in the contract of December 4, 1923, was for work which was still to be done, including work which had been done? A. Yes.

Q. What was the amount due you at that time? A. $7,563.75.

Q. Was that for the materials then due? A. And which had been delivered.

Q. Does the amount due to the New Jersey Fire Escape appear on that contract? A. It was at that time, but we gave them $1,000.

Q. How much is there? A. $3,250.

Q. Did that include all of the work, the amount which they were to receive if they completed all of the work? A. Yes.

Q. And on account of that they have received how much? A. $1,000.

Q. From whom did they receive that? A. They received this $1,000 from Mr.—

Q. Was that in accordance with the contract? A. $500 they received from Feder and $500 from Mr. Loeb.

Q. They received $1,000 called for in the contract of December 4, 1923? A. Yes, sir.

Q. The work which they did in April, 1924, was done in pursuance of that agreement D2? A. Yes.

Q. And I understood you to say that the work done under Exhibit D13 was extra work? A. Yes, extra work ordered by us.

Q. And had no bearing on the contract at all of December 4, 1923? A. No.

Q. The amounts due in the schedule shown were amounts fixed and determined for work already done or to be done by the various men; is that correct? A. These amounts were fixed when that building would be entirely completed by them.

Q. Under the contract of December, 1923, whatever other work they did there was ordered by you and paid for by you? A. It was ordered and paid, some of the bills, and to be paid as the rent will be collected from that building, according to our understanding.

Q. You had kept a record of all the rents collected? A. Yes.

Q. Where was that money deposited? A. In the Service Trust Company, Passaic, New Jersey.

Q. All moneys expended were on check? A. On checks.

Q. You kept a record showing the income and expenses? A. Yes.

Q. Have you the record? A. Yes.

Q. Will you produce it; by whom was that kept? A. By Miss

Q. She is employed by whom? A. By Mr. Eichenbaum.

Q. Have you totaled the amount of money that you have collected in all? A. Yes, sir.

Q. Do you now what it is? A. No, sir, I have no idea.

Q. Will you let us have the amount, please? A. $5,734 from the new building.

Q. Up to what date is that the total amount of income? A. Until November 30, 1924.

Q. And from when? A. August 1, 1924.

Q. Will you tell us how much money you obligated yourself with regard to work that had to be done to complete that building and is still unpaid? A. About $20,000 in round figures.

Q. Will you prepare schedule showing the amount of income, the amount of expenses, and the amount of obligations contracted by you and Mr. Eichenbaum with regard to the completion of that building? A. Yes.

Judge Heisley: May I suggest that he show what he has expended the money for, and itemize it?

Mr. Weinberger: Yes.

It is stipulated and agreed between counsel that such statement when prepared and sent to the Master, is to be marked Exhibit D14.

CROSS-EXAMINATION by Judge Heisley:

Q. You spoke about $5,000 being put up; who put up the $5,000? A. Mr. Goldstein.

Q. Slaff and Eichenbaum did not? A. No.

Q. And that money was to be devoted to the payment of bills that should be contracted to complete the building, isn't that right? A. No, this $5,000 is to go to three people only: $2,000 to Goldberg, $2,000 to Rabinowitz & Schmidt and $1,000 to the New Jersey Fire Escape & Railing Company.

Q. Isn't it a fact that the $5,000—is it not a fact that at the time of the signing of the agreement of December 4, it was known to you all that there was to be labor and material furnished for the building which was not embraced in the original contracts between Goldstein and the contracting parties? A. No, we did not know at that time.

Q. I call your attention to the third paragraph of the agreement, "That those parties of the first part who shall have labor or material to supply to said building which shall not be embraced in their contracts with the said Max Goldstein shall proceed to furnish the necessary, &c." A. That is right.

Q. You knew then that there was to be material

and labor performed which was not embraced in the old contract with Goldstein? A. We did not.

Q. And isn't it true that the $5,000 were to be held by Feder and Loeb for the purpose of paying these persons? A. Which was done.

Q. Did you pay any interest on mortgages? A. No, sir.

Q. Did you pay any taxes? A. No, sir.

Q. You gave a bond, you and Eichenbaum gave a bond? Yes, sir.

Q. What did you understand by the condition in the bond saying that you will receive and collect all the rents and profits of said building and pay all charges and disbursements upon said property? A. All disbursements, whatever bills will be contracted.

Q. What did you understand by charges? A. Charges, whatever will be necessary against the building.

Q. Didn't you know that in order to protect that property, it would be necessary to pay the taxes, or the county and state would sell it, and it would be necessary to pay the insurance and the interest or the mortgagees would foreclose? A. Of course, I did not know.

Q. Then why did you take the money for the purpose of finishing the building instead of paying things which if not paid might extinguish the property? A. That was the agreement at that time, that we should pay out those people, otherwise they don't go to work.

Q. You refer to the agreement of December 4, 1923? A. Yes.

Q. That will speak for itself. You didn't sell the property? A. No, sir.

Q. You didn't mortgage it? A. No.

Q. And in the bond you agree to sell it for not less than $181,000, or to mortgage it, don't you? A. That is right.

Q. You haven't done either? A. We couldn't get it.

Q. You haven't done it, either? A. We couldn't get no mortgage.

Q. Answer the question. A. That is answered; we couldn't get no mortgage; otherwise, we would mortgage it.

Q. Then you have not mortgaged it? A. No, we couldn't.

Q. As I understand you, there seems to be a great difference of opinion between you and Eichenbaum, on the one side, and my clients, the lienors, on the other; you say that none of my clients have furnished any material there for which that property is liable; is that right?

Mr. Lane: I object to that question on the ground that it does not appear in this record yet, that there is any difference of opinion at all. The difference of opinion is between the counsel.

Q. There is a difference of opinion between you and the lienors as to whether there is any sum of money due them on their lien claims, isn't there? A. I don't know.

Q. You have been served with affidavits made by the lienors swearing that there are certain amounts due them, for which they claim a lien on this property.

Mr. Lane: I object to that as wholly im-

material and irrelevant and not proper cross-examination.

A. I was.

Q. You know that in those affidavits which have been served, they swear that there are certain amounts due, and that they have liens on this property ahead of your mortgage?

Mr. Lane: Objected to on the same ground.

A. I know it.

Q. You say that isn't the fact?

Mr. Lane: I object to that upon the ground that the question is wholly improper—to ask a witness whether or not certain statements contained in an affidavit are or are not the facts. He is not shown the statement.

Q. You know that in those affidavits which have been served, they swear that there are certain amounts due, and that they have liens on this property ahead of your mortgage? A. I claim that there is none ahead of my mortgage.

Q. You also say, as I understand you, that none of those lienors have completed their contracts, is that right? A. No.

Q. I say you do say that? A. Yes, certainly I do say that; they did not complete the contracts.

Q. And then although they all swear that they have done certain work, and you have seen their affidavits, or copies, that does not change your opinion? A. No, because I hired other men to do the work, and paid them. They did not com-

plete the work; otherwise, I wouldn't have to hire other men.

Q. You made this agreement with Simon Brothers after the foreclosure had been begun? A. I don't know when the foreclosure was begun, but if you will give me the dates, I will probably tell you.

Q. The foreclosure was filed the eighth of May, 1924, and this agreement was made on the sixteenth. A. If the date is there, it is all right.

Q. And at that time you had the title to this property in your own name, didn't you? A. Yes, we have even today.

Q. You claim to own that property, or do you claim that that is simply a mortgage? A. It is for the creditors; we own that property for the creditors and the mortgagees.

Q. Then I understand that that deed is really a trust deed to you and Eichenbaum for the benefit of creditors; is that right? A. Well, I cannot tell you what it is, but that is just the understanding.

Q. The understanding is that you hold that property only as a trustee, is that right? A. Yes.

Q. Yet you know that that deed is a plain warranty deed for the Goldstein building, do you not? A. Well, that was in the deed.

Q. It was a plain warranty deed from Mr. Goldstein to Eichenbaum and you? A. That is the understanding.

Q. That is a plain warranty deed, is it not? A. I don't know.

Q. You say that was the agreement between

you and the creditors? A. Whatever we have got on the deed, that is the agreement. Everything we hold right along.

Q. Why is it, Mr. Slaff, that if you and Mr. Eichenbaum were to hold this valuable property as trustee that you didn't say so in that deed? A. Is wasn't necessary.

Mr. Lane: I object upon the ground that the opinion of the witness is highly inconsequential.

Q. In this agreement with Simon Brothers you obligated to pay them out of the first moneys that came into your hands didn't you? A. Under the agreement?

Q. Well, you did, didn't you? A. Under the agreement, nineteen—

Q. Will you answer the question? A. Yes, we have got here—

Q. Never mind what you have got here—just answer my question, you can't bluff me. A. You can't put words in my mouth. What I should say I will answer just what you will tell me to answer.

Q. Isn't the fact—? A. I will not allow you to put anything in my mouth.

Q. I ask you if this is so, that in the agreement with Simon Brothers you agreed to pay them $1,200 out of the first moneys that came to the property whether by rent or mortgage? A. Under the agreement December 4th, 1924?

Q. That is what you agreed to do? A. Yes, sir.

Q. Have you done it? A. We couldn't do it, for the reason—

Q. You have done it? A. We have done it.

Q. You have paid them $1,200? A. No, sir.

Q. How much have you paid them? A. Nothing.

Q. Then you say you haven't paid them out of the first moneys you received? A. We haven't paid them, but we have done what the agreement calls for.

Q. The fact is that you haven't paid Simon Brothers one dollar on their $1,200 contract? A. We didn't have the money to pay them.

Q. Yet you have collected rent, haven't you? A. We did.

Q. And this says you were to pay them out of the first moneys that came to the property whether by rent or mortgage? A. Yes, sir, we paid bills previous to this. That came out of the money previous to December, 1923.

Q. Your excuse then, for not paying Simon Brothers the $1,200 is that you took the rent or at least part of it to pay other persons who had furnished material? A. Furnished material and performed labor in it before your people did their work.

Q. You also know that the agreement of December 4th called people of the class of Simon Brothers preferred creditors, didn't you? A. I don't know—whatever the agreement calls for.

Q. What is the amount of taxes due on that property, about? A. About $5,300.

Q. And what is the amount of interest due on it about? A. I have no idea.

Q. In this deed from Goldstein to you and Eichenbaum, did that include any other property than the Jefferson Street property? A. Yes, sir.

Q. It included the Monroe Street proprety? A. No, sir.

Q. What other property? A. Jefferson Street and Street property.

Q. Have you got a deed for the Monroe Street property? A. No.

Q. You have got a mortgage on that? A. No, sir.

Q. Do you know why you are made a party defendant in the foreclosure against the Monroe Street property? A. I do.

Q. Why? A. Because I have got a mortgage on that property.

Q. That is what I asked you? A. You said a deed.

Q. A mortgage, yes. A. A mortgage I have, yes, sir.

Q. Who holds that mortgage? A. Samuel Slaff.

Q. And not Eichenbaum? A. No, sir.

Q. How big a mortgage is that? A. $35,000.

Q. Is that for the same debt that is embraced in the mortgage of $35,000 on the Jefferson Street property? A. Yes, sir.

Mr. Weinberger: Is that on Monroe Street too?

The Witness: Yes, sir.

Mr. Weinberger: It is a blanket mortgage?

The Witness: Yes, sir.

Q. How much do you claim is a debt upon the Monroe Street property, of this $35,000 mortgage? A. I am wrong. The $35,000 comprises only Jefferson Street.

Q. Then will you be good enough to tell me why you are made a party defendant in the foreclosure of the Monroe Street property? A. I wasn't made a party defendant on Monroe Street.

Q. Now, I will show you an advertisement of the sale—an advertisement of the Sheriff's sale of the Monroe Street property, and on the 12th of December the Sheriff of Passaic County is going to sell the Monroe Street property, in a suit wherein Max A. Slaff is complainant and Samuel Eichenbaum, Samuel Slaff and others are defendants. I am asking you why you are made a party in that foreclosure suit? A. I have no idea.

Q. This $35,000 mortgage does not cover that? A. No, sir.

Q. You have a deed for it, haven't you? A. I have a deed for the Jefferson Street property.

Q. Have you a deed for the Monroe Street property? A. No, sir.

Q. And you haven't any idea why you are made a party defendant? A. That is the first time I seen it.

Q. Have you been served with process by the Sheriff? A. No, sir.

Q. Who is Max Slaff? A. My brother.

Q. Are you interested in the Superior Finance Company? A. Yes, sir.

Q. What position do you hold there? A. Vice-President and Treasurer.

Q. Are you a large stockholder? A. No.

Q. Is Mr. Eichenbaum interested in it? A. No, sir.

RE-DIRECT EXAMINATION by Mr. Lane:

Q. Mr. Slaff, I direct your attention to this Simon Brothers Contract, part of which has been read by counsel, and the statement in full is that the $1,200 is to be paid in manner following, reading the agreement: "According to an agreement entered into between the creditors of Max Goldstein former owner of the above property, to wit that the above moneys ($1,200.00) be paid from the first moneys that come to the property whether by rent or mortgage. This agreement was between the parties of the first part in this agreement and all creditors concerned in the above mentioned property and parties of the first and second part agree to the payment of this agreement according to those terms.

It is expressly covenanted, stipulated and agreed that the parties of the first part in entering into this agreement with the parties of the second part do not assume any personal liability for the payment of the money to be paid hereunder, it being expressly understood and agreed that the parties of the second part are to be paid out of any moneys that may come into their hands either from rent of the Jefferson Street building or from the proceeds of any mortgage loan that they may raise on the said property in accordance with agreement made between the creditors of Max Goldstein and the parties of the first part hereto, which agreement bears date December 24, 1923, and is in the possession of Harry Loeb." And I refer to the agreement of December 4th, 1923, the third paragraph, "Those

parties of the first part who shall have labor or material to supply to said building which shall not be embraced in their contracts with the said Max Goldstein, shall proceed to furnish the necessary labor or material or both requisite to complete the said building, and that such parties shall be preferred creditors, in that they shall be paid from the first moneys that come into the hands of the parties of the second part hereto, except Samuel Goldberg, Rabinowitz & Schmidt, and New Jersey Fire Escape and Railing Co." Did you pay those claims? A. We did.

Q. Whose? A. Rabinowitz & Schmidt.

Q. My question is whether you paid any of the parties to the agreement of December 4th, 1923, for any work which they had performed before December 4th, 1923, except the payments which were made to Samuel Goldberg, Rabinowitz & Schmidt and the New Jersey Fire Escape and Railing Company out of the $5,000? A. No, we did not.

Q. Now, will you tell me, if you can, how you could pay interest and taxes and Simon Brothers when you didn't have any money to pay with? A. We can't.

RE-CROSS EXAMINATION by Judge Heisley:

Q. Is it true that the contract with Simon Brothers made by you and Eichenbaum was not for materials which were embraced in their contract with Max Goldstein? A. No.

Q. Is it true? A. Yes, it wasn't embraced in the contract.

Q. Then they were to be paid, as you understood, and as the agreement says, that they shall be preferred creditors in that they shall be paid from the first moneys that come into the hands of the parties of the second part. You knew the agreement said that? A. Yes.

Q. And you have already told me that the reason you didn't pay Simon Brothers out of those first moneys was because there were other people you had to pay? A. No.

Q. Didn't you tell me that? A. We didn't pay Simon Brothers because we didn't have any money to pay to them.

Q. Why didn't you have any money? A. Couldn't collect no rents.

Q. You collected over $5,000? A. We had to pay for water and gas and we had to pay for the electric and we had to pay the people that performed the labor that they didn't do under the contract.

Q. In other words you took this money which came to you as rents and exhausted it in paying other bills, is that right? A. To who?

Q. The bills you just mentioned, water, gas and other mechanics? A. Yes, that is the proper thing to do.

RE-DIRECT EXAMINATION by Mr. Lane:

Q. Water bills and other mechanics—what do you mean, other mechanics, mechanics who had performed any work before December, 1923? A. We did not.

Q. Or did you pay other mechanics who per-

formed any work except work to complete the contracts which these gentlemen did not, or failed to complete? A. No, we didn't pay them.

Q. And are there still due, moneys for mechanics to complete the work, and moneys due materialmen also, to complete the work which these contractors agreed to do—including Simon Brothers? A. Yes, sir. We owe all for the medicine chests about sixty of them, $5,000. We owe to Passaic Plumbing Company about $4,500. We owe to the Yellow Pine Lumber Company $4,000 for lumber. They left the building open. We owe to the Passaic Glass Company $1,000 which we have paid on a note. We have renewed the note right along. We also owe $2,500 to the painter. We tried to complete the building the best we could.

RE-CROSS EXAMINATION by Judge Heisley:

Q. You paid $1,000 to the Passaic Glass Company? A. The Passaic Sash Company, for sash.

IN

CHANCERY OF NEW JERSEY.

Between:

HARRY H. WEINBERGER and BENJAMIN A. HARTSTEIN,
Complainants,
and

MAX GOLDSTEIN, *et als.*,
Defendants.

Continuation of the testimony in the above-entitled cause before Nicholas W. Bindseil, a Master in Chancery of New Jersey, at his office, Prudential Building, Newark, New Jersey, on Thursday, December 11th, 1924, at four o'clock, P. M.

Appearances:

(Same as before.)

SAMUEL SLAFF, duly recalled for further cross-examination by Judge Heisley:

Q. Mr. Slaff, you said something the other day about your mortgage that you had on the property—that $35,000 mortgage. Has that debt always been due—the $35,000, from the date of the making of the mortgage? A. At the time when the mortgage was made there was due $35,000 to the Yellow Pine Lumber Company.

Q. And has it been due ever since? A. I don't know about the Yellow Pine Lumber Company. You are asking about Samuel Slaff or the Yellow Pine Lumber Company?

Q. You got a mortgage of $35,000. At the time you took that mortgage how much was there due you on that mortgage? A. $35,000.

Q. How much is there due you on it today—I mean for principal—is it $35,000 or something else? A. On that mortgage there was paid to me $8,000 on that mortgage.

Q. How was that paid? A. Mr. Weinberger gave me a check for that.

Q. That is to say your mortgage for $35,000—A. (Interrupting.) Was reduced to $27,000.

Q. There is no doubt about that? A. Absolutely.

Q. Isn't it true that you recently in this foreclosure—in the foreclosure of Weinberger against Goldstein, or in the foreclosure of Sidney Lobsenz, swore and made an affidavit that there was $35,000 due you on that mortgage? A. Yes, sir.

Q. How do you account for that? A. Because I advanced back the $18,000 to Goldstein to pay the Yellow Pine Lumber Company.

Q. When did you advance that $8,000 back? A. It was either June or July.

Q. 1924? A. 1924—1923 that is.

Q. Why this mortgage was dated, I think, in June, 1923—I think this mortgage is dated June 19th, 1923? A. I think it was a month later.

Q. You say then that in all possibility within a month or so after you had been paid $8,000

on account of this mortgage by a check from Mr. Weinberger? A. Yes, sir.

Q. You then paid back to Goldstein $8,000 in money? A. No, I have paid Goldstein in such a way that I give him an order to deliver to the Yellow Pine Lumber Company for $8,000 for material that he took. That is that $35,000.

Q. He gave you an order to deliver to the Yellow Pine Lumber Company for $8,000 of what? A. For material that he took of the Yellow Pine Lumber Company for that building.

Q. Do you mean to say that he got a further credit from the Yellow Pine Lumber Company for $8,000, and said that your mortgage was then to stand for the $27,000 plus the $8,000? A. Yes, sir, Mr. Heisley.

Q. In your accounting for the rents the other day, you didn't account for the rents of the old building, did you? A. No, we have got all that. We will give you a copy of it.

RE-DIRECT EXAMINATION by Mr. Weinberger:

Q. You have had prepared, have you not, in accordance with our suggestion, a detailed statement showing the income and expenditures which you have had on the proprty in question? A. Yes, sir.

Q. Will you produce that, please? A. (Witness produces statement.)

Mr. Weinberger: I offer in evidence a detailed statement showing bills paid on

the new building, 72-78 Jefferson Street, amounting to $4,582.54, being the statement which was to have been prepared as per the last hearing, and submitted today.

Judge Heisley: I must object to that, but I don't know anything about it being an accurate account or anything else.

Mr. Weinberger: You might cross-examine on it. We have got the bills and all for it.

The Master: This is the statement you wished produced.

Marked Exhibit D14.

Mr. Weinberger: I offer in evidence a statement showing the bills still due and unpaid, amounting to $19,427.95.

Marked Exhibit D15.

Judge Heisley: This relates to bills not paid. Manifestly I must have an opportunity to cross-examine on it. I can't do that today.

Mr. Weinberger: We are not precluding the Judge from that privilege, and I am offering it so that the Judge may have the privilege of doing that very thing.

By Judge Heisley:

Q. Didn't you say the other day that you had expended $7,445.60 on the property—actually paid, $7,445.60, whereas today your statement shows that you only expended—paid—$4,582.54? A. That was the old and new at that time, as the books show, but here we show for the new building only.

Q. Why do you show for the new building only when you say that you held all the property described in the deed from Goldstein to you, in trust for his crdeitors? A. We could show on the old building, if you want.

Q. Why don't you account for all the property—the rents for all the properties which you hold in trust? A. The mechanics didn't work on that building. He asked me which money we paid out on the new building.

Q. For what creditors do you hold all the property which is described in the deed from Goldstein to you? A. The collections on the old building is $725. The expenditures on the old building is $230.26.

Mr. Weinberger: Have you the detailed record showing the moneys received on the old building and expended on the old building?

The Witness: Yes, sir.

Mr. Weinberger: Will you prepare a statement of that and produce it?

The Witness: I will.

Q. Will you put the dates on it? A. Certainly.

Q. Was this building originally erected by a general contract or not? A. I don't know.

Q. Was it built according to any plans and specifications? A. No doubt it was—I don't know.

Q. In contracting these various debts here, approximating $19,000, you did it without reference to what the building was to be according to the original scheme, is that right? A. No,

this was contracted in order to complete the building. The building was all right except to complete it. We had to do it.

Q. You don't know whether it was complete? A. It was complete.

Q. You don't know, Mr. Slaff, whether the building was completed according to any plans and specifications mentioned in the contracts of Goldstein, did you? A. At that time when I took it over?

Q. You don't know whether it is now completed according to any plans and specifications of Goldstein's, do you? A. No, I don't know.

Q. Has the property been sold for taxes? A. No, not yet.

Q. Is it advertised? A. I don't know. I couldn't tell you whether it is advertised or not. There is no sale—we would have notice.

RE-DIRECT EXAMINATION by Mr. Weinberger:

Q. All the work which was done there was in pursuance of an understanding had at these various creditors' meetings, was it not? Whatever work you did? A. Yes, why certainly.

Q. Will you see that the dates are furnished showing the time when these various items were paid out and the dates when these bills were contracted? A. Certainly—we could show checks on that. We didn't pay out by cash.

Q. Have you the checks in each instance for these various items which were paid out? A. Yes, we have got them right here.

Q. Will you produce them? A. Yes, sir.

Mr. Weinberger: I offer in evidence the batch of checks drawn on the Service Trust Company, on the account of Eichenbaum & Slaff, covering the items referred to in Exhibit D14, and ask that they be marked as Exhibit D14a.

Marked Exhibit D14a.

Q. Mr. Slaff, was any money paid to the Yellow Pine Lumber Company, or the Passaic Plumbing Supply Company for any materials delivered by them, in this group of checks? A. No, sir.

Q. Were any payments of any kind made to either your concern—the Yellow Pine Lumber Company, or the other—Passaic Plumbing Supply Company, of which Mr. Eichenbaum was an officer? A. No.

Q. Referring now to Exhibit D14 and Exhibit D15; was this the only work that was ordered by you and Mr. Eichenbaum to be done on that building? A. Yes, sir.

Q. Aside from the work that was done under the contract bearing date December 4th, 1923, was there any other work done excepting as provided for in Exhibits D14 and D15? A. No.

RE-CROSS EXAMINATION by Judge Heisley:

Q. Let me go back again to that credit of $8,000. I understood you to say you thought it was in June or July? A. I could tell you by my books, Mr. Heisley.

Q. Have you got them here? A. No, I didn't bring the Yellow Pine Lumber Company books.

Q. Who is the Yellow Pine Lumber Company? A. I am interested in it.

Q. And the president of it? A. Yes, sir.

Q. You said a while ago that you thought it was in June or July and I called your attention to the fact that your mortgage was made in June. When do you think it was that Goldstein gave you this order, or you arranged with him to let him have $8,000 worth of material from the Yellow Pine Lumber Company, and that was to go back on your mortgage. When was that, would you say? A. Well, let me think. It was about a month or six weeks later.

Q. Wasn't it in the fall. Wasn't it as late as October? A. Maybe it was—I couldn't recall exactly. I can tell you tomorrow, if you want, by the books.

Q. Well, are you sure it was in the summer season? A. That was in either the summer or the fall season.

Q. How late in the fall? A. I couldn't tell you exactly, because from month to month it run down, and after a while he needed some more material when the workingmen stopped on them before he had procured the loan of the Superior Finance Company, and I said, "Goldstein, I will not give you any more material; so far as the Yellow Pine Lumber Company is concerned we cannot go on after all this trouble." He says, "I tell you what you do; pay the $8,000 back to the Yellow Pine Lumber Company and give me material for that amount."

Complainants' Witness, Samuel Eichenbaum, Direct

Q. Did you pay the $8,000 to the Yellow Pine Lumber Company? A. I did.

Q. How did you pay it, by check? A. I couldn't tell you exactly.

Q. You didn't pay it by cash? A. I don't believe I did, but will look it up and tell you just exactly how I paid it.

SAMUEL EICHENBAUM, duly sworn for complainants.

Direct-examination by Mr. Weinberger:

Mr. Weinberger: I offer in evidence at this time the opinion or decision of Judge Newman, in the case of The Paterson Glass Company, a corporation of the State of New Jersey, plaintiff, vs. Max Goldstein, *et als.*, defendants, bearing date December 9th, 1924, and ask that that be marked.

Marked Exhibit D16.

Judge Heisley: I don't see the relevancy, but I don't object to it.

Q. Now, Mr. Eichenbaum, you live where? A. Passaic.

Q. How long have you lived in Passaic? A. For the last fourteen years.

Q. And what is your business? A. Plumbing supplies.

Q. How long have you been in that business? A. The last twenty years.

Complainants' Witness, Samuel Eichenbaum, Direct

Q. You are the Samuel Eichenbaum who is one of the grantees named in a certain deed made by Max Goldstein to Samuel Slaff and Samuel Eichenbaum? A. Yes, sir.

Q. With what concern are you connected? A. With the Passaic Plumbing Supply Company.

Q. And that is a corporation of the State of New Jersey? A. Yes, sir.

Q. What office do you hold in that company? A. President and treasurer.

Q. Did your company have occasion to deliver any materials to the building of Max Goldstein on Jefferson Street, Passaic? A. We did.

Q. And to what extent? A. Well, before the making of the contract of December 4th, 1923—

Judge Heisley: You mean the agreement?

The Witness: The agreement—I was in to the tune of $13,000. I was in to about $13,000.

Q. And that consisted of what class of materials? A. For plumbing supplies, consisting of plumbing and heating—plumbing supplies, pipe, valves, fittings, etc.

Q. And these materials were all new materials, delivered for the premises in question, were they? A. Yes, sir.

Q. Were you familiar with the progress of that building? A. I wasn't familiar until after I have heard when he asked for money and he couldn't get any money—that made me familiar with the progress of the building.

Q. And as a result of that did you eventually

negotiate with the creditors with regard to taking steps to protect your interest? A. We did.

Q. And that led up to the signing of the contract of December 4th, 1923? A. Yes, sir.

Q. Mr. Eichenbaum, where were the meetings held? A. There was a few meetings held at the Y. M. H. A. It might have been one or so, or maybe more that I haven't attended. I was not interested as far as the merchandise was delivered to the plumbers and I wasn't directly connected with Goldstein, not knowing of the facts, and I didn't attend those but to one or two I have attended at the Y. M. H. A.

Q. And were there any attorneys present? A. At the Y. M. H. A.? I don't recall.

Q. Did you finally go to any attorney's office to hold meetings? A. Then there were meetings held at my office. Upon the first or second meeting of the creditors, we got together, and we decided to go to an attorney.

Q. What attorneys were there? A. No attorneys were present at that time, at my office, but we decided as to what attorney we should engage.

Q. Who was present at the time? A. All the creditors, Rabinowitz & Schmidt, Goldberg, Mr. Green. I believe Goldberg. I believe they were all there. Practically all the creditors.

Q. Did you finally agree on any attorney? A. Yes, several names were put up.

Q. Who was the attorney you agreed on? A. Harry Loeb.

Q. Did you go up to Mr. Loeb's office? A. We all went the day after.

Q. And who attended there? A. All the creditors.

Q. And were these agreements finally drawn? A. After pro and cons and back and forth, they were drawn.

Q. Did Mr. Goldberg have an attorney at that time? A. Mr. Goldberg had an attorney, Joseph Feder.

Q. And did eventually this contract of December 4th, 1923, appear, and was it executed? A. Absolutely.

Q. Now, Mr. Eichenbaum, when this deed was drawn and executed at whose suggestion was it that you and Mr. Eichenbaum became the grantees in that deed? A. The suggestion of the creditors.

Q. And did you undertake your duties then, as trustees of that property? A. We did.

Q. What did you start to do? A. We immediately tried to see that the building is—to complete the building—to see that the various contractors complete that building.

Q. Calling your attention to the agreement of December 4th, 1923, marked Exhibit D2, I ask you whether the conditions so far as you and Mr. Slaff were concerned were in fact complied with and carried out? A. Absolutely.

Q. Was there any default by any of the creditors who signed that agreement, after it was executed? A. There was quite a default by the creditors.

Q. Tell us who they were that defaulted, and what their default consisted in? A. We had our hands full the moment we signed this agreement. We were begging them on our knees.

Q. Who were you begging? A. Rabinowitz & Schmidt, Goldberg, the electrician—Simon—the iron man.

Q. Who was he? A. The Jersey Fire Escape —then the painter.

Q. Who was he? A. L. Bohen. The lather, Benjamin Levine—Melis & Tuzzi—they was the tile men. Turak wouldn't carry out his work unless we paid him in advance, which we did. In fact he got a first check.

Q. What finally happened after you tried to get them to do this work—did they do it? A. Well, to tell you frankly I was just heartbroken—I wished I had never signed that agreement. I would rather have lost my money than have the trouble I went through with.

Q. What was the trouble? A. They wouldn't complete the building.

Q. What did you do to get them to go to work? A. We got them after we have called up—we have tried to get together and have other meetings, why we don't progress with the work. We have sent them notices on several occasions. In fact we tried to make a different agreement with them. We have tried everything with them to get them to complete the building, and they wouldn't go ahead.

Q. Were you finally advised that there was a foreclosure pending on this mortgage held

by Mr. Weinberger and Mr. Hartstein? A. We were.

Q. Did they go ahead then? A. Then they certainly stopped.

Q. Who said they wouldn't go ahead? A. The carpenter, the mason—everybody that had any connection with that building.

Q. Did Goldberg ever carry out the contract of December 4th? A. He started to work but he never finished—never completed.

Q. Did Rabinowitz & Schmidt ever complete the work they agreed to do under that contract? A. He acted in the same manner as Goldberg. He started in the beginning but didn't complete the job in full. We had to engage others to finish it.

Q. Did Bohen carry out his agreement? A. Bohen didn't carry it out, no.

Q. Did he? A. He did not; Bohen completed the work after we had to give him a personal guaranty that we ourselves, would be personally liable and not the building; then he would go ahead with the work.

Q. Who do you mean by "we"? A. Samuel Slaff and Samuel Eichenbaum.

Q. So that despite the agreement of December 4th, 1923, you personally gave a personal guaranty to the painter to proceed with the work? A. Yes, sir.

Q. And did he then complete the work? A. He did afterwards—he completed that work.

Q. Melis and Antuzzi—did they complete the work in accordance with the agreement of De-

cember 4th, 1923? A. They did some work and we had to pay them extra money to finish up which they credited to us after, and to which we was not aware, but we paid them in order to finish the building which checks we have to show.

Q. I direct your attention to the fact that there is a schedule attached to the agreement of December 4th, 1923, and in that schedule there is the item, "Simon Brothers, $1,300." Did Simon Brothers complete their work after the execution of that agreement, in accordance with the agreement? A. I can't exactly state whether they have completed that work or not, because I believed that their wiring was done. Of course I don't know whether it wasn't done or not. I wasn't much acquainted with that building, as to how far the building progressed, but I believe—

Q. You don't know? A. I really don't know —I can't say.

Q. Mr. Eichenbaum, did you ever order any brick of Albert Paskevic? A. I did not.

Q. Did you ever order the Actinolyte Roofing Company to do any work except repair jobs on the old building, and a repair job on the new building? A. We did order them to do extra work on the old and new buildings—repair work.

Q. Did you give them any order at all for any work aside from the repair work? A. Never.

Q. Did you, at any time order Rabinowitz & Schmidt to put up a pier in the basement, in October, 1924? A. Not to my recollection.

Q. Well, did you? A. I did not.

Q. Was there any need for any pier in that building, or a part of a pier, that was put up in October or November?

Judge Heisley: I object, because it doesn't show whether the building was erected according to plans and specifications. If it was the plans and specifications would be the best evidence.

A. No pier was necessary. The pipes were properly suspended from the ceiling.

Q. Mr. Samuel Goldberg has filed a lien against this building and alleges he did some work there as late as October, 1924—did he do it at your request? A. No, sir.

Q. Did Mr. Goldberg do some work on behalf of you and Mr. Eichenbaum—I mean Mr. Slaff —and was he paid for the work? A. Yes, sir.

Q. Was there any work done by him other than that work at your request? A. No other work except the work ordered by us and paid for.

Q. Did he ever do any work at all excepting under the agreement of December 4th, 1923, and the order which you paid for, on that building? A. No, sir.

Q. Now, with regard to the foreclosure, Mr. Eichenbaum, was that discussed at the meeting of these various creditors? A. Very much so.

Q. Who was present? A. Most of the creditors.

Complainants' Witness, Samuel Eichenbaum, Direct

Q. Were all the present lien claimants present? A. Yes, sir.

Q. Was the Actinolyte Roofing Company present? A. Yes, sir.

Q. The Paterson Glass Company? A. Paterson Glass, Rabinowitz & Schmidt, the electrician, Simon, Mr. Goldberg, and all those that were interested in this building.

Q. And during the course of the discussion what took place and what was said? A. Well, we tried to devise ways and means how to raise moneys in order to pay up the mortgages so that we can go ahead and complete the building, and pay them off, and several suggestions were made. On one of the meetings, I recollect, I was acting chairman, and I appointed committees.

Judge Heisley: What committee?

The Witness: A committee. Mr. Grossman was acting secretary? That is his handwriting.

Q. Is that the Grossman who appears for the Simon Brothers? A. Yes, sir, and here is what it said.

Q. By whom were those minutes kept? A. These minutes were written by Mr. Grossman.

Q. And is he the representative of Simon Brothers? A. Yes, sir.

Q. Will you state just what those minutes show?

Judge Heisley: Doesn't it speak for itself?

Mr. Weinberger: I offer them in evidence.

Complainants' Witness, Samuel Eichenbaum, Cross

CROSS-EXAMINATION by Judge Heisley:

Q. When did you say this meeting was held? A. I can't recall it. We did try to trace the telephone calls. In many cases we wrote letters, and on other occasions we called them up, and we have some slips from the telephone company showing when we called up.

Mr. Weinberger: Was this the last meeting?.

The Witness: No, this was the meeting where I appointed a committee to find ways and means to finance this building. Then we had another meeting where they could report their findings.

Q. Who wrote those minutes? A. The minutes was written by Mr. Grossman.

RE-DIRECT EXAMINATION by Mr. Weinberger:

Mr. Weinberger: I offer them in evidence.

Marked Exhibit D17.

Mr. Green motioned & seconded that a comm. of 7 be app. by the Chair purpose devising ways & means whereby the sum of $157,000 be raised or sell the new & old bldg. for the price $250,000.00.

Mr. Slaff, Chair.

Mr. Eichenbaum, ex-officio,

Mr. Green,

Complainants' Witness, Samuel Eichenbaum,
Cross

Mr. Levenson
Mr. Paskevitch,
Mr. Goldberg,
Mr. Grossman,
Mr. Rubenowitz and Mr. Goldstein.

Q. Have they been in your possession since the meeting? A. Yes, sir.

Q. I direct your attention to the fact that Mr. Green, Mr. Levenson, Mr. Paskevic, Mr. Goldberg, Mr. Grossman, Mr. Rabinowitz and Mr. Goldstein were appointed on that committee. Are those all the men who filed lien claims in this case, excepting Goldstein? A. Green, Levenson—except Levenson—Green, Paskevic, Goldberg, Grossman and Rabinowitz & Schmidt.

Q. The only one that does not appear on that committee is the Actinolyte Roofing Company? A. They were not appointed, although they were present.

Q. Now, was there any discussion had for the purpose of ascertaining how much money was due on the Weinberger-Hartstein mortgage, and who was appointed a committee to find out? A. It was questioned how much was due to Weinberger and myself and Mr. Slaff were appointed with Mr. Grossman to go to Mr. Weinberger.

Q. And you ascertained the amount due and then reported back to the creditors? A. Yes, sir.

Q. Did they say anything to you about filing

any answer after it was reported back? A. No, the only question was to find the correct amount and when we got that they asked me if we could get extensions from you and Lobsenz.

Q. Did you do that? A. We did that. The others were instructed to look for mortgages.

Q. And was everybody trying to find money to finance that building? A. Well, they were all trying because Mr. Green came back at the next meeting and reported what he found.

Q. Now, Mr. Eichenbaum, did you one day call down at that building and find someone working on the building long after there was any work done by them on the building? A. Yes, sir.

Q. When was that, do you recall? A. I don't recall the date—it might have been in October.

Q. Of 1924? A. Yes, sir.

Q. Who did you find at the building? A. I found Mr. Goldberg and Rabinowitz & Schmidt there.

Q. Mr. Goldberg, the gentleman who is the carpenter—and the mason—the man doing the mason work? A. Yes, sir.

Q. And you found them working there? A. Yes, sir.

Q. Did you order them to do any work there that day? A. We did not.

Q. Will you tell us what they did there that day? A. I asked him. I says, "I was trying all summer to get you to do some work." He says, "That's all right—never mind."

Q. What work did he do there that day? A. He put up a partition in the cellar.

Q. How big a partition? A. I didn't measure it. I should judge between eight, ten or twelve feet—that is all I recall.

Q. And that is all he did there? A. Yes, sir.

Q. Did you order that work to be done? A. No, sir.

Q. So the work he had done at your request had been paid for? A. Yes, sir.

Q. And receipted for by him? A. And we got a receipt for it.

Q. Was anybody else there that day? A. Mr. Rabinowitz.

Q. He is the mason? A. Yes, sir.

Q. What did he put up there? A. He put up a pier—a brick pier.

Q. And did you order that? A. We did not.

Q. Did you supply him with the brick? A. No, sir.

Q. Did you order any brick from anybody? A. No, sir.

Q. Did you know that anybody had delivered brick? A. When I was there I saw the bricks, and I said, "Where did you get the bricks?" I thought Mr. Slaff ordered the bricks. So I asked the janitor where the bricks were from. He says, "Well, a load was brought by somebody and dropped off."

Q. Where were they dropped? A. I believe they were dropped in the yard, and a few of them were brought down into the cellar.

Q. And that is the pier that my friend Rabinowitz made that day? A. Yes, sir.

Complainants' Witness, Samuel Eichenbaum, Cross

Q. Aside from the pier was the work he did paid for? A. All extra work he did was paid for.

Q. And the only work he did was part of the work under the contract of December 4th, 1923, and work which you ordered him to do that was all paid for? A. Yes, sir.

Q. Did you ever order the Actinolyte Roofing Company to do anything on that building? A. No, sir, except extra work for which we have a bill.

Q. Who ordered that, you or Mr. Slaff? A. I can't recall.

Q. That was the repair job we have referred to? A. The repair job.

Q. All the work that was done at your request was charged to Eichenbaum and Slaff and paid for by them? A. Yes, sir.

Q. And that was by checks drawn on the Service Trust Company of Passaic, New Jersey? A. Yes, sir.

CROSS-EXAMINATION by Judge Heisley:

Q. Mr. Eichenbaum, in this memorandum that you say is in the handwriting of Mr. Grossman, the idea is expressed that you were to sell the property, if you could, for $250,000, is that right? A. Yes, sir.

Q. Did you think that was a fair price for it? A. I don't know—I am not in real estate. That was discussed by the various creditors.

Q. Did you all agree that was the price that was to be had for the property? A. It was agreed at the meeting.

Q. Did you all seem to think that was the fair value of this property in question? A. It seemed so.

Q. That didn't include the old property? A. That I can't recall. I really don't know what it included.

Q. Did it include the new property—where the new building is? A. I was willing to do anything to get through with it.

Q. You can't tell whether the price of $250,000 was to be for the apartment house and the land belonging to it, or whether it was to cover all the land? A. I honestly don't recall.

Q. When do you say this foreclosure of the Weinberger and Lobsenz mortgages was discussed—when at those creditors' meetings? A. They were discussed—the mortgages—the foreclosures were discussed after the foreclosure was started.

Q. Was it discussed before the signing of the agreement of December 4th, or after? A. No, sir.

Q. When, afterwards? A. The Weinberger mortgage?

Q. I ask you when the foreclosures were discussed by the creditors. Was that at meetings before the agreement of December 4th, or after? A. After the agreement—certainly. We didn't know there would be a foreclosure when we made the agreement.

Q. What did you learn was the amount due on the Weinberger mortgage? A. We learned that the amount due was $65,000, plus $2,000, I believe, interest—about $67,000, of which Mr. Weinberger gave us a paper.

Q. When was it that you learned that that sum was due? A. Afterwards—

Q. When afterwards? A. Well, a few days after the foreclosure proceedings started. We immediately got busy.

Q. Now, you folks took a deed—you and Slaff, for all this property, and you had made yourselves safe for the Yellow Pine Lumber Company bill of $35,000 by taking a mortgage? A. Made ourselves what?

Q. Made yourselves safe. You took care of yourselves pretty well on that, didn't you, getting a mortgage? A. I didn't get a mortgage.

Q. Well, Slaff did, for the Yellow Pine Lumber Company? A. He had the mortgage before the agreement was signed.

Q. Are you interested in the Yellow Pine Lumber Company? A. No, sir.

Q. You got a deed for all the property? A. We had, yes.

Q. And you were to handle that property, as I understand, as trustees? A. Yes, sir.

Q. Trustees for these creditors, weren't you? A. Yes, sir.

Mr. Weinberger: Including himself. He happened to be one of the biggest.

Q. After you got title, as I understand, you contracted debts outside of taxes, which were due for material and labor, as I understand, spent on this property, of approximately $14,000, outside of the taxes? A. Yes, sir.

Q. Those have to be paid? A. Yes, sir.

Q. Are you personally responsible for those bills? A. No, not for all except Bohens, if you have Bohen's here. On this bill we are personally responsible. He wouldn't go ahead without our security.

Q. This Exhibit 15, as I understand it—of all these items totaling nearly $20,000, you and Slaff are only responsible for $2,045? A. I am sorry I am responsible for this.

Q. Won't you be good enough to answer my question? A. That is all.

Q. That is all you and Slaff are personally liable for, out of a total bill of $19,427.95?

Mr. Weinberger: I object on the ground that that calls for a legal conclusion. These men ordered those things and I think they are responsible for them as a matter of law.

A. Well, I don't quite get the question.

Q. You want to get it? A. Yes, sir.

Q. Out of a list of unpaid bills, which you say are due but not paid, amounting to $19,427.95, and all of which were contracted on this property that now stands in your name and the name of Slaff, you think you are only personally responsible for the bill of Bohen, for $2,045, is that right? A. No, sir.

Q. What other bill did you guarantee then, besides Bohen's bill? A. We are responsible for all the bills that are on here, under the agreement of December 4th, 1923, as trustees.

Q. I am asking you if it isn't so, that you

consider that you and Slaff are only personally responsible for only the bill of Bohen, of $2,045?

Mr. Weinberger: I object on the ground that it calls for a legal conclusion.

A. Mr. Bohen—

Q. If you want to say you won't answer it, let us have it on the record? A. We are responsible for all these bills contracted for.

Mr. Weinberger: On Exhibit D15.

The Witness: Yes, sir.

Q. That is to say you believe that you are personally responsible and personally liable for the payment of those bills and not simply as trustees, is that right? A. We so believe.

Q. You believe that if you were sued on these bills you would have no personal defense against it? A. I don't know.

Q. Why do you believe that you are personally responsible for them, and yet you can't tell me whether you know you have a defense for them? A. These bills were ordered by us.

Q. Personally? **A. Yes.**

Q. Not as trustees? A. Not all of them.

Q. Were any of them ordered by you as trustees? A. They were ordered to carry on the building.

Q. Were they ordered by you so that you thought you made yourselves personally liable, or only liable as trustees under the agreement of December 4th? A. I feel we are responsible for this bill in its entirety.

New Jersey State Library

Q. Personally? A. Yes, sir.

Q. You said that the work of Simon Brothers was not completed? A. His work, no.

Q. Then why do you say on this list that that is a bill that is due, if it is not completed? A. The list as submitted to you is given according to Mr. Simon's bill. When we get money together enough to pay these various obligations we will have a figuring out with Mr. Simon, and show him the moneys which we have paid out should be deducted out of his bill, and out of his debt.

Q. Mr. Eichenbaum, if that is so, don't you think you are liable only as trustees? A. I don't know how we are liable. We are liable to pay these bills as we contracted them.

Q. And you haven't paid them? A. We are paying them as we go along.

Q. Although you thought you were personally liable for them you are only paying them as you collect more moneys from the buildings, is that right? A. Certainly, you don't want me to take money out of my pocket for it.

Q. You said you were personally liable? A. As far as the building is concerned you wouldn't want me to take my money and give it to Mr. Goldberg?

Q. You say there has been no default in your agreement of December 4th? A. No, sir.

Q. And you recall that you and Slaff gave a bond for $100,000? A. Certainly did, yes, sir.

Q. You haven't sold the property, have you? A. No, sir, give me a buyer and I will.

Complainants' Witness, Samuel Eichenbaum, Cross

Q. Don't argue, if you please. You haven't sold the property for $181,000? A. No, we did not.

Q. The $181,000 was supposed to be the sum that would pay off all these bills, isn't that right? A. I presume it is. At that time that was a figure, yes.

Q. Nor have you mortgaged the property for enough to pay off these men? A. No.

Q. Do you know whether the Simon Brothers fixture contract was completed? A. Their fixture contract, I believe, was completed.

Q. Is that the contract on which there is $1,200 due? A. Yes, sir, you got the bill for it.

Q. Now, as I understand it then, the situation is this: That you and Slaff have got in your names as individuals all the property, practically, that this man Goldstein owned, the new building, the old building, the vacant lot on Madison Street, and you have allowed these various creditors to put in $14,000 of bills for materials and labor on this property that you and Slaff own in your own names, according to the record, and yet haven't paid these men a dollar on account, is that right? A. I will answer if you let me explain.

Q. You can make your explanation afterward —I want to know if that is right? A. Correct.

Complainants' Witness, Samuel Eichenbaum, Re-direct

RE-DIRECT EXAMINATION by Mr. Weinberger:

Q. Mr. Eichenbaum, I find that there is a bill due but not paid to the Passaic Plumbing Supply Company amounting to $4,738.92. Was that for materials furnished after the contract of December 4th, 1923? A. Yes, sir.

Q. Was any part of that paid? A. No, sir.

Q. And is the entire amount due and owing? A. The entire amount is due and owing.

Q. And that is your company, is it? A. Yes, sir.

Q. What work was that? A. That was for the delivery of different materials in order to help complete the building.

Q. What materials? A. These gas ranges, pipes, valves, fittings—everything—all extra materials to finish up the building, and I didn't get one cent.

Q. The items appearing on this list of bills due but not paid include an item of Simon Brothers, electrician, $1,200; is that the amount which you specified in your contract with Simon Brothers? A. Yes, sir.

Q. That is the subject-matter of a written agreement? A. Yes, sir.

Q. Executed between you and Mr. Slaff and Simon Brothers? A. Yes, sir.

Q. And that contract provides a method of payment, does it not? A. Yes, sir.

Q. I call your attention to the amount of $5,282.40, taxes. That was for taxes which

had accrued prior to the time you took the deed? A. Yes, sir.

Q. And possibly part of it after you took the deed, is that correct? A. Yes.

Q. Where did you try to get this mortgage, will you state some of the places you applied? A. Myself and Mr. Slaff went over to the Passaic National Bank and spoke with Mr. Scoles, president of the Passaic National Bank and Trust Company, of Passaic, New Jersey.

Q. Anybody else that you applied to? A. Well, I went—I was trying to fish around, but I couldn't get anything.

Q. Who did you ask? A. Several people, but I couldn't get such a big loan. It was too big.

Q. Of this new building—you have produced a record, have you not, showing the rents collected and the amounts paid out? A. Yes, sir.

Q. Is that a correct record? A. Yes, sir.

Q. You have the books showing those items? A. We have.

Q. And the young lady who kept the records is who? A. Miss Goldman.

Q. And those records are made up of the actual bills and checks paid out? A. Yes, sir.

Q. Kept under your supervision? A. Yes, sir.

Q. She is employed by you? A. Yes, sir. She gets paid extra for this work.

Q. Mr. Loeb was paid, was he not? A. He was.

Q. By whom? A. Eichenbaum and Slaff.

Q. And was the amount agreed upon? A. Yes, sir.

Q. And how much was the amount paid? A. $250.

Q. Were the creditors apprised of that fact, and did they want it paid? A. Yes, sir.

MISS SADYE GOLDMAN, duly sworn for complainants.

Direct-examination by Mr. Weinberger:

Q. Miss Goldman, you are the young lady who has kept the books with regard to the various items appearing on Exhibits D14 and D15? A. Yes, sir.

Q. And you have had charge of the checks marked Exhibit D14a? A. Yes, sir.

Q. And do these statements which you have prepared show the exact items of income and expenditure on the new building? A. Yes, sir.

Q. And the checks paid out for the various items appearing on D14? A. Yes, sir.

Q. You have the books here? A. Yes, sir.

Q. Will you produce them so that we can have them marked? They are in your handwriting, are they? A. Yes, sir.

Mr. Weinberger: I offer the books in evidence. The yellow covered book is the ledger, showing unpaid bills, and the bills are attached to each page.

Marked Exhibit D18.

This book (indicating) is the ledger,

showing the rents collected on the old and new building.

Marked Exhibit D19.

This is the purchase ledger.

Marked Exhibit D20.

This is the check book.

Marked Exhibit D21.

This is the cash book.

Marked Exhibit D22.

Q. You have personally prepared the Exhibits D14 and D15, from these books, have you? A. Yes, sir.

Q. And they are accurately transcribed? A. Yes, sir.

Q. Will you produce the dates on these lists and will you affix to the lists D14 and D15 the dates on which these various items appear? A. On Exhibit D15 I think it is impossible.

Q. Well, on D14? A. On D14 I can do it.

Q. Will you likewise prepare and produce a list showing the income of the old building and the expenditures on the old building? A. Yes, sir.

CROSS-EXAMINATION by Judge Heisley:

Q. You say the bills from which Exhibit D15 was prepared are all here, and attached to the book? A. Well, I will tell you, the Actinolyte Roofing Company Mr. Slaff has.

Q. You think all the bills, Miss Goldman, the itemized bills mentioned on Exhibit D15, are in this book? Or in this bundle marked Exhibit D6? A. Well, not all in that bundle. There are some in the book.

Q. Are there any in the book? A. Yes, attached to the ledger pages.

Q. Are you going to leave that book here? A. I suppose I will have to.

Mr. Weinberger: We rest.

ISADORE M. GROSSMAN duly sworn for defendants.

Direct-examination by Judge Heisley:

Q. Mr. Grossman, you are the subscribing witness to the agreement made between Simon Brothers and Slaff and Eichenbaum? A. I am, sir.

Q. And at the time that agreement was signed did you know anything about either of the foreclosures, the Weinberger and Hartstein, or the foreclosure of Lobsenz? A. I did not.

Q. Did Slaff or Eichenbaum, or either of them, tell you at that time that there had been any foreclosure proceedings started? A. They did not.

Q. Did Slaff at that time, or at any other time about that date, make any statement as to the amount that was due on his mortgage? A. Insofar as Slaff is concerned that statement to me was in a comprehensive way, but was some $27,000 due him as I audited the accounts of Mr. Goldstein the builder and found—this is the exact copy I took of Mr. Goldstein's bills, but he had a contract for $42,123.52 with the Yellow Pine Lumber Company for material

that was supposed to be furnished by the Yellow Pine Lumber Company to the building on Jefferson Street, upon which the Yellow Pine Lumber Company received $15,000 leaving a net due on the contract of $27,123.52, and at the same time Mr. Goldstein told me that the Yellow Pine Lumber Company had not fulfilled its full contract at that time.

Q. When was that? A. That was November 25th, on a Sunday—either November 25th or 26th, 1923. It was on a rainy Sunday. I went up to his house on Columbia Avenue.

Q. At any time after that did he speak of the amount due on his mortgage? A. Well, I spoke to Slaff about it and there was no comprehensive answer given to me on it.

Q. Was there anything said by him after November 25th or 26th as to there being less than $35,000? A. Yes, that was at one of the meetings of the creditors.

Q. When? A. Well, some time in December, I should judge.

Q. After the agreement was signed? A. No, before the agreement was signed.

Q. After the signing of that agreement of December 4th, did Slaff ever say anything to you about the amount that was due on his mortgage? A. Yes.

Q. When? A. That was in the middle of December, Judge. I think you are all under a misapprehension—

Q. This is examination we are having? A. But December 4th is the wrong date. We

started December 4th, but we ended up December 24th.

Q. Was it after December 4th that he told you the amount due on his mortgage? A. I can't recall.

Q. You said something about after the signing of the agreement? A. That was during the time between the 4th and the 24th.

Q. What amount did he tell you, between December 4th and December 24th, was due on his mortgage? A. About $27,000.

Q. Did he ever make any statement to you that it had originally been $35,000 and it had been reduced to $27,000, and then that he had procured a credit of $8,000 for Goldstein at the Yellow Pine Lumber Company, and the mortgage was to go back and be for $35,000? A. Never did.

Q. Has he ever paid you anything on account of your wiring contract? A. On my wiring contract, no.

Q. Not a dollar? A. Not a dollar, no, sir.

Q. He says that wasn't completed? A. I beg pardon.

Q. He says that wasn't finished? A. That isn't so.

Q. Was it finished? A. It was.

Q. Absolutely? A. Absolutely.

Q. And has he or Eichenbaum ever complained to you that you did not complete the contract? A. He did at one time.

Q. When was that? A. That was some time in September—August or September.

Q. Of what year? A. 1924. I was called up on the telephone by Mr. Slaff telling me that there was something the matter with my wiring—no, something the matter with the bells, and I says, "Mr. Slaff, I will send the man over to inspect it." When my man got there to fix the trouble up on the bells, because we wire our bells in series, he found another man there repairing the trouble.

Q. Was that any fault of Simon Brothers? A. That the bells were out of order, no, sir.

Q. Is it true that Simon Brothers absolutely and completely fulfilled their wiring contract?

Mr. Weinberger: I object on the ground that this man doesn't know anything about wiring.

A. May I state I am the general manager of Simon Brothers. I take jobs and submit estimates on contracts and I sign contracts.

Mr. Weinberger: The question is objected to on the further ground that the gentleman doesn't do the work and didn't do the work in this particular case, and his testimony would be a conclusion as to somebody else's work.

Q. Tell me whether the contract for the fixtures was fully completed? A. Yes, sir.

Q. Are you conversant with that kind of work? A. Absolutely.

Q. How long experience have you had? A. Over a year and a half.

Defendants' Witness, Isadore M. Grossman, Cross

Q. Did Eichenbaum and Slaff ever complain to you that Simon Brothers had not finished their fixture contract? A. No, sir.

Q. Did they ever complain that Simon Brothers did not fulfill their wiring contract? A. No, sir.

Q. Did they ever express any dissatisfaction at all? A. No, except the bells.

Q. Did Slaff ever tell you anything about going to sell the property? A. Yes, sir.

Q. When? A. All through the year that he had a customer for $225,000 for the building, at the time we signed the contract that as soon as the building is finished he will sell the building for $225,000.

Q. Has he ever told you since the signing of the agreement anything about his going to sell it and what he could sell it for? A. When?

Q. What did he say he could sell it for? A. $225,000.

Q. Did he ever say anything about mortgaging the property? A. He did.

Q. What was that? A. He said it was a cinch to get $125,000 first mortgage on that building.

Q. Did he ever complain about your not having finished your work or it not being finished according to the contract? A. He did not.

CROSS-EXAMINATION by Mr. Weinberger:

Q. Are you an electrician? A. I am not.

Q. You have been with the concern a year and a half? A. Yes, sir.

Q. Did you do any work on this building? A. Myself personally?

Q. Did you do any work? A. Personally?

Q. Yes? A. No.

Q. When was the job started? A. May 2nd.

Q. Have you the record when the job was started? A. Yes. When our job was started there? I haven't.

Q. You haven't got the account here? A. No, sir.

Q. You didn't bring that? A. No, I didn't; I wasn't asked to.

Q. You don't know when you first stopped doing work on that building? A. I do, sometime in October or the early part of November, 1923.

Q. You haven't any record here showing that? A. No.

Q. When did you again resume work on there, do you know? A. I resumed work there on or about January, 1924.

Q. Are you guessing, or do you know? A. I know that.

Q. That is positive? A. Yes.

Q. You have a record showing it? A. No, I have no record, but that is positive.

Q. Did you keep a record showing when you did work? A. Of that I did not keep a record, but I have other records.

Q. Will you answer my question? A. Not that, I have no record.

Q. So that you haven't any record showing when there was any resuming of work on that particular job, is that true? A. I have.

Q. You just said you didn't keep any such record? A. In January, but subsequent to that I have.

Q. Let us get this right. Your men stopped working—Simon Brothers—in November, 1923? A. Yes.

Q. When they resumed work you kept no record? A. They finished the roughing at that time.

Q. Will you answer my question; did they at any time stop work? A. No, sir.

Q. Didn't you just a moment ago say— A. I didn't understand what you meant.

Q. Didn't you just a moment ago say that in November, 1923, they stopped work? A. By that I meant they finished the roughing.

Q. Did you say that? A. I did.

Q. Did you mean that? A. No.

Q. What did you mean? A. I meant that they finished the roughing.

Q. Isn't it a fact that they stopped doing any work there at all after November, 1923? A. No, sir, because that was the time they have to stop to finish the roughing.

Q. Isn't it a fact that they stopped because they were not getting any money? A. No, sir; we got money in November, 1923.

Q. Was there any difficulty after November, 1923, with regard to getting money from Goldstein? A. In November we got a payment of $500.

Q. I am speaking of after November? A. I never asked him for any.

Defendants' Witness, Isadore M. Grossman, Cross

Q. Didn't you sign the contract of December 4, 1923? A. Yes.

Q. Didn't you know that the reason for the contract was because of the Goldstein difficulties? A. Not with me, but for the benefit of the other creditors.

Q. Don't you know that the other creditors couldn't get money from Goldstein? A. Yes.

Q. Didn't you know that this contract was the result of these negotiations? A. Absolutely.

Q. And were you not the representative who participated in the discussion of this meeting? A. Yes, sir, I was instrumental in having that signed.

Q. You were one of the moving parties and the cause of having it signed? A. Yes, sir.

Q. You witnessed the signatures? A. I think I did, all of them.

Q. Of the others? A. Yes.

Q. After this contract was signed, do you know when your men resumed work on that job? A. Yes, sir.

Q. Have you the records of the company here? A. I have the time cards of the men, when we had to go back to finish the job.

Q. You have the time cards? A. Yes.

Q. By whom were they kept? A. The men themselves filled them out in their own handwriting, and hand them in to me on Saturday for their pay; they get paid according to these cards.

Q. Have you got all of the time cards on this entire job from beginning to end, today? A. We did not have that system, because I was

not in the employ of Simon Brothers at that time.

Q. At what time? A. At the time this job was started; the entire job. I installed this system of time cards for Simon Brothers on or about the first of January, 1924.

Q. When did you start working with Simon Brothers? A. About October, 1923.

Q. Then you don't know who started on this job, do you? A. Yes.

Q. Who started on that job? A. A man named Harry Wilson.

Q. When did he start? A. About May, 1923, he started the roughing.

Q. You were not in the employ of Simon Brothers? A. No, sir.

Q. And yet you say that Mr. Wilson started on that job? A. Yes.

Q. How do you know that? A. Because Mr. Simon told me to send him back to finish the building, because the same man that roughs the building, he finishes it.

Q. Do you understand English? A. Yes.

Q. Do you know of your own knowledge whether or not Wilson did any work on that building prior to 1923? A. Yes.

Q. How? A. Because I heard Mr. Simon say to send Wilson back to that job, because he roughed it.

Q. Do you know of your own knowledge? A. Yes.

Q. Did you of your own knowledge know? A. Personally, no.

Q. Then you don't know what was done prior to November, 1923, on that job by anybody for Simon Brothers, of your own knowledge? A. I think some of it I do. At the time that I was there in October, when Harry Wilson was finishing, roughing the job.

Q. Prior to October? A. Yes. I came there about the latter part of September, 1923.

Q. Prior to the time you went there in September, did you know what work had actually been done? A. No, sir.

Q. Then you don't know whether the work was completed prior to that time or not of your own knowledge? A. What do you mean "completed"?

Q. The roughing completed? A. The roughing, of course, wasn't completed at that time.

Q. You don't know what was done up to the time you got there, of your own knowledge? A. No; I know wiring was done there.

Q. After the contract of December 4, 1923, was signed and executed by you on behalf of your company, whom did you send back to do work? A. A man named Chadwick, a man named Bill Walmsley, a man named Amica.

Q. You witnessed that contract? A. Yes.

Q. I call your attention to this language in this contract, referring to the Simon Brothers contract: "Twelve Hundred Dollars, lawful money of the United States of America, according to an agreement entered into between the creditors of Max Goldstein former owner of the above property, to wit that the above mon-

eys ($1200) be paid from the first moneys that come to the property whether by rent or mortgage. This agreement was between the parties of the first part in this agreement and all creditors concerned in the above mentioned property and parties of the first and second part agree to the payment of this agreement according to those terms." Did you know that that was in the contract when it was signed? A. Yes.

Q. You also knew this, did you not, as being in the agreement: "It is expressly covenanted, stipulated and agreed that the parties of the first part in entering into this agreement with the parties of the second part do not assume any personal liability for the payment of the money to be paid hereunder, it being expressly understood and agreed that the parties of the second part are to be paid out of any moneys that may come into their hands either from rent of the Jefferson Street building or from the proceeds of any mortgage loan that they may raise on the said property in accordance with agreement made between the creditors of Max Goldstein and the parties of the first part hereto, which agreement bears date December 24, 1923, and is in the possession of Harry Loeb." A. I didn't see that clause, or I didn't read it, if it is in there.

Q. You witnessed the Simon Brothers signature, did you not? A. Yes.

Q. You read the contract before it was executed? Yes or no. A. That paragraph was

written in after Mr. Simon signed that contract. That paragraph was written in at the Yellow Pine Lumber Company's office in Passaic after Mr. Herman Simon signed the contract.

Q. Did you know it was in before the contract was delivered? A. No, I did not; I didn't read it over; I believe Mr. Slaff saw it.

Q. You knew it was intended to be in there, the arrangement between the parties, to be in? A. No, I did not, not that of the personal liability. I knew one clause to be added was that—

Q. You received a copy of the contract? A. Yes.

Q. And retained possession of it up to the time you filed the lien? A. Yes.

Q. You never returned the contract for any reason to Slaff or Eichenbaum? A. No.

Q. You never knew there was a foreclosure of the Weinberger-Hartstein mortgage? A. No.

Q. Never heard of it? A. Not until at the time I installed the fixtures there.

Q. When did you install the fixtures? A. On or about June, 1924.

Q. Did you personally deliver them? A. I packed them—

Q. Yes or no. A. Yes.

Q. You just said you only packed them. A. I saw that they went out on the job, and inspected the job at the time they were hanging—

Q. Do you understand English? A. That I delivered them personally?

Q. Yes. A. Once I did, I was on the truck delivering them also.

Q. Are you a truck driver, too? A. No, I happened to go on the truck; I wanted to see what the men were doing there.

Q. When was this particular time you were on the truck; on or about June 25? A. Something about that time; the time they were hanging the fixtures; I cannot tell positively the time, but during that week or two.

Q. How many deliveries of fixtures were there? A. About five or six.

Q. All in June, 1924? A. Yes.

Q. You are sure of that? A. Positive.

Q. Have you the record here? A. Yes.

Q. Will you produce it? A. Yes (producing yellow card with white slip attached).

Q. When did you prepare this card? A. This card was given to the men the Saturday before the other week terminated, if the men's was due on a certain Saturday.

Mr. Weinberger: I offer it in evidence. Marked Exhibit D23.

The Witness: Here are some more of them cards to be marked in evidence.

Q. Is this the only record which you have in your place? A. Yes, on jobs on contract, that is the only record I have.

Q. This was a contract job? A. Yes.

Q. Written contract? A. The first job?

Q. Yes. A. No, the first job was not written; the wiring job was not written; the fixture job was written.

Defendants' Witness, Isadore M. Grossman, Cross

Q. You said a moment ago that this is the only method you have for contract jobs? A. Yes.

Q. I ask you if this was a contract job, and you say it was not a contract job. A. Not a written contract job, a verbal contract job.

Q. If it is a contract job, didn't you have this card system? A. But I wasn't there at the time the first contract was consummated.

Q. Have you any record of the first job? A. No, sir.

Q. None at all? A. The finishing.

Q. The original, the start. A. No.

Q. You finished this up for the purpose of this lawsuit, didn't you? A. No, I had no idea of a lawsuit at all. That record is lying in my desk since June 28, at the time the job was finished by the men. As a matter of fact, one man isn't in my employ for two months.

Q. Is the last work that was done on this job June, 1924? A. Yes.

Q. What work was done then? A. Wiring and fixtures at the same time.

Q. Where did you get those fixtures for this job? A. We bought them from the Pioneer Fixture Company.

Q. What is their address? A. 13-17 Crosby Street, New York City.

Q. When did you get them from them? A. In about May and June, 1924.

Q. Are you sure of that? A. Positive. And we might have gotten some of them from the National Lighting Fixture Company or Centre Lighting Fixture Company.

Q. There were five different deliveries made of these fixtures, you claim? A. Yes, maybe more.

Q. All made in June, 1924? A. All made practically in June, 1924.

Q. Did you have any one receipt for the delivery of these goods? A. No, sir.

Q. Did you ask Mr. Slaff or Mr. Eichenbaum for a receipt for them? A. I didn't think it was necessary.

Q. Did you? A. No, sir.

Mr. Weinberger: I ask that what he thought necessary be stricken out.

Q. You didn't know of the foreclosure in June, 1924? A. No.

Q. But you did learn of it when? A. Sometime in August or September, when Mr. Slaff came before a meeting of the creditors and said, "Now, what are we going to do with that building?"

Q. I asked you when? A. On or about August or September, sometime during one of those meetings.

Q. You never attended any meeting up to August, 1924, of creditors? Yes or no. A. Yes.

Q. What was the object of these meetings that you attended? A. Get some of the other creditors back to work.

Q. What was the trouble with them? A. Some of them didn't have sash in so we couldn't go back to work on account of the metal sash

not being on the job, because Mendelson, the metal sash man, wouldn't come up.

Q. What others? A. That is after the Ac-Tin-o-Lyte man was out of the building.

Q. What other men wouldn't come back to complete? Mr. Goldberg hasn't given them. A. I don't know.

Q. You were there? A. I don't know, I don't remember whether he was one.

Q. Will you say he wasn't? A. I will.

Q. Say what? A. That he wasn't one of those that refused to go back to complete, because I remember Sam Goldberg saying, "I am ready to go back and complete the thing; give me the sash."

Q. The only work that he had to do depended on the sash? A. I wouldn't say that.

Q. When was the sash put in? A. I have no knowledge.

Q. Were they put in before or after your fixtures? A. I think they were put in before my fixtures, otherwise I wouldn't put my fixtures up, because my fixtures aren't waterproof.

Q. Don't you know that Mr. Goldberg was working on that job in March? A. I saw him working on the job there.

Q. In March, 1924? A. I can't say that.

Q. You just a moment ago said, "Yes"; what do you mean by saying you don't know? A. I cannot tell you whether it was actually the month of March.

Q. You have been rather interested in this case in trying to get these creditors to swear falsely to various affidavits? A. I have?

Q. Yes. A. No.

Q. You have not? A. No.

Q. You haven't interviewed Goldberg in this regard? A. No.

Q. You haven't had meetings with Goldberg, Paskewic, Schmidt, Rabinowitz and Green? A. I?

Q. You. A. No, sir.

Q. You haven't attended any meetings with these men? A. I have.

Q. With regard to getting them to file lien claims? A. Not to get them to file lien claims, no.

Q. For what purpose? A. I was called to a meeting of the creditors.

Q. Where? A. At Mr. Rabinowitz's house.

Q. When? A. After Judge Heisley was retained as counsel.

Q. And after that original meeting, didn't the men go down there and do some work? A. That I don't know.

Q. Were you present when anyone made that suggestion to these men? A. I was not.

Q. You say you were not present when the suggestion was made to Goldberg to go down and do some work on that building in October, 1924? A. I don't know of any such suggestion.

Q. Do you know that in October, 1924, Goldberg went down to that building and put a partition up? A. I was apprised of the fact.

Q. When did you first learn of it? A. When they filed our lien claim.

Q. Is that the first you knew of it? A. Yes.

Defendants' Witness, Isadore M. Grossman, Cross

Q. Hadn't you met before you filed your lien claims? A. Yes.

Q. Where? A. At Mr. Rabinowitz's house.

Q. When? A. Sometime in October, about the fifteenth of October; fifteenth or thereabout.

Q. That was before the lien claims? A. Yes.

Q. Who was there at that meeting? A. I attended the second meeting that was called up in Rabinowitz's house. Mr. Herman Simon of my firm—

Q. Who was present? A. Who was present at the meeting that I attended before the lien claims were filed on that house? Mr. Rabinowitz was present, Mr. Schmidt, Mr. Goldberg, Mr. Robinson, of the Ac-Tin-o-Lyte, Mr. Paskewics was there, his daughter was there; that is about all, I should judge.

Q. And at that time had anyone yet interviewed Judge Heisley? A. Yes.

Q. Who? A. I really don't know.

Q. Who reported back, giving the report of Judge Heisley? A. Nobody in particular.

Q. I asked you who reported back. A. I really don't remember; they all told me that.

Q. Did Mr. Green speak about having seen Judge Heisley? A. Mr. Green personally?

Q. Yes. A. No.

Q. Who spoke about having seen Judge Heisley? A. Nobody.

Q. You just said all of them made reference to it. A. I was called up—

Q. You are there now at the meeting. A. I want to say I came up there—

Q. I didn't ask you that; I asked you what was said there? A. That Judge Heisley is coming up.

Q. Did Judge Heisley come down? A. Yes.

Q. To this place? A. Yes.

Q. What day was that? A. On or about December 15.

Judge Heisley: December?

The Witness: October 15, 1924.

Q. Are you sure of that date? A. I am not positive, but I should judge it was on Tuesday or Wednesday evening.

Q. You had not been up to Judge Heisley up to the time of this particular meeting that night, had you? A. No, sir.

Q. And at this particular meeting the Judge was to come down? A. I did not know.

Q. It was reported he was coming? A. Not to me.

Q. You just said it was reported that the Judge was to be at that meeting? A. After I got there I was told that Mr. Heisley was coming there, a man whom I had never saw before.

Q. At that meeting and up to the time of that meeting isn't it a fact that Goldberg had done no work there for months prior? A. I don't know, Mr. Weinberger.

Q. Isn't it a fact that Paskewic had delivered no bricks for months? A. I really don't know.

Judge Heisley: I object on the ground that it is not cross-examination.

Defendants' Witness, Isadore M. Grossman, Cross

Q. Isn't it a fact that at that time Paskewic had not delivered any brick for almost a year prior?

Judge Heisley: Same objection.

A. I really do not know.

Q. At this particular meeting, isn't it a fact that it was suggested by someone that Goldberg come down and put a partition up? A. Not to my recollection.

Q. After you got there? A. Yes.

Q. Didn't you hear it? A. No, sir.

Q. Will you say that it wasn't said by someone? A. I will.

Q. Were the liens discussed? A. The liens discussed? At that time? My lien was discussed.

Q. Were any of the others discussed?

Judge Heisley: I object on the ground that it is not cross-examination, and also on the additional ground that anything that occurred there that night between my clients and myself is privileged and cannot be inquired into.

Q. Will you answer that question?

Mr. Lane: Exclude the time Judge Heisley was there.

A. When I got there I will tell you what transpired; I came up there, I was the third one there—

Q. Were there other liens discussed in the

presence of Judge Heisley between the different men who were there that night? Were they? A. No.

Q. They were not discussed at any time during the evening? A. No.

Q. Did you have any other meeting after that night?

Judge Heisley: With whom?

Q. These creditors, the claimants in these lien claim suits. A. The next time I knew of it, I was told to come down to Judge Heisley, to sign up—

Q. Will you answer my question? A. Did we have any other meeting? No, sir.

Q. You are sure of that? A. I was present at one or two meetings at Rabinowitz's house. I think there was another meeting I attended at Rabinowitz's house.

Q. When was that? A. I really cannot tell you the date, whether it was on Sunday; it was on some afternoon; we got together over there—yes, there was another meeting that same afternoon, yes, sir.

Q. Who was present? A. Mr. Rabinowitz, Mr. Schmidt, Mr. Green and Mr. Goldberg.

Q. Mr. Paskewic? A. His daughter was there.

Q. Was it suggested then by anyone as to when they ought to go down to do some work on the building? A. To my recollection no suggestion like that was made.

Q. Don't you know that they did go down

after that in pursuance of a suggestion? A. I do not.

Q. Were you present when the lien claims were prepared in Judge Heisley's office? A. No.

Q. Were you at Judge Heisley's office? A. Yes.

Q. When? A. I think I was called up to come down—the lien claim was mailed to me, but I didn't understand a single thing, and I went to get in touch with Judge Heisley, and I couldn't get in touch with him, so I took Mr. Isadore Simon down with me to Newark in his Peerless car, and I said to him, "Izzy, you will have to go down and sign that lien claim"; he said, "All right." We went down and the Judge told me to go back and have it sworn to before a notary public in Passaic, and then for me to forward it to the County Clerk over in Paterson.

Judge Heisley: I offer in evidence certified copy of the deed of Max Goldstein and wife to Samuel Slaff and others, dated December 24, 1923, and recorded in the office of the Register of Passaic County, on January 17, 1924, in Book S-30 of Deeds, page 556

Marked Exhibit A1.

Adjourned to Thursday, December 18, 1924, at 2 P. M.

Defendants' Witness, Isadore M. Grossman, Cross

IN

CHANCERY OF NEW JERSEY.

Between:

HARRY H. WEINBERGER and BENJAMIN A. HARTSTEIN,
Complainants,
and

MAX GOLDSTEIN, *et als.*,
Defendants.

Continuation of the testimony in the above entitled cause before Nicholas W. Bindseill, a Master in Chancery of New Jersey, at his office, Prudential Building, Newark, New Jersey, on Thursday, December 18, 1924, at 2 P. M.

Present: Counsel as before stated.

ISADORE M. GROSSMAN, recalled for further cross-examination.

By Mr. Weinberger:

Q. How many meetings did you attend with the lien claimants in this case in all, before the lien claims were filed? A. One or two.

Q. Was it one or two? A. Two, I think it was.

Q. And they were both at whose home? A. Mr. Rabinowitz's home.

Q. Did you give the data to Judge Heisley

with regard to the filing of your lien claim? A. Yes.

Q. Where? A. Over at Judge Heisley's office.

Q. That was when? A. Sometime in October.

Q. Was that prior to the meetings at Rabinowitz's house? A. Some data I gave him prior to the meeting at Rabinowitz's house and some data afterwards.

Q. Did you give this data to Judge Heisley before any meetings were held in Passaic? A. No, sir.

Q. After? A. After.

Q. I thought you testified that the first time you were at Judge Heisley's office was to sign the lien claim? A. The first time I was to Judge Heisley's office with Mr. Simon was to file a lien claim—to sign the lien claim.

Q. Just a moment ago you said that the lien claim was sent to you by mail? A. Yes, Judge Heisley mailed it to me.

Q. Where did he get the data from which to prepare the lien claim? A. I gave it to him at Rabinowitz's house.

Q. Didn't you testify at the last examination that you didn't give him any data with regard to the lien claim? A. I gave him my contract.

Q. Didn't you just a moment ago say you gave the data to Judge Heisley at his office—some of the data? A. Yes, we destroyed the original lien claim and he redrew another one.

Q. What was wrong with the original? A. I think that the amount was wrong in one of them; he made one lien claim out of the two,

and then I told him I would rather have the lien claims in two lien claims instead of one.

Q. Mr. Grossman, when you met up at Rabinowitz's house and gave Judge Heisley the data, you knew he was coming down, didn't you? A. I knew? Not I.

Q. Did any of the Simons know? A. I cannot testify to that.

Q. Do you know whether they knew? A. I do not.

Q. You had the contract with you, didn't you? A. I did, yes.

Q. What did you bring it there for? A. I always carried that contract with me whenever I went to a meeting, even at Eichenbaum's office, I always had the contract with me, in case anything come up; I always carried it with me.

Q. When was the last work done by the Simon Brothers? A. As a matter of fact I did not have the contract with me, I telephoned the office to have it sent up; it was in the safe at that specific time.

Q. When was the last work done? A. The last work done by us was about June 28; I will refresh my memory from the time card of the men—Friday, June 27 was the last work done on the Jefferson Street house, and after that I have no record. The week ending June 28th, and Friday was June 27th.

Q. Who was the last man to do work at that time? A. Bill Walmsley and a man named Chadwick worked there until Wednesday the 25th.

Defendants' Witness, Isadore M. Grossman, Cross

Q. What was the last work that was done there the 28th? A. Running the grounds, finishing up the wiring and hanging the fixtures.

Q. Did you see the work done? A. I did.

Q. Did you supervise it? A. I supervised it myself.

Q. Were you present on that day and saw the men doing work on June 28? A. I was present at that time when the men left the job.

Q. Will you answer that question? On June 28, 1924, were you present at the buildings at Jefferson Street, Passaic, owned by Max Goldstein in the name of Slaff and Eichenbaum, and personally saw Bill Walmsley do work on the job that day? A. Yes, sir.

Q. You just a moment ago said you saw him when the job was finished that day. A. I saw them working; they went away after the job was—

Q. Did you see them? A. Yes.

Q. Then you didn't see them do any work? A. I did see them doing work; I came there a few minutes before they were finished, and I watched them finish up running the grounds, and one was upstairs in the building hanging the fixtures; the helper was upstairs finishing the fixtures.

Q. Who was the helper? A. A man named Sodel, Walmsley's helper; Chadwick's helper was named Seiderman.

Q. You saw them both there that day? A. Seiderman wasn't there, but Bill Walmsley and Sodel was there.

Q. You saw them both there? A. Yes.

Q. You saw them both working on the job that day? A. Yes, I went through the building.

Q. I didn't ask you that. A. I did.

Q. You saw Sodel doing what work? A. Hanging fixtures.

Q. In what room? A. I think the three-light fixture in one of the rooms.

Q. Which room? A. On the second floor.

Q. You say that that was being put in? A. Yes.

Q. Front or rear apartment? A. I cannot specify that.

Q. When had that fixtures been delivered? A. The fixtures were delivered in bulk.

Q. When? A. I think that fixture, something was the matter with it; they couldn't test it out, when they tested it to light it; they brought one back to the store and got another fixture.

Q. Will you tell me when they were delivered? A. The same day.

Q. All of them? A. No.

Q. When were they delivered? A. At various times.

Q. When was the last delivery made? A. That same day.

Q. Of this one fixture? A. Yes.

Q. Prior to that— A. The day before.

Q. How many? A. I cannot say how many.

Q. Why not? A. Because they were not taken out in specific numbers.

Q. You have no record showing the dates of delivery of the fixtures? A. No.

Defendants' Witness, Isadore M. Grossman, Cross

Q. Then you don't know from your records when they were delivered? A. During the month when they started to hang them.

Q. (Question repeated.) A. No.

Q. What did you see Walmsley do? A. He was running the ground.

Q. Where? A. Down in the cellar.

Q. They hadn't been run prior to June 28, had they? A. No, he was running—

Q. Will you answer the question? A. For the temporary lighting for the store, there was a ground there, but not for the whole building; they gave temporary light to the store and ran a ground and then they ran a ground for the rest of the building.

Q. You audited Mr. Goldstein's books, did you? A. Yes.

Q. Did you know he owned other property on Monroe Street? A. Yes.

Q. Did you know when that property was built? A. What other property he owned—

Q. I am speaking now of Monroe Street. A. I do not know when it was built.

Q. How long are you in Passaic? A. Two years pretty near.

Q. You have no knowledge when that building was built? A. No knowledge whatsoever.

Q. Where do you live? A. At present 418 Paulison Avenue.

Q. Where did you live prior to that place? A. 114 Autumn Street.

Q. In auditing the books of Mr. Goldstein, did you go by books to make the audit? A. By some book that he had there and by his bills.

Q. And did you make a record of it? A. I have.

Q. Have you the records? A. Yes.

Q. Have you got them here? A. Yes.

Q. From what was that record made? A. From the bills and the book that he had there.

Q. May I see it? A. (Producing paper.)

Q. Is this the only record you made? A. Yes, this is the only record I have.

Q. These are the only figures you ever got from Goldstein? A. Yes.

Q. This list is merely a list of how much money he owed to creditors? A. No, how much he paid to them and what was due them.

Q. What does "cont." mean? A. Amount of contract.

Q. What does "act." mean? A. Account, that is; received on account, that means.

Q. And due on completion? A. Due on completion.

Q. "Due on completion" is the last item? A. Yes.

Q. You mean to say that no other creditors besides those whose names appear on this list were paid any money by Goldstein on the construction of the building on Jefferson Street? A. I don't know.

Q. Will you say he didn't give you any more? A. That is all he gave me.

Q. Do you mean to say you didn't see any more? A. No, I did not.

Q. When was this made? A. November 25, 1923, or thereabouts, a day before that or after.

Defendants' Witness, Isadore M. Grossman, Cross

Q. What was the occasion of making this? A. Mr. Goldstein—that was after the meeting of the creditors, and the creditors asked me to go up there, and Mr. Goldstein asked me to come up there and to look up to see how much was due, so that he might come to an agreement to go back and finish the building, whether to assign to trustees or let him go on with it himself.

Q. In pursuance of the request of the creditors you went up there? A. Yes, to Mr. Goldstein; I went up to his house.

Q. This was November 23? A. Yes.

Q. You didn't put down the mortgages on this paper, did you? A. No, sir.

Q. You didn't put down how much money was received from the mortgagees on this paper? A. No, sir.

Q. You did not put on this paper how much money was in fact paid out by the mortgagees? A. No, sir.

Q. Obviously the reason that you didn't put it down was because you didn't get that information? A. No, because in so far as the mortgagees were concerned, we were noti nterested enough at that time to know what was due them, to mortgagees, as Mr. Slaff and the rest of the creditors wanted to know how much will be due all of the creditors if the building will be completed.

Q. But I say you did not put down how much money had been paid out by the mortgagees to the various creditors? A. No, sir.

Q. The reason for that was because you did

not get that information? A. No, not because of that.

Q. You didn't put it down? A. I didn't, but I did get the information.

Q. You did? A. Yes.

Q. Why didn't you put it down? A. Because it wasn't necessary to put it down on there.

Q. Didn't you want to know how much the creditors received from the mortgagees? A. No, I wasn't interested.

Q. Isn't that what the "act." means? A. No, "On account," that was received from Goldstein. What difference did it make whether from the mortgagees or Goldstein; that is all the money that was received in that building, and that is all I was interested in.

Q. Isn't it a fact that you didn't put down what was taken from the mortgagees because there was no reference specifically made to what the mortgagees paid? A. Yes, there was reference made, but I didn't put it down.

Q. Do you wish to say that there was reference made to the amount? A. Absolutely.

Q. But you didn't put it down? A. I did not.

Q. Will you state whether or not in November, 1923, there was any statement made as to the amount of money advanced by Samuel Slaff on his mortgage? A. Mr. Goldstein told—

Q. Yes or no? A. Yes.

Q. How much? A. None.

Q. Was there any statement made as to how much money the Superior Finance Company had paid out? A. Yes.

Q. How much? A. $15,000.

Q. Any statement made as to how much money had been paid out by Mr. Harry Weinberger? A. Yes.

Q. How much? A. About $35,000.

Q. About? A. About thirty-five.

Q. You understand English, do you? A. Yes.

Q. What was the amount stated? A. About $35,000.

Q. Do you mean that? A. Yes, thirty-five to forty thousand is what Goldstein told me what he paid.

Q. Do you understand English? A. Yes.

Q. I again ask you was the amount which was stated about thirty-five? A. We went into the—

Q. I didn't ask you that; I asked you whether there was any amount stated how much had been paid out on that mortgage? A. On that mortgage; well, there is two ways of doing that.

Q. Was there anything stated? A. Yes.

Q. How much? A. About $53,000.

Q. A moment ago you said thirty-five, then you changed it to forty, now you have changed it to fifty-three; which amount was given? A. The fifty-three was given, the thirty-five—

Q. Will you answer my question? A. Yes, fifty-three.

Q. Is that correct? A. Yes.

Q. Why did you a moment ago say that Mr. Goldstein told you about $35,000? A. That went into the Jefferson Street building.

Q. Do you understand English? A. Yes.

Q. I asked you whether there was any statement

made as to how much money the mortgagees had paid out? A. $53,000.

Q. Is that what Goldstein told you? A. Yes, and I think it is on that slip.

Q. A moment ago you said you were not interested to find out how much the mortgagees paid out, because you didn't reach that point in November, 1923? A. I wasn't interested.

Q. Was that true or false? A. Yes, it is true.

Q. Then you were interested, were you, in finding out how much money had been paid out on the mortgages? A. Not at that time.

Q. You were not interested then? A. No.

Mr. Weinberger: I ask that the paper produced be marked for identification.

Marked Exhibit D24 for identification.

	Cont.	Act.	Due on Completion.
Yellow Pine	42,123.52	15,000.	27,123.52
Goldberg	27,000.	19,000	8,000.
Levinson	26,000.	13,000.	13,000.
Rabinowitz & Smith	23,500.	16,500.	7,000.
N. J. Fire	4,400.	1,200.	3,200.
Paskevitch	10,750.	3,000.	7,750.
Simon Bros.	1,800.	500.	1,300.
Mendelsohn	6,950.	3,000.	3,950.
"	705.50	———	705.50
Belmont Lumber	1,500.	610.	890.
J. Feld	937.	750.	187.
B. Levine	2,240.	2,000.	240.
Metal Ceiling	375.	———	375.
Digger	375.		375.

Tiling	2,000.	500.	1,500.
Stone Cutter	925.	850.	75.
Robinson	871.	Note	871.
Paterson Glass	1,990.	1,000.	990.
Cellar Digger	5,000.	5,000.	———
Foundation	280.	280.	———
Zaentz	1,240.	1,000.	240.
Ashes & Stone	1,200.	1,200.	
Warshaw	245.	200.	45.
	162,407.02	64,590.	77,817.02

Q. Did you go around to any of the creditors to try to enlist them to file lien claims? A. I did not.

Q. Mr. Grossman, you did not approach anyone to file lien claims? A. Absolutely not.

Q. When you met at the house of Mr. Rabinowitz, was there any discussion with regard to the dates by which liens were to be filed? A. None at all.

Q. Any discussion as to when the four months expired? A. I don't remember whether there was any discussion whether the four months expired, but there was some discussion on the liens. I said, "My lien is up in a couple of weeks, and seeing that the foreclosure is on"—

Q. Then there was a discussion about the time being up, the four months? A. That was my point saying about my lien.

Q. Then there was a discussion? A. Yes.

Q. Who discussed the question of the four months having expired? A. I did.

Q. Anybody else?

Judge Heisley: You say "had expired"?

Q. I will reframe that; was there any talk on the part of the other claimants with reference to the time for their liens having expired? A. I don't remember.

Q. There may have been? A. There may have been, yes.

Q. You have a delivery slip system in your office, have you not, in your business? A. None whatsoever.

Q. In no instance at all do you get delivery slips where you deliver merchandise? A. Except.

Q. Do you; yes or no. A. Yes.

Q. What did you mean by, "None whatsoever," a moment ago? A. I have buildings under contract.

Q. What did you mean by "None whatsoever," when you said it a moment ago? A. You see there are three departments in our business. I meant none whatsoever in regard to contract, even where we do work for builders.

Q. I asked you a moment ago whether you have a delivery method in your business; you answered "None whatsoever." Did you answer that? A. Yes.

Q. How much money have you received on account on this contract? A. On account of the wiring, $500.

Q. Did you get certificates of completion? A. Yes.

Q. You obtained those yourself? A. Yes.

Q. When? A. Sometime in July, I should judge, or in the latter part of June; we re-

ceived them on the completion of the buildings, the latter part of June, or early part of July.

Q. When do you say the certificate for the wiring was issued? A. The certificate for the roughing and wiring was issued sometime in 1923.

Q. Isn't it true that from that time up to the time of the delivery of the fixtures no work was done on the building? A. That is untrue.

Q. After the certificate of wiring was issued, what did you do? A. We went back and set meter trims and ran the service; otherwise, the storekeepers would have no lights; we ran some fixtures for the store, fixtures that were not charged up against the building.

Q. So that the next work you did after the certificate of wiring was obtained was to trim the meters? A. Set meter trims.

Q. For the storekeepers? A. Yes.

Q. Do you know when that was? A. Sometime in September or October, 1923.

Q. That was all prior to December 4, 1923, when this contract was executed? A. Yes.

Q. I just asked you a moment ago whether it is not a fact that you did no work until the fixtures were delivered, after the certificate of wiring had been obtained; do you mean to qualify that and say that you did do the work for the storekeeper? A. And for the building also; we put in the meter trims in the buildings, but we couldn't go ahead on the inside of the building.

Q. How much do you claim is due you now? A. On the wiring?

Q. Yes. A. $1,300.

Q. That was the original contract with Goldstein? A. Yes.

Q. On the contract with Slaff & Eichenbaum you received the contract, did you not, on the sixteenth day of May, 1924? A. Yes.

Q. And that was to provide the fixtures? A. Yes.

Q. So that the last work you did prior to the fixtures was sometime in September, 1923? A. The last work?

Q. Yes. A. No, that is not true.

Q. Was it? You remember; when was it? A. We did work there in April of 1924, April of this year we did some work there setting meter trims, but we couldn't go in to set the switches, and if we did, the plates would have tarnished, and we would have to set new ones, and we waited until we got the fixture contract to finish the wiring contract.

Q. All you were hired to do by Slaff & Eichenbaum was as per your contract of May 16, 1924? A. Yes.

Q. And that work you know was in fact finished? A. Absolutely.

Q. And billed out? A. Absolutely.

Q. Aside from the contract of May 16, 1924, you received no orders from them at all outside of this contract? A. None at all. Mr. Weinberger, may I supplement one of my answers?

Q. And on that very contract there is due how much? A. On the fixture contract $1,300.

Q. Wasn't the contract $1,200? A. $1,200, excuse me.

Defendants' Witness, Isadore M. Grossman, Re-direct

Q. From Goldstein you claim there was due him independent of this contract how much? A. According to the agreement of December 4, $1,300.

Q. That was independent of the $1,200? A. Yes. May I supplement one answer, saying that the letter boxes, which were part of the wiring contract entered into with Max Goldstein, were set sometime in June, 1924.

RE-DIRECT EXAMINATION by Judge Heisley:

Q. You had a wiring contract with Goldstein, as I understand it? A. Yes.

Q. And the fixture contract with Eichenbaum & Slaff? A. Yes.

Q. Did you put in all the fixtures called for by that contract? A. Yes, sir.

Q. You were to receive $1,200 for it? A. Yes.

Q. You haven't received a dollar on account of it? A. No, I have not.

Q. The fixtures are still there? A. Yes.

Q. When did you do the last work on the wiring contract that you had with Goldstein? A. June 27.

Q. When did you do the last work on the fixture contract? A. June 27.

Q. Why was it that you did work on both contracts, the last work, on the same day? A. Because we finished the ground and finished setting the switches at the time we hung the fixtures, instead of sending men on two different occasions, we did that, setting the switches and letter boxes all at one time.

Q. You said something about getting some certificate last July; what did you mean, certificate of what? A. The final certificate.

Q. Whom from? A. Chief Gibson.

Q. Of Passaic? A. Yes.

Q. What would that apply to? A. That would apply to the fixtures only; the chief inspects the building and he sees that the fixtures are up, and if a few are missing he sends the certificate anyway.

Q. Have you the certificate? A. I have it at the office.

Q. I call your attention to Exhibit D24 for identification; this paper, I understand, is the original statement that you made of an accounting of what Goldstein had contracted to spend in the erection of thisb uilding, and of the amount that had been paid on account, and of the balance that would be due, is that right? A. Yes.

Q. Is it true that this shows, in the first column, that the total amount of his contracts for the building amounted to $162,407.02? A. Yes.

Q. And that there had been paid on account $84,590? A. Yes.

Q. And left a balance to be due on completion of $77,817.02? A. Yes.

Judge Heisley: I desire to offer this paper in evidence, which has already been marked Exhibit D24 for identification.

Marked Exhibit B.

Judge Heisley: I also desire to offer these three time cards in evidence.

Time card heretofore marked Exhibit

D23 for identification, now marked Exhibit C.

Two time cards marked Exhibit D.

Mr. Weinberger: I object to that offer on the ground that these cards are apparently made from some other records, and the originals, from which these apparent entries are made, are not produced, and not made in the handwriting of Mr. Grossman.

Judge Heisley: They were called for and accepted by counsel on the other side and used, and therefore it makes them competent as evidence by me, if I chose to offer them.

Mr. Weinberger: I offered one; I do not object to the one I offered. I object to the others, on the ground that they were not called for and not used by me.

Q. Are these time cards the original records or not? A. Yes.

Q. Of the men who worked on that building? A. Yes, sir.

Q. All three of them are? A. Yes.

Q. Do you know that of your own knowledge? A. Absolutely.

Q. Will you produce that little yellow slip; I think you produced it the other day, upon which some figures were made having an estimation of the property being worth $250,000; did you have that? A. No, Mr. Weinberger had that.

Q. I call your attention to Exhibit D17; was it estimated at that time that the old building and the new building were worth $250,000? A. Yes.

Defendants' Witness, Isadore M. Grossman, Re-direct

Q. In the contract of December 4, in Paragraph 7, it says in substance that when Slaff shall receive an amount equal in proportion to that received by other creditors hereto, not less than 76% of $27,000, he shall cancel his mortgage; what did that refer to, 76% of $27,000? A. That was all that was due Slaff.

Q. How do you know that? A. He told me so, and he had me put that into the contract.

Q. You put it in? A. Yes.

Q. You wrote it? A. I wrote it, if the figures are there. I figured that 76%; I wrote it in the original contract; I wrote some of it in.

Q. I show you the original contract, D2? A. That is my handwriting (indicating).

Q. I notice in this paper, Exhibit B, Yellow Pine Lumber Company is put in as contract of $42,123.52, and received on account $15,000, leaving due $27,123. Who gave you those figures? A. Goldstein did.

Q. Did you speak to Slaff about that account? A. Yes.

Q. Did he ever dispute it? A. No, sir.

Q. Did he ever say to you anything about his having received $8,000 on account of his mortgage from Goldstein, and this subsequently put the mortgage back to $35,000, by his securing a mortgage of about $8,000 for Goldstein from the Yellow Pine Lumber Company? A. He never told me.

Q. When did you first hear of that? A. At the last session of this hearing.

Q. At any of the creditors' meetings did Slaff ever say to any of you that his claim was more than $27,000? A. I don't remember

Defendants' Witness, Isadore M. Grossman, Re-cross

RE-CROSS EXAMINATION by Mr. Weinberger:

Q. Mr. Grossman, I direct your attention to the schedule annexed to Contract D2, dated December 4, 1923, and call your attention to the item "Yellow Pine Lumber Company," and ask you in whose handwriting part of the numerals are written; do you know? A. I don't know; I don't remember.

Q. How much is the amount stated there? A. $7,563.75.

Q. Didn't you know at the time that contract was signed, that Yellow Pine had a claim of that sum in addition to their mortgage?

Judge Heisley: There is no evidence that the Yellow Pine had a mortgage; the mortgage was of Samuel Slaff.

Q. Didn't you know at the time that contract was made that there was a mortgage of Samuel Slaff for $35,000? A. Yes.

Q. Then you did know of this mortgage prior to the execution of that contract? A. Yes.

Q. Leaving that for a moment, and looking at your figures here on Exhibit B. I call your attention to the item appearing on this, of Goldberg contract, $27,000; account, $19,000; due $8,000; is that correct? A. That is what Mr. Goldstein gave me at that time.

Q. Are you sure of that? A. Positive.

Q. No question about that? A. No question about that.

Defendants' Witness, Isadore M. Grossman, Re-cross

Q. You got that from his books? A. No, I didn't get that from his books.

Q. From his checks? A. That is what he gave me verbally; most of that was given verbally, except the Yellow Pine, whose bills I looked over.

Q. Then you got most of these verbally? A. Yes.

Q. You didn't get it from the checks? A. No.

Q. I thought you gave the impression before that it was taken from checks? A. With Yellow Pine.

Q. Aside from the Yellow Pine note item, which was derived by the check book, it was all orally given to you by Goldstein? A. I saw some checks, but I don't remember on whose account they were. As a matter of fact, at that time Mr. Goldstein told me that the Yellow Pine owed him some credit on cement bags, that that was not given.

Q. Who is Mr. Robinson? A. He is the roofing man.

Q. The Ac-Tin-o-Lyte? A. Yes.

Q. The item of $871, I direct your attention to the word "note"; is that in your handwriting? A. Yes.

Q. He had been paid then in full, had he, by note? A. He had been given a note, but I don't know whether that was in full or not.

Q. Did you ever get paid by Goldstein? A. I was paid by a check from the Superior Finance.

Q. Any money from Goldstein? A. None whatsoever.

Q. Never received a check? A. No, sir.

Defendants' Witness, Isadore M. Grossman, Re-cross

Q. From Mr. Goldstein? A. I received a check from Mr. Goldstein which came back N. G., and then that was taken care of by a check for $500 from the Superior Finance.

Q. You have a system, have you, of sending out bills when money is due, and when you don't get paid you send a statement? A. Yes, sir.

Q. You don't send statements unless the money is due you? A. Absolutely.

Q. So that when a statement is sent to a concern, it means that the money is due? A. Yes.

Q. Otherwise you are not entitled to it? A. More or less that way.

Q. What is your system? A. We send out a statement, even if the money isn't due. If the bill was billed out before the first of the month, the man gets a statement just the same.

Q. You wouldn't send a bill unless it is due, and you wouldn't send your statement to follow it up unless it is due? A. No, that is not our system. As soon as a job is started, I send out a bill on it.

Q. When it is finished what do you do? A. Notify him; I let the man know that my job is started.

Q. In this particular job, in June, did you send a statement out after the job was finished, to Slaff and Eichenbaum? A. I might have.

Q. Did you? A. I don't remember, if I go through 500 accounts in the book, I cannot say.

Q. Did you in this particular case, when the work was completed in full, send a bill for $1,200? A. No, sir.

Q. You did not? A. No.

Q. Never sent a bill when the job was completed for $1,200? A. No, I sent them a duplicate bill some months later. But the original bill was mailed when the job was started.

Q. When the job was started did you or did you not send a bill? A. No, sir.

Q. I show you Invoice No. 4802 and ask you whether that happens to be a billhead of your concern. A. It is.

Q. And what is its number? A. 4802.

Q. And what date does it bear? A. It bears date June 20, 1924.

Q. Is it in your handwriting? A. The name is not, but the "Yellow Pine Lumber Co., Clifton, N. J.," and "Mr. Slaff" is in my handwriting. I mailed that bill.

Mr. Weinberger: I offer it in evidence for identification.

Marked Exhibit D25 for identification.

The Witness: This is for the extra work.

Q. I direct your attention to the item "Fixtures at 72 Jefferson St. as per contract $1,200"; is that right? And when you sent that on June 20, 1924, it meant that the fixtures were at 72 Jefferson Street? A. No, it did not.

Q. It didn't mean that? A. No.

Q. That was written by you, though? A. Not "Fixtures as per contract" was not written by me.

Q. "Fixtures at 72 Jefferson St."? A. That was not written by me.

Q. That is not in your handwriting? A. No.

Defendants' Witness, Isadore M. Grossman, Re-direct

Q. "Slaff & Eichenbaum," whose handwriting is that? A. Mr. Weckstein's handwriting.

Q. He worked for you? A. For Simon Brothers he worked.

Q. That went out and mailed by you? A. Yes.

Q. As is? A. Not on the same day.

Q. As is? A. Yes, I folded it up and put it in an envelope and mailed it.

Q. When you met and discussed the selling of the property, and so forth, you all agreed that the creditors thought that if an available purchaser could be found for two hundred and fifty, it would be a good thing to sell the old and new property? A. To get our money out, yes.

Q. You all tried to get buyers, I suppose? A. Yes.

Q. You didn't succeed, any of you? A. We could have succeeded if we were not hampered.

Q. You didn't succeed? A. We couldn't.

Q. Answer the question. A. No, we didn't.

Q. You all tried to raise a mortgage, too, did you not? A. Yes.

Q. Did you succeed? A. We did not, because we were hampered.

Q. I didn't ask you that. A. No.

Mr. Weinberger: I move that that be stricken out.

RE-DIRECT EXAMINATION by Judge Heisley:

Q. When Goldstein gave you these figures in this schedule and gave for the Yellow Pine Lum-

ber Company $7,635, did he or did Slaff at that time say that there had been any arrangement whereby Goldstein had paid off $8,000 on a mortgage and that Slaff had stood his sponsor for credit with the Yellow Pine Lumber Company for $7,635? A. No, I never knew about that.

SAMUEL GOLDBERG, sworn for defendants.

Direct-examination by Judge Heisley:

Q. Mr. Goldberg, you had a contract with Goldstein, did you not? A. Yes.

Q. And this is it, is it not? A. Yes, sir.

Judge Heisley: I offer this contract in evidence.

Marked Exhibit E.

Q. I call your attention to this: After enumerating the payments, there is this clause: "It is hereby further mutually understood and agreed that the said Samuel Goldberg shall, in consideration of the price hereinbefore mentioned, supervise, manage, control and direct the entire construction of the entire buildings, which services shall be along the following lines: Purchase materials, subcontract work, supervise the construction of building while in progress, obtain help, dictate to all employees and subcontractors as to the method of construction, and manner of erection of said building, and do all other work necessary and incidental to the proper construction and erection of said buildings jointly with the

owner aforementioned." Did you continue in that capacity until the building was completed? A. Yes, sir, I did.

Q. After the deed was made December 21, from Goldstein to Slaff and Eichenbaum, did you still continue in that capacity? A. Yes, sir, absolutely.

Q. The same as you had before? A. Yes.

Q. With or without the knowledge of Slaff and Eichenbaum? A. Without the knowledge of them.

Q. With their knowledge or without their knowledge; did they know about it? A. They did know, because it was the understanding in the agreement of December 4.

Q. I mean to say that after the deed—after Slaff and Eichenbaum got this title in their own name, did they know that you were there supervising the erection of the building? A. Absolutely they did.

Q. In that capacity, did you have to have knowledge of how the various contractors were working, whether they were completing their contract? A. Yes.

Q. Do you know whether or not you finished your contract? A. I did.

Q. Do you know whether or not any of those persons for whom I have filed mechanic's liens failed to finish their contract? A. No, sir, they did finish all the contract.

Q. Everyone? A. Yes.

Q. Is there any doubt about it? A. No doubt about it.

Q. And you have seen their liens or talked over

with me about the dates in their lien claims, haven't you? A. I did.

Q. And is it or is it not true that they did work or furnished material on the last date stated in those lien claims? A. They did.

Q. When did you gentlemen retain me to represent you in this matter? A. Sometime in September.

Q. And who was that retained me? A. I was, Mr. Green.

Q. Paid my fees? A. Paid your fees.

Q. And when was it that I met with you gentlemen at Mr. Rabinowitz's house in Passaic, in September or October? A. It was in October, sometime.

Q. Was there any agreement among you people or any suggestion by any of you, that any of you should, for the purpose of keeping your claims within the four months statutory period, that you should do some work or furnish some material on this property; was there anything of that kind? A. No, sir.

Q. Was it ever suggested? A. No, sir.

Q. In the agreement of December 4, Slaff agrees to take not less than 76% of $27,000; why was $27,000 mentioned, if you know? A. That was the mortgage due to him, $27,000.

Q. Did he say so? A. He said so.

Q. Did he ever say to you gentlemen or any of you, that there was $35,000 due on the mortgage? A. No.

Q. Did he ever say anything about the mortgage having been originally $35,000, and then he getting a check from Mr. Weinberger or some-

one for $8,000, and then after that he arranged for a credit with the Yellow Pine Lumber Company for $8,000 for Goldstein, and that was to make the mortgage go back to thirty-five; did he ever say that? A. I never heard that.

Q. When did you hear him say that for the first time? A. I never heard him say that.

Q. Did you hear him say it on the stand the other day? A. I did.

Q. Did you hear it before that? A. No, sir.

Q. Why did you delay so long in filing your lien claim? A. Because I had full faith and trust in Mr. Eichenbaum and Samuel Slaff that they will do whatever they promised under their contract and that everything will get paid, even with interest.

Q. Did they ever outside of the contract promise to pay you with interest? A. Yes.

Q. More than once? A. Yes.

Q. Have you ever heard them promise anybody else similarly? A. Yes.

Q. Whom did you hear them promise?

Mr. Weinberger: I object to this line of examination, on the ground that if it is such a character of promise which will necessitate a contract in writing, under the Statute of Frauds, the writing should be produced, and that under no circumstances can an oral arrangement bind these men to pay, in view of the fact that they were not purchasing for themselves, as obviously appears from the testimony.

A. At the meetings.

Q. Would they talk to you occasionally about this building as it progressed along after the agreement was signed on December 4th? A. Yes.

Q. Did they ever complain to you that you had not finished your contract? A. Never did.

Q. Did they ever complain to you that any of the gentlemen or firms for whom I have filed liens didn't finish their contract? A. No, sir.

Q. Never? A. Never.

Q. Are you sure of that? A. Positive.

Q. Did you ever hear them complain of it and say that until here the other day on the witness stand? A. That was the first time.

Q. This building was erected according to plans and specifications? A. Yes, it was; there were small changes directed by the Tenement House Board after the plan was prepared, but during the progress of the work.

Q. In other words, it was built generally under written plans and specifications? A. Yes, absolutely.

Q. Who has those plans and specifications, if you know? A. It was drawn up by Mr. Abram Preiskel & Skvarla.

Q. Slaff and Eichenbaum have contracted, they say, debts of about fourteen or fifteen thousand dollars for material and labor in this building. Do you know what those fourteen or fifteen thousand dollars represent? A. I cannot know without seeing the bills and slips.

Q. You want to see the itemized bills? A. Yes, then I could say.

Judge Heisley: We are to have them.

Mr. Weinberger: They are all here.

Paper produced showing dates of payment marked Exhibit D14a.

Q. What bricks was Paskewicz to furnish? A. All the bricks necessary for the building.

Q. For the whole building? A. Yes.

Q. Was that the contract? A. Yes.

Q. Did anybody else furnish any brick but Paskewicz? A. No.

Q. He furnished some bricks, I believe, along this fall, did he not? A. He did.

Q. What were those bricks used for? A. Supposed to be used for piers in the cellar, under the main sewer line.

Mr. Weinberger: You mean under the sewer?
The Witness: Yes.

Q. Were they used? A. They were.

Q. About how many bricks were used? A. About 300.

Q. Were there any piers built there in the cellar? A. I saw two.

Q. Besides the bricks that were used to support the sewer? A. Yes, sir, two piers I saw built, and they were supposed to build fifteen.

Q. Did you order the bricks? A. I did.

Q. How did you come to use the bricks? A. Because it was discussed several meetings in August yet that it is necessary to put down according to the tenement house law, to support all the main sewers with piers, because the sewers was hanging sewers, not laying on the ground, and this is a letter from the Board of Tenement, that all the sewers—

Q. Whom did you discuss that with in August?

A. With Slaff and Eichenbaum, at meetings of the Plumbers' Supply.

Q. Is there any question about that? A. No, sir, positive.

Q. Did Slaff and Eichenbaum at any time give you any instructions to get these bricks from Paskewicz, and if so, when was it? A. He didn't give any instructions, but he was in the cellar when I put on the coal bins to divide all the six stores from the cellar.

Q. And who was in the cellar at that time? A. Mr. Eichenbaum, Mr. Samuel Slaff and Mr. Rabinowitz.

Q. What was said at that time to you by either Slaff or Eichenbaum? A. That it is necessary to use brick to support the sewers, because the inspector is claiming he must have it.

Q. And was it because Slaff or Eichenbaum said that, that you ordered the bricks from Paskewicz?

Mr. Weinberger: I object to the leading form of questions; counsel is deliberately putting the words in the mouth of the witness, and on matters which obviously are already framed, if I might so phrase it.

A. He didn't mention Paskewicz.

Q. Why did you order bricks? A. Because it was necessary.

Q. Was it because of anything that was said to you?

Mr. Weinberger: I object to that on the ground that counsel is deliberately putting

questions in the mouth of the witness and is leading him on matters that he realizes he is in difficulty about.

A. It was said to me it is necessary to build piers under the sewers.

Q. Who said that? A. Mr. Samuel Slaff and Eichenbaum.

Q. In the presence of anyone? A. Mr. Rabinowitz.

Q. When was this? A. That was the times we need to put up the partitions in the stores.

Q. About when was that? A. October 10 (referring to book). October 10.

Q. You are referring to your book? A. Yes.

Q. What is it, your time book? A. Yes.

Q. For work done on that job? A. Yes.

Q. Will that time book show when you did any work there? A. Yes.

Q. Is it in your handwriting? A. Yes.

Q. What is the last date you did any work there? A. October 10, 1924.

Q. And were these bricks and were these piers called for by the original plans and specifications, to the best of your recollection and belief? A. It wasn't, under the plans, but it is the law from the Board of Tenement.

Mr. Weinberger: I object to this line of examination, on the ground that it appears that this contract specifically provided that the man was to work according to plans and specifications, and any attempt to vary it on his part is for the purpose of bolstering up lien claims as appears from his

testimony and from the collusive fraudulent lien claims now on file.

Q. Mr. Goldberg, can you tell us whether or not the completion of the building was delayed in any way? A. It was.

Q. What by? A. By the metal sash.

Q. What have you to say about that? A. The metal sash Mr. Mendelson didn't want to come in on the contract.

Q. Under the agreement? A. Under the agreement, unless Mr. Slaff and Eichenbaum will guarantee him personally for his money; he was willing to have a note even for two years in renewal, but they must personally guarantee, so they didn't deliver the sash, and the building was opened without sash, and without kalamine doors, two months.

Q. Was that after the agreement of December 4, 1923? A. Yes, sir, that was the first of July.

Q. Did the plans and specifications call for metal ceiling sash? A. It did.

Q. And because those metal ceiling sash were not furnished, what part of the work did that retard? A. All the work in the building; the mason couldn't come in to patch the rooms; the plumber couldn't do anything inside to complete his plumbing work to put on his faucets, because he was afraid someone should steal them.

Mr. Weinberger: Will you tell what you know about this case, and don't tell what someone else said?

The Witness: Whatever I say is nothing but the truth.

Q. How long did that delay the building? You said two months? A. Two months, about.

Q. You were building for Goldstein, I think, while the Jefferson Street building was going up, another building on Monroe Street? A. We did.

Q. And do you know whether or not you received on the Monroe Street building any mortgage money from Weinberger or anybody else, which should have been used on the Jefferson Street property? A. I know that.

Q. Tell us what you know about that? A. Mr. Goldstein told me that he was up—

Mr. Weinberger: I object to it on the ground that it is certainly not binding on Mr. Weinberger, unless he was present.

Q. Go ahead. A. Mr. Goldstein told me that it was in June, 1923, that he had $29,000 from the mortgagee on Jefferson Street, to pay off 270 and 272 Monroe Street.

Q. Is this what you mean to say, that he had $29,000 of money which he had raised on account of the Jefferson Street property, and had devoted it to the payment of bills on the Monroe Street property? A. That is what Mr. Goldstein told me.

Q. Do you know how much of that, if any, you got? A. I cannot say exactly.

Q. Did you know it at the time you were getting it? A. No, I did not.

Q. When was it he told you? A. The last part of June.

Q. How many bricks did you order of Paskewicz? A. 2,000.

Q. How many of them were used? A. About 300.

Q. And the balance was there? A. The balance was there.

Q. What was the idea of ordering so many? A. It was necessary.

Q. Why? A. For all the piers.

Q. Have the others been used since, or don't you know? A. They wasn't; Mr. Rabinowitz told me that the janitor didn't let him in there to finish it.

CROSS-EXAMINATION by Mr. Weinberger:

Q. How long have you been in the contracting business? A. I am in the building business since 1907.

Q. You were bankrupt? A. I was.

Q. You have been very careful since you have been a bankrupt to make certain that when you have a contract that you know what you are signing? A. Yes.

Q. You were very careful to know what you were signing in this contract? A. Yes.

Q. Your contract said that this building was to be finished before the first of July, 1923; was it finished before that time? A. It wasn't.

Q. You had the supervision of this building, did you? A. Yes.

Q. You were the sole supervisor? A. Yes.

Q. Yet you didn't finish your building by the first of July, 1923? A. I couldn't finish it.

Q. You didn't, did you? A. No.

Q. Did you stop on that building at any time before December, 1923? A. I didn't.

Q. You worked right along? A. Yes.

Q. Never stopped for a day? A. If material was delivered.

Q. Will you answer my question; did you stop at any time before December, 1923? A. No, sir.

Q. Sure about that? A. Sure about that.

Q. Then December, 1923, your contract was signed, wasn't it, with all the creditors? A. It was.

Q. You had been working regularly up to that time? A. Mostly.

Q. Now, you say "mostly" and a moment ago you said "every day." A. I was working every day, sure, since the stoppage was made from every creditor.

Q. When? A. Sometime in November, the last part.

Q. Then you stopped in November? A. Yes.

Q. Then you didn't work after they all stopped, did you? A. No.

Q. Then you did stop? A. I did.

Q. When you said you didn't stop, you were lying? A. I wasn't lying.

Q. You were telling the truth? A. Yes, but I didn't understand the right question.

Q. See if we can make this clear. Did you ever stop working on that building before December, 1923? A. When everyone stopped.

Q. That was when? A. Sometime in November.

Q. Had you kept a record up to that time of all the work you did on that building, in a book? A. On the labor work?

Q. Yes. A. I did.

Q. Have you got the book here? A. It is right here.

Q. Have you got a record of all the supplies you ordered, in that book? A. No, sir.

Q. Have you got any such book? A. No, sir, just a time card.

Q. Answer my question. A. No, sir.

Q. You never made any book showing what you ordered at all, did you? A. No, sir.

Q. Why not? A. Because it was not necessary.

Q. You only started making a record when you were told you would have to fix up a case? A. No, sir, nothing of the kind.

Q. Did you keep a record after that? A. We did.

Q. Did you ever make a record of what you had to buy? A. No.

Q. Never did? A. No.

Q. Did you ever make a record in that book for brick for Paskewicz? A. I did not.

Q. Sure of that? A. No.

Q. Are you sure of it? A. Sure I didn't.

Q. You never wrote in this book in which you say your labor appears, the name Paskewicz, did you? A. I don't remember.

Q. Who wrote that book? A. Where is it? I wrote it.

Q. In your handwriting? A. Yes.

Q. When did you buy that book? A. The date is there.

Q. When? A. The date is there.

Q. When? A. 1923, or something like that.

Q. When? A. I will have to look at it; I don't remember.

Judge Heisley: May I ask two or three questions about the book so I can offer it?

Mr. Weinberger: Certainly.

RE-DIRECT EXAMINATION by Judge Heisley:

Q. Mr. Goldberg, this book starts at the very first entitled "Jefferson St. Mr. Goldstein"? A. Yes.

Q. And says, "Date, April 23, 1923"? A. Yes.

Q. It runs along, page after page, until it goes over to April 28—what year is that? A. 1924.

Q. Where does it go from there; you start in April, 1923, and it runs down to April 28, 1924? A. Yes.

Q. Where is there any other account there? A. I have a time book home yet, an old one.

Q. This went up to last April? A. Yes.

Q. Where is your time book showing what you did last summer? A. I have it.

Q. Where is that? A. Home.

Q. Why didn't you bring that? A. I don't know; because the other one was filled out, so I brought this one, the latest time that I worked on it.

Q. In this book, there are no other places showing any account with Jefferson Street property after April 28, 1924, is that right? A. Right here (indicating).

Q. Then I call your attention to the fact that

on the third page from the last of this book you have "Jefferson St. Goldstein," top, beginning with May 5, and running down to October 10th? A. Yes, sir.

Q. You have two men in May—Goldberg, and who is the other man? A. Benny.

Q. And on May 5 and on June 10, Benny again? A. Yes, and J. Goldberg.

Q. And on July 9, Goldberg? A. Yes.

Q. And on October 16, Willie? A. Yes.

Q. And these crosses in these columns, on the other page, meaning the days under the various letters? A. Yes.

Q. Is that really a continuation of the account which ended at the bottom of this—

Mr. Weinberger: I object to counsel leading and suggesting to the witness.

A. Yes.

Q. Mr. Goldberg, your item on April 28, 1924, was down to the bottom of the page, wasn't it? A. Yes.

Q. On the next page it starts in with 131 Parker? A. Yes, H. Barnett, a different job.

Q. What did you mean awhile ago when you said that you did have at home another book, which would show the account in 1924? A. In 1924, before I started this job.

Q. I understood you to say that you had a book home that would show the items of work during the summer of 1924; did I misunderstand you? A. 1923, from the time I started.

Judge Heisley: I offer the book in evidence.

Marked Exhibit F.

RE-CROSS EXAMINATION by Mr. Weinberger:

Q. Jefferson Street job, Goldstein, that is this job, isn't it, the new building? A. Yes.

Q. Jefferson Street is the only job you have in this book? A. Yes, sir.

Q. I mean with regard to Goldstein property? A. Yes.

Q. That is the only Goldstein job in this book? A. Yes.

Q. There are others that Judge Heisley has called your attention to, but that is not Goldstein's property? A. Correct.

Q. This book ought to help you out to show when you stopped working on that job, ought it not? A. Perhaps it will show.

Q. Does it? A. Yes.

Q. You haven't anything in this book which would show you were working on that job when you were not working? A. No.

Q. You wouldn't do anything like that? A. No.

Q. So when you stopped working, you, of course would show it in this book? A. Yes.

Q. Just show us when you first stopped working, in this book, Exhibit F. A. From November 15 up to December, 1923.

Q. December 23, 1923, that you stopped working; is that right? A. Yes.

Q. Then when did you start again, December 29? A. Yes.

Q. When did you stop again? A. We started December 29th.

Q. How long did you work? The next item there is what date; what is the next item? A. December 29, I start to work.

Q. When did you stop? A. I kept working—

Q. Tell me when you stopped.

Judge Heisley: According to the book.

A. We stopped working—I kept working right along.

Q. Where is it; what is your next item? A. December 29, January 5, January 19.

Q. December 29th? A. Yes. January 5, 1924.

Q. Is that January? A. Yes, January 5, 1924.

Q. Then the 12th? A. Yes.

Q. Then the 19th of January? A. Yes.

Q. Then the 27th? A. Yes.

Q. Then the second of February? A. Yes.

Q. Is this the truth? A. Yes, according to the way it is marked there.

Q. March 4? A. Yes.

Q. Is that right? A. It is marked so.

Q. Is that right? A. It is right whatever is marked there.

Q. March 15? A. Yes.

Q. April 14? A. Yes.

Q. April 21? A. Yes.

Q. How many days in the week are there? A. There are five and one-half working days.

Q. Go back to January; how many days did you work in January, the fifth? A. Four.

Q. What? A. Four.

Q. January—what do these three lines mean? A. That meant three men were working.

Q. For how long? A. Four days, the second man was working.

Q. And when you see a cross there that means they worked? A. A cross means they were not working.

Q. Monday, were they working? A. Yes.

Q. There is a cross there? A. That is an "8."

Q. What is that (indicating) "8"? A. No, sir, it is a cross.

Q. What does that mean? A. They didn't work that day.

Q. Wednesday? A. They worked.

Q. Thursday? A. They worked.

Q. Friday? A. Worked.

Q. Saturday? A. Didn't work.

Q. What is this four hours, half a day? A. Yes.

Q. How did you pay, by check or cash? A. By cash.

Q. Don't you pay anybody by check? A. Paid the bills.

Q. You never paid your workmen by check? A. Never did, no.

Q. How did you get your pay roll? A. In the bank, by check.

Q. You cashed your check? A. Yes.

Q. You have checks for each of those items which were drawn at that bank? A. More or less.

Q. What do you mean? A. Sometimes I drew for myself including that, and sometimes not.

Q. It would be more than that? A. Yes, more or less.

Q. To get the pay roll you have to have that? A. Yes.

Q. You say that on each Saturday you have a check showing that withdrawal? A. Yes.

Q. Is that right? A. Should be.

Q. That is correct? A. Yes.

Q. That is your system? A. Yes.

Q. You worked the 12th, 19th, 27th, February 2nd? A. Yes.

Q. Those days you didn't work then? A. No.

Q. From the second of February to March 8? A. Yes.

Q. You didn't work, did you? A. No, sir.

Q. Why not? A. Because the sash and doors weren't there.

Q. Were they there on the fifteenth? A. I cannot remember that.

Q. You just said they were not there on the eighth? A. If it is marked working, they were.

Q. You just said they were not there on the eighth. A. I only kept record when my men worked.

Q. On the eighth you say the sash and doors was not there? A. I know I stopped for the sash and doors.

Q. Answer my question; from February 2nd to March 8th you did no work? I asked you why not. A. Because I know there was the delay on the sash and doors.

Q. Then you couldn't do any work? A. I couldn't do any work; I did work.

Q. Answer the question. Is it true that the reason you did no work on that job and why you stopped on February 2nd, was because

there were no sash and doors; is that true? You didn't go back until the eighth of March? A. I worked there on the wooden sash, for which I got paid extra.

Q. Will you answer my question? Did you as a matter of fact stop working there on account of the sash? A. I did.

Q. Is it true that you couldn't do any work there during that time? A. I could do a little.

Q. But you didn't do any work from the second of February to March eighth? A. No.

Q. Why not? A. Because I was waiting for the sash.

Q. You just said there was work there to do, but you didn't do it. A. It wasn't necessary to do it.

Q. You just said there was work there. A. It was all ripped off; I was supposed to do it over again.

Q. Do you mean that there was work to do or there wasn't work to do? A. It was not necessary to do it.

Q. You said that it was not, and you said that it was; which is true? A. It was not necessary to do.

Q. You came back on the fifteenth of March, is that right? A. Yes.

Q. When did you stop after you came back? A. Is there anything marked there? I cannot remember unless I look at the book.

Q. You cannot remember? A. No.

Q. How many days' work did you do? A. I cannot remember without looking at the book.

Q. What did you do when you came back in March? A. In March it was the wooden sash.

Q. Without looking can you tell? A. I cannot tell.

Q. Look and tell us. A. March 8, Goldberg; Cohen was working on the wooden sash, which was changed from the metal sash furnished by the Yellow Pine Lumber Company, wooden sash to put in on March 15th.

Q. How long did you work there after you got there on March 15th, how many days? A. Three and one-half Goldberg made and four Cohen made.

Q. You worked there three days or four days? A. Yes.

Q. On the same day? A. On the same day.

Q. Two men worked three days and one worked three days and four hours? A. And the other man four days.

Q. Those are the same days you worked, Tuesday, Wednesday and Thursday? A. Yes.

Q. So two men worked three and one-half days? A. Yes.

Q. You stopped again? A. Yes.

Q. When did you next go back? A. In April.

Q. What was the matter? A. I had to finish it up.

Q. What was the matter; why didn't you do any more work? There was a lot to be done. A. It was impossible to do it, because there was no material to do it with.

Q. Why didn't you do it? A. Because I couldn't do it.

Q. The reason was you couldn't do it? A. No.

Q. Is that correct? A. Sure.

Q. You finally came back there after the tenth of April on the twenty-first, is that right? A. Yes.

Q. Then you came back the twenty-eighth of April? A. Yes.

Q. You never came back until you saw Judge Heisley, is that right? A. April?

Q. Yes. April 28, then you never came back until you saw Judge Heisley? A. I never saw Judge Heisley April 28.

Q. Isn't it true that you came back on the twenty-eighth of April? A. Yes.

Q. And then stopped until you saw Judge Heisley? A. No, sir.

Q. When did you next go back? A. May 5th.

Q. Where is that? A. (Indicating in the book.)

Q. Going back to your book again—maybe I don't see well—April 28 is the last memorandum in this book? A. Yes.

Q. Is that right? A. Yes.

Q. Then you have the next job 131 Parker Avenue? A. Yes.

Q. That was October 27? A. Yes.

Q. What year? A. 1924—1923.

Q. You are changing that? A. 1923.

Q. Goldstein job is April, 1924, is that right? A. Yes.

Q. January, 1924? A. Yes.

Q. And in the same book? A. Yes.

Q. On the next page, 131 Parker Avenue, you got a job starting October, 1923? A. Yes.

Q. Do you see that? A. I do; I will explain that.

Q. Then the next page, 131 Parker Avenue, of 1923? A. Yes.

Q. Is that correct? A. Yes.

Q. The next one, 131 Parker Avenue, of 1923? A. Yes.

Q. Then the next job, June, 1924, 131 Parker Avenue? A. Exactly.

Q. Is that the same job? A. Yes.

Q. The next page, 131 Parker Avenue, 1924, the same? A. Yes, that was A. Ginsberg; I started a few houses in Clifton.

Q. July 19—what year? A. I didn't mark it; that was this summer, 1924.

Q. That is all you have in this book? A. Yes.

Q. Then you stop to the end of the book? A. Yes.

Q. From the third page from the last and you mark Jefferson Street, is that right? A. Yes.

Q. And the first item on there is May 5? A. Yes.

Q. Goldberg? A. Yes.

Q. And Benny? A. Yes.

Q. Then you have an erasure? A. No erasure at all.

Q. This wasn't rubbed out? A. No.

Q. "June" wasn't rubbed out? A. No, the same, June 10.

Q. Is not rubbed out? A. Perhaps it is.

Q. Tell us whether there is any rubbing out there. A. June 10.

Q. Is rubbed out? A. It is, but it is the same item.

Q. A moment ago you said there is no rubbing out. A. I say June 10th, the same item.

Q. How about the name, is that rubbed out? A. I don't know what it was.

Q. Who was there? A. I don't know.

Q. I show you the dates 1, 2, 3, 4, are those rubbed? A. Those are rubbed—yes, they are.

Q. They show that the men worked on Sunday, Monday, Tuesday and Wednesday, and they are rubbed out? A. Not Sunday.

Q. Three days? A. No, sir, that is why it is rubbed out, because Monday—

Q. Wait a minute; are there four days rubbed out there? A. There is.

Q. Are there four days erased? A. Yes.

Q. What days are they erased? A. They are erased Monday, Tuesday and Wednesday.

Q. And have you got the amount there? A. No, sir.

Q. On the erased line isn't there an amount under "Dollars"? A. It is $100.

Q. But the others are rubbed? A. Yes.

Q. Who rubbed that out? A. I suppose I.

Q. Do you know? A. I did.

Q. When? A. I don't remember.

Q. Any one ask you to or tell you to? A. No.

Q. Any one call your attention to it? A. No, sir. It was necessary to; I suppose it was a mistake by marking down the time.

Q. So you made mistakes and rubbed it out? A. Yes, very often.

Q. Did you do it in preparing this case? A. No, I would never do it.

Q. But you did do it? A. I never did.

Q. You just said you rubbed it out. A. Not in preparing this case; perhaps I rubbed it out at the time.

Q. Let us go back again; the next item on that book is June 10? A. Yes.

Q. Benny? A. Yes.

Q. How many days? A. Four and one-half days.

Q. What did he do there? A. Carpenter labor work.

Q. What work did he do? A. Cellar doors.

Q. In June, 1924? A. Yes.

Q. Benny—what is his last name? A. I don't know his last name.

Q. Where does he live? A. In Passaic.

Q. Do you know where he lives? A. He lived at that time in Jefferson Street.

Q. Has he moved from Passaic? A. No, he didn't move away; he is there yet.

Q. A carpenter? A. Yes.

Q. Can you give us his name? A. Yes.

Q. And his address? A. Yes.

Q. Will you do so, please? A. I will do it if I will be able to locate him.

Q. You don't think you can locate him? A. Perhaps I cannot.

Q. On June 10 he worked there? A. Yes.

Q. Why did you go back to work? A. Any time there was work to do on the job to complete the job, I went there.

Q. You knew there was a foreclosure at that time of a mortgage? A. I didn't know at that time.

Q. You didn't know Mr. Weinberger was foreclosing the mortgage? A. No, sir.

Q. You were not at any meetings before June 10, 1924? A. Then I didn't know it.

Q. Answer my question. A. I didn't know it until I saw the summons from court by the storekeeper, Mr. Shelkowitz.

Q. That was May, 1924? A. I don't remember, now, exactly the date.

Q. After you knew it, did you want to go back to work? A. I did.

Q. You did go back? A. Yes.

Q. Then you stopped in June, did you, on the tenth? A. Yes.

Q. And you went back again when? A. July 9th.

Q. What for? A. It was necessary to do some work.

Q. What was necessary? A. All the time; any time I saw it was necessary for me to do something, for me to work, I went there to do it.

Q. How long did you work on July 9th? A. Two and one-half days.

Q. What was necessary? A. There was necessary to complete—

Q. What? A. For instance—

Q. What? A. There was delivered—I don't know when it was delivered, but I set medicine chests in the bathrooms.

Q. Was there any other carpenter working on that job besides you? A. Not that I know of.

Q. Who put the medicine chests in? A. My carpenter.

Q. Did you get paid for it? A. No, not for the medicine chests.

Q. Wasn't it a metal chest? A. Yes, set by the carpenter.

Q. Did you make out a bill to Mr. Slaff on the 14th of March, 1924? A. I did.

Q. Is that your bill, referring to Exhibit D6? A. It is mine.

Q. Was that for the fourteenth of March? A. I suppose it was.

Q. Was it? A. It was.

Q. Why did you hand a bill to Mr. Slaff and Mr. Eichenbaum; why didn't you put it on there, if you had done more work? A. What? That was for work which I was not supposed to do, and they paid me for, which I had a written order for.

Q. Where is the written order? A. (Producing paper.)

Mr. Weinberger: I offer this paper in evidence.

Marked Exhibit D26.

"We, the undersigned to herewith agree to pay to Samuel Goldberg, one dollar and twenty-five ($1.25) cents for the installing, fitting and hanging of each window at #72, 74, 76, 78 Jefferson St., Passaic, N. J., at the completion of the aforementioned work.

(Signed) SAMUEL EICHENBAUM."

Q. Why did you do that? A. Because I wasn't supposed to do that work; it was not under my contract.

Q. Rabinowitz and Schmidt did some work there in October, 1924? A. They did.

Q. Were you on the job when they did it? A. Pretty near every day there.

Q. Who ordered that work? A. It was under their contract.

Q. Who ordered that work? A. I ordered it.

Q. When? A. When it was necessary under the contract.

Q. Did you order any extra work? A. I didn't order any extra work.

Q. You did not? A. No, sir.

Q. So you had nothing to do with the work that they did there in October at all? A. Not extra work.

Q. I meant in October, 1924, you never gave them any order for any work? A. Not for extra work.

Q. Any work? A. I did.

Q. When? A. I don't remember exactly the date.

Q. When? A. In October some time when the piers was set, they were all present and I say many times they shall come.

Q. In October, 1924, you ordered the piers put down? A. Yes.

Q. Had you seen Judge Heisley with some of these men who filed claims before you gave the order? A. I don't remember.

Q. Will you say you didn't? A. I won't say yes or no; I don't remember.

Q. Will you say that after you had your meeting with Judge Heisley and some of these creditors, that you didn't then give an order to Rabinowitz and Schmidt? A. No, sir.

Q. What? A. I didn't give them any afterwards. I was after him all the time to put on—

Q. Will you answer my question? A. I don't remember it.

Q. Is that your answer? A. Yes.

Q. Is that your best answer? A. Yes.

Q. When did you come down to see Judge Heisley? A. Sometime in September.

Q. When did you order the bricks from Paskewicz? A. It was in October.

Q. Then you did order the bricks after you saw Judge Heisley? A. I did order—

Q. Answer my question. A. I don't remember the date.

Q. Didn't you just say so; yes or no. A. October was delivered the brick, a day before I ordered them—either a day or two, I didn't keep track of it.

Q. How many brick did you order? A. 2,000.

Q. You knew Mr. Slaff and Mr. Eichenbaum were the men who had the deed for the property? A. I did.

Q. Did you get a writing to do that? A. No, sir.

Q. Get an order from them? A. No, sir.

Q. Why not? A. Because they told me it is necessary to deliver the bricks.

Q. Why not? A. Because I was the one to order all the bricks necessary on the job.

Q. In October you knew there was a foreclosure, did you not? A. I did.

Q. You knew at that time you had already consulted a lawyer, Judge Heisley, to start a suit, did you not? A. I did.

Q. You wanted to file a lien claim, did you not? A. Yes.

Q. Do you mean to tell this Court that you went out a day before the bricks were delivered there and ordered 2,000 brick; do you mean that? A. Sure I did.

Q. Mr. Goldberg, if you knew you were filing a lien and there was a foreclosure going on there, what right did you have to order any bricks? A. It was necessary on the job, because we were all under one contract to complete the job.

Q. In October you had met with Paskewicz, Mr. Green, Mr. Rabinowitz, Mr. Schmidt and Mr. Grossman and had talked over filing liens, had you not? A. I don't remember what it was talked over.

Q. Before you filed your lien on the twenty-fourth of October, you had been in Judge Heisley's office, in September, that is true? A. Yes.

Q. And whom were you with? A. I was with Mr. Green, the first time.

Q. And at that time you told him that you had a contract, did you not? A. I did.

Q. And that there was money due you? A. I did.

Q. You claimed that there was a certain amount due you, did you? A. I did.

Q. How much was the amount? A. $9,000.

Q. And you claimed that that money was due you for putting up and supervising this building? A. Absolutely.

Q. You told him you couldn't get your money? A. Yes.

Q. You told him that there was a deed in the name of Slaff and Eichenbaum? A. I did.

Q. You also told him that you couldn't get any money from them? A. Yes.

Q. You told him you had trouble? A. Yes.

Q. You told him there were other creditors

who had trouble, who couldn't get their money? A. I don't remember if I mentioned any other creditors.

Q. Didn't you? A. I suppose I did.

Q. Didn't you mention Rabinowitz & Schmidt? A. I don't remember.

Q. Will you say you didn't? A. I wouldn't say yes or no.

Q. Will you say you didn't mention Simon Brothers? A. I wouldn't say; I am so sure positive of my own troubles.

Q. When was this, in September, you saw the Judge? A. I cannot remember exactly the date; I think it was the nineteenth.

Q. About the middle of September? A. Sometime.

Q. You finally gave him your case to sue? A. Yes.

Q. Was that in September? A. It was.

Q. And you gave him your contract and asked him to sue, is that right? A. Yes.

Q. And Mr. Green asked him to take his case? A. Yes.

Q. And then did you arrange a meeting with Green in Mr. Rabinowitz's house? A. I don't remember.

Q. Will you say you didn't? A. I wouldn't say I didn't.

Q. Will you say that you didn't go to certain creditors and ask them to go to Rabinowitz's house? A. No, sir.

Q. None of them? A. None of them, no, sir.

Q. Do you know Mr. Paskewicz? A. I do.

Q. Did you go for him? A. No, sir.

Q. Speak to him or his daughter? A. Oh, I saw him many times before.

Q. Did you ask him to come to Rabinowitz's house to a meeting? A. I don't remember.

Q. Will you say you didn't? A. I wouldn't say I didn't; I don't remember.

Q. Was he there? A. He was.

Q. You had a meeting? A. Yes.

Q. Was that meeting the first you had—was Judge Heisley there? A. I don't remember if it was the first or second.

Q. Wasn't there a meeting without the Judge first? A. Perhaps it was.

Q. You were there? A. It was a meeting; I don't remember if it was the first or second.

Q. Did you know that he wasn't at the first meeting? A. I don't remember; I didn't keep any record of it.

Q. What was the idea of holding this meeting; you had been to see your lawyer, the Judge, and you gave him your case to sue; what did you call a meeting for? A. To go to consult a lawyer, that is all.

Q. You had consulted a lawyer? A. Sure.

Q. What did you mean them to consult the lawyer about? A. Who?

Q. Paskewicz, Grossman, Rabinowitz and Schmidt, Ac-Tin-o-Lyte? A. They go themselves; they went just for the same benefit as I.

Q. I am speaking of at Rabinowitz's house; what did you want to meet there for? You gave your case to a lawyer. A. We were together.

Q. What for? A. Just to help, we should not have to pay too much expenses.

Q. Help expenses? A. Yes.

Q. So you were going to arrange a plan to divide your expenses? A. Yes.

Q. Is that all you met for? A. Yes.

Q. You didn't discuss anything about giving anybody any jobs there? A. No.

Q. Not a thing about that? A. No.

Q. You didn't discuss about giving any men any contract for any work? A. No.

Q. Any order for brick or anything like that? A. No.

Q. That wasn't talked of at all? A. No, sir.

Q. Goldberg, do you mean to tell this Court that you didn't arrange, or someone didn't say something about giving an order for bricks? A. A. Not that I know of.

Q. Didn't you give an order? A. I don't remember it.

Q. You didn't give an order for bricks? A. I don't remember; I did give an order, but not at that time. After I called Paskewicz—

Q. You know you are under oath here? A. Yes. I tell nothing but the truth.

Q. I ask if it is not true—by the way, when were these meetings held, fix the time. A. I don't remember the time.

Q. You cannot remember? A. No, I didn't keep no record.

Q. It is only a few months ago. A. I don't remember it, because I didn't pay attention, but it is when the meeting shall be.

Q. You knew when you did your last work? A. Yes, because they are marked in the book.

Q. You knew when you gave an order to Paskewicz? A. Yes.

Q. What was the date? A. Let me see it—I marked it in the book. There was a delivery slip.

Q. Let us have the paper; fix the date. A. October 13, or something like that.

Q. On the 13th of October, 1924; you gave an order for 2,000 brick, which was delivered; when did you give the order? A. I don't remember.

Q. Didn't you say the day before? A. Perhaps a day or two.

Q. Didn't you just say under oath it was a day or two before you gave the order for 2,000 brick? A. I don't remember the date.

Q. Will you say you didn't give it, then? A. I cannot say, because I don't remember it.

Q. You gave it, didn't you? A. I did, for brick.

Q. Where was he when you gave him the order? A. Over at his house in Hackensack.

Q. Before that date, you had met Paskewicz at whose house? A. I don't remember.

Q. What? A. I don't remember, if I met him somewhere before or not.

Q. Mr. Goldberg, was he at Rabinowitz's house? A. I saw him there.

Q. When was that? A. I don't remember.

Q. Was that before the bricks were delivered? A. I don't remember.

Q. Mr. Goldberg, do you mean to say it wasn't before the thirteenth of October? A. I don't remember; what do you want me to say?

Q. What makes it so hard for you to remem-

ber on what day you met at Rabinowitz's house? A. I don't remember.

Q. Do you think it is a convenient way of saying you don't want to say? A. No, sir; I would say anything which I know.

Q. You never met in Rabinowitz's house after you got the brick, did you? A. I don't remember that, if we were or not—if we met there once more or not.

Q. How many times did you meet altogether? A. I didn't keep no record.

Q. Have no idea? A. No.

Q. Was it once? A. Once or twice perhaps.

Q. No more than twice? A. I don't remember; perhaps three times; I didn't keep any record.

Q. When you ordered these 2,000 bricks, you knew then you were suing already, didn't you? A. I think I was.

Q. What right did you have to sue? A. The right right; he was under the same right that I was there.

Q. Who told you you had the right? A. I thought so.

Q. Who told you? A. I thought so.

Q. Who told you, if anybody? A. Nobody told me.

Q. No one told you? A. No.

Q. You knew you were not going to do any more work on that job? A. I did.

Q. Yes. A. Sure I did.

Q. And you gave your claim to a lawyer to sue, didn't you? A. I did.

Q. And knowing that you were going to sue

and didn't want to do any more work there, and knowing you couldn't get your money, do you mean to tell this Court you went out and gave orders for material and workmen to do more work? A. I did not get your question.

Q. (Last question repeated.) A. I did give them order.

Q. Is that right? A. I give them an order for 2,000 brick.

Q. Knowing that you couldn't get your money — A. No, sir.

Q. Wait a minute—knowing that you couldn't get your money and had to sue and gave your case to a lawyer, do you mean to say that you would go out and give other materialmen orders for materials? A. I didn't know that I wouldn't get my money.

Q. Didn't you know when you were in Rabinowitz's house that you were all going to sue; did you know that? A. I wasn't sure.

Q. Didn't you know Paskewicz already was in for $7,000? A. He was.

Q. And you knew he couldn't collect that? A. I didn't know that.

Q. You knew that he didn't file a lien, didn't you? A. I didn't know anything about his business.

Q. You didn't know he didn't file a lien? A. I don't know if he consult lawyers before.

Q. Rabinowitz and Schmidt and Paskewicz and you were all at that meeting? A. Yes.

Q. You knew they were all complaining about getting their money? A. Yes.

Q. You knew that they wanted to have one

lawyer, so the expenses wouldn't be so high; you said that a moment ago. A. Yes.

Q. Then you knew they didn't have a lawyer, because they hired the same lawyer? A. Yes.

Q. You knew that? A. Yes.

Q. On top of the money that they already had in that building do you mean to say that you gave orders for more? A. I did give them an order that they should bring 2,000 brick, if he wants to; that is all, it is up to him.

Q. You didn't do it because you knew that he had no right to file a lien, and if he wanted to file one he had to make delivery there, did you? A. No.

Q. And that wasn't talked about there? A. No, not that I know of.

Q. What? A. No, sir.

Q. What do you mean, "not that I know of," by qualifying that answer? A. I don't know anything about that; it wasn't talked there at all.

Q. How much money did you collect up to October, 1924, on this job? A. $18,000.

Q. Is that all you got? A. Yes.

Q. How much was your lien for? A. $9,000 I think.

Q. So there was $9,000 due you? A. Yes.

Q. I call your attention to contract D2, December 4, 1923, and ask you if it is not true, that under this contract you were to receive $9,396? A. Yes.

Q. And you had already then received $18,000? A. Yes.

Q. Is that right? A. Yes.

Q. After this contract was signed, did you get any money from Mr. Goldstein? A. $2,000—$11,000.

Q. Answer my question; did you get any money? A. $2,000; that should be $11,000 on that contract.

Q. Oh, there is a mistake, then? A. No, no mistake.

Q. Eleven and nine are the same? A. $9,000 was taken over; when the contract was signed there was due to me $11,396; I received $2,000 to finish the job.

Judge Heisley: You were to receive that?

The Witness: Yes, right after the contract was signed, on December 4, which left a balance of $9,396.

Q. You received your $2,000? A. Yes.

Q. So this contract at the time it was signed there was $11,000 due you? A. Yes.

Q. And not nine? A. Yes.

Q. You went back in October, did you, to do some work? A. Yes.

Q. That was October what day? A. October 10th.

Q. So August to September you didn't do any work at all? A. No.

Q. October 10 you went back? A. Yes.

Q. What for? A. Because it was ready there for my work there.

Q. What for? A. To finish the job.

Q. What did you have to finish? A. I have to divide all partitions in those stores.

Q. Did you do it? A. I did.

Q. All the six stores you prepared the partitions on October 10? A. Yes, the tenth I started, I worked on Monday—not Monday; Friday and Saturday, a day and a half.

Q. You were not working on any other job on the tenth of October, 1924, in Passaic? A. No, sir.

Q. You worked there a day and a half? A. Yes.

Q. With how many? A. One man—me and a man.

Q. What is his name? A. Willie.

Q. Where does he live? A. Plauderville, New Jersey.

Q. Do you know where in Plauderville? A. I don't know.

Q. Could you tell us his address? A. I don't know where he lives. How could I tell the address? I know he worked for me.

Q. But you don't know where he lives? A. I don't know.

Q. You cannot get anywhere near him now? A. Perhaps I could.

Q. What is his last name? A. I don't know his last name; I called him Willie.

Q. Weary Willie? The bum Weary Willie? A. Willie.

Q. Where he lives, you don't know? A. Plauderville.

Q. That is a safe place to put a man, Plauderville? A. No, not always.

Q. July 9, Goldberg worked himself how many days? A. Wednesday, Thursday, Friday, half a day.

Q. What did you do? A. All the touches; ready for the painter to complete the work.

Q. That is $25 worth of work on July 9th? A. Yes.

Q. October 10, $15 worth of work? A. Yes.

Q. Is that correct? A. Yes.

Q. On June 10, $50 worth of work and $30 worth of work? A. Yes.

Q. On May 5, $50 and $50 worth of work? A. Yes.

Q. So that the $9,000 was already due you on December 4, 1923, is that right? A. Yes.

Q. It was eleven, but you got two? A. Yes.

Q. You claim that there was not nine, do you, but eleven due you on December 4, 1923? A. Eleven.

Q. You are positive? A. Yes, and I got $2,000, which left nine.

Q. Mr. Goldberg, how many piers did you say were put up there, or were needed, on October 24? A. There was needed about fifteen.

Q. How many were put up? A. I saw two.

Q. Did you ever see any more? A. No, sir.

Q. I thought you were interested to see the job finished? A. I did.

Q. Why didn't you put the fifteen up? A. I asked the mason why he didn't put it up; he claimed that the janitor had an order from Mr. Slaff and Eichenbaum not to leave anybody inside.

Q. Why didn't you see that they were finished? A. I am telling you.

Q. Did you go to Mr. Slaff? A. No.

Q. Did you go to Mr. Eichenbaum? A. No.

Q. Say anything to them about the fifteen piers? A. No.

Q. Ever make a complaint to them? A. No.

Q. Why not? A. Because there was no use to make a fight there.

Q. You didn't go near him? A. No.

Q. What fight? A. I didn't go to see him.

Q. Why not? A. Because I didn't.

Q. Then as soon as they could file their lien, that is all you were interested in? A. No.

Q. You were not interested in seeing them file their lien? A. No.

Q. Sure about that? A. No, sir.

Q. You were not interested? A. I was interested for myself.

Q. Didn't you all go down to Judge Heisley to sign a lien claim? A. I don't remember if all or individually.

Q. You don't know whom you went with? A. I know I was myself.

Q. Who else was there? A. I don't remember. Someone was; I don't remember who it was; I cannot make out who it was.

Q. Mr. Goldberg, when did the tenant move into that building? A. I don't remember exactly the date.

Q. I thought you supervised this job? A. I didn't take part in the rental.

Q. When did they move in? A. They didn't move in, all in the same month.

Q. When did the first move in? A. I think in August. I didn't keep track of that, because I wasn't interested in the rental.

Q. By the way, when did you finish the house

on Monroe Street? A. It was ready for occupation the last part of December, 1922.

Q. You mean to tell this Court, do you, that Mr. Goldstein told you that he got moneys from Mr. Weinberger on the Monroe Street mortgage which was finished in December, 1922; is that it? A. He told me.

Q. Do you mean that? A. I told you what he told me.

Q. Didn't you know the mortgage of Goldstein was not made until the nineteenth of July, 1923? A. I didn't know when it was made.

Q. Didn't you know that? A. No.

Q. Didn't you get some money from Mr. Weinberger yourself? A. I did.

Q. Didn't you get a check? A. I did.

Q. Don't you know when you got it? A. I don't know exactly the date.

Q. Where is your book showing the payment you got? A. Here is the book; I got $4,000 from you; August 6, $2,000; August 14, $2,000.

Q. What year? A. 1923.

Q. When did you finish the other building? A. 1922, December 29.

Q. You mean to tell this Court, under oath, that Goldstein told you in December, 1922., before you had finished this building, that he had received from Weinberger on the $80,000 mortgage how much money? A. $29,000 he spent it; he paid it off, $29,000 on 270-272 Monroe Street, to pay him off on the contract.

Q. When did you go up on the other building, on Monroe Street? A. It is right in front of you.

Q. When did you get your last payment? A. June first I got a check for $5,000.

Q. That was in full? A. No, sir.

Q. When was the last payment made? A. I got to count it over until I get $59,000.

Q. When did you get the last payment? A. I don't remember exactly the last payment.

Q. Tell us from the book. A. About—

Q. Not "about"; you got it in the book.

Judge Heisley: If you can find the entry, find it.

The Witness: About—

Judge Heisley: Read the entry.

The Witness: I kept the amount received.

Q. What book is this book? A. Memorandum for myself.

Q. One of your own memorandums? A. Yes.

Q. This book shows payments received from Goldstein? A. Yes.

Q. What jobs? A. 272-270 Monroe Street.

Q. These are all payments on 270-272 Monroe Street? A. Yes.

Q. Isn't it true that you got all of your payments in full before July, 1923, for your Monroe Street job? A. No, sir.

Q. Just give one payment after July, 1923. A. On the Monroe Street job—I cannot say on the Monroe Street job.

Q. You just swore under oath here that that record was for Monroe Street, 1923. A. For all my work I did with Goldstein.

Q. Answer my question. A. No, sir.

Q. You didn't say that? A. No, sir.

Q. Do you want to change that now? A. Yes.

Q. I call your attention to the fact that your book says 270-272 Monroe Street, Passaic, New Jersey. A. Yes.

Q. Is that true or false? A. Yes, it is true.

Q. Is that the record of payments for 270-272 Monroe Street? A. Yes.

Q. Are you sure, now? A. Yes, absolutely.

Q. So that every payment on here is for 270-272 Monroe Street? A. Yes.

Q. This is continued on the next page? A. No, sir, not continued; it is all on account for 270-272 Monroe Street, including Jefferson Street also.

Mr. Weinberger: I would like this book marked for identification on these pages.

Two pages referred to marked Exhibit D27 for identification.

Q. Is it true that this is a continuation of 270-272 Monroe Street? A. No, for both jobs.

Q. Is there anything in this book which will show on these two pages any job except 270-272? A. Yes, Jefferson Street.

Q. Where is it? A. It is both continuous.

Q. I want you to point out on those two pages which have just been marked in evidence, anything on here which reads Jefferson Street. A. No, sir, it does not read, but there are your payments. I didn't mark it, because I kept straight along for one continuous account.

Q. You will answer my question before you are through with me. Point out to the Court where there is any item on here "Jefferson Street." A. Yes.

Q. The words "Jefferson Street"? A. No words "Jefferson Stret."

Q. It is not on there? A. No.

Q. Is there anything on this record which will show what the payments were for, excepting 270-272 Monroe Street? A. No, sir; I didn't get more money than I was entitled to.

Q. I show you a check June 22nd, for $500. A. Yes.

Q. On what job was that? A. That was when I was working on Jefferson Street.

Q. June 30? A. Also Jefferson Street.

Q. So that it is not on Monroe Street? A. No.

Q. July 7? A. $500. I was working on the Jefferson Street job.

Q. August $500? A. I was working on Jefferson Street.

Q. August first, $2,000; there you say working on Jefferson Street; is there anything there which shows from whom you got that money? A. No.

Q. You cannot say anybody gave it to you then, because there is no one's name there? A. From Goldstein.

Q. I am speaking of from Weinberger? A. No, sir.

Q. Check for $2,000; where did you get that? A. From Mr. Weinberger.

Q. What job? A. Jefferson Street.

Q. August 30, $500, whose job? A. Jefferson Street.

Q. And yet you have that all under 270-272 Monroe Street; why, if you are honest? A. I am honest.

Q. Why have you got it there? A. By mistake; I don't mark the number of the street, that is all.

Q. When did you make the mistake? A. At the time, when I marked it in the book.

Q. Is that the time you made the mistake? A. Yes.

Q. Who put down 270-272 Monroe Street? A. I did.

Q. Why didn't you put Jefferson Street there, if it belonged there? A. Because this job was first, and I kept the continuous account what I received from the Goldstein contract.

Q. You thought that you might be able to get more money on the Jefferson Street, didn't you? A. Nothing at all.

Q. If you went and credited the Monroe Street job? A. Nothing at all; you may think that.

Q. You did not? A. No, sir, never did.

Q. Where did you get the payment June 16, $500? A. From Mr. Goldstein.

Q. What job? A. I don't remember; I was working at that time on Jefferson Street.

Q. What job? A. I don't remember what job.

Q. You mean that now; didn't you finish the Monroe job in December? A. Yes, but he didn't finish with his payments at that time.

Q. You were taking the payments that you were applying from the mortgage on your Monroe Street house, is that the scheme? A. No scheme at all.

Q. Was that the trick? A. No trick at all.

Q. I show you payment made June 1, $5,000. A. Yes.

Q. Whose check? A. I don't know just whose check it was; it was Goldstein's.

Q. Where did you get the money? A. From Goldstein.

Q. What job? A. When I was working in Jefferson Street, but it was at the time to clear off Monroe Street.

Q. Why didn't you put down Jefferson Street? A. I put on account what I received from Goldstein; that is all I can do.

Q. Why is it that you did not classify or state which payments were Jefferson Street and which were Monroe Street, but that you got them all under 270-272 Monroe Street? A. I am not a bookkeeper; I put it down for my own purpose when I start at 270—memorandum for myself.

Q. How much money did you get on the Jefferson Street job? A. $18,000.

Q. Point out the $18,000 in that book? A. I will have to start over here.

Mr. Weinberger: He has added all the items appearing on the second page, the continuation, and he has added and set about here referring to $3,000 item, is that right?

Judge Heisley: What does it amount to altogether?

The Witness: About $17,000 or $18,000.

Q. Is that what it amounts to? A. Yes.

Q. Read the figures. A. $2,000, $3,500, $500, $500, $2,000, $200, $500, $500, $600, $500, $500, $5,000.

Q. Where is the other five? A. Perhaps it was all from the $3,000

Q. You might deduct it from the three? A. Yes.

Q. Maybe it was $500 out of the $3,000 of the May 4th item? A. Yes.

Q. What do you mean? A. That is what it is.

Q. Where are your credits for $18,000 in your book? A. That is—

Q. It is $17,600; where is the other $400? A. I suppose—

Q. Did you make any other payments outside of those on the two jobs? A. Sure I did, right here.

Q. I mean besides those two pages did you get any other payments on account of the Monroe and Jefferson Street job? A. No.

Q. Who was the mortgagee on the Monroe Street job? A. Paterson Mortgage Company.

Q. Did you get any checks from it? A. From Goldstein.

Q. From the Paterson Mortgage Company? A. I think they gave me $5,000 once.

Q. Did you subrogate your lien to the mortgage? A. I think I did.

Q. And after you subrogated your lien to the mortgage of the Paterson Mortgage Company, you had money that you got from the Jefferson Street job and thought you would apply it on the Monroe Street, did you? A. From Jefferson? No, sir. I kept account of whatever I received from Goldstein to clear off the first bill and then charged it to the next one.

Q. Did you consider the Monroe Street contract and Monroe Street job separate from the Jefferson? A. Yes.

Q. You credited your payments separately? A. No, when I received any checks from Mr. Goldstein on the one page and charged it on the other.

Q. Will you tell us how much money you got from Goldstein on the Jefferson Street job, payments that you credited on both jobs? A. I don't understand your question.

Q. Will you tell the Court, please, how much money you got from Goldstein while you were working on the Jefferson Street job in all which you credited to both the Monroe Street and the Jefferson Street?

Judge Heisley: I object to that; he says he credited to both of them.

Mr. Weinberger: To either the Monroe or Jefferson.

Q. Will you state to the Court how much money Goldstein gave you from the proceeds of the Jefferson Street mortgage, which you applied either on the Jefferson Street or on the Monroe Street, in all? A. I received $17,600, according to the figures, on the Jefferson Street job, and the rest went for 270-272 Monroe Street.

Q. How much went? A. I got to figure it out.

Q. Figure it out. How about the $3,000, $3,000, $600, $1,000, $2,500, $3,000, $5,000, $2,000, $1,000, $250, $750, $1,000, $5,000, $11,750, $1,500, $1,000, $5,000, $1,000, $1,000, $4,500, $1,500 and the $1,000? A. Yes, that is all I received for 270-272 Monroe Street.

Q. So that all of those payments you got from the Jefferson Street moneys and applied them

on Monroe Street, is that right? A. All this from Jefferson Street?

Q. Yes. A. All this money I received from Goldstein on 270-272 Monroe Street and on Jefferson Street.

Q. I am asking you when you were finished with this job in December, every payment from December was moneys which Goldstein got from the mortgages on Jefferson Street, is that right? A. No, sir.

Q. How do you know? A. He told me that.

Q. Told you what? A. $15,000 I received from the Paterson Mortgage Company.

Q. The rest of it— A. I didn't take care of Goldstein's business, where he got the money; he told me that in the last part of June.

Q. I now ask you again to tell us how much money you got while you were on the Jefferson Street job in all, not only on the Jefferson, but on both? A. Including the $17,000 before and whatever the figures amount to now.

Q. Is that correct now? A. Yes.

Q. Will you say you didn't get a check for $5,000 in June on the Jefferson Street job? A. I was working there.

Q. I didn't ask you that; will you swear that you didn't get this $5,000 on the Jefferson Street job? A. That was on the Jefferson Street.

Q. Will you swear you didn't get $3,000 on the Jefferson Street job? A. I cannot swear to that.

Q. Will you swear you didn't? A. I don't know.

Q. Will you say you didn't get the $6,000 payment on the 9th of April, 1924, on the Jefferson

Street job? A. I was supposed to pay off the 270-272 Monroe Street first.

Q. I asked you whether you didn't get it on the Jefferson Street job? A. No, sir, not that I know of.

Q. Do you know whose check it was? A. No, I don't.

Q. Will you say that you didn't get it from Mr. Weinberger? A. No, I never got it from Mr. Weinberger, $6,000.

Q. Are you sure of that? A. Yes, positive.

Q. From any mortgagee on the Jefferson Street property? A. No.

Q. You did not? A. No, sir, only two checks from Mr. Weinberger I received.

Q. When you gave credits in your lien claim, how much of the $3,000 did you credit on the Jefferson Street property? A. I don't remember; I credited $5,900 which I received from 270-272 Monroe Street, and the balance was on Jefferson Street I received.

Q. Did you order the Ac-Tin-o-Lyte man there to come back there and do any work? A. I did, sure.

Q. When? A. I don't remember the date; sometime in June or July.

Q. To do a repair job? A. It was a repair job.

Q. And on what building? A. On the whole building—on the new building, the entire building.

Q. You just said old building. A. No, the entire new building.

Q. When did you give that order? A. I cannot give the date, sometime in June or July.

Q. Was he one of the gentlemen who met with you in the Rabinowitz house? A. Yes.

Q. You were all sharing your lawyers' expenses? A. Yes.

Q. Mr. Goldberg, did you get a certificate from Mr. Preiskel? A. No, I didn't.

Q. When did you last supervise the building? A. In October.

Q. You last supervised it in October? A. July or June I made returns, I received material.

Q. You went there in June, did you? A. I was always on the job; any time I had a chance to work, I worked.

Q. Did you obtain a release from all of the men when they finished their work; did you give a certificate to all the men that they completed their work? A. No, I didn't.

Q. How much were you to get for supervising the work? A. It was all one price, $27,000.

Q. How much were you to get for superintending? A. $27,000 for my carpenter and labor work, superintending and everything.

Q. When you ordered material did you get a writing? A. Through the telephone.

Q. Would you get a writing? A. From whom?

Q. From the contractor or the materialmen; would the bill be made out to you? A. No.

Q. Did you sign delivery slips? A. Yes.

Q. Did you sign them for Paskewic in October? A. I did.

Q. You were on the job waiting for the bricks? A. Yes, showing where to dump them.

Q. You counted the bricks? A. No.

Q. Why not? A. Because there is a load always.

Q. Did you count them? A. No, I did not.

Q. Were you there when the piers were being put up? A. I was there when they brought the bricks there and the laborers were working there.

Q. How many men worked there? A. I saw a laborer, mason.

Q. How many men? A. One laborer, I saw there, carting bricks.

Q. I asked you did you see any men working there? A. No.

Q. Why did you say a moment ago you saw a man working there? A. Carting bricks.

Q. Who was it? A. A laborer, an Italian fellow.

Q. Did you order him? A. No.

Q. When was the pier put up? A. I don't know the date.

Q. What do you know? You were superintendent; you were there? A. I know what it was done.

Q. When? A. A day or two after.

Q. When? A. I don't know the date.

Q. What date? A. I didn't keep a record.

Q. What day? A. The day or date of the month?

Q. Were you not interested to know when this work was being done? A. It was a very small job.

Q. It required 2,000 bricks? A. Yes; the building required more than half a million.

Q. Turn to your book again with the payments, Mr. Goldberg; on October 24 did you get $3,000? A. Yes.

Q. Where is it? A. It is right here.

Judge Heisley: He points to the second line from the bottom, on Exhibit D27, being the short page.

Q. Show me the payment May 4, for the thousand dollars in that book? A. I didn't receive on May 4 a check.

Q. Do you know you swore in your lien claim to the effect that you got from him on the fourth of May a $1,000 check; is that true or false? A. I don't remember what I swore to.

Q. Did you get a payment on May 4th of $1,000? A. No, check for $3,000 on May 4.

Q. How much payments did you get in all on this job? A. It is according to what my contract, whatever I was supposed to get; I didn't get all.

Q. How much did you get in all? A. $18,000.

Q. Didn't you get $18,100? A. That was extra work, $100.

Q. So that if your lien claim says that you got $1,000 on May 4, 1923, it was false?

Judge Heisley: I object; he has no right to characterize them as being false. I think the witness's answer shows that he got $3,000 on that day, and I dare say that it is entirely possible that $1,000 of that was on account of the Jefferson Street property.

Q. Let us get this right. Is it a fact now that if your lien claim says that you got a payment of a thousand dollars on May 4, that it is not correct? Answer yes or no. A. I got $3,000 check on May 4.

Q. For Jefferson Street? A. Work on Jefferson Street.

Q. Answer my question. A. I don't know.

Q. Who should know, if you don't know? A. I kept right along an account.

Q. Who should know, if you don't know? A. I kept right along an account.

Q. Answer my question; did you on the fourth of May receive $1,000? A. I didn't; $3,000.

Q. So that it was not your intention to credit $3,000 on the fourth of May on the Jefferson Street, was it? A. I didn't credit him that much; I just marked it on the account.

Q. How about the first of June, how much of a payment have you got there? A. June 1, $5,000; June 16, $500; June 22, $500; June 30, $600; July 7, $500; Aug. 3 or 8, $500; Aug. 6, $2,000; Aug. 14, $2,000; Aug. 30, $500; Sep. 14, $500; Oct. 24, $3,000; Dec. 26, $2,000; that is all.

Q. When you made those entries, that was when you got the checks, is that right? A. Sometimes the same day; sometimes the next; any time I go to the bank.

Q. Did you get any payments in 1924? A. No, sir.

Q. None at all? A. Except that Mr. Weinberger paid me for the sash. I didn't mark that in; that was a written order.

Q. Do you know Mr. Levenson? A. I do.

Q. Did you try to get him to file a lien claim in this case? A. I tried to get him? But he never did.

Q. You didn't speak to him about filing a lien in this case? A. No, sir, never did.

Q. You didn't tell him about the trick you were all playing down there?

Judge Heisley: I object as being a characterization.

Q. Did you tell him, "We are playing a trick, we are going down, we were told to go down; Rabinowitz & Schmidt will put a pier up, I will put up a partition, and Paskewic is going to deliver bricks, and we are going to file liens"? A. It is absolutely a dirty lie, a frame-up.

Q. Did you keep a record of what men were doing work on that job beside yourself, what other contractors? A. No, sir.

Q. Never kept a record? A. No.

Q. You were the supervisor? A. Yes.

Q. Did you keep a record of when you delivered merchandise on the job? A. The slips.

Q. A record? A. It was not necessary.

Q. Did you keep a record? A. No, sir; slips.

Q. Have you any other slips except the ones you have here? A. No, sir.

Q. Are these all the slips for October, 1924? A. To date.

Q. Show me any date. Do you mean to say that is all the materials that were delivered on that building? A. No.

Q. How many hundred bills more are there? A. 200.

Q. I mean before October have you any at all? A. Yes, May and April, June and July, any time you want.

RE-DIRECT EXAMINATION by Judge Heisley:

Q. Mr. Goldberg, why was it that you didn't work continuously on the building? I mean by that, I understand you to say you used the expression several times that you worked whenever you could; what do you mean by that? A. It was delay of the plumber; the first delay was on the metal sash.

Q. Do you mean or not that you couldn't do your carpenter work except as other people did their work? A. Nobody could do it.

Mr. Weinberger: I have a couple of questions which I overlooked.

FURTHER RE-CROSS EXAMINATION by Mr. Weinberger:

Q. You received a three-day notice to continue work? A. Nothing.

Q. You attended various meetings of the creditors, did you not? A. I did.

Q. And the reason for those meetings was that there was a foreclosure going on and you wanted try and get the men to hold the foreclosure up? A. Yes.

Q. The creditors wanted to see if they couldn't hold that off to give them a chance to sell the property? A. Yes.

Q. How often did you meet, Mr. Goldberg? A. I didn't keep no record.

Q. There were a lot of meetings? A. Three or four.

Q. Who reported that there was a foreclosure going on, at the meetings? A. I don't remember; I came to Mr. Eichenbaum and asked if he received any notice of the foreclosure, after I saw that the notice was served on Mr. Shelkowitz, a storekeeper.

Q. Who stated it? A. Mr. Eichenbaum denied that he received any, but I show him a summons by Mr. Shelkowitz.

Q. You did know of the foreclosure and discussed it at these different meetings? A. Yes.

Q. And all of the men refused to go to work unless this was struck out, because they would lose their money? A. Anybody had a chance to work.

Q. Most of them refused to work? A. No, sir, everybody had a chance.

Q. Didn't you openly say you wouldn't finish the job unless you were protected well with money? A. I don't remember if I did.

Q. Wouldn't it be natural for you to say that? A. I don't remember it and I wouldn't say yes or no.

Q. The fact is that Mr. Slaff and Mr. Eichenbaum did go to see Mr. Weinberger to hold off on the foreclosure? A. Yes.

Q. And they reported back that Mr. Weinberger would wait? A. Yes.

Q. And he did wait? A. Yes.

Q. And when there was no settlement he had to go ahead? A. We couldn't go on with the work, because the plumber kept us back.

Q. You had already reported to him? A. Yes.

Q. Mr. Goldberg, isn't it a fact that everybody

was wondering where they would get their money before they would go farther with their work? A. They were worrying.

Q. A good many refused to deliver or do any work unless they were guaranteed their money by someone? A. It was discussed how to be guaranteed, but everyone was working on it.

Q. But nobody was delivering materials? A. It was.

Q. New materials? A. Yes.

Q. Without the guarantee of Slaff and Eichenbaum? A. I don't know without the guarantee.

Q. You didn't know that? A. The Yellow Pine Lumber Company, whatever they delivered, and Passaic Plumbing Supply delivered.

Q. They are Mr. Eichenbaum and Mr. Slaff's companies? A. Yes.

Q. As a matter of fact, no one else would deliver, unless they knew where the money was coming from? A. Perhaps they wouldn't.

Q. And Mr. Eichenbaum's company and Mr. Slaff's company both did deliver? A. Yes.

Q. And in order to finish the buildings? A. Yes.

Q. Is this building completed today yet? A. It is.

Q. Are the coal bins all finished? A. Yes.

Q. Did you finish them? A. No, sir, I finished only the partitions of the store, dividing.

Q. Why didn't you put the coal bins in? A. It wasn't necessary.

Q. According to the plans, it wasn't necessary? A. It was out entirely because at that time it was to be without steamheated flats, and now it is with steam flats, and we have got to have all the room necessary for coal.

RE-DIRECT EXAMINATION by Judge Heisley:

Q. You were asked about some erasures in this book; where are they? A. June 10th erased out, and June 10th again, I don't know what it was.

Page showing erasure marked Exhibit F1.

Q. I call your attention to the page in Exhibit F, marked F1, to the place where the erasure has been made of June 10; it does not change the amount of money due, does it? A. No, sir.

Q. Does it change the name of the man who worked, or can't you tell? A. I don't think so, the same man was working.

Q. You don't know why "June 10, Benny" was rubbed out and right below it "June 10, Benny" written again? A. I don't know; I have no idea why it was.

Q. In this book marked D27, you have, as I understand it, an account of all moneys that Goldstein paid you on these two jobs; is that right? A. Yes.

Q. Although it is entitled 270-272 Monroe Street? A. Yes.

Q. Could there possibly have been due you on the Monroe Street property all the money that is shown that was paid you in these two accounts? A. No, sir, absolutely not.

Q. You say that on May 1 you received $3,000? A. May 4.

Q. There was a payment due you on that day, on May 1, of $1,000 on the Jefferson Street prop-

erty; can you tell whether or not the $3,000 might not have included the $1,000 on account of the Jefferson Street property?

Mr. Weinberger: Objected to on the ground that it remains a fact that has not been testified to yet.

Q. Can you tell us whether you have any recollection as to what the $3,000 covered, whether it was on only the Monroe Street property, or partly on the Monroe Street property and partly on the Jefferson Street? I cannot tell. A. I cannot say that.

Q. When was the Monroe Street job done? A. The last part of December, 1922.

Q. Don't you know that Mr. Weinberger had a mortgage for $50,000 on the Jefferson Street property in February of 1923? A. I did know that.

Q. Did Simon Brothers ever refuse to deliver the fixtures? A. No, sir.

Judge Heisley: I have recently filed lien claims for these various clients, and the time for answering is up, but I verbally agreed with Mr. Weinberger that I would not enter any judgment against the clients he represented, without giving him notice to do so; therefore, he has not filed answers; but I want to say to him now that I shall expect him to file his answers by Christmas, or I will take such judgment as I am entitled to.

Mr. Weinberger: May I put on the record that Judge Heisley wrote me, that con-

firmed a letter of my own, saying that it wouldn't be necessary for me to file answers until after order of the Court, but I will, irrespective of that. I am perfectly willing to take some step with regard to either filing the answer, or some other proceeding by Christmas.

Continuation of the testimony in the above-entitled cause before Nicholas W. Bindseil, a Master in Chancery of New Jersey, at his office, Prudential Building, Newark, New Jersey, on Tuesday, January 13, 1925, at 2 P. M.

Present: Counsel as before stated.

SAMUEL GOLDBERG, recalled for further direct-examination by Judge Heisley:

Q. Mr. Goldberg, in your contract with Goldstein there is some provision requiring you to produce an architect's certificate before you would get your payment, and at the last session, as I recall it, Mr. Weinberger asked you if you had obtained those certificates, and I think you said you had not gotten them; why didn't you get them? A. Because I asked Mr. Goldstein in the beginning if it is necessary, a certificate for payment, and he says, "Never mind, I don't want it, because if I got the architect on the place, I got to pay him, and I don't want to pay him any extra money; I am satisfied."

Q. He didn't want to pay him any extra money?

A. If the architect should come all the time on the job, he would have to pay him.

Q. Did he require you to produce any certificates? A. He did not ask me.

Q. And some of those payments you got, I think—now, don't let me mislead you, but I think some of your payments were not just the same sum that was mentioned in your contract; isn't that right? A. That is right, it was not the same sum as mentioned in my contract—just on account.

Q. He did pay you on account? A. Yes, sir.

Q. Have you paid anything on account of the money which you claim to be due in the lien claim? A. No, sir.

CROSS-EXAMINATION by Mr. Weinberger:

Q. When this contract of the fourth of December, 1923, was signed, you had nothing more to do with the supervising of the building after that date, did you? A. I did.

Q. Did you make any agreement—contract for any plumbing supplies after that time? A. No, sir.

Q. Did you make any order for lumber after that? A. I did.

Q. How much? A. Whatever it was necessary, I ordered from the Yellow Pine Lumber Company.

Q. That was extra work you did? A. No, whatever was necessary to finish the building.

Q. What did you order? A. There was lots.

Q. When did you give the last order? A. I

don't remember; I couldn't state exactly the date

Q. Have you no record at all? A. I have some slips; it was delivered.

Q. Have you the last record when you got some doors? A. I couldn't tell you exactly. Glass and cement and all kinds of stuff was necessary on the job.

Q. When did you order the doors? A. I believe whatever it was necessary.

Q. I asked you about the doors? A. Doors, I don't remember.

Q. You don't know the date, do you? A. I don't know, no.

Q. Now, Mr. Goldberg, did you hire the men for the job after December, 1923? A. No, sir, it was everything hired.

Q. Did you hire them? A. No, I did not.

Q. Do you mean to say you were on that job regularly from the fourth of December down to October, 1924? A. Every day.

Q. You worked on the job every day? A. If I didn't work—I ordered the material that was necessary.

Q. From the fourth of December, 1923, down to October, 1924, you worked on that job every day? A. No, sir.

Q. Did you supervise it every day? A. Yes, sir.

Q. Are you sure of that? A. I was every day on the job.

Q. Don't you know you testified at the last hearing you were not there for a month or more? A. Well, working.

Q. Or supervising? A. Supervising, I was pretty near every day there.

Q. Don't you know that nobody was on that building for nearly six months? A. Yes; I was there to know if it was necessary to take care of something—if it was ready to take care of something.

Q. What did you supervise? A. One was working if the other was not working. Sometimes one was working and the other was not working.

Q. Do you mean that there was always somebody working on that job? A. Most of the time.

Q. You just said there was always somebody working on the job? A. Yes, sir.

Q. Don't you know there was a time when nobody worked on that job for as much as six weeks? A. I don't know that.

Q. Tell us who worked on it in January, 1924? A. The plumber was there most of the time in January.

Q. Do you mean that? A. Yes, sir.

Q. Who was there in February, 1924? A. I don't remember in February.

Q. March? A. March, I think I was working there.

Q. April? A. I was working there.

Q. May? A. May, the mason was working there.

Q. June? A. June, the lather was working there.

Q. July? A. The plumber was working there.

Q. August? A. Whitewashing.

Q. So that nobody ever stopped working on that building at any particular date? A. Yes, sir.

Q. Did you supervise the whitewashing of the building? A. Well, it was under the contract—I had the mason there.

Q. Did you supervise it? A. No.

Q. Who did the whitewashing? A. Two colored people.

Q. Who? A. I don't know their names.

Q. For whom did they do it? A. For Rabinowitz & Schmidt.

Q. Did any other mason work on that building besides Rabinowitz & Schmidt? A. Yes, sir.

Q. Who? A. Scherin.

Q. You say you supervised their work? A. I did.

Q. Do you mean that? A. There was nothing necessary to supervise—they were working there. I would just order material where it was necessary. I was not supposed to stay there—necessary material to order, I did.

Q. After you signed this contract of December 4, 1923, you knew, did you not, that the agreement provided as to how you would get your money and from what sources you would get it? You knew that? A. I think I knew that, sure.

Q. I thought you said you didn't want to go ahead with the work because the foreclosure was started? A. I never said so—I don't think I said so.

Q. You didn't stop on account of the foreclosure? A. No, sir, because Mr. Eichenbaum said there was nothing the matter. I saw Mr. Eichenbaum, and he said, "Never mind, don't worry about it, I am seeing everyone gets paid for it."

Q. You were just asked by Judge Heisley whether you had received any payments on account of the lien claim which you have filed. The payments which you did receive are shown in that book which you had here and which was marked in evidence? A. No, sir.

Q. All the payments that you got were shown in that book? A. Yes, sir.

Q. Are you sure about that? A. Quite sure.

Q. What do you mean by that? A. I think it was marked every one.

Q. Well, wasn't it? A. I don't know.

Q. Will you say all the payments you received were not in that book? A. I wouldn't say that.

Q. Would you say they were all in that book? A. I am not quite sure—I can't say they were there.

Q. So you may have received payments which were not in that book? A. I don't know.

Q. May you have received them or not? A. Unless they show me checks.

Q. If we show you checks, you may say that there are payments which you received that are not entered in that book? A. I know the Goldstein account was settled December 4th; everything was figured out.

Q. You swore at the last hearing that when you got a check you entered it in that book? A. Most of the time I did.

Q. Now, do you say you did not do that? A. Yes, sir, I did.

Q. Do you say all these checks you received were entered in that book? A. I don't know that.

Q. There may have been checks which you received which were not entered? A. Yes, sir.

Q. Why don't you know? A. Sometimes I forget to mark it in the book.

Q. How many times did you forget to mark it in the book? A. I don't remember.

Q. How much do you say is due you now? A. $9,000.

Q. Are you sure of that? A. Yes, sir.

Q. Are you sure of that? A. I am.

Q. You are? A. Yes, sir.

Q. How much do you claim on this particular building? A. $18,000.

Q. $18,000 on this building? A. Yes, sir.

Q. How much did you get from the time you started this building to the time you stopped working on it? A. From the time I started?

Q. From the time you started on Jefferson Street until the time you stopped on Jefferson Street finally, how much did you get? A. Well, it would be $2,000 less; that is $16,000.

Q. Isn't it a fact that from the time you started on the Jefferson Street building up to the time you finished, you received in all $59,000? A. I didn't get your question right.

(Last question repeated.)

A. Well, the $59,000 was from the time I started on 270-272 Monroe Street, Mr. Weinberger, not on Jefferson Street.

Q. Mr. Goldberg, isn't it a fact that from the time you started on Jefferson Street to the time you stopped on Jefferson Street, and while you did no work on Monroe Street, you received in all $70,000? A. I received $59,000 for 270-272 Monroe Street.

Q. Do you understand my question now? A. Perhaps I don't.

Q. Isn't it true that all the money which you have in this book, you received while you were working on Jefferson Street and after you had finished the Monroe Street property? A. After I was finished?

Q. Yes. A. I was finished Monroe Street in December—the first part of January, 1923—I don't understand you.

Q. Yes, you understand me; so that from the time you finished on Monroe Street and from the time you started on Jefferson Street to the time you finished on Jefferson Street, you received all the money which is shown in this book? A. It shows whatever I received. He gave it on account. He paid off Monroe Street. During the time I was working on Jefferson Street he paid off Monroe Street.

Q. All the money entered in this book was given to you while you were working on Jefferson Street and after you had completed Monroe Street? A. No, sir, not all the money. When I was working on 270-272 Monroe Street, not all the money was paid to me—part of the money.

Q. How much? A. Well, I couldn't make it out.

Q. Tell me by looking at the book. A. It was $16,000 I received from Mr. Goldstein on Jefferson Street.

Q. You are not answering my question. A. And $2,000 received by signing December 4, 1923, the contract.

Q. Mr. Goldberg, how much money did you re-

ceive in all from the time you started on Jefferson Street until the time you finished on Jefferson Street? A. I don't remember; I just kept an account.

Q. You have got the book in front of you. A. I didn't make no separate entry.

Q. Have you got the date when you finished that building? A. It was January first ready for occupancy.

Q. 1923? A. Yes, sir.

Q. From January 1, 1923, down to date, you never did any more work on Monroe Street? A. No, sir.

Q. And the only building you ever worked on for Goldstein was on Jefferson Street? A. And 164 Hamilton Avenue—his old houses.

Q. How much was the charges on 164 Hamilton Avenue? A. It was over $900.

Q. Did you put that in your book? A. I gave him a bill for it.

Q. Did you enter that item in this book? A. I kept an account with him.

Q. Did you enter that in the book? A. Well, that is included in the $59,000.

Q. Is it credited in that book? A. It is.

Q. Point out where it is? A. I think it was marked under a separate account.

Q. Where is it in that book? A. It was an account received.

Q. Point out the item, if it is in there? A. I didn't make it directly.

Q. Point out the moneys which were paid on Jefferson Street? A. I can't make it out.

Q. You can't do it, can you? A. No.

Q. So that the last time you were on the stand you did try and point out the money? A. I don't remember if I did or not.

Q. But now you can't point them out; that is right, isn't it? A. Well, I kept an account of it.

Q. Is that right? A. Well, I don't know.

Q. You can't point them out, can you? A. I received $59,000.

Q. I didn't ask you that. You can't point out those items, can you? Answer me yes or no. A. I can't point to it.

Q. Was your memory better the last hearing than it is today? A. About the same.

Q. Did you get any payment of $2,000 that you haven't got in that book? A. $2,000?

Q. Yes. A. I got $2,000, the last one—I don't remember when it was.

Q. And another $2,000 besides the last? A. There is a $2,000.

Q. Did you get that on the Jefferson Street or Monroe Street? A. That was Jefferson Street.

Q. You don't know, is that right? If you don't know, say so. A. What, the $2,000 on Jefferson Street?

Q. Yes. A. The $2,000 was on Jefferson Street.

Q. You are sure of that? A. I am mostly sure.

Q. You are somewhat in doubt? A. That was the last time I worked on Jefferson Street.

Q. The reason you think you got that $2,000 on Jefferson Street is because you were working on Jefferson Street? A. Yes, sir.

Q. When you referred to the $2,000, you referred to the August 15th, $2,000? A. Yes, sir.

Q. The one above that you were working on Jefferson Street, too; the one above that, the $500, you were working on Jefferson Street at that time—you were working on Jefferson Street June 30, when you got the $600, and on June 22, when you got $500? A. Yes, I was working on Jefferson Street at that time, surely.

Q. And you were working on Jefferson when you got that $500 on the sixteenth, and on the first of June you got $5,000, when you were working on Jefferson Street, and you were working on Jefferson Street May 4, when you got $3,000? A. Yes, sir.

Q. On April 19, when you got $6,000? A. Yes, sir.

Q. On April 13, when you got $1,000? A. Yes, sir.

Q. And on the second of April, when you got $500? A. Yes, sir.

Q. And also on the 22nd of March, when you got $2,000? A. Yes, sir.

Q. And $3,000 on the 20th of March? A. Yes, sir.

Q. And on the 14th of March, when you got $5,000? A. Yes, sir.

Q. And you were working on Jefferson Street on the 21st of February, when you got $4,000? A. Yes, sir.

Q. And on the 29th of January, when you got $1,000, you were working on Jefferson Street? A. I think so—yes. The Monroe Street job was finished then.

Q. So that from January 29 all the way to the next January—December 26th—these payments

were given you while you were working on Jefferson Street? A. Yes, sir.

Q. That is why you know it was on Jefferson Street property you received the money? A. That was paid off on the Monroe Street.

Q. I just asked you a minute ago how you knew the $2,000 payment of August 14 was on the Jefferson Street job, and you said the reason was because you were working there.

Judge Heisley: I would like to make this objection, Mr. Weinberger, I think you are mistaken. He did not say, in answer to your question, that these payments were made on the Jefferson Street job, but while he was working on the Jefferson Street job.

Mr. Weinberger: I press the question on the ground that it clearly appears from the evidence that he so testified.

Q. What is your answer? A. Because I received the $2,000 twice—checks that you gave to us, to get us through on Jefferson Street; that was the first $2,000, and the second $2,000; I was supposed to get $4,000, but I got it in two payments.

Q. Mr. Goldberg, you personally were represented by Mr. Feder, were you not, when this contract was signed? A. Yes, sir.

Q. And he and Mr. Loeb drew this contract? A. Yes, they did.

Q. And after it was drawn, you signed it? A. We did.

Q. You knew that under this contract you were

supposed to complete your work that you had to do under the contract? A. Yes, sir.

Q. You also knew that this was in the contract, did you not: "1. That the parties of the first part hereto do hereby assign, transfer and set over unto the said Samuel Slaff and Samuel Eichenbaum, the said parties of the second part, all their right, title and interest in said property by reason of having furnished any labor or material or both so that whatever lien claim interest, right or liability of any kind that they may have against the said building shall be and the same hereby is assigned, transferred and set over unto the said Samuel Slaff and Samuel Eichenbaum, the said parties of the second part hereto." You know that, did you not? A. I knew that would be exception—

Q. You knew that? A. Yes, sir. This waiving of liens was only for the purpose to get mortgages.

Q. I am asking you whether you knew it was in there? A. I did.

Q. You also knew—

Judge Heisley: Of course, this man is my witness, and you are going into matters not brought out on direct-examination. I want to get through with them.

Mr. Weinberger: I am through. The reason I asked that particular question was because I thought you had referred to it.

RE-DIRECT EXAMINATION by Judge Heisley:

Q. You have been asked about these payments which were credited in the book. Now, then, don't misunderstand me—you don't talk very good English—do any of these entries in this book show that you credited these sums on any particular job, or do they simply show the date when you received the payments? A. Just an account of the dates that I received them from Mr. Goldstein.

Q. And none of the entries show—if this is so, I want you to say so, and if it is not, I want you to tell me—none of them show that you have applied them to any particular job? A. No, because in the beginning when I started 270-272 Monroe Street and I expected to get finished, but after that, when I didn't get my payments right, I just kept an account.

Q. These payments you got were in what form, cash or check or what? A. Checks; sometimes they give me a note to discount, and if I paid it, they give me a check.

Q. And whose check did you get? A. Goldstein's, except two checks from Weinberger direct.

Q. How big were those two checks you received from Mr. Weinberger? A. $2,000 each.

Q. $4,000 you received altogether from him; is that right? A. Yes, sir.

Q. All the other checks which you have testified to in this case were checks of Goldstein himself? A. All of them were by Goldstein him-

self, but I don't remember one check of $3,000, from the Superior Finance Corporation—either it was made out to Goldstein or myself.

Q. Do you mean to say you don't know whether the Superior Finance check was made out to you or Goldstein? A. Yes, sir.

Q. With the exception of those three checks, were all the rest of the money paid in checks to you? A. In checks, yes, sir.

Q. And they were Goldstein's checks? A. Goldstein's check, yes, sir.

Q. Not the checks of any of these mortgagees? A. No, sir.

RE-CROSS EXAMINATION by Mr. Weinberger:

Q. You don't mean that? A. I do.

Q. You are sure of that, now? A. I am.

Q. That book does show on what property the money was paid, doesn't it? A. On the beginning it started—

Q. Have you got anything in it about Jefferson Street at all? A. No, sir.

Q. Have you got the number of Jefferson Street at all? A. I don't see it.

Q. You know it is not in there? A. Yes, sir.

Q. So the payments you are supposed to get from Goldstein are all credited on Monroe Street in that book? A. In an account.

Q. How much were you supposed to get on Monroe Street? A. $59,000.

Q. And you were to get how much of that on Jefferson Street? A. $18,000.

Q. Didn't you get any money from the Paterson Mortgage Company? A. I did, $5,000.

Q. Did you get a check direct to you? A. I don't remember that; I was with Goldstein then.

Q. What did you mean, a minute ago, when you said you didn't get any money from any mortgagees? A. I didn't mean that check.

Q. You didn't get any money from any mortgagees—what did you mean by that? A. Well, the $5,000 I was with Goldstein then.

Q. You mean you got it from the Paterson Mortgage Company? A. Yes, sir.

Q. You mean you forgot that? A. Yes, sir.

Q. Is there anything else you forgot? A. I don't remember now; there was the $5,000 there.

RE-DIRECT EXAMINATION by Judge Heisley:

Q. The Paterson Mortgage Company had a mortgage on Monroe Street? A. Yes, sir.

FURTHER RE-CROSS EXAMINATION by Mr. Weinberger:

Q. Did you get any money from Mr. Max Slaff, the mortgagee, on Monroe Street? A. On Monroe Street?

Q. Did you get any money from him? A. I don't know.

Q. You understand what I mean. A. I don't know whether it was to me or Goldstein. I received the check from Goldstein.

Q. Did you ever personally get any money from Max Slaff? A. I don't remember.

Q. Did you get any money from J. & A. Steinberg? A. No.

Q. Are you sure of that now? A. Not direct to me. I never saw J. & A. Steinberg.

Q. What is this page in this book, "Expense, 270-272 Monroe Street"? A. That means all the bills I paid out.

Q. On what property? A. Expenses 270-272 Monroe Street.

Q. Was that all on 270-272 Monroe Street? A. Yes, sir.

Q. There are no Jefferson Street items there? A. No, sir.

Q. So that the pages running next to the income, the expenses, pages 1, 2 and 3, are all on Monroe Street? A. Yes, sir, and I had only labor work.

Q. Did you agree at any meeting to advance any money to finance this proposition yourself, pro rata with the other creditors?

Judge Heisley: I object to that on the ground that it is not cross-examination, and I won't be able to conclude my part of the case today, if you waste so much time. If you want to call him as your own witness, there is no objection. I think you ought to pursue your regular course of cross-examination.

Mr. Weinberger: I am not going to press it.

Q. On May 4, 1923, you received $3,000 on what property? A. I think by that time the Monroe Street was paid off.

Q. On what property did you credit the $3,000? A. I didn't credit it—I kept an account.

Q. You got $3,000 on May 4, didn't you? A. Yes, sir.

Q. It is in this book? A. Yes, sir.

Q. Tell us on what property you credited it? A. I did not credit it—I kept an account, until it was paid off—Monroe Street.

Q. You got $3,000 from Mr. Goldstein on the 12th of May. Whom did you want to credit it to, what job? A. I did credit it to the business—

Q. Whom did you want to credit it to? A. First to 270 Monroe Street and the balance to Jefferson Street.

Q. Goldberg, whom did you credit that to? A. I just kept an account.

Q. So that with all the payments you just kept an account? A. Yes, sir.

Q. You didn't keep any record of it? A. It was just my intention to keep an account.

Q. So that when any mortgagees paid you, you would take it on Jefferson Street for the Monroe Street property? A. I didn't know anything about mortgagees' money.

Q. You never knew of a Mr. Weinberger's mortgage? A. No.

Q. When Goldstein got money from Weinberger, on what property did you credit it? A. I don't recall.

Q. Didn't you know that Mr. Weinberger had a mortgage there? A. Yes, sir, I did know.

Q. Do you know when it went on record? A. I didn't look on the record.

Q. Do you know when it went on record? A. No.

Q. You knew about when? A. Only one time we should come to your office to sign a release.

Q. Then you knew about it? A. At that time I knew.

Q. Do you know that was when the mortgage was given? A. I suppose it was.

Q. Don't you know that after that when Mr. Goldstein got money from Mr. Weinberger, on what property it was to be credited? A. I didn't know that.

Q. Do you mean to tell us now that you don't know what property Mr. Weinberger gave money for? A. He didn't tell me for where he took it.

Q. Did you know? A. He told me if he sold the property and he got $43,000, he might give me some of the money.

Q. Mr. Goldberg, do you know? A. These mortgages are first.

Q. When you got $2,000 on March 22nd, on what property did you credit that? A. Which year?

Q. 1923. A. Well, it was—

Q. Which property? A. I don't remember; my intention was to credit first 270-272 Monroe Street for that amount of the contract, and then to credit to Jefferson Street.

Q. Which account did you credit? A. I can't remember which account I credited.

Q. That is your best answer? A. Yes, sir.

Q. You got $6,000 on April 19th; to which account did you credit that? A. I don't remember.

Q. Is that the best answer you can give? A. That is the best answer.

Q. Will you say you did not intend to credit Jefferson Street? A. Perhaps I did.

Q. You don't know? A. I don't know.

Q. On May 4th, $3,000—which did you intend to credit, Jefferson or Monroe Street? A. I don't remember.

Q. Will you say you didn't intend to credit Jefferson Street? A. Perhaps I did.

RE-DIRECT EXAMINATION by Judge Heisley:

Q. Mr. Goldberg, did Goldstein at any time, when he gave you any of these payments, tell you to apply it on account of the Jefferson Street property? A. He never did.

ISADORE M. GROSSMAN, recalled for further direct-examination by Judge Heisley:

Q. You were asked the other day about whether you had the final certificate—the electric lighting certificate from the architect. A. From the chief —the fire chief of Passaic.

Q. Yes—and you said you had; have you produced it here today? A. Yes, sir.

Q. Is this it (showing witness a paper)? A. Yes, sir.

(The certificate reads as follows):

Defendants' Witness, Isadore M. Grossman, Direct

"CITY OF PASSAIC.

Certificate No. 9365.
Electrical Bureau.
Application No. 11636.

Passaic, N. J., July 16, 1924.

Certificate issued to comply with the requirements of the National Electrical Code.

This certifies that the electric wiring and equipment in the premises of Slaff & Eichenbaum occupied by tenants as stores and apartments,
Street—Jefferson
Number—72-74
has been inspected, and the following installation is hereby approved, it being understood and agreed that no alteration in the equipment after this date will be made without written notice to and consent of this Electrical Bureau.

Under the column headed by the printed words 'Incandescent lamps' appears in typewriting 416.

The equipment installed by Simon Brothers, 21 meters, Walter S. Gibson, Electrical Inspector."

Q. I call your attention to the fact that this describes a building at 72-74 Jefferson Street; that is not the new building, is it? A. That is the new building, yes, sir.

Q. When did you receive this certificate? A. Some time in July, after that date. This is one of the new buildings.

Q. There is only one building there. A. There is two sets of meters. The chief might have said that one certificate would cover both buildings.

Defendants' Witness, Isadore M. Grossman, Cross

Q. What I am getting at is whether this is a certificate for the new building, on which Simon Brothers claims a lien? A. It is upon one of the new buildings.

Q. It is for only one new building? A. Yes, but it is in two sections.

Q. Was this on the property on which Simon Brothers have filed a lien? A. Absolutely.

CROSS-EXAMINATION by Mr. Weinberger:

Q. You gave a different answer a minute ago. Have you any regard for what an oath means? A. I am surprised at you, Mr. Weinberger.

Q. Have you any regard for an oath? A. Yes, sir. According to Judge Heisley's question, I have answered it properly.

Q. Does that cover both buildings? A. It covers the property on which Simon Brothers claim a lien.

Q. Mr. Grossman, I don't propose to fence around with you—do you say that covers both buildings? A. 72-74 Jefferson Street.

Q. Do you say that covers all the work that was done there? A. It might not.

Q. Does it? A. I don't know.

Q. You say that this certificate is the only certificate for the entire new structures put up there? A. It might not be. I don't say that.

Q. The Judge asked you whether that covers the buildings upon which the lien claim was filed. Did you mean to say yes? A. If those buildings are together.

Defendants' Witness, Isadore M. Grossman, Re-direct

Q. What did you mean when you said yes to that question? A. We filed a lien claim for that new building.

Q. What new building? A. 72-74.

Q. And is that all? A. 76-78 Jefferson Street.

Q. Then you were trying to suppress something, weren't you? A. I wasn't trying to suppress anything. If there is another certificate, I will produce it.

Q. Does this certificate cover all the properties upon which you filed your lien? A. It might not. According to the certificate, it only covers 72-74 Jefferson Street. I have got to produce a certificate for 76-78, which I shall do.

Q. The Judge asked you if it covered the property upon which you filed a lien? A. The Judge's question was whether this certificate covered the property which was covered by a lien.

RE-DIRECT EXAMINATION by Judge Heisley:

Q. Where were the 416 incandescent lamps put? A. In the apartments and the stores in that building.

Q. Were any of them put in the old building—were those 416 incandescent lamps all put in the new building, or were some of them put in the old building? A. All put in the new building, which this certificate covers.

GERALD GREEN, sworn for the defendants.

Direct-examination by Judge Heisley:

Q. Mr. Green, were you present at any meeting of the creditors in, I think, the month of August, or the summer of 1923, when Mr. Slaff and Mr. Eichenbaum were present, and Mr. Goldberg, Rabinowitz & Schmidt were present, at which either Slaff or Eichenbaum gave any orders or direction about continuing any work in the premises in question? A. I was.

Q. Where was that meeting? A. That was held in Eichenbaum's office, at nighttime, in the early part of August.

Q. What was said by either Eichenbaum or Slaff, and to whom? A. Slaff said to Rabinowitz and Schmidt, the masons, that they should go and build certain piers in the cellar which were ordered by the Tenement House Commission or the tenement house inspector, and also directed Goldberg to build some wood bins in the cellar, and Eichenbaum seconded that motion and asked it also.

Q. I don't think I have asked any witnesses about the property. I just want to ask you a question about that. This property of Goldstein, which was conveyed to Eichenbaum and Slaff, consists of three parcels, does it not? A. Yes, sir.

Q. What is the first parcel? A. The first parcel is the new building.

Q. What is that? A. 72-78 Jefferson Street.

Q. How many stories? A. Four-story brick apartment.

Q. How many apartments in it? A. Fifty-six.

Q. And stores under it? A. Stores.

Q. Is that a property by itself? A. A property by itself, upon which all this work was done.

Q. What is the second parcel? A. We found that there was a twelve-family brick apartment, and it is right next door, situated on a lot 42 by 100, something of that sort.

Q. And what is the third parcel? A. Lots of vacant land, right in back of these two buildings, on Madison Street.

CROSS-EXAMINATION by Mr. Weinberger:

Q. You filed a lien claim against Goldstein and certain mortgagees, Mr. Green, as an officer of the Paterson Glass Company? A. Yes, we directed our lawyer to do so.

Q. And you were instrumental in getting these men to file their lien?

Judge Heisley: I object as not cross-examination.

Mr. Weinberger: The question is asked for the purpose of impeaching the credibility of the witness.

Q. Did you, as a matter of fact, point out to Rabinowitz & Schmidt and Goldberg and Simon Brothers, or any of the men, the fact that they had to file lien claims, and it would be worth while? A. I didn't say that in those words.

Q. What was said? A. I just talked with them and we thought it was the proper proceeding to take.

Q. After that meeting was the time the piers were done? A. After that meeting?

Q. That meeting or other meetings? A. I don't know about that.

Q. You heard this talk about piers, didn't you? A. Why, yes, I heard that talk.

Q. You recall distinctly the conversation? A. I recall part of it.

Q. Yet you can't tell us whether at that meeting, where you assembled for the purpose of starting litigation, whether the piers were ordered then? A. I don't know.

Q. You don't recall? A. No.

Q. Was it before or after Slaff or Eichenbaum spoke to these men? A. It was after.

Q. Are you sure about that? A. Certainly, the piers were built afterward.

Q. How long after? A. I don't know.

Q. When was it this alleged conversation took place? A. Which conversation?

Q. That you say Slaff had or Eichenbaum had with Rabinowitz & Schmidt or Goldberg—any conversation; I want an answer without carrying you along, if you can give it to me. Let us get the data of this alleged conversation. When was this supposed talk that you heard between Slaff or Eichenbaum and Rabinowitz & Schmidt or Goldberg—who was it had this conversation? A. What conversation?

Q. Did you ever hear any conversation between Slaff and Goldberg? A. Lots of them.

Q. Any of them concerning the erecting of that building or any part of the business? A. Yes, sir.

Q. When? A. In August.

Q. When? A. In August, the early part, when the meeting was held in Eichenbaum's office.

Q. Who spoke? A. Slaff and Eichenbaum.

Q. Both or one? A. Both.

Q. What did Slaff say? A. Directed Rabinowitz & Schmidt to build those piers in the cellar.

Q. What piers? A. Brick piers.

Q. How many? A. I don't know how many.

Q. Did you hear how many? A. I don't recall how many.

Q. Did Eichenbaum say anything about it? A. Yes, sir.

Q. What did he say? A. He backed up—

Q. What did he say? A. The same as Slaff said, that the tenement house inspector insisted upon the piers being there.

Q. They both gave the same order? A. Yes, sir.

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

Q. Why were you so interested? A. I happened to be at the meeting.

Q. Was this a public meeting? A. All the creditors were there.

Q. What else was said at that meeting? A. Some conversation about some cesspools that were built, and Slaff questioned Goldberg why that wasn't done originally and it cost him so much money.

Q. What else took place at that meeting? A. Some reference was brought out as to you retaining $15,000 out of a mortgage—that a check was made and the check happened to be made out in your office and was never sent to Lobsenz.

Q. Anything else? A. I believe there was mention of a $12,500 bonus you got.

Q. Who made that statement? A. It was made in the course of conversation.

Q. Who made it? A. I can't recall who made it; it was made.

Q. Who made it? A. I can't recall.

Q. Was anything else said? A. Yes, there was things said about sending money for mortgages and the hole that they had gotten into.

Q. Anything else? A. That is about all I can recall.

Q. When did Mr. Slaff or Mr. Eichenbaum say that they should go down and make those piers? A. Why, I understood it was to be done right away.

Q. Immediately? A. Yes, sir.

Q. This was the early part of August? A. Yes, sir.

Q. And was there any meeting after that? A. There was one.

Q. Where? A. The same place.

Q. When? A. I judge in the latter part of August or first week in September.

Q. Was there a report on the piers being made? A. No, I don't think there was.

Q. What was said at that meeting? A. Oh, a general discussion about the condition of the building.

Q. What? A. That you had foreclosed your mortgage and didn't want to grant another extension of it; that Lobsenz had foreclosed the building, and we then found out that Slaff and Eichenbaum had taken title to three pieces of property instead of one.

Q. What else? A. And reference was made that the creditors would have to dig down to float this thing along, and several mentions were made of different plans of how to float it.

Q. And then you decided you would engage counsel? A. That is what we did.

Q. Did you? A. Did I?

Q. Yes. A. After conversation with some men, yes.

Q. And did you, in concert with Mr. Goldberg, go down to see Judge Heisley? A. We did.

Q. Isn't it a fact that after you went to see Judge Heisley Goldberg went on the job to put up these bins? A. I presume he did.

Q. Don't you know? A. According to his testimony, yes.

Q. Didn't you go down to see Judge Heisley in September, 1924? A. We did.

Q. Don't you know Goldberg didn't put any bins in that building until October? A. If he says so, it is so.

Q. He never told you that? A. No.

Q. You never heard that discussed in any of the meetings you attended? A. Yes, I did.

Q. Did you hear that discussed at the meetings? A. At the first meeting in August the bins were discussed.

Q. I am speaking after your conference with Judge Heisley. A. You didn't give me the question that way.

Q. I ask you it now. A. No.

Q. Were you present when Rabinowitz & Schmidt and Goldberg and the Ac-Tin-o-Lyte Roofing Company met at Rabinowitz's house? A. Yes, sir.

Q. Do you remember anything being said about the bins at that meeting? A. No.

Q. What was the object of that meeting?

Judge Heisley: That is not cross-examination.

Mr. Weinberger: This affects his credibility.

A. We were endeavoring to find means to prevent Slaff and Eichenbaum getting the building.

Q. One of the means discussed was that it would be advisable to have bins and piers built? A. No, sir.

Q. What else was to be done? A. That was not discussed.

Q. You have had an adverse decision against your lien claim? A. I have.

Q. And your lien claim has been discharged, so far as Mr. Samuel Slaff, the Superior Finance Company, and the mortgagees, Weinberger and Hartstein, are concerned? A. Yes, sir.

Q. Have you been promised any moneys if you would act as a witness? A. No, sir.

Q. No man promised you part of his money to protect your lien claim, if his lien claim were paid? A. No, sir.

Q. You made no such agreement with them? A. No such agreement.

Q. Tell us when it was you met at Rabinowitz's house. A. About the week following the meeting in Eichenbaum's office.

Q. The month, if you can. A. September.

Q. How many times did you meet in all during the month of September? A. I believe two times.

Q. Who was present on those occasions? A. There were about seven of the creditors.

Q. Anybody else? A. Yes.

Q. Who? A. Judge Heisley.

Q. You all complained that you could not get your money from Slaff and Eichenbaum? A. Yes, sir.

Q. You all insisted upon getting suits started or some measures taken to protect your claims? A. Yes, sir.

Q. You retained counsel for that purpose? A. Yes, sir.

Q. Yet you know that men went down to do more work even though they did not get paid for what they had done? A. Yes, sir.

RE-DIRECT EXAMINATION by Judge Heisley:

Q. Mr. Green, in this agreement, which is dated December, and which has been offered in evidence, the seventh clause reads as follows: "That it is further understood and agreed that when Samuel Slaff shall have received an amount equal in proportion to that received by the other creditors hereto, not less than 76% of $27,000 Dollars, that he shall simultaneously therewith deliver duly endorsed for cancellation the bond and mortgage made by Max Goldstein and wife to him in the sum of $35,000, which mortgage is now of record against the said property." As I interpret that clause, he was to receive 76% of $27,000. Do you know why that clause was put in that agreement—how they agreed on 76% of $27,000?

A. $27,000 represented the amount of his third mortgage on that building.

Q. Why was he to cancel it when he got 76%? A. Because he had been paid money on account of the building, and that $27,000 did not represent the full amount of the money.

Q. You mean that was in excess of the amount due him? A. That is the way I understood it, by the figures rendered there by Grossman.

Mr. Weinberger: If he was not there, that is not competent.

Q. What I am getting at is to try and find out why it was that Slaff, who had a mortgage of $35,000, and who has testified he got paid on account of it, and then put it back to $35,000 again, as he says, agreed to take 76% of only $27,000—if you know. A. Well, of course, that mortgage I always understood to be a phoney mortgage.

Mr. Weinberger: I ask that that be stricken out, on the ground that this witness has certainly not answered the question, and has used language which indicates that it is a conclusion on his part, and not predicated on facts testified to by him.

Q. Was there anything said—without limiting you to exact words—was there anything said in the presence of Slaff as to why he should get only 76% of $27,000? A. I believe that is all he was entitled to.

Q. Was there anything said? A. Not that I can recall.

RE-CROSS EXAMINATION by Mr. Weinberger:

Q. You were not present when this agreement was drawn? A. No, sir.

Q. You don't know what took place with regard to the inserting of that particular provision? A. No.

Q. So you don't know what led up to that? A. No.

Q. When you used the phrase "phoney mortgage," you personally don't know what is due on that mortgage? A. No.

Q. Just answer my question, please. Do you know of your own knowledge how much is due on that mortgage? A. Yes, from what Mr. Slaff tells me, it was $27,000.

Q. And that is the only source of knowledge that you have? A. That is all.

Q. When you used the word "phoney" a moment ago, did you mean to convey the impression that he was not entitled to any part of $27,000? A. Yes.

Q. Do you know that of your own knowledge? A. No.

Q. Do you desire to go on record in this court as saying that that $27,000 mortgage is a phoney mortgage? A. Yes, sir.

Q. Of your own knowledge? A. Yes, that is a phoney mortgage, the way I would put it.

Q. What do you mean by that? A. It is simply a transaction for Slaff to take care of himself—money that was handed over to protect his own interest, representing no real value.

Q. Nothing was given? A. Yes, a check that came back to him the same day.

Q. How do you know that? A. He said so.

Q. Do you know that there was other consideration for that mortgage? A. You know what I mean.

Q. Answer my question. A. There might have been.

Q. Do you say materials were not delivered to that building? A. Yes, sir.

Q. Do you say that there was not a debt due from Goldstein to the Yellow Pine Lumber Company? A. Yes, sir.

Q. Do you call that a phoney transaction? A. Yes, sir.

Q. Materials delivered? A. And a mortgage taken back for more than the amount due him? Yes, I call that a phoney transaction.

Q. You personally signed that agreement, didn't you? A. Yes, sir.

Q. If you knew it was a phoney mortgage, why did you sign your name to it? A. I didn't know a lot of these things until after.

Q. How long have you been in business? A. About ten years.

Q. Will you answer this question: Why did you sign your name to that contract if in fact you had any information with regard to this $27,000 mortgage? A. At the time the agreement was signed, there was a lot that I didn't know until afterwards; I found out a lot afterwards. I thought I was dealing with honest men, and I found out I wasn't. I was getting trimmed.

RE-DIRECT EXAMINATION by Judge Heisley:

Q. Is Slaff really the Yellow Pine Lumber Company? A. He was the president of the Yellow Pine Lumber Company. Today I think he is the vice-president of it.

Q. And as I understand from what you say to Mr. Weinberger, you believe that this was a debt that was due to the Yellow Pine Lumber Company and Slaff took it over? A. Yes, sir.

Q. By a note? A. Yes, sir.

LOUIS RABINOWITZ sworn for defendants.

Direct-examination by Judge Heisley:

Q. Mr. Rabinowitz, you and Mr. Schmidt have filed a lien claim against this property? A. Yes, sir.

Q. Have you been paid anything on account of the amount in that lien claim? A. No.

Q. Is it all still due? A. Yes.

Q. Did you do any work for Slaff & Eichenbaum which is apart from—outside of the lien claim? A. Outside of the lien claim?

Q. Yes. A. I want to understand that better.

Q. Did you do any work for Eichenbaum and Slaff for which you have given them any receipt? A. I gave them a receipt, yes.

Q. For what? A. For extra work.

Q. Is or is not that work outside of your lien claim? A. Yes, sir.

Q. It is outside? A. Yes.

Q. What do you know about any instructions or orders being given for the building of piers in the basement of this building? A. We had a meeting in August; Eichenbaum and Slaff gave an order to build the piers there.

Q. Whom did they give the order to? A. To me and to my partner, Rabinowitz & Schmidt.

Q. And where was this? A. Under the sewer pipe.

Q. And where were they when they were talking to you? A. That was in Mr. Eichenbaum's office.

Q. Do you know whether Mr. Green was present? A. Yes.

Q. He was? A. Yes.

Q. Did you build the piers? A. I did later on; I didn't have no brick then.

Q. You had no bricks then? A. No.

Q. When did the bricks come? A. Some day in October.

Q. Where did they come from, if you know? A. From Hackensack.

Q. From Paskewic? A. Yes, sir.

Q. And how many bricks came? A. About 2,000.

Q. And how many piers were there to be built? A. I built up a pier and a half there; on the next day the laborers did not come, and after that day I came and the janitor chased me out; he said he shouldn't let me get in the cellar.

Q. Do you know whether the whole 2,000 bricks were delivered there in the cellar? A. Yes, they were delivered.

Q. Did Slaff and Eichenbaum ever complain of your work? A. Never.

Q. I show you a paper in lead pencil; who gave you that paper? A. Mr. Eichenbaum.

Q. Mr. Eichenbaum? A. Yes.

Q. When did he give that to you—about—as near as you can remember? A. In April.

Q. In the spring? A. Yes, sir.

Q. Was that for extra work or not? A. For extra work.

Q. That is what was paid for? A. Yes, sir.

Judge Heisley: I will read it:

"Messrs. Rabinowitz & Schmidt:

Kindly fill in the floors for the drain, in both buildings, for which we agree to pay you extra for the labor.

Yours very truly,
EICHENBAUM & SLAFF,
By Samuel Eichenbaum."

Q. You did that work and that has been paid for? A. Yes, sir.

Q. And that is not in your lien suit? A. No.

Q. Was your partner present at that meeting in Eichenbaum's office, when they told you to build the piers? A. Yes.

Q. Whom did you receive this paper from (showing witness a paper)? A. This is—I received a letter from Mr. Eichenbaum; he said go and finish the cellar ceiling. We always spoke in every meeting why we should finish the ceiling with plaster board, and we always used to blame it on the lather, and the lather was blaming it on the plumber. That day he send me a letter it is all ready to go ahead.

Q. Who gave you this paper? A. Mr. Eichenbaum.

Q. How did it come to you? A. Mr. Eichenbaum mailed it.

Q. It is signed "Eichenbaum & Slaff"? A. Yes, sir.

Q. You received it? A. Yes.

Judge Heisley: Mr. Slaff admits he signed this paper, and I will offer it in evidence.

The paper reads as follows:

"October 9, 1924.

Messrs. Rabinowitz & Schmidt.

Gentlemen:

Mr. Morris Chanin has filed a stop notice for labor performed on the Jefferson Street building, to the amount of $248. Unless this account is straightened out within thirty days from date, we may pay out the amount of money to Mr. Chanin.

Yours truly,
EICHENBAUM & SLAFF."

Q. Let me ask you—was the money that you owed Chanin, $248, a part of your original job there; it was not an extra job? A. No, my original job.

Q. It is a part of the work for which you have filed your lien suit? A. No.

Q. Why do you say it was not extra work? A. What do you mean?

Q. You had a contract to do what kind of work? A. Mason work.

Q. And what was Chanin? A. Chanin was a plasterer.

Q. And were you to do the plastering, too? A. Yes, sir.

Q. And did you contract the plastering with Chanin? A. Yes, sir.

Q. And was the $248 due Chanin on your contract with him? A. On my contract.

Q. And that was not an extra; it was the original contract? A. Yes, sir.

CROSS-EXAMINATION by Mr. Weinberger:

Q. Mr. Rabinowitz, you are a mason? A. Yes, sir.

Q. Did you do the mason work on the building —the new building, for Goldstein? A. Yes, sir.

Q. And you got paid by checks? A. Yes, sir.

Q. How much did you get? A. I can't tell that; I made it $18,500.

Q. When was the last work you did on that building? A. I did the last work about October 15th—something like that.

Q. Before that, when did you do any work? A. Every month.

Q. How long before October did you do the last work? A. September.

Q. Do you know? A. Yes.

Q. When? A. The plasterers were through.

Q. When? A. Since March or April we was working straight ahead.

Q. March and April you worked straight ahead? A. Yes, sir.

Q. The last you did was in October, about the middle of October? A. Yes, sir.

Q. Why did you go down there in October? A. Because that was—

Q. Why did you go down in October? A. To finish the work.

Q. To finish what? A. The piers.

Q. How many piers did you put up? A. One and a half piers.

Q. How much work was one and a half piers? How long did it take you? A. It takes you a day.

Q. Were you there yourself? A. Yes, sir.

Q. The plans called for piers? A. It does not call for piers.

Q. Did the specifications or the contract call for piers? A. It does not.

Q. What did you put them up for? A. Because it was necessary.

Q. What did you put them up for? A. That is necessary.

Q. Your contract didn't call for it? A. I don't know—let me have a chance to explain. When they accept the job, they didn't want to give me the rest of the money on that $2,000, so they saw me—Mr. Slaff and Eichenbaum and Mr. Goldberg—and they said, "We wouldn't give you the last money until you build those piers."

Q. How many piers? A. About ten or twelve.

Q. Did you build them? A. I start to build them.

Q. Did you get the payment without building them? A. I get it.

Q. Then you didn't build them? A. No—you are always talking; let me talk.

Q. You happen not to be the lawyer, so you will answer my questions. A. I want to answer you.

Q. Rabinowitz, you hired Judge Heisley, did you—your lawyer? A. You are asking me about the piers now.

Q. Did you hire Judge Heisley? A. Yes, sir.

Q. When? A. In September sometime.

Q. And when you hired Judge Heisley, it was because you couldn't get any money on that building? A. I see they are going to make crooked business.

Q. You saw who was making crooked business? A. Eichenbaum and Slaff.

Q. And then you hired a lawyer? A. Yes, sir.

Q. That was in September, 1924? A. I don't remember that. I don't know the month exactly; I am a working man, and I don't know the month.

Q. Well, a working man has brains, and a working man knows the months of the year. A. You have got brains, sure, and I have got brains, but I don't know the month.

Q. Did you hire your lawyer in September? A. Sure.

Q. That was all you wanted—to get your money? A. Yes, sir.

Q. And you couldn't get your money from Slaff & Eichenbaum? A. Yes, sir.

Q. And you had a meeting? A. Yes, sir.

Q. Mr. Green, of Paterson, was there? A. Yes, sir.

Q. Simon Brothers and Mr. Grossman? A. Yes, sir.

Q. And Mr. Paskewic? A. Yes, sir.

Q. And the Ac-Tin-o-Lyte Roofing Company? A. Yes, sir.

Q. Judge Heisley was there, too? A. Yes, sir.

Q. And you all hired the Judge? A. Yes, sir.

Q. Then you were through with the job when you hired the Judge—you wanted the money then, didn't you? A. Yes, sir.

Q. You had enough money in that job then and you didn't want to put in any more money? A. We would like to get our money anyway. When we finished the building, we tried to get our money.

Q. You tried all right, but I am not asking you how you tried; I am asking you if it is not true that when you got Judge Heisley, and the other creditors, in September, that then and there you gave your claim to the Judge to start a suit? A. Yes, sir.

Q. And about four weeks after, you went back to do some more work? A. Yes, sir.

Q. Why did you go back to do more work? A. You want I should explain that?

Q. That is what I am trying to get. A. If I didn't furnish one brick, I knew Mr. Slaff would put up a bill on my work for $5,000. If you will tell me now, I will go there to do anything necessary under my contract.

Q. Is that the reason? A. Yes, that is the reason.

Q. The reason you went there after you hired a lawyer to sue for you, and put up one and a half piers, when there were about twenty necessary, was because you were afraid of Mr. Slaff? A. Yes, sir.

Q. You mean that? A. Yes, sir.

Q. Did Mr. Slaff tell you to put up those piers in October? A. Yes, sir.

Q. That was October, 1924? A. In October or the end of September.

Q. Either one of those two months? A. I don't remember.

Q. October you say, or the end of September? A. Yes, sir.

Q. Let us have this straight, Rabinowitz—you went down yourself to do this work? A. Yes, sir.

Q. Put up a pier and a half, and it took you a day? A. Yes, sir; and the next day the laborers didn't come.

Q. You spoke to Sam Slaff in the end of September or the beginning of October, and he asked you to go down there and make the piers? A. Yes, sir.

Q. Don't you know Sam Slaff was away on a vacation from September 15th to October 15th? A. He come from his vacation.

Q. It was after he came home from his vacation? A. Yes, sir.

Q. So it was when he came from his vacation in October—after he came back—you did the work? A. Yes, I was working all along.

Q. When he ordered the piers? A. Yes, sir.

Q. And the first time he ever ordered the piers or spoke about the piers was after he came from his vacation, and he told you to go down there and build them? A. Him and Eichenbaum and Goldberg, at that time. I will tell you, Mr. Weinberger—I want to talk to you, please. If Slaff and Eichenbaum will swear that they didn't show me the places where the piers were to go, I will be glad to give him a present of $100; let him swear. I am saying the truth. I will give him $100.

Mr. Weinberger: This gentleman is volunteering a statement which is not responsive to a question. I ask that that be stricken from the record on the ground that it is not responsive to any question propounded, and is merely an offer.

Q. Let me ask you this question: Is it true that the first time that Slaff or Eichenbaum ever spoke to you about the piers was when Slaff came back from his vacation? A. That one time I was talking before the vacation.

Q. When? A. In the middle of the summer; I don't know exactly the month.

Q. When? A. In August or something like that; I don't remember exactly, but we held one meeting afterwards in Eichenbaum's office.

Q. Goldberg did not ask you to do the piers, it was Slaff or Eichenbaum? A. It was both of them.

Q. You mean Slaff and Eichenbaum, but not Goldberg? A. Yes, sir.

Q. When did you order the bricks? A. I didn't order them.

Q. Did you ever tell anybody to order the bricks? A. I could not; as soon as the brick is coming, I will build the piers. It is both three of them.

Q. A minute ago, you said you never spoke to Goldberg. You didn't speak to Goldberg, did you? A. I don't know what you mean by "speak"; I speak with him today, too.

Q. About the piers? A. About the piers I never spoke to him.

Q. You knew that there was a foreclosure of that property in May, 1924, by Weinberger and Hartstein, didn't you? A. Yes, sir.

Q. And you had meetings with the creditors, didn't you? A. Yes, sir.

Judge Heisley: I object to this as not cross-examination. If Mr. Weinberger wants to get this out, he should call him as his own witness.

Mr. Weinberger: This man is a claimant, and I am entitled to examine him.

Q. When you were at these meetings, everybody didn't want to work on account of the foreclosure—the men didn't want to work? A. We try our best. We have meetings.

Q. Nobody wanted to work, though, because of the foreclosure? A. Yes, sir.

Q. And then Slaff and Eichenbaum said they would see if they could get a buyer or a mortgage? A. Yes, sir.

Q. Nobody got a buyer and nobody got a mortgage? A. Yes, sir.

Q. Then after the meetings were held the creditors decided that it looked very bad and that the foreclosure was going on, and they were going to lose everything—that is what it looked like? A. Yes, sir.

Q. When you saw it looked like that, why did you want to do any more work? A. Because we were trying to get together and find out can we do something.

Q. You saw you couldn't get together—you saw the buildings could not be sold, why did you do

more work? A. Mr. Slaff said we would all go to Weinberger and try to lay off that mortgage.

Q. But you found out it couldn't be done; why did you go back and do any more work? A. I went to do more work, so I could put a lien on the building for my full contract.

Q. So you went to finish the contract? A. Yes, sir.

Q. Your contract didn't call for piers? A. If it is necessary they force me to it. I did it, but my contract didn't call for it. They didn't want to give me the rest of the money. I give my honor word, as soon as the brick in coming, when you pay me the $2,000, I will build the piers.

Q. When did you get your last $2,000? A. I get pro rata in all of those.

Q. When did you get it? A. I get that—that I got some day in October.

Q. Didn't you get the money paid to you before you made the pier? A. Yes, sir.

Q. And you say they forced you to do the work? A. We had a meeting—

Q. Did they or did they not? A. Let me explain; I want to explain it to you. They didn't want to give me the rest of the money from the $2,000 until I finished the piers; I gave them my honor word as soon as the brick is coming, I will finish the piers, and they gave me that check, and as soon as the brick is coming, I will finish the work.

Q. Rabinowitz, did you get the $2,000 before October? A. I don't remember when I got it.

Q. Did you get it before September? A. I got $5,000 when the sidewalk was done.

Q. Did you get it before September? A. I don't know.

Q. Isn't it true that you went back in October to do the piers after you got the money which you claimed? A. Yes, sir.

Q. Why did you go back? A. Because I gave my honor word I would go back.

Q. You just a minute ago said they forced you back. A. They didn't want to give me the rest of the money. I gave them my honor word I would go back.

Q. Did they force you in October? A. That is the way they did.

Q. Did they force you in October? A. No.

RE-DIRECT EXAMINATION by Judge Heisley:

Q. Mr. Rabinowitz, is it true that I only met with you gentlemen once? A. Yes, sir.

Q. Had I not been employed before that by Mr. Goldberg and Mr. Green and they had me come over to your house and meet you gentlemen, isn't that so? A. Yes.

Q. If you don't understand me, say so—did I tell you or did I tell any of you men to go and do any other work on that property after that? A. You did not tell us that.

Q. I want to know whether I told you to do any work on that property? A. No, you did not.

Q. Didn't I tell you I thought your action was against Slaff and Eichenbaum or their bond? A. Yes, sir.

Mr. Weinberger: I object to the form of the question on the ground that it is leading and self-serving.

Q. Didn't I afterwards tell you I thought you had better file your lien claims? A. Yes, sir.

Q. You say they forced you to build the piers; is it not true that after the signing of this agreement—the creditors' agreement—Sam Slaff, who practically owned the Yellow Pine Lumber Company, had taken a mortgage which he thought made his claim good, and then he and Eichenbaum got the property in their own names, didn't they? A. Yes, sir.

Q. And they didn't pay you, did they? A. No, sir.

Q. They finally made a promise to you to pay you $2,000, if you would do certain work? A. That is the money.

Q. They promised to pay you $2,000 if you would do certain work? A. Yes, sir.

Q. Who put up that $2,000? A. Goldstein.

Q. He put up $5,000? A. Yes, sir.

Q. Slaff and Eichenbaum didn't pay you a dollar out of their own pocket? A. No, sir.

Q. They still have got title to the property, haven't they? A. Yes, sir.

Q. They are collecting the rents? A. Yes, sir.

Q. And there is due you today over $5,000, isn't that so? A. Yes, sir.

Q. Have they ever offered to pay you anything? A. No, sir.

RE-CROSS EXAMINATION by Mr. Weinberger:

Q. Do you remember when Judge Heisley met with you in Passaic? A. Yes.

Q. When was it? A. It was September sometime—I don't know how to call the month.

Q. And did he at that time tell you to file a lien for the full amount? A. No.

Q. He told you you couldn't file a lien? A. He didn't say I could or not—he said he would try to sue Slaff and Eichenbaum on the bond.

Q. Did you want to sue Slaff and Eichenbaum? A. If I could, yes.

Q. Did you tell him to sue? A. He knows better than I.

Q. Did you tell him to sue? A. I didn't tell him anything.

Q. Didn't you ask him? A. He told us we shall file better our lien claims.

Q. You have had other cases? A. I never sue in court.

Q. You never sued anybody before? A. No, sir.

Q. You never sued anybody? A. I sued once or twice.

Q. Once or twice? A. Yes; maybe three or four times.

Q. You never filed lien claims before? A. No, sir.

Q. You are positive? A. Yes.

Q. Didn't you, just a minute ago, when I said to you, "Did you file lien claims before," answer that you didn't ever before? A. I didn't say that.

Q. What did you say about liens? A. We tried to sue Mr. Eichenbaum and Slaff on the bond.

Q. If you were going to sue on a bond, why did you file liens? A. We found out it is better to file liens.

Q. When did you find out? A. We found out together.

Q. When did you find that out? A. When we come together, every one of us. If you had been a creditor, I would have seen you.

Q. You all got together, and instead of suing on a bond, all the creditors said, "Let's file liens"? A. Yes, sir.

Q. Who was the first one to say, "I will go back and do some more work," Goldberg or you? A. We had to finish that job on the contract.

Q. So that you decided to file liens, at one of the meetings you held? A. Yes, sir.

Q. At whose house was that meeting? A. Mine.

Q. After you decided to do that, you went back and made a pier and a half? A. Yes, sir.

Q. Paskewic got an order for 2,000 bricks? A. Yes, sir.

Q. Who gave the order, you or Goldberg? A. I didn't.

Q. Paskewic was at the meeting? A. We didn't talk about the piers at all. After the meeting he told me to make the piers. I would make them even today.

Q. Paskewic got his brick order from Goldberg or you? A. I don't know.

Q. Who gave Paskewic the brick order? A. I don't know.

Defendants' Witness, Louis Rabinowitz, Re-cross

Q. Mr. Robinson, of the Ac-Tin-o-Lyte Roofing Company, was there? A. Yes, sir.

Q. And he decided to file a lien, too? A. Yes, sir.

Q. And he went back and did some work? A. I don't know anything about him.

Q. This is right after this meeting in your house, when you went back and made this pier and a half? A. Yes, sir; we had not decided at that time to file liens.

Q. You just said, a minute ago, that all the creditors wanted to file liens. A. We decided to sue him on the bond.

Q. You mean to say you didn't decide to file liens? A. Yes, sir.

Q. Why did you file liens? A. Because the foreclosure is coming.

Q. The foreclosure didn't come in September, did it? A. I don't know when; it comes darn near to it.

Q. When did you decide to file the lien?

Judge Heisley: You have been over that; I don't think you ought to take up all my time.

Mr. Weinberger: I want to get through with this, but I want to make sure that we have got everything covered.

Judge Heisley: I don't think it is fair hardly to take up all the time.

Q. Will you fix the time when you decided to file liens, and where it was you decided it? A. I don't remember exactly if it was October.

Q. Well, the beginning of November? A. Or the beginning of November.

RE-DIRECT EXAMINATION by Judge Heisley:

Q. I understood you to say that when Slaff and Eichenbaum met with you and Goldberg and when they told you that they wanted the piers put up, it was down in the basement of the building? A. Yes, sir.

Q. That was long after you had seen me over at your house with the creditors, isn't that so? A. Yes, sir.

RE-CROSS EXAMINATION by Mr. Weinberger:

Q. How much was the pier and one-half that you did there? A. What do you mean, "how much"?

Q. What was it worth? A. That takes for me a day and a half.

Q. A pier and a half, what was it worth? A. It is worth about eighteen or twenty dollars.

RE-DIRECT EXAMINATION by Judge Heisley:

Q. You mean each pier and a half? A. That first pier and a half—you start to get ready to do it. It takes more time than when you go ahead.

RE-CROSS EXAMINATION by Mr. Weinberger:

Q. How much would the last one be? A. About ten dollars—something like that.

JOSEPH SCHMIDT sworn for defendants.

Direct-examination by Judge Heisley:

Q. You are the partner of Mr. Rabinowitz, in the firm of Rabinowitz & Schmidt? A. Yes, sir.

Q. And did you personally do work on this building? A. Yes, sir.

Q. And what is this book that I show you? A. This book is my time book.

Q. In whose handwriting is it? A. In my handwriting.

Q. All of it? A. All of it.

Q. Does it show the time of the men who worked on this job? A. Yes, sir.

Q. Does it show any other job than this? A. Well, maybe in the beginning—we worked on that building on Monroe Street. I didn't want to buy a new book.

Q. There is an account down to November 10, 1922. That wouldn't be on the Jefferson Street job. A. That is starting Jefferson Street.

Q. On November 10, 1922? A. Here (indicating) it starts.

Q. The account down to November 10, 1922, was not on the Jefferson Street job, was it? A. No.

Q. Now, then, after November 10, 1922, this book shows an account beginning on May 11, 1923? A. Yes, sir.

Q. Does all the rest of this book refer simply to the Jefferson Street job? A. Yes, sir.

Q. You have another book in your hand. A. That finishes that book (pointing to the first book referred to) and starts here again.

Q. Now, was there a book between November 10, 1922, and May 11, 1923? A. That is right.

Q. You have got that book? A. Yes, sir.

Q. Is this it (indicating)? A. Yes, sir.

Q. In whose handwriting is it? A. In mine.

Q. Does this all refer to the Jefferson Street property or not? A. All of it.

Q. Does this first page, November 10, 1922, refer to it? A. Yes.

Q. And everything done in this book refers to the Jefferson Street property, doesn't it? A. Yes, sir.

Q. Now, without leading you, this is what you call your time book? A. Yes, sir.

Q. You have the names of the men in it? A. Yes, sir.

Q. And the list of the hours and the amount that was due them? A. Yes.

Q. That is what it cost you to do this work, so far as labor was concerned? A. Yes, sir.

Q. That is what you are trying to get paid for? A. Yes, sir.

Q. Now, I find that in May there seems to be a great deal of work done. When you get to June, you had eight dollars worth of work, done on June 7th; the last item in this book was July 12th? A. Yes, sir.

Q. Two men working, $20? A. Correct.

Q. Then the next was October 10th, whitewashing? A. That is right, two men whitewashing.

Q. Did you write that "Vitevashing"? A. Yes, sir; I didn't went to school.

Q. Now, was there any other work done in the summer of 1924 besides the work that is here? A. Yes, sir.

Q. What was there done? A. That is plasterers. We give the work out to do the plastering in the building. We paid those people by checks.

Q. Is it true that you subcontracted or employed other people to do the plastering for you, in the summer of 1924? A. Yes, sir.

Q. And you produce four checks? A. Yes, sir.

Q. Signed by Rabinowitz & Schmidt? A. Yes, sir.

Q. One is June 16, to Gingin and Chenen, $120? A. Yes, sir.

Q. The other is to the same firm, dated June 7, 1924, for $220? A. Yes, sir.

Q. The next is to the same firm, dated July 3, $130? A. Yes, sir.

Q. And the last is to the same firm, dated June 9, $100? A. Yes, sir.

Q. That was a part of the original contract? A. Yes, sir.

Q. It was not for extras? A. No.

Judge Heisley: I offer those checks in evidence.

Marked Exhibit G.

Q. On the backs of these several checks I notice a writing over the signatures, saying what this work was for. Was that already on these checks when these people endorsed them? A. Yes, sir.

Mr. Weinberger: They are immaterial, irrelevant and incompetent, on the ground that they are no part of any proceedings between the owner, Goldstein, and these people. They are checks made by the

claimant to some third party, and I can't see on what theory they are evidence.

CROSS-EXAMINATION by Mr. Weinberger:

Q. You kept these books? A. Yes, sir.

Q. In pencil and in ink? A. Yes, sir.

Q. And these books show all the time you spent on Jefferson Street? A. Except the time my partner worked on the piers, and except the sidewalk we put down.

Q. That is not shown in these books? A. No, and except those people working on the plaster, for those amount of money on these checks.

Q. You haven't got any record of the labor for which these checks were given? A. No, sir.

Q. The work that was done for which these checks were paid? A. It is not in there.

Q. You had a contract for the mason work, did you? A. Yes, sir.

Q. And that contract was with Goldstein? A. Yes, sir.

Q. You signed this contract of December 4, 1923? A. Yes, sir.

Q. The creditors' agreement with Slaff and Eichenbaum? A. Yes, sir.

Q. According to your books—there are two books here—some are of 1922 and some of 1923—the book of 1923 has also got something of 1922 in it. Are these the only books you have? A. Yes, sir; the only books.

Q. When did you make the one book up (D 28)? A. This book, that is the same book that continues.

Q. When did you make it up? A. When I worked on the job, I marked it in the book.

Q. You didn't make it up recently? A. Nothing at all.

Q. Are you sure about that? A. Positively.

Q. Everything in the book is in your handwriting? A. Yes, sir.

Q. "Mr. Goldstein, Jefferson Street, July 12," is that right? A. Yes, sir.

Q. Did you do work for Mr. Goldstein in July, 1924? A. Yes, sir.

Q. Do you know Mr. Slaff? A. Yes, sir.

Q. Do you know Mr. Eichenbaum? A. Yes, sir.

Q. Did you do any work for them? A. Yes, sir.

Q. Where is that in this book? A. Work for them?

Q. Yes. A. That doesn't show, the work for them.

Q. I thought you did work for them. A. I did some extra work on that house, that is not in here.

Q. Why not? A. Because it is extra work.

Q. Where is it? A. It is not in here.

Q. Your laborers were in there? A. It is extra work. I wouldn't put it in this book.

Q. Why, therefore, did you put in contract work and not extra work? A. I didn't want to mix it.

Q. Why did you have to keep a record of the men you had on the job there, if you had a contract? A. I didn't have to keep no record. I keep a record on my contract.

Q. Why—what did you need a record for? You had a contract. When did you make that record, Schmidt? A. All my time, Mr. Weinberger, I keep that book on this job. I have got to have a time book, to know what I am doing.

Q. How about the time for the extras, on this extra work? A. I haven't got the extras; I have got no extra work in this book.

Q. Did you keep a record anywhere? A. No, sir.

Q. Your partner just said you kept it all on a piece of paper. Is that true or false? A. I have a partner. If we keep a piece of paper as a record for that extra work, I haven't got it.

Q. You didn't need any record for the extra work? A. I didn't make any.

Q. You didn't need that, did you? A. I don't see why I would need it.

Q. Did you need it? A. No, I did not need it—what for?

Q. On the eighteenth of October, 1924, you have here "Carmelo," what is this? A. Two days' work.

Q. Two days' work? A. Yes, sir.

Q. Mr. Carmelo worked on that building on the eighteenth of October? A. Yes, sir.

Q. Do you mean that? A. I am positive sure.

Q. Don't you know in your lien claim, the last date is no later than the fifteenth—when did you make that? A. When I make that?

Q. Yes. A. When I work.

Q. Did you work after the lien claim was filed? A. Yes, sir.

Q. Did you do work there after you gave the case to Judge Heisley? A. I see this work.

Q. You yourself—did you yourself see this man work? A. No.

Q. Why did you, a minute ago, say yes, you did? A. Anybody is liable to make a mistake.

Q. You made a mistake when you said you saw the man working? A. Repeat it over and I can tell you what it is.

(Question and answer repeated.)

A. I made a mistake.

Q. Why is it you say you saw the man work there when you did not? A. I might have made such a mistake.

Q. You call that a mistake? A. That is a mistake.

Q. Mr. Brown, on October 10th, did you see him work? A. No, that is the same thing.

Q. Did he do any work there in August? A. Whatever it shows on this book.

Q. Here is the book; tell us whether you did any work there in August, 1924? A. Whitewashing the cellar.

Q. In October, 1924? A. That is October.

Q. August, I said, not October. A. Wherever it shows in this book.

Q. Mr. Schmidt, did you do any work there in August? A. No.

Q. Did you do any work there in September? A. I have told you before—

Q. Did you? A. Except my partner did some piers. I don't know what it was—he put them piers up.

Q. Then you didn't do anything in September, so far as your books are concerned? A. Just a minute, I will look. (After consulting book.) I don't see here.

Q. Let me ask you this question. The reason you didn't do any work was because you couldn't get any money from Eichenbaum and Slaff, and wouldn't do any work? A. That had nothing to do with it. Whenever it was ready something to do, I went back there and done it.

Q. You never went back in October; you never went back yourself, did you? A. Does it show an October there?

Q. Yes; did you ever go back in October? A. That was my partner.

Q. Did you ever go back? A. No. What is the difference, me or my partner?

Q. Did you ever go back in September? A. My partner did.

Q. Did you? A. No, I went back on the day after my partner came over to me, and the man told him he shouldn't go in the cellar. I was there that day and I heard the man said it to him.

Q. You heard the man tell that to your partner? A. Yes, sir.

Q. You just said a minute ago you weren't there; were you there when the man told your partner he couldn't go to work? A. Yes, sir.

Q. Who was the man? A. The janitor there.

Q. What is his name? A. I don't know.

Q. How does he look? A. A skinny fellow, about my size.

Q. With a mustache? A. No, I don't think so.

Q. No, do you say? A. No.

Q. And when was this? Why didn't you put the pier work in there, if you knew about it? A. Because it is my partner there. He attended to that.

Q. Did you hear your partner say just a minute ago the reason it was not in there was "what did it amount to"? Did you hear him just say that? A. I don't know what he said.

Q. You didn't hear him? A. I don't know what he said.

Q. Then I ask you, is it in the book, and if it is not, why isn't it? A. Because my partner went down to work with a laborer and I didn't take care of it.

Q. You just said you went down there the next day, and you said the janitor stopped him from working after he had been there the day before? A. I didn't went over to put it in the book, a little thing like that.

Q. How much was it? A. A day's work, he was there with the laborer. The reason I didn't put it in is this—that laborer didn't show up the next day and I didn't know of that, and I didn't know the laborer. Of course, you get me mixed up. You give me a chance, and I will answer anything.

Q. What is that "Brown, whitewashing," how much? A. We give a man a contract.

Q. How much was the contract? A. I just could not remember.

Q. What is that $75 there? A. That was due, and the balance come to that man.

Q. How much? A. $75.

Q. You say that man did that on that day? A.

These people finished their work on this week—the week of October 10.

Q. I direct your attention to the item in the book marked D 28 to "Brown vitevash $75 October 10, 1924," and I ask you if that man did that work on that day? A. In that week.

Q. Will you answer my question? Was it on that day? A. In that week.

Q. Did you see him do the work? A. My partner.

Q. Will you answer my question? A. My partner did.

Q. Did you see him do the work? A. No.

Q. Did you pay that man the money? A. No.

Q. Who was Brown? A. Brown, a man who we give the whitewashing contract to.

Q. Is he around anywhere? A. In Passaic—I hope he is there today.

Q. And that man got that job on the tenth of October? A. He got that job when it was ready to whitewash.

Q. When? A. I can show you the check when I paid to him the money.

Q. When did he get the job? A. I got the check home.

Q. You haven't got the check here for that man Brown? A. No.

Q. Now, on the eighteenth of October, "Carmelo 2 days work $16"; was that too small to put in the book? A. What do you mean by "too small"?

Q. Was it not too little an item to put in that book? A. Because the laborers didn't show up the next day when I came there.

Q. Isn't the $16 too small an item to put in that book? A. That was the reason I didn't put it in.

Q. Was it too small—was the $16 too small to put in the book, or was it big enough to put in the book? A. I don't need such a thing; I am telling you the truth. I didn't intend such a thing at all.

Q. Was a $16 item large enough to put in that book? A. No such thing at all.

Q. Did you put it in because it is big enough? A. Because it is coming to the man.

Q. Why didn't you put in what was coming to the man for the piers? A. The man never came back.

Q. Then they don't owe you for the piers because it is not a credit; you don't claim any money for the piers you put in there in October, do you? A. No—I don't know.

Q. Do you claim any money for the piers that were put in that building? A. That comes under my original contract.

Q. Don't you know your partner Rabinowitz testified it was not in the contract? A. We have made other buildings—there was such things not in the contract, and I have done them. Such things as come under the law we have done. So we have done it here, because we got to do it so.

Q. You just said the piers were part of your contract—is that true or false? A. Of what contract?

Q. Is that true or false? A. Whether it is part or not a part, we always do it. There is there the piers under the same sewer pipe, and there was nothing in the contract about it at all.

Q. Will you state on the record whether the piers were part of your contract and were in your contract?

Judge Heisley: I submit he has answered it.

Mr. Weinberger: I submit he has not answered it—he is evading the truth and seeks to suppress his answer by being boisterous.

Judge Heisley: Answer the question.

A. I cannot tell you.

Q. Is that your answer? A. It is always.

Q. Do you know whether it is in your contract? A. We have always done it where we got to do it, and so we done it here, because we know you got to do it.

Q. Did anybody tell you to do it? A. Yes, I heard it in the office; I was present at the meeting. Eichenbaum and Slaff said so.

Q. When? A. In the early part of August, the meeting before the last.

Q. Who ordered it to be done? A. Mr. Slaff and Mr. Eichenbaum.

Q. What did they say? A. It had to be done on account of the Board of Health—they want to have those piers under the sewers.

Q. And he needed it immediately, didn't he? A. What is that?

Q. When did they ask you to do it? A. They needed it.

Q. How soon? A. As soon as the brick and everything is there we will be there to do it.

Mr. Weinberger: I ask that this book

be marked on these pages: July 12, October 10 and October 18.

Book so marked.

Q. When Eichenbaum and Slaff ordered any work done, did they give you a writing? A. For that extra work over those drains. There is never such a thing in the buildings that there was in every building.

Q. Just answer my question. Did you get any writing from Slaff and Eichenbaum for work to be done there? A. For those two drains.

Q. Did you ask for any writing for the piers? A. No.

Q. Your partner just informed you you weren't there, and is that true? Were you there or weren't you there? A. I was there in the office at that meeting.

Q. You heard him say you weren't there, just this minute? A. I don't know what he said. I am watching what you are talking to me.

Q. Did you expect to put up the piers for nothing? A. There was money coming to me, and to get that money I have to go back and finish my work.

Q. Did you expect to get paid for the piers or didn't you? A. All the money is coming to me.

Q. Mr. Schmidt, did you expect to get paid for the piers? You understand English. A. I had that coming to me.

Q. Answer my question. A. On account of needing that money, I am going there to make the piers.

Q. For nothing? A. So long as I get my payment.

Q. Did you or did you not expect to get paid for those piers? A. Just to get my payment.

Q. What payment? A. That was due on this $2,000.

Q. Don't you know that was paid long before? A. No.

Q. Show us when you were paid this money. A. My partner gave his word to make the piers.

Q. Show us when you were paid the $2,000? A. My partner gave his word he is going to do them piers.

Q. You just said you have the checks here showing the payments; can you produce them?

Judge Heisley: Have you made a statement of the payments you got?

The Witness: Yes, sir; October 16.

Q. That was what? A. That payment.

Q. What payment? A. October 16.

Q. 1924, May 16, $500? A. Yes, sir.

Q. July 19, $500? A. Yes, sir.

Q. October 16, $377? A. Yes, sir.

Q. And that sixteenth of October you say you got that payment from whom? A. Eichenbaum and Slaff—that was the money I had from Goldstein.

Q. That was a check or cash? A. Check.

Q. Is that all you got? A. There was one check before this, when I finished the sidewalk.

Q. Where is it? A. In here.

Q. How much was it?

Mr. Rabinowitz: $500.

Q. How much was it? A. $500.

Q. Why don't you have it in this book? A. Why don't I have it in this book.

Q. That is what I asked you; that is your book. When did you make it? A. Whenever I got paid.

Q. You got paid $500—the first payment; why didn't you have it in there? A. That is the first $500 when we finished the sidewalk.

Q. That is the first $500, that is not in the book; why didn't you put it in the book? Did you forget to put it in when you made this book up for this case? A. I didn't make up no book at all. That is the way the book is made—the way we were getting paid for it.

Q. Why didn't you put that in? A. I didn't put that in.

Q. Why not? (No response.)

Q. Is that the best answer you can give me—nothing? A. No, I want to think it over.

Q. You can't answer it, can you? (No response.)

RE-DIRECT EXAMINATION by Judge Heisley:

Q. You say there was a sidewalk? A. Yes, sir.

Q. Was that in your contract? A. Yes, sir.

Q. I understand that you received $500 for that sidewalk and you have not credited it here? A. No.

Q. You are not suing for the $500, are you? A. No.

Mr. Rabinowitz: No.

Q. You know that these two men got title to this property, don't you? A. Yes, sir.

Q. And since they got title to it they have per-

mitted you to go on there and spend hundreds of dollars of your money on their property, and they haven't paid you a dollar of it out of their own pocket? A. No.

Q. Isn't that so? A. Yes, sir.

Q. They never told you not to work, did they? A. No.

Q. And they never promised to pay yet, did they? A. No, sir.

Q. Even after the foreclosure was going on they allowed you to go there and work on their property? A. My partner came back to me and he said that the janitor said that he shouldn't come in there after that. When I came down with him, he said the same thing again. That was the first time—up to that time.

Q. The $377 that they paid you on October 16 was the money that poor old Goldstein had put up, isn't that so? A. Yes, sir.

Q. Mr. Weinberger asked you if it is not a fact that you did work or had work done there by this man on October 18th; he says after you filed your lien claim. I call your attention to this book and ask you if October 18th is not Saturday? A. Yes, sir.

Q. Doesn't this book say "the week ending October 18th"? A. Yes, sir.

Q. Saturday would be the eighteenth? A. Yes, sir.

Q. What days did these men work there? A. Just show me that book. What days? Monday and Tuesday.

Q. When did you say that you would do these piers? A. Whenever the bricks would be there.

Q. You said in substance that whether you got paid for those bricks—the work and the piers, or not, you would have done it for the purpose of getting the balance of the $2,000 that Slaff and Eichenbaum had to pay you; isn't that right? A. Yes, sir.

Q. And they did eventually pay you the $2,000? A. Yes, sir.

Q. But that, as I understand you, is all Goldstein's money? A. Yes, sir.

Q. But being spent for the purpose of improving the property to which these two men had gotten title? A. Yes, sir.

RE-CROSS EXAMINATION by Mr. Weinberger:

Q. The phrase, "week ending October 4," that covers the whole week, doesn't it? A. Yes, sir.

Q. July 12th—"week ending July 12," that would be only one day's work, on Tuesday? A. Yes, sir.

Q. That was not on the twelfth of July—that would be only a day in the week ending July 12? A. Yes, sir.

Q. On October 10th, that was the week ending October 10th? A. October 10th. This is a man I hired by day. I put him down what is coming to him—the whitewashing.

Q. Was the whitewashing work done before the tenth of October? A. Before the tenth?

Q. Was the whitewashing work done the week of the tenth? A. Yes, sir.

Q. So that it was completed on the tenth? A. The week of the tenth.

Q. So that it was completed by the tenth? A. Yes, sir.

Q. And paid for? A. Mr. Eichenbaum and Slaff paid the check to those people.

Q. Who ordered that work? A. Mr. Weinberger, you get people balled up.

Q. Are you balled up? A. I was not.

Q. Was this whitewash work given out by you or was that a separate job given out by Eichenbaum and Slaff? A. That work was given out by Rabinowitz and Schmidt and paid on those checks that was coming to those people, except this last balance.

Q. Brown did whitewashing in the week ending October 10th; was he paid by you? A. That balance he was paid by Eichenbaum and Slaff.

Q. So that the $75 was paid by Eichenbaum and Slaff? A. Yes, sir; and deducted from my last payment.

Q. So that the $75 was not paid by you? A. No, deducted of my money.

Q. Did you get $2,000 in cash? A. Yes, sir.

Q. Your book does not show; your book only shows $1,877. A. No, it does not show.

Q. $1,377? A. It does not show.

Q. Where is the balance? A. It does not show.

Q. Why not? A. That time I just forgot to put it in. That was a way—a time before.

Q. Did you get paid for your extra work? A. Yes, sir.

Q. Where is that? A. Not in.

Q. Who paid you? A. Slaff and Eichenbaum—Goldstein's money.

Q. Goldstein's money paid you for that? A. No, I cannot say whether that is Goldstein's money.

Q. Why did you say it, then? A. Anybody is liable to make a mistake.

Q. Is that another mistake? A. Before you think it over.

RE-DIRECT EXAMINATION by Judge Heisley:

Q. What do you want to say about this paper (showing witness a paper)? A. This is when they paid them that check.

Q. What does it show? A. Mr. Weinberger asked about who paid that money.

Judge Heisley: This shows their receipt, Mr. Weinberger, by Barthoff and Brown, of $75, for kalsomining and patching.

Q. This is a receipt from Slaff and Eichenbaum? A. Yes, sir.

Q. You produce here a receipt signed by Brown and another man, where they acknowledge that they received from Slaff and Eichenbaum the sum of $75 on a bill which was owing by you, Rabinowitz & Schmidt, for the kalsomining and patching at 72 Jefferson Street, Passaic. Now, I understand you to say—if this is not true, correct me—I understand you to say that although this money was paid by Slaff and Eichenbaum, it was charged up to your contract, is that right? A. Yes, sir.

Q. So you really paid it? A. Yes, sir.

Q. Although Slaff and Eichenbaum turned over the money or check to these people? A. Yes, sir.

Paper offered in evidence and marked.

Judge Heisley: I rest.

Mr. Weinberger: We rest.

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New Jersey Court of Errors and Appeals

Between

HARRY H. WEINBERGER, *et als.*,
Complainants-Appellants,

and

MAX GOLDSTEIN, *et als.*,
Defendants,

and

ALBERT PASKEVITCH,
Respondents.

Between

SIDNEY LOBSENZ,
Complainant,

and

MAX GOLDSTEIN, *et als.*,
Defendants,

and

HARRY H. WEINBERGER, *et als.*,
Defendants-Appellants,

and

ALBERT PASKEVITCH, *et als.*,
Respondents.

On Appeal from Order Admitting Parties Defendant in Foreclosure Suit.

Sat Below
WALKER, *C.*

APPELLANTS' BRIEF.

(Italics, etc., ours except where otherwise stated.)

The case is printed in two books—one containing the pleadings below and on appeal and exhibits and the other containing the testimony.

The Book containing the book of pleadings will be herein designated as "B. of P." Where page numbers are referred to without otherwise indicating they refer to pages in the book of testimony.

Statement of the Case.

This is an appeal from an order of the Chancellor made March 30, 1926 (B. of P., p. 14), admitting respondents, alleged lien claimants, parties to a foreclosure suit, upon an opinion of the Chancellor (B. of P., p. 4). The pleadings and the history of the litigation are contained in an abridgment (B. of P., p. 28).

On May 7, 1924, Weinberger and Hartstein filed a bill, D. 55/659, to foreclose a mortgage made July 19, 1923, by Max Goldstein and Lena Goldstein, his wife, to Weinberger, to secure the payment of the sum of $80,000 on July 19, 1924, an interest in the mortgage having been assigned to Hartstein.

On June 19, 1923, Goldstein had given a mortgage to Samuel Slaff for $35,000 which was subordinated to the Weinberger mortgage and Slaff was made a party defendant. On October 19, 1923, Goldstein had given a mortgage to the Superior Finance Corporation and it was made a party. On December 21, 1923, the lands and premises had been conveyed by Goldstein to Slaff and Eichenbaum, and they were made parties defendants.

The bill recited that on November 27, 1923, the Paterson Glass Company had filed a mechanics' lien against Goldstein and Weinberger and Hartstein, and it was made a defendant.

On or about the 23rd day of June, 1924, a bill was filed on behalf of Sidney Lobsenz, D. 56/119, to foreclose a mortgage prior to that of Weinberger and Hartstein and the same parties were made defendants as in the Weinberger and Hartstein foreclosure.

Decrees *pro confesso* were taken against the defendants in both suits, and, in the Weinberger suit, there was a report of a master, filed on the 20th day of October, 1924, from which it appeared that: there was due to Weinberger and Hartstein for principal and interest upon their mortgage the sum of $73,196.30; to the Superior Finance Company upon its mortgage the sum of $16,720; to Samuel Slaff, $37,776.67.

On the 27th day of September, 1924, before the Master, Mr. Heisley, representing the respondents, alleged lien claimants, appeared, and said:

> "I do not think that the agreement of December 4, 1923, precludes my clients from filing liens. They have not been made parties to this foreclosure and therefore their rights are not affected. In the present status of the suit, they have no standing before the Master, and *I conceive that their duty is to either apply to the Court for leave to be made parties and to file answers* setting up their alleged priorities *or else ignore* the Chancery proceedings and file their mechanics' liens."

In the Sidney Lobsenz case, D. 56/119 the Master's report was made on or about the 3rd day of October. The amount found to be due to Sidney Lobsenz was fixed at $20,000; to Harry H. Weinberger and Hartstein $73,776.75, to Samuel Slaff $37,660, and to the Superior Finance Company $16,666.66.

The hearing before the Master in this case took place on the 9th day of September, 1924. There was no appearance by Mr. Heisley or by any of the respondents, alleged lien claimants.

On or about the 14th day of October, 1924, in the case of Weinberger and Hartstein against Goldstein, 55/659, the Paterson Glass Company, which had been made a party defendant to that suit and against which a decree *pro confesso* had gone, presented its petition through Mr. Heisley to Vice-Chancellor Foster. In that petition it set up, in substance, that; prior to November 27, 1923, it had furnished material toward the construction of the building located on the lands described in the complainants' bill, and that there was due to it the sum of $990, for which sum it had filed a lien on November 27, 1923, in the Clerk's Office of Passaic County, and on the 27th day of November, 1923, had caused a summons to be issued; its contract for the furnishing of materials was made before the giving of the Weinberger mortgage; a considerable portion of the material was actually used in the construction of the building prior to the giving of the Weinberger mortgage and by reason thereof it had a prior lien; none of the moneys represented or intended to be secured by the Weinberger mortgage were used in the erection of the building and that therefore it had a prior lien; although the bill of complaint alleged the entire sum of $80,000 due a much less sum was, in fact, due. It made the same charges with respect to the Superior Finance mortgage. It noted the conveyance made on December 21, 1923, from the Goldsteins to Slaff and Eichenbaum and charged that the conveyance, although in form a deed, was really given as a mortgage and pledge to secure * * * the payment to Slaff and Eichenbaum of a debt due from

Goldstein to them. It set up (paragraph 15), that it had not filed an answer "because it believed, and it had been so advised by its attorney who filed said lien claim for it, that its interests in said mortgaged premises, by reason of the said lien, *were fully protected and safeguarded by the terms of a certain agreement made by and between various persons and itself, who had furnished material or labor for the erection of the said building,* as parties of the first part, thereto and the said Samuel Slaff and Samuel Eichenbaum as parties of the second part."

"16. That after the time limited by law and the rules of this Court for filing any answer had expired, to wit, *in the latter part of September, 1924, it became evident that the terms of the said agreement were not being fulfilled and that said agreement did not protect or safeguard petitioner's interest and that said agreement had, by its terms, become inoperative."* Shortly thereafter it was advised by its attorney that, due to the relations of its attorney with the various parties to the said agreement, he could not act for it, and that it thereupon obtained another attorney. It asked leave to file an answer in the nature of a cross bill.

On presenting that petition, the Vice-Chancellor advised an order, in case 55/659, requiring the parties to show cause on November 5th, why the prayer of the petition should not be granted.

On the 31st day of October, 1924, and more than a month after Mr. Heisley had appeared before the Master, a petition was presented by him, for and on behalf of Samuel Goldberg and Herman Simon and Isidore Simon, partners trading as Simon Brothers, setting forth that

they had furnished labor and material and that the mortgages of Weinberger and Hartstein, Slaff and the Superior Finance Corporation were subsequent and subject to their liens and that they had filed liens, Samuel Goldberg for $9,000, October 24, 1924, and Herman Simon and Isidore Simon, partners trading as Simon Brothers, one for $1,200 and one for $1,300, October 24, 1924; that they were not made parties defendants to the bill and they prayed to be made such. They did not attack the mortgages in any way except by the general statement that their liens were prior to the liens of the mortgages (B. of P., p. 45).

Upon the presentation of this petition the Vice-Chancellor made an order, requiring the parties to show cause on November 5, 1924, why the prayer of *that* petition should not be granted.

In November, 1924, in Weinberger and Hartstein *v.* Goldstein, *et als.*, 55/169, a petition was presented by Mr. Heisley on behalf of Albert Paskevitch, Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz & Schmidt, Ac-tin-o-lyte Roofing Co., a New Jersey corporation, and Joseph Leschinsky and Stanislau Karpinsky, partners trading as New Jersey Fire Escape Railing and Construction Company, alleging that they had furnished materials, etc., setting up the mortgages and alleging that, because the contracts for labor, etc., were made before the mortgages were given and, because the moneys, the payment of which were intended to be secured by said mortgages, were not applied to the payment of bills for labor and material used in the erection and construction of the said building, their liens were prior to the liens of the mortgages and they set up that the lien claim of Albert Paskevitch was filed November 1,

1924, for $7,598; Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz & Schmidt for $5,000, November 1, 1924; Actin-o-lyte Roofing Co., for $945.76, November 3, 1924, and the claim of the New Jersey Fire Escape Railing and Construction Co. for $2,250, November 1, 1924, and they set up that they were not made parties defendant to the bill and prayed to be made such (B. of P., p. 49).

Upon the hearing of the orders to show cause, heretofore referred to, affidavits were read before Vice-Chancellor Foster. There were several hearings.

Appellants insisted that they were entitled to take testimony upon the issues raised before the applying lien claimants should be let in as parties whereupon a reference was made and testimony was taken which is contained in a book of some 300 pages, and this testimony was all considered before the Chancellor made the order appealed from.

On or about February 1, 1925, a notice was given by Mr. Heisley, representing respondents that he would apply for leave to file an answer and an answer in the nature of a counter-claim "setting up in addition to those facts and allegations which are set forth in the form of a proposed answer heretofore served upon you, the facts set forth in the annexed supplemental petition," and also to insert in the counter-claim a prayer for additional relief, *i. e.* "(1) That the deed from Max Goldstein to Samuel Slaff and Samuel Eichenbaum *is a trust deed* and in the nature of a mortgage *for the benefit of the said petitioners,* respondents, and that Max Goldstein is the real owner of said property, and that said deed is subsequent to the rights of the said

petitioners in said property." "2. That the property embraced in the said mortgages shall be sold in parcels."

The supplemental petition set up *for the first time,* an agreement made on December 4, 1923, between respondents and Slaff and Eichenbaum. It recited the third and fourth paragraphs of that agreement, and charged, that, by reason of a violation of its terms by Slaff and Eichenbaum, respondents were relieved from its obligations (B. of P., p. 54).

A decree was made in the Sidney Lobenz suit which provided for the sale of the mortgaged property in parcels and for the payments of the amounts found to be due to Hartstein and Weinberger and the Superior Finance Corporation and Slaff, upon their giving a bond to the Chancellor in the sum of $40,000, conditioned to pay such moneys:

> "As the Court of Chancery, subject to appeal, may direct to be paid by the said Harry H. Weinberger and Benjamin A. Hartstein and Samuel Slaff and Superior Finance Corporation, to them or either of them as the result of the determination of the rights of the said Harry H. Weinberger and Benjamin A. Hartstein and Samuel Slaff and Superior Finance Corporation and the Paterson Glass Company, Inc. [and then follows the names of the alleged lien claimants] as between themselves, arising out of the mortgage of said Harry H. Weinberger and Benjamin A. Hartstein and the mortgages of Samuel Slaff and Superior Finance Corporation" (B. of P., p. 61).

The Master's report in the Sidney Lobsenz suit as to the amount due to Weinberger and Hartstein, Slaff and the Superior Finance Corporation was confirmed.

The property was sold and payments were made of the amount due to Weinberger and Hartstein, $77,395.14, and to Slaff, $35,343.29, less than the amount due him. These payments exhausted the fund.

It developed in the proofs upon which the order appealed from is based that: all of the respondents, contractors on the work, knew of the existence of the Weinberger and Hartstein mortgage; some time in the early winter of 1923 Goldstein, the owner, ran out of money, and conferences of the various contractors engaged on the work, including respondents, were held; Slaff and Eichenbaum represented two of the largest creditors; as a result of these conferences, on December 4, 1923, an agreement, to which all of the respondents were parties, was made; that agreement, among other things, provided (Ex. D. 2, p. 3):

> "It is expressly covenanted and agreed as follows:
>
> 1. That the parties of the first part hereto (including the alleged lien claimants, respondents) do hereby assign, transfer and set over unto the said Samuel Slaff and Samuel Eichenbaum, the said parties of the second part, all their right, title and interest in said property by reason of having furnished any labor or material or both so that whatever lien claim interest, right or liability of any kind that they may have against the said building *shall be and the same hereby is assigned, transferred and set over unto the said Samuel Slaff and Samuel Eichenbaum, the said parties of the second part hereto.*"
>
> "10. It is understood and agreed that the object and intention on the part of the parties of the first part in granting any conveying unto the parties of the second part their entire interest as expressed in paragraph 1 of this agreement is to *obviate, eliminate and extinguish any interest or claim that*

the said parties of the first part may have in the Jefferson street property above referred to by reason of their lien claims, so as to vest a complete fee simple interest in the said parties of the second part."

* * * * * *

"13. It is expressly covenanted and agreed that in the event that there shall be any breach or failure to comply with any of the terms and conditions of this agreement or of the terms and conditions of a bond of indemnity of even date herewith given by the parties of the second part to the parties of the first part or any of them, that then and in such event *the parties of the first part shall have the right to file a lien against the property above described, anything to the contrary herein contained notwithstanding;* provided, however, that in the event that any lien shall be filed by any of the parties hereto, that all right and recourse of the parties of the first part or any one of them upon the said bond shall be extinguished, and the parties of the second part shall be thereby released and discharged from any and all liability by reason of having entered into said bond."

Simultaneously with the making of this agreement a deed was given by Goldstein, the owner, to Slaff and Eichenbaum, and Slaff and Eichenbaum gave a bond to faithfully comply with the terms of the agreement of December 4th.

Slaff and Eichenbaum, after taking title, proceeded to complete the building; some of the alleged lien claimants, if not all, proceeded, in part at least, with the performance of their contracts under the terms of the agreement.

Immediately upon the filing of the Weinberger and Hartstein bill, on May 4, 1923, there were conferences of the lien claimants, including respondents, with Slaff and Eichenbaum. *Respondents requested Slaff and Eichenbaum to*

secure a stipulation from Weinberger that he would not go on with his foreclosure for a month. Weinberger acceded to this request, a formal stipulation being entered into on May 19, 1924, which extended the time to answer until July 20, 1924 (an extension of two months), and which provided:

> "* * * it being expressly understood and agreed that progress on the completion of the building shall proceed so that the building shall be entirely completed by July *1, 1924,* and in the event that the said building shall not be completed by July 1, 1924, that then and in such event the complainants may proceed with the foreclosure and the defendants shall have twenty days from July 1, 1924, to file such answer, plea, or make such objection to the bill of complaint as they may be advised."

Weinberger waited until after the expiration of the time fixed and then proceeded, no answers being filed.

It was contended, that the lien claims were not filed until more than four months after the last work had been done, and that, for the purpose of making it appear that work had been performed within the period, certain of the lien claimants, without orders or instructions and without right, pretended to perform certain work upon the building or to furnish certain materials for the express purpose of giving them the right to lien, and that their conduct amounted, in effect, to the fabrication of claims and was fraudulent.

Vice-Chancellor Foster died before he could determine the matter. He orally delivered tentative conclusions (B. of P., p. 71). The matter was then considered by the Chancellor and he decided it in the opinion reported in 4 N. J.

Advance Reports 567, and made the order appealed from. B. of P., p.

The Contentions Below.

Respondents relied upon section 58 of the Chancery Act, 1 C. S. of N. J., p. 432, which, so far as material, reads as follows:

> "In any suit for the foreclosure of a mortgage * * * all persons claiming an interest in or incumbrance or lien upon such property, by or through any conveyance or * * * *lien* * * * which, by any provision of law, *could be recorded* * * * or filed in any public office in this state, and which *shall not be so recorded* * * * *or filed at the time of the filing of the bill in such suit,* shall be bound by the proceedings in such suit, so far as the said property is concerned, in the same manner as if he had been made a party to and appeared in such suit, and the decree therein made against him as one of the defendants therein; but such person, upon causing such conveyance, or * * * lien, * * * to be recorded * * * or filed, as provided by law, may cause himself, to be made a party to such suit by petition, in the same manner as is by this act provided in the case of persons acquiring an interest in the subject-matter of a suit after its commencement. * * *"

Section 29, which is the section referred to in section 58, 1 C. S. of N. J., p. 421, reads as follows so far as material:

> "Where, *after the filing of the bill,* any person shall acquire such an interest in the subject-matter of the suit as would have made him a proper or necessary party, if such interest had been possessed by him at the time of the commencement of the suit, it shall not be necessary to file a supplemental bill to make such person a party, but the same may be done by petition filed in

the cause, and which petition, verified by oath, shall state the interest of such person, and the manner in which the same was acquired; and a copy of the petition and notice of the application shall be served on the complainant or his solicitor, etc., * * * and the chancellor may thereupon, *if it appear that such person is entitled to be made a party to the cause, and has acquired his interest from some party to the same, order that he be made a party thereto; but such person shall be bound by all orders and proceedings in the cause against the party whose interest he has acquired, and the cause shall not be delayed by the admission of such party, except for such time as it may seem to the chancellor to be necessary to take the evidence regarding such claim.*"

And section 30, 1 C. S. of N. J., p. 422, reads as follows:

"In all causes in which it is provided in this act that a person may be made a party by petition after the commencement of the suit, such person may be made a party either before or after an interlocutory or final decree therein, *but such decree shall not be opened or set aside thereby,* and in all cases where the person so made a party does not dispute the claim of the complainant, or any part of it, the complainant, or any defendant whose prior right is not disputed, shall not be delayed by the admission of such party; but his claim shall be fully heard and investigated in disposing of the residue of the subject-matter of the suit or of the proceeds thereof."

And Chancery Rule 6 which reads as follows:

"Any person may be made a defendant who either jointly, severally or in the alternative is alleged to have or claim an interest in the controversy, or in any part thereof, adverse to the complainant; or whom it is necessary or proper to make a party for the complete determination or settlement of any question involved therein."

And Rule 13 which reads as follows:

> "13. The court may determine the controversy as between the parties before it, where it can do so without prejudice to the rights of others.
>
> Where a complete determination cannot be had without the presence of other parties the court may direct them to be brought in, but in all cases where it shall appear to the court that persons who might otherwise de deemed proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.
>
> Where a person, not a party, has an interest or title which the decree will affect, the court, on his application, shall direct him to be made a party."

The objections taken by appellants to the making of the order applied for, as made in the court below, were as follows:

> "1. The lien claimants are barred by reason of the signing of the stipulation of May 19, 1924, and the circumstances surrounding the making of that stipulation and by their laches from making the present application."
>
> "2. By virtue of the agreement of December 4, 1923, the alleged lien claimants abondoned their lien claim if they did not, the lien claims were held by Slaff and Eichenbaum during the foreclosure proceedings of Weinberger and Hartstein; Slaff and Eichenbaum were parties to the suit; the alleged lien claimants must come in, if at all, under the provisions of section 29, and if they do, they are, by the express language of the statute, bound to the same extent as Slaff and Eichenbaum would be bound at the time they are permitted to inter-

vene; therefore, they cannot be permitted to answer."

"3. The alleged lien claimants have not shown that the events set forth in paragraph 13 of the agreement of December 4, 1923, which, in terms, permits them to file liens upon the happening of certain events, have, in fact, occurred."

"4. The proofs show that the last work was performed and the last materials furnished by the various lien claimants more than four months prior to the filing of their lien claims and that some of them deliberately went to the building after their work had been completed or abandoned and without orders or instructions and without right pretended to perform certain work upon the buildings or furnish certain materials for the express purpose of giving them the right to lien and that their conduct amounted in effect to the fabrication of claims and was fraudulent, and that statements were made by them and positions taken in the proceedings in this cause contrary to the facts known to them, and that their conduct is so grossly inequitable as that, under the cases, they will not be heard in whatever may be their strict legal right."

"5. As ordinary judgment creditors the alleged lien claimants cannot come in. If they do come in as such they are bound by all of the proceedings before they come in and it is therefore useless for them to come in."

"6. If they are permitted to intervene their defences should be strictly limited.

(a) No advantage should be permitted to be taken of the payment of $5,000 by Slaff and Eichenbaum in accordance with the terms of the agreement of December 4, 1923, the benefit of which was received by three of the alleged lien claimants. The practical construction put upon the agreement by the parties should bind them.

(b) They should be prevented from pleading usury.

(c) Weinberger and Hartstein should not be compelled to follow the money advanced upon the mortgage into the property."

Conclusions of the Court.

The Court, construing sections 29, 30, of the Chancery Act, 1 C. S. of N. J., 431, 422, in conjunction with sections 3, 11 and 13 of the Chancery Act of 1915, and Chancery Rules 6 and 13, held that respondents were within the statute and might be admitted, and that they were not bound by the proceedings theretofore taken in the causes. The Court further held that, although it appeared in the evidence that respondents, by the agreement of December 4, 1923, had assigned their rights to Slaff and Eichenbaum and that Slaff and Eichenbaum were parties defendant to the cause and had, at the request of respondents, obtained a stipulation extending the time to answer, respondents were not bound by the proceedings in the cause which had been taken against Slaff and Eichenbaum. The Court also held that their right to file liens was not extinguished by the agreement of December 4, 1923, and, if there had been a breach of that agreement, their rights to file liens were revived. It declined to, in anywise, limit the matters which they might set up.

THE LAW.

Respondents relied upon Section 58 of the Chancery Act, 1 C. S. of N. J., p. 432.

That section applies only to those persons who have an encumbrance or lien upon the property which, by any provision of law, "*could be recorded, registered, entered or filed in any public*

office in this State, and which shall not be so recorded, registered, entered or filed at the time of the filing of the bill in such suit."

The statute is not designed to permit parties, who have acquired an interest in the subject-matter of the suit after the filing of the bill, to intervene as parties.

Certainly at *the time of the filing of the bill* these alleged lien claimants did not have any liens which could be filed for, at least at *that* time, the contract by, which they had waived their liens *was in full force and effect,* and they had, in fact, transferred their liens to the owners of the fee, and therefore the liens had become merged with the fee. Whether at any time, after the making of such a transfer, the situation could be changed so as to re-establish the liens is a matter which is considered under another head. *During the continuance of the contract and while these liens were in the possession and ownership of the owners of the fee, the alleged lien claimants had no liens which could be filed.*

To come within the provisions of section 29, 1 C. S. of N. J., p. 421, the person must have acquired such an interest in the subject-matter of the suit, subsequent to the filing of the bill, as would have made him a proper or necessary party, if such interest had been possessed by him at the time of the commencement of the suit, and it must appear to the Chancellor, before an order is made, that such person *"is entitled to be made a* party to the cause, *and has acquired his interest from some party to the same."*

The lien claimants are not within this provision of the statute for they have not acquired an interest in the subject-matter of the suit *after the filing of the bill* from any person, a party to

the cause, unless it be that, upon the breach of the contract by which they parted with their liens to the owners of the fee, they become entitled to file liens and that they acquired that interest from the owners of the fee, by virtue of the breach of the contract. If this be true, then, under the express provisions of the statute, they are "bound by all orders and proceedings in the cause against the parties whose interest he has acquired" and, at the time of the application in the present case, an interlocutory decree had been made against the owners of the fee, the persons from whom, if any, the alleged lien claimants acquired their interest, and the Master had reported.

The alleged lien claimants are within neither section 29 nor section 59, and this will appear upon a consideration of the testimony.

But if they are, before they may be made parties it must appear to the Chancellor "that such person is entitled to be made a party to the cause," and the testimony discloses that they are not entitled to be made parties for they have no rights as against any of the parties to the cause.

Not being within the provisions of sections 29 or 58, if they are to be heard at all, they are to be heard as upon an appeal to the discretion of the court, and the equities of the case required the denial of their application, or at least such a strict limitation of the defenses to be made by them as that it would be useless for them to intervene.

Even if they are within the language of sections 29 or 58, it is insisted that the equities of the case must be considered because, *in effect*, these alleged lien claimants *were* parties to the cause and had the opportunity either themselves,

or through their trustees, to file answers and they *deliberately permitted the opportunity to go by and they are in inexcusable laches.*

In *Conrad* v. *Mullison, et al.,* 24 N. J. E. 65, a case arising under section 29, the Chancellor said:

> "Again, it is urged that the petitioner must, before he can be admitted to answer, or permitted to file a cross-bill, submit his proposed answer or bill to the court, that it may judge of it. The practice does not require it. In the cases cited by counsel, the applicants were defendants *in excusable laches,* asking to be allowed to answer. In such a case as this, all that can reasonably be required is, that the applicant shall, by petition, specifically state such facts, duly verified, as will satisfy the court that he has a bona fide claim to such an interest as entitles him to be made a party to the suit."

This was a case within the very words of the present section 29.

Vice-Chancellor Green, in the case of the *Mutual Life Insurance Co.* v. *Schwab,* 51 N. J. E. 204, at p. 212, stated the effect of an application to be made a party defendant when the applicant comes within the provisions of the statute, as follows:

> "If he is to be admitted as party defendant, he comes in under the statute, which declares *that he shall be bound by all orders and proceedings in the cause against the party whose interest he has acquired;* and further, *that if an interlocutory or final decree has been entered in the cause, it shall not be opened or set aside.*"

In *Hewitt* v. *Montclair Ry. Co.,* 25 N. J. E. 100, there was a foreclosure; subsequent to the commencement of the proceedings Guest purchased the lands, "subject to all prior liens and en-

cumbrances," at a sale, made under an order of the Court by trustees appointed in proceedings instituted against the company to prevent frauds by incorporated companies; there were two foreclosure suits to which Guest asked to be admitted as a party; one was on a first mortgage which had proceeded to decree *pro confesso* with the usual order of reference; the other had proceeded to final decree; the petitioner asked to be admitted as a defendant to both suits, to the end that he might have an opportunity of contesting the claims in both suits. His application to be admitted to the second suit was denied, the Court holding that he was bound by the final decree. He was admitted as party defendant to the first suit, but

> "He is bound, however, by all the proceedings in that suit up to the time when he acquired his title; *he will, therefore, not be permitted to answer.* He may be present at the taking the account, and may avail himself of all defences of which the company could avail themselves after interlocutory decree *pro confesso* against them and order of reference."

This order was affirmed by this Court, 27 N. J. E. 479.

If the claimants in the case at bar are within the statutory provisions at all it would seem that, under the circumstances of this case, they are barred from filing an answer or a cross bill, if *Hewitt* v. *Montclair Ry. Co.* states the law.

If they are within the provisions of the statute it is because, by reason of the breach of the contract between themselves and the owners of the fee, by which contract the owners of the fee acquired their liens, they are entitled to receive back their liens, and therefore may be said to have acquired an interest *pendente lite* from the

owners of the fee, but if this is so, *their alleged claims were represented by the owners of the fee*, who were defendants in the foreclosure suit, and, as in the Hewitt case, a decree *pro confesso* had been made and an order of reference. All that they would be entitled to do would be to be present at the taking of the account and avail themselves of all defenses of which the owners could avail themselves "after interlocutory decree *pro confesso* against them and order of reference."

The owner of the fee, under such cimcumstances, could not avail himself of the defense of usury or of any other defense now sought to be interposed by the alleged lien claimants.

Vice-Chancellor Howell in *Shepard* v. *N. J. Consolidated Water and Light Co.*, 73 N. J. E. 578, at p. 584, considered sections 29 and 58, and, it is clear from what he there said, that he thought they are confined to very narrow limits.

With respect to the 29th section, he said:

> "Its design is to provide an easy and inexpensive method by which the person who succeeds to or acquires *pendente lite* an interest in the subject-matter of a suit may take the place of his predecessor under the issues existing in the suit and just in the state or condition in which those issues are when he comes in, but it *is not its design to give him the right to raise new and different issues from those existing at the time he comes in.*"

And with respect to the 58th section, he says:

> "The fifty-eighth section relates to the admission to foreclosure suits of persons claiming under conveyances or liens, the evidence of which is not recorded."

Kirkland's Administratrix v. *Kirkland*, 26 N. J. E. 276, was a case in which the rights of the

petitioner had accrued before the commencement of the foreclosure there under discussion, and all that the Court held was that a person, who had the right to an instrument which could be recorded at the time of the commencement of the suit, should not be deprived of the benefit of the statute where the instrument was improperly withheld and it is significant that in that case, the equity was with the petitioner because the deed, which was the instrument of title, was withheld by the "complainant's attorney."

The case does not militate against our contention that the provisions of the 58th section of the statute are confined to those cases where, *at the time of the filing of the bill,* the person applying has an unrecorded conveyance or lien. If he has no such conveyance or lien he must come in, if at all, under the 29th section, which is designed to provide for those cases where the rights are acquired subsequent to the filing of the bill, and, as argued above, in the instant case, the parties are not within the purview of that section.

Again, with respect to the 58th section of the statute, this Court in *Pancoast* v. *Geishaker,* 58 N. J. E. 537, said:

> "This general equitable rule has been in great measure abrogated in New Jersey by section 58 of the Chancery Act (Gen. Stat. p. 387) but that statute *does not reach parties who possess rights not evidenced by any instrument legally capable of being recorded, registered,* entered or filed in any public office in the State, and therefore is inapplicable to the present case." (Italics mine.)

Vice-Chancellor Grey in *Stiles* v. *Galbreath,* 69 N. J. E. 222, which case the Chancellor cited below, seemed to think that materialmen who had inchoate liens at the time of the commencement

of a foreclosure suit, which had not yet advanced to the state of filed claims, might apply to make themselves parties defendant to the cause upon filing their liens. The Vice-Chancellor indicated in that opinion that the situation existing *at the time of the filing of the bill* must be considered for, to come within the statute, the person must have an inchoate lien *at that time.* Having such inchoate lien he has the right to file a lien claim. He is, therefore, within the very words of the statute.

But the question here is—*at the time of the filing of the bill did the materialmen have any inchoate lien?* They did not, for they had, by their contract hereafter noted, *transferred these liens to the owners of the fee,* and had thereby merged them, but whether they were merged or not, *at the time of the filing of the bill they had no claim of any kind, nature of description whatever.*

Even where the parties are within the very words of the statute (section 58), the Chancellor said, in *Raymond* v. *Post,* 25 N. J. E. 447:

> "The provisions of that act (section 58), *require diligence and action on the part of those who may have claims* against mortgaged premises, which may be recorded, registered, entered or filed in any public office in this State, to protect their interest in those premises in case of proceedings for foreclosure."

Section 18 of the *Chancery Act,* 1 C. S. of N. J. 416, referring to absent defendants, provides that, upon a petition being filed, within a certain length of time, by an absent defendant, he "may be permitted to appear and answer the complainant's bill." The language used is equivalent to that used in sections 29 and 58, for, in section 29, it is provided that the Chancellor

may thereupon * * * order that he be made a party thereto, and in section 58, that the petitioner may cause himself to be made a party to such suit by petition in the same manner as is by this act provided in the case of persons acquiring an interest in the subject-matter of a suit, etc.

As to section 18, the Court, in *Cresse* v. *Security Land Investment Co.*, 54 N. J. E. 447, after quoting from *Horner* v. *Corning,* 28 N. J. E. 254, in which this Court had said as follows:

> "The act simply declares it lawful for the court, under the circumstances named, to issue the supersedeas. Whether it shall or not issue depends not on the will of the party, but on the discretion of the court, to be exercised in view of all the circumstances of the case. I think a party who invokes he aid of the court under this statute should show, at least, surprise and merits."

said—

> "I think that in this case it was incumbent upon the Bethlehem Iron Company to unequivocally allege and establish that it was never served with notice of the suit in the manner prescribed by the eighteenth section of the Chancery Act, so that it actually received the notice of the suit, or to allege surprise in some other form which will justly call for this court's interference in its behalf, and also that the defense it proposes to interpose is possessed of merit."

In *Davis* v. *Sullivan,* 33 N. J. E. 569, which was an application to open a final decree in order to let a party in to answer and defend, he having acquired an interest in the property pending the suit, this Court said:

> "A party who, having acquired an interest during the pendency of the suit, applies, under the chancery act, to be made a

party in order to move to open the decree, must present, in his petition, *a case of substantial equity.*" (Italics mine.)

And on page 573:

"In construing this enactment in Guest *v.* Hewitt, 12 C. E. Gr. 479, this court decided, in substance, that a petitioner under it must show that he would be advantaged by being made a party in respect to the matter touching which he seeks to intervene."

The order of the Chancellor denying the right to intervene was affirmed.

If the alleged lien claimants are not within sections 29 or 58, they can obtain no relief in this suit for they are strangers to the litigation and cannot be admitted.

Shepard v. *N. J. Consolidated Water and Light Co.*, 73 N. J. E. 578;

Mutual Life Insurance Co. v. *Schwab*, 51 N. J. E. 205.

It is insisted that, if they can be heard at all, the same rules apply as if they had been parties and were appealing to the discretion of the Court to open a decree *pro confesso*. The rules with respect to the exercise of that discretion are settled and substantially are that parties will not be let in unless they show a meritorious equitable case and are free from laches, and they will not be permitted to plead disfavored defenses such as usury, and the Court will require, before permitting them to intervene, that they should set up the defenses that they intend to make.

Hall v. *Urquhart*, 11 N. J. E. 318;
Emery v. *Downing*, 13 N. J. E. 59;
Miller v. *Held*, 11 N. J. E. 25;
Boyer v. *Boyer*, 77 N. J. E. 144;
Sandford v. *Wellborn*, 85 N. J. E. 577;
O'Neill v. *Linowitz*, 92 N. J. E. 179.

In *O'Neill* v. *Linowitz,* 92 N. J. E. 179, Vice-Chancellor Buchanan said:

> "Remain the questions as to whether defendant shows that he has in fact a defence or defences, and whether such defences or any of them, are valid, meritorious and equitable. Not for every defence, though valid, which might have been pleaded within time, will leave be given to be set up after decree *pro confesso.* Where defendant answers not as of right but by leave of the court, he will not be permitted to set up other than equitable defences. Vandeveer *v.* Holcomb, 22 N. J. E. 555."

And the Vice-Chancellor in that case considered the defences sought to be set up and denied the application.

And the present Chancellor said, in *Vineland* v. *Maretti,* 93 N. J. E. 513:

> "This leave will be denied upon the principle that the court will not grant leave to plead disfavored defences after time for answering has expired. (Campion *v.* Kille, 15 N. J. E. 476; Vandeveer's Admr. *v.* Holcomb, 22 N. J. E. 555), nor grant leave to amend answers already filed so as to raise such defences. Campion *v.* Kille, *supra;* Bohme *v.* Rall, 51 N. J. R. 541, 546."

Campion v. *Kille,* 15 N. J. E. 476, was a case in this Court in which the Court said that after the time to answer had expired, the Court would not permit usury to be set up.

The Chancery Act of 1915 and the rules adopted in pursuance thereof have no application in this case.

Chancery Rules 6 and 13, have no application. Rule 6 is intended to provide the class of persons who may be made defendants to a bill when originally filed. It is designed to permit the

joinder of all parties who may jointly, severally or in the alternative or who may be necessary or proper to make a party for the complete determination or settlement of any question involved in the suit. It does not pretend to deal with the right of a person to make himself a party to a cause after bill filed.

Rule 13 is designed to permit the Court, on its own motion, to direct parties to be brought in where it finds in the course of the litigation that a proper conclusion cannot be arrived at without the presence of such a party. There is no such situation in the case at bar.

Sections 58, 29 and 30, of the Chancery Act, 1 C. S. of N. J., pp. 421, 422, are specific in their application to the rights of parties to intervene in pending litigation where interests have been acquired subsequent to the filing of the bill, etc., and these statutes are not inconsistent with Sections 3, 11 and 23 of the Chancery Act of 1915, nor with Rules 6 and 13 promulgated in pursuance thereof and are not, therefore, repealed or affected by the later legislation. It is submitted that it is upon these sections of the statute that respondents must rely.

THE FACTS.

The Weinberger and Hartstein mortgage was made on July 19, 1923. All the alleged lien claimants knew of its existence. Sometime in the early winter of 1923, Goldstein, who owned the property, ran out of money and conferences were held of the various contractors, participated in by all of the alleged lien claimants. See the testimony of Harry Loeb (pp. 15, 19), the attorney who represented the alleged lien claimant, Paterson Glass Company, Inc., and who, in No-

vember, 1923, on its behalf, had filed a lien. The filing of this lien brought the matter to a focus. Slaff, representing the Yellow Pine Lumber Company, was one of the largest creditors as was also Eichenbaum, representing the Passaic Plumbing and Supply Company. Loeb was selected as the attorney to draft the agreement between the creditors and represented them all (Loeb, p. 14; Slaff, p. 44; Eichenbaum, p. 84; Grossman the general manager of the alleged lien claimants, Simon Bros., p. 113). As the result of these conferences, the agreement of December 4, 1923, to which agreement all the alleged lien claimants were parties, was executed. That agreement (Ex. D. 2, p. 3) made between the alleged lien claimants and other contractors as parties of the first part and Samuel Slaff and Samuel Eichenbaum as parties of the second part, provided:

> "Whereas, it is desired herewith, that all of the said parties of the first part *shall assign and transfer all of their right, title and interest to said building of Max Goldstein* (that is the building under foreclosure) which they have by reason of having furnished labor or material or both, and those of the parties of the first part who shall not yet have completed their contracts for the completion of their work on said building shall proceed to complete said building upon the terms and conditions hereinafter expressed. * * *"
>
> "It is expressly covenanted and agreed as follows:
>
> 1. That the parties of the first part hereto (including the alleged lien claimants) *do hereby assign, transfer and set over unto the said Samuel Slaff and Samuel Eichenbaum,* the said parties of the second part, *all their right, title and interest in said property by reason of having furnished any labor or material or both* so that whatever lien claim in-

terest, right or liability of any kind that they may have against the said building *shall be and the same hereby is assigned, transferred and set over unto the said Samuel Slaff and Samuel Eichenbaum, the said parties of the second part hereto.*"

2. To the effect that those creditors who had not yet completed their contracts should proceed

"expeditiously and with all possible dispatch towards the completion of their work to the end that the said property shall be promptly finished in accordance with their respective contracts entered into as aforesaid."

"3. That those parties of the first part who shall have labor or material to supply to said building which shall not be embraced in their contracts with the said Max Goldstein shall proceed to furnish the necessary labor or material or both requisite to complete the said building, and that such parties shall be preferred creditors, in that they shall be paid from the first moneys that come into the hands of the parties of the second part hereto, except Samuel Goldberg, Rabinowitz & Schmidt, and New Jersey Fire Escape and Railing Co."

"4. This agreement shall not become binding and affecting unless and until there shall be deposited with Harry Loeb five thousand dollars to assure those of the parties of the first part referred to in the preceding paragraph hereof that they will be paid promptly upon the completion by each of the creditors of their respective work."

The fifth paragraph provides that the parties shall be paid a pro rata dividend quarterly on account of their debts.

"7. That it is further understood and agreed that when Samuel Slaff shall have received an amount equal in proportion to that received by the other creditors hereto,

not less than 76% of $27,000 dollars, that he shall simultaneously therewith deliver duly endorsed for cancellation the bond and mortgage made by Max Goldstein and wife to him in the sum of $35,000, which mortgage is now of record. * * *"

"8. *Said Samuel Slaff herewith agrees and binds himself that he will procure an extension for the payment of the mortgage of $15,000 made by the said Max Goldstein to the Superior Finance Corporation for a period of three months from the present expiration thereof.*"

"9. The parties of the second part shall furnish a bond in the sum of $100,000, conditioned upon the faithful performance and compliance by them with the terms, stipulations and conditions expressed in this agreement."

"10. It is understood and agreed that the object and intention on the part of the parties of the first part in granting and conveying unto the parties of the second part their entire interest as expressed in paragraph 1 of this agreement is to *obviate, eliminate and extinguish any interest or claim that the said parties of the first part may have in the Jefferson street property above referred to by reason of their lien claims, so as to vest a complete fee simple interest in the said parties of the second part.*"

* * * * * * *

"13. It is expressly covenanted and agreed that in the event that there shall be any breach or failure to comply with any of the terms and conditions of this agreement or of the terms and conditions of a bond of indemnity of even date herewith given by the parties of the second part to the parties of the first part or any of them, that then and in such event *the parties of the first part shall have the right to file a lien against the property above described, anything to the contrary herein contained notwithstanding,*

provided however, that in the event that any lien shall be filed by any of the parties hereto, that all right and recourse of the parties of the first part or any one of them upon the said bond shall be extinguished, and the parties of the second part shall be thereby released and discharged from any and all liability by reason of having entered into said bond."

The fourteenth paragraph provides that the parties may proceed against Goldstein, the person who owned the property, for any deficiency.

Simultaneously with the making of this agreement a deed was given by Goldstein, the owner of the property, to Slaff and Eichenbaum, and they gave a bond (p. 22) in which it is recited,

"Whereas, the said parties hereto relinquished *and waived their right to liens* against said property to said Samuel Slaff and Samuel Eichenbaum, upon the terms and conditions expressed in a certain agreement bearing date December 4, 1923, between the said parties of the second part and said Samuel Slaff and Samuel Eichenbaum, in consideration that the latter (Slaff and Eichenbaum) should administer the said building with all due regard for the interest of the said parties of the second part.

Now, the said Samuel Slaff and Samuel Eichenbaum, do covenant:

1. That they will receive and collect all the rentals and profits of said building and pay all charges and disbursements imposed upon said property.

2. That they will faithfully comply with the terms and conditions expressed in a certain agreement bearing date December 4, 1923, with the parties of the second part hereto and also that certain agreement between the parties of the first part and one Max Goldstein.

3. That they will sell and convey said property for any sum not less than the sum

of $181,000, one hundred eighty-one thousand 00/00 dollars.

4. That upon the compliance by said Samuel Slaff and Samuel Eichenbaum of the terms and stipulations set forth in this bond and in the said agreement referred to above, that this Bond of Indemnity shall thereupon become null and void, anything to the contrary contained herein notwithstanding."

The mortgage of Slaff is referred to in the agreement of December 4th. The mortgage of Weinberger and Hartstein had been placed upon the property in July of 1923, and payments had been made by Weinberger for labor and material going into the building. Inquiry was made before the agreement of December 4, 1923, as to the amount of money advanced by Slaff and by Weinberger and Hartstein (Grossman, pp. 147 to 151).

Slaff and Eichenbaum, after taking title proceeded to complete the building. Some of the alleged lien claimants, if not all, proceeded, in part at least, with the performance of their contracts under the terms of the agreement. Then came, on May 4, 1924, the filing of the bill of complaint by Weinberger and Hartstein, to which bill one of the lien claimants, the Paterson Glass Company, which had actually filed a lien, was a party.

Immediately the lien claimants took the position that they would no longer proceed and conferences were held between them and Slaff and Eichenbaum. Goldberg, one of the alleged lien claimants, testifies to these conferences (p. 208) as follows:

"Q And the reason for those meetings was that there was a foreclosure going on and you wanted to try and get the men to hold the foreclosure up? A Yes.

Q The creditors wanted to see if they couldn't hold that off to give them a chance to sell the property? A Yes.

Q How often did you meet, Mr. Goldberg? A I didn't keep no record.

Q There were a lot of meetings? A Three or four. * * *

Q You did know of the foreclosure and discussed it at these different meetings? A Yes.

Q And all of the men refused to go to work unless this was struck out, because they would lose their money? A Anybody had a chance to work.

Q Most of them refused to work? A No, sir; everybody had a chance.

Q Didn't you openly say you wouldn't finish the job unless you were protected well with money? A I don't remember if I did. * * *

Q The fact is that Mr. Slaff and Mr. Eichenbaum did go to see Mr. Weinberger to hold off on the foreclosure? A Yes.

Q And they reported back that Mr. Weinberger would wait? A Yes.

Q And he did wait? A Yes."

Green, the representative of the Paterson Glass Company, an alleged lien claimant, testifies to substantially the same thing (pp. 240, 241).

Slaff testifies (pp. 42, 43) that: after the making of the contract of December 4, 1923, the lien claimants did not proceed with their work, as that agreement required; finally the Weinberger foreclosure came on, and then they would not proceed at all; there were meetings held (p. 43); it was finally agreed that Slaff and Eichenbaum should get a stipulation from Weinberger that he would not go on with his foreclosure for a month (pp. 44, 45); in accordance with their request, Slaff and Eichenbaum approached Weinberger and obtained such a stip-

ulation (p. 44); still they did not go on with the work. Slaff says (p. 65) that they held the property for the creditors.

Eichenbaum says (pp. 85, 86) that: he and Slaff were made grantees in the deed at the suggestion of the creditors and that they were trustees for the creditors; the alleged lien claimants did not proceed with their work and stopped completely when the Weinberger foreclosure was started (p. 87); the foreclosure was discussed at meetings of the creditors (p. 89), at which all the alleged lien claimants were present (p. 89); there was a committee appointed to devise ways and means to dispose of the property. Minutes of one of the conferences were produced (Exhibit D. 17, p. 91), at which representatives of the alleged lien claimants were present, and the following is an extract:

> "Mr. Green motioned & seconded that a comm. of 7 be appointed by the Chair purpose devisings ways and means whereby the sum of $157,000. be raised or sell the new and old building for the price of $250,-000.00."

Every alleged lien claimant was present (p. 92). Slaff, Eichenbaum and Grossman were appointed to go to Weinberger and ascertain the amount due upon his mortgage (p. 92); they were instructed to get an extension from Weinberger (p. 92); they obtained information as to what was due upon it (p. 96); Slaff and Eichenbaum were acting as trustees for the creditors (p. 97).

At the time of these conferences, and when the creditors were negotiating with Weinberger for an extension of time, etc., they knew that the Slaff mortgage was "phoney." (Green of Paterson Glass Company, pp. 245, 246.)

They also knew in August, at least, of the claim of usury in the Weinberger mortgage (Green, p. 240).

Rabinowitz of Rabinowitz and Schmidt, one of the lien claimants, testifies that: he knew of the foreclosure of the Weinberger and Hartstein mortgage in May, 1924 (p. 257); there were meetings of creditors held and—

"Q Nobody wanted to work, though, because of the foreclosure? A Yes, sir.

Q Nobody got a buyer and nobody got a mortgage? A Yes, sir.

Q Then after the meetings were held the creditors decided that it looked very bad and that the foreclosure was going on, and they were going to lose everything—that is what it looked like? A Yes, sir.

Q When you say it looked like that, why did you want to do any more work? A Because we were trying to get together and find out when can we do something.

Q You say you couldn't get together—you saw the buildings could not be sold, why did you do more work? A *Mr. Slaff said we could all go to Weinberger and try to lay off that mortgage.*"

On May 19, 1924, in the Weinberger suit, a stipulation (p. 18) was signed, reading as follows—

"It is stipulated, consented and agreed by and between the solicitors of the complainants herein and solicitor for the defendants mentioned below, that the time to answer, plead or make any objection to the bill of complaint herein, shall be and the same is hereby extended to July 20th, 1924; (This was an extension of two months), it being expressly understood and agreed that progress on the completion of the building shall proceed so that the building shall be entirely completed by July 1st, 1924, and in the event that the said building shall not be completed by July 1st, 1924, that then

> and in such event the complainants may proceed with the foreclosure *and the defendants shall have twenty days from July 1st, 1924, to file such answer, plea, or make such objection to the bill of complaint, as they may be advised.* Dated, May 19, 1924."

This stipulation was signed by the solicitor of complainants and by Loeb, as solicitor for dedenfants Max Goldstein, Lena Goldstein, his wife; Samuel Slaff, Fannie Slaff, his wife; Samuel Eichenbaum, Anna Eichenbaum, his wife; Superior Finance Corporation, Paterson Glass Company, a New Jersey corporation.

The testimony heretofore referred to indicates beyond possibility of dispute that *in getting the stipulation Slaff and Eichenbaum acted at the request of and for the benefit of all the alleged lien claimants.*

It is quite true that Mr. Loeb, the solicitor (p. 16), testifies that he signed only for Slaff and Eichenbaum and that he thinks that the putting in of the other names was an inadvertence. Although representing the Paterson Glass Company in the filing of the lien claim, he says that he was not their attorney in the foreclosure suit, although he was their general attorney (p. 17). He says that when the subpoena for the Paterson Glass Company was brought to him by Green in that suit he advised him—

> *"I did not think an answer should be filed, because the amount of his interest did not warrant him to contest the foreclosure* * * * and furthermore, I thought that the fact that Messrs. Slaff and Eichenbaum were handling the situation as provided by that agreement, it wasn't necessary, and for that reason an answer was not filed, and I never was retained to file an answer."

While he says that he did not sign the stipulation for the Paterson Glass Company (al-

though apparently he did) and that he only represented Slaff and Eichenbaum, he testifies (p. 29) *that all of the creditors knew of the foreclosure and that the matter was discussed by him with the representative of the Paterson Glass Company,* and he also remembers a discussion with Goldberg, an alleged lien claimant, and that there was something said about refusing to go on with the work on account of the foreclosure (p. 30). He says (p. 35) that he did not think the Paterson Glass Company should file an answer. He again insists that he did not obtain this stipulation for the other lien claimants, but, he says (p. 30) that it was at the request of Slaff and Eichenbaum that he got it. On page 16 he says that he signed it at their request.

ARGUMENT.

I.

The lien claimants are barred by reason of the signing of the stipulation of May 19, 1924, and the circumstances surrounding the making of that stipulation and by their laches from making the present application.

From the testimony hereinbefore set forth, coming from the mouths of the representatives of the alleged lien claimants, it appears, beyond possibility of dispute, that: they had full notice of the foreclosure proceedings instituted by Weinberger and Hartstein at or about the time they were instituted; because of the institution of those foreclosure proceedings they failed to go forward with the work which they were obliged to perform under the agreement of December 4, 1923; they had full knowledge, at the time, of the alleged usury in the Weinberger

and Hartstein mortgage and also knew, at the time, of the claim that but $27,000 had been advanced on the Slaff mortgage; they considered Slaff and Eichenbaum, the holders of the legal title, as their trustees, representing them; they had meetings with Slaff and Eichenbaum and it was agreed at those meetings that Slaff and Eichenbaum should go to Weinberger and Hartstein and get an extension of the time to answer in the foreclosure suit; in response to their request Slaff and Eichenbaum did go to Weinberger and did arrange for an extension of time to answer until twenty days after July 1, 1924; in pursuance of the request of all of these alleged lien claimants, through Slaff and Eichenbaum, Loeb, the solicitor, secured and signed the stipulation of May 19, 1924, which extended their time to answer for twenty days from July 1st, 1924, or to July 20th, 1924.

Although, technically, these alleged lien claimants, with the exception of the Paterson Glass Company, were not parties to the record, they had full knowledge of the proceedings and expressly authorized Slaff and Eichenbaum to obtain an extension of time for them; while not parties to the record themselves, *the alleged lien claims,* which they now seek to assert, were parties to the record because Slaff and Eichenbaum had all the claims by assignment, the alleged lien claimants having expressly assigned the claims to Slaff and Eichenbaum by the agreement of December 4th, 1923, and there is no claim that at the time of the institution of the foreclosure proceedings and of the extension of time to answer there was any breach of the agreement on the part of Slaff and Eichenbaum. There was no repudiation of that agreement and it was recognized as in full force and effect

as late as August, 1924, at which time there was the meeting, the minutes of which were kept by Grossman (p. 120), at which a committee was appointed for the purpose of attempting to dispose of the mortgaged property.

The general rule with respect to *res adjudicata* is found in 34 *Corpus Juris, title "Judgments,"* Sec. 1420, p. 999—

> "Although one is not nominally or formally a party to an action, he will be concluded by the judgment therein if he was represented, *as to his rights or interests in the subject matter, by a party legally entitled to represent him, or who actually conducted the prosecution or defense on the behalf and for the benefit of such persons.* * * *."

And with respect to trustee and *cestui que trust,* although the general rule is that the *cestui que trust* is not concluded by a judgment against his trustee, nevertheless

> "it has been held that the beneficiary will be bound by the judgment in a suit prosecuted or defended by the trustee with his knowledge and consent, or at his request or with his participation."

34 *Corpus Juris,* title "Judgments," Sec. 1423, p. 1003.

And with respect to assignor and assignee the rule is—

> "Where, however, the assignor has timely notice of the pendency of a suit against the assignee and fails to defend, he may be bound by the judgment therein."

34 *Corpus Juris,* title "Judgments," Sec. 1442, p. 1019.

In this case, not only were Slaff and Eichenbaum the trustees of the legal title of the prop-

erty for the alleged lien claimants, but they were also assignees of the alleged lien claimants, and they acted, in intervening in the suit and obtaining the stipulation of May 19th, 1924, at the request and on behalf of the alleged lien claimants, and the alleged lien claimants had not only timely notice of the pendency of the proceedings but notice likewise of the alleged defects in the mortgages sought to be foreclosed.

With this knowledge they deliberately let the time to answer go by and deliberately refrained from filing their lien claims. They did not file their lien claims until on or about the 24th of October, 1924, three months and more after the time to answer had expired and after the report of the Master in the foreclosure suit had been made (the lien claim of the Paterson Glass Company had been filed before December 4th, 1923, but never prosecuted) and they did not apply to the court of chancery for relief until the last part of October, 1924.

And this, although Mr. Heisley, representing them, had appeared before the Master on September 27th, 1924, and had made statements before the Master at that time. He said his clients were not parties to the foreclosure suit and could not be heard and that he conceived it to be their duty *either* to apply to be made parties *or ignore the proceedings* and file mechanics' liens (B. of P. 30). He took no steps to make the present applying lien claimants parties to the record until October 31st, 1924 (B. of P. 33), more than a month after he had stated it was their duty to elect either to apply to be made parties or *ignore* the proceedings.

Even if these alleged lien claimants are within the very language of the statute, section 58, they

have not complied with the rule as stated by the Chancellor in *Raymond* v. *Post*, 25 N. J. E. 447—

> "The provisions of that act (section 58) *require diligence and action on the part of those who may have claims against mortgaged premises, which may be recorded, registered, entered or filed in any public office in this state, to protect their interest in those premises in case of proceedings for foreclosure.*"

It cannot be that a person who has an unrecorded lien may, with knowledge of the pendency of foreclosure proceedings, deliberately permit those proceedings to go on until decree, and then file his lien and come in and open the decree.

If he have an unfiled lien he is bound to act with reasonable diligence after he has knowledge of the foreclosure proceedings.

If the alleged lien claimants are here under the discretionary power of the court to open a decree *pro confesso* they have not shown the elements which must be present before the court will act. They have shown no surprise, nor have they shown merits, and neither merits, without surprise, nor surprise without merits will suffice; both must be present.

If the alleged lien claimants had not be represented in the suit by Slaff and Eichenbaum, if they had not intervened by requesting Slaff and Eichenbaum, for their benefit, to secure the extension which Slaff and Eichenbaum did secure, if they had simply known of the foreclosure proceedings, they would be barred for they have not acted with reasonable diligence, nor do they show surprise.

The case is stronger against them where it appears that they were not only, in fact, repre-

sented by the holders of the legal title, who held it for their benefit and by the assignees of their alleged lien claims, but that they actually consulted with these representatives and others, and instructed their representatives to get the extension of time which Slaff and Eichenbaum obtained from Weinberger and Hartstein.

II.

By virtue of the agreement of December 4, 1923, the alleged lien claimants abandoned their lien claims. If they did not the lien claims were held by Slaff and Eichenbaum during the foreclosure proceedings of Weinberger and Hartstein; Slaff and Eichenbaum were parties to the suit; the alleged lien claimants must come in if at all, under the provisions of section 29, and if they do, they are, by the express language of the statute, bound to the same extent as Slaff and Eichenbaum would be bound at the time they are permitted to intervene; therefore, they cannot be permitted to answer.

By the express terms of the agreement of December 4th, 1923 (Exhibit D. 2, p. 3), by paragraph 1, the alleged lien claimants set over to Samuel Slaff and Samuel Eichenbaum—

> "* * * all their right, title and interest in said property by reason of having furnished any labor or material or both so that whatever lien claim interest, right of liability of any kind * * * *is assigned, transferred and set over* unto the said Samuel Slaff and Samuel Eichenbaum."

By section 10 it is provided—

> "It is understood and agreed that the object and intention on the part of (alleged lien claimants) of the parties of the first part in granting and conveying unto the parties of the second part their entire in-

terest as expressed in paragraph 1 * * * is to *obviate, eliminate and extinguish any interest or claim that the said parties of the first part may have in the Jefferson* Street property above referred to by reason of their lien claims, so as to vest a complete fee simply interest in the said parties of the second part."

Slaff and Eichenbaum were the owners of the fee as trustees for the lien claimants and there was a merger.

The right to assign a lien, it would appear, has never been decided in the courts of this State.

Luce on Mechanics Lien, p. 126.

We do not consider it necessary, for the purposes of this case, to consider the question as to whether there can be an assignment of an inchoate lien for, if there cannot be, the effect of the agreement of December 4th, 1923, was to *obliterate the liens.* It may be that the assignment conveyed no rights to the assignees, but the alleged lien claimants had, by their act, parted with their liens. Having parted with their liens, they have no right to perfect them. It is immaterial whether the assignees had the right to perfect them.

Moreover, the effect of the conveyance of the liens to the owners of the fee was to merge the liens in the fee. This is not only what the effect would be at law but is the expressed intent of the agreement subject to what we shall hereafter advert to.

And it was the intent of the parties, as disclosed by the testimony, for Mr. Loeb, the attorney who drew the agreement and represented the Paterson Glass Company and, in the matter

of the drawing of the agreement, represented *all* of the alleged lien claimants (see p. 13) said—

"A The understanding was plain, that the agreement was to terminate the litigation; that was the understanding among all the creditors that participated in the negotiations."

And (p. 17) with respect to the failure to file an answer and to prosecute the lien of the Paterson Glass Company—

"And furthermore, I thought that the fact that Messrs. Slaff and Eichenbaum were handling the situation as provided by that agreement, it wasn't necessary, and for that reason an answer was not filed, and I never was retained to file an answer."

(P. 32)—

"* * * I think the discussions lasted for some days, and finally the negotiations culminated in the agreement of December 4, 1923. So that when that agreement was entered into, I felt in my mind, and I am confident that all the creditors felt then, that we had avoided the expense of litigation, we were through with litigation."

(P. 35)—

"A Yes, but I will also add by saying that my understanding was, and everybody's was, that when we entered into that agreement, that terminated the litigation. (Agreement of December 4th, 1923.)

(P. 36)—

"* * * I want to say that my clients did not intend that I should proceed with the lien claim."

(P. 37)—

"A Yes, my clients never dreamed that I should ever proceed with the lien claims, and I never dreamed it."

(P. 37)—

"A It was intended that litigation should stop when that agreement was made."

(P. 40)—

"A I have already answered that, by saying that the agreement was the end of it, so far as I was concerned."

And the terms of the bond indicated the intent to waive the lien, for it recites (p. 22):

"Whereas, the said parties hereto (the alleged lien claimants) relinquished and waived their right to liens against said property to said Samuel Slaff and Samuel Eichenbaum, upon the terms and conditions expressed in a certain agreement bearing date December 4, 1923. * * *"

The lien of the Paterson Glass Company was dismissed by the Passaic Circuit Court for lack of prosecution. (Opinion of Judge Newman, Exhibit D. 16, p. 79.)

There is a provision in the agreement of December 4, 1923, paragraph 13—

"It is expressly covenanted and agreed that *in the event that there shall be any breach or failure to comply with any of the terms and conditions of this agreement or of the terms and conditions of a bond of indemnity of even date herewith* given by the parties of the second part to the parties of the first part or any of them (the alleged lien claimants) that *then and in such event the parties* of the first part shall have the right to file a lien against the property above described, anything to the contrary herein contained notwithstanding."

It is there provided that if a lien is filed the bond of indemnity given by Slaff and Eichenbaum shall be discharged.

Having expressly waived and relinquished their liens and assigned whatever rights they might

have to file liens to the owners of the fee, it is hard to say that there can be reserved in the same agreement the right to, upon the happening of certain contingencies, resurrect the liens.

But, if that right may be reserved, as was attempted in paragraph 13, *until the event* has occurred which permits the resurrection of the liens, the inchoate rights of lien, if they existed at all, *were held by Slaff and Eichenbaum and they were parties to the litigation,* and the alleged lien claimants were bound by all of the proceedings in the cause.

Hewitt v. *Montclair Ry. Co.,* 25 N. J. E. 100, affirmed 27 N. J. E. 479;

Mutual Life Insurance Co. v. *Schwab,* 51 N. J. E. 205.

When these alleged lien claimants attempted to come into this litigation, there had been a reference to a master and a report by him and, under the cases, the alleged lien claimants could only be permitted to set up what their predecessors in the title, *i. e.,* Slaff and Eichenbaum, as assignees of their lien claims, would have been permitted to set up *after decree,* and the allegee lien claimants do not ask to set up anything which a party would be permitted to set up after decree.

However, that may be, there can be no question but that, before the alleged lien claimants can be permitted to intervene in this suit, they must show that the event has happened which permits them to avoid the effect of the agreement of December 4, 1923, and this brings us to

III.

The alleged lien claimants have not shown that the events set forth in paragraph 13 of the agreement of December 4, 1923, which, in terms, permits them to file liens upon the happening of certain events, have, in fact, occurred.

This question, we urge, should have been determined by the Court below before the alleged lien claimants were permitted to intervene because, if they apply to come in under the provisions of sections 29 or 58, it must appear to the Chancellor, by the express terms of the statute, that they have a right to come in and if they apply to the court under any discretionary power of the court to permit parties to intervene, of course they must show that they have the right to come in.

In the ordinary case it may be that, by filing a lien, a lien claimant establishes a status which permits him to make application to come in, but this would only be so if it was conceded that the inchoate lien existed at the time of the filing of the bill which is denied here. The filing of the lien claim is not a judgment. There has been no adjudication in any court that the liens are properly filed nor is this a case where the adjudication of whether the liens are properly filed or not should be at law. The alleged lien claimants have, by their petition, set up their right, to wit, as lien claimants with filed liens. The mortgagees respond that they have no right to the liens, and that the liens are improperly filed.

This is not a case where the alleged lien claimants should be permitted to intervene, and then appellants be permitted to attack their liens in the Chancery litigation, as the court

below thought, for their right to intervene, *in the first instance,* depends upon their interest in the subject matter and whether they have an interest in the subject matter depends *not only upon their right to file the liens but also upon the existence of their inchoate liens at a time which would permit them to attack the mortgages.*

It is, therefore, necessary, we urge, for the court to consider and determine, if it holds that by the terms of the agreement of December 4, 1923, the liens may be resurrected, and if it further holds that the effect of the resurrection of the liens is to relieve the assignors of the binding effect of the proceedings against the assignees, during the time that the assignees held the claims, whether the events, set forth in paragraph 13 of the agreement which gives the right to the alleged lien claimants to resurrect the liens have, in fact, occurred, and to determine this question resort must be had to the testimony.

The original petitions filed by the alleged lien claimants (Exhibits 2, 3, B. of P. pp. 45, 49) did not set up the claim of the alleged lien claimants as to the happening of the events which would give them the right to file liens under the provisions of section 13 of the agreement of December 4, 1923. The supplemental petition (Exhibit 3½, B. of P., p. 54) purported to schedule the events which happened which, under the provisions of section 13, they allege would give the alleged lien claimants the right to file liens, and this supplemental petition (not filed until February 9, 1925) was filed after there had been hearings upon the original petitions and after the mortgagees had taken the position before Vice-Chancellor Foster which they now take.

The claims of the alleged lien claimants are that,

1. In violation of the 3rd and 4th clauses of the agreement Slaff and Eichenbaum paid moneys which they had received as rents and also the $5,000, or a large part thereof, mentioned in paragraph 4, to persons who had furnished labor or material or both, which was embraced in the contracts of such persons with Goldstein, the owner, and had not paid such rents and moneys to such persons who had supplied labor and material which was not embraced in the contracts of such persons with the said Goldstein (Paragraph 1 of the supplemental petition (Exhibit 3½, B. of P., p. 54).)

2. (And this refers only to the alleged lien claims of Simon Bros.) That: on May 18, 1924, Slaff and Eichenbaum entered into a contract with Simon Bros. to furnish electric fixtures, said fixtures were not embraced in the contract of Simon Bros. with Goldstein; by virtue of said contract Simon Bros. were entitled to the benefits of paragraphs 3 and 4; notwithstanding the fact that Slaff and Eichenbaum had collected many thousands of dollars of rent and had appropriated a large sum of the said sum of $5,000 mentioned in paragraph 4, they had not paid Simon Brothers anything on account of their said contract, but they had paid large sums of money out of said sum of $5,000 to Goldberg, Rabinowitz & Schmidt and New Jersey Fire Escape Railing and Construction Company and others, to the great detriment and loss of said Simon Brothers.

3. (This also has reference to Simon Bros. alone.) That Slaff and Eichenbaum agreed to pay $1,200 to Simon Brothers from the first

money that come to the property, whether by rent or mortgage.

4. (And this applies to all lien claimants.) That under the terms of the agreement Slaff and Eichenbaum were to make pro rata distribution of dividends and had not done so, but on the contrary had misappropriated the money "and paid to other parties of their own selection their claims in full in great detriment to your petitioners' rights."

5. That under the terms of the bond Slaff and Eichenbaum were required to pay "all charges and disbursements imposed upon said property" and that "They have utterly failed to pay any of the taxes assessed upon said property, or of interest accruing upon the said mortgage."

6. That by paragraph 3 of the bond it was provided that Slaff and Eichenbaum would sell and convey the property for any sum not less than the sum of $181,000, but by said affidavit it appeared they had not sold said property, nor had they made any efforts so to do.

7. That the bond stated that Slaff and Eichenbaum should administer the said building with all due regard for the interests of the petitioners (the alleged lien claimants) and others mentioned in said agreement, but that they had done absolutely nothing in performance of that promise but "on the contrary, have neglected their said duties and have obtained title in their own name to the said property and are collecting the rents and profits thereof for their own benefits."

We will consider these allegations in their order.

A.

Slaff and Eichenbaum have not violated the third and fourth clauses of the agreement by paying moneys which they had received as rents and also the $5,000 or a large part thereof, mentioned in paragraph 4, to persons not entitled thereto.

By the third paragraph of the agreement of December 4, 1923 (p. 3), it is provided—

> "that those parties of the first part (the alleged lien claimants) who shall have labor or material to supply to said building which shall be embraced in their contracts with the said Max Goldstein shall proceed to furnish the necessary labor or material or both requisite to complete the said building, and that such parties shall be preferred creditors, in that they shall be paid from the first moneys that come into the hands of the parties of the second part hereto, except Samuel Goldberg, Rabinowitz & Schmidt, and New Jersey Fire Escape and Railing Co. (three of the alleged lien claimants represented by Mr. Heisley).
>
> "4. This agreement shall not become binding and effecting unless and until there shall be deposited with Harry Loeb Five thousand dollars to assure those of the parties of the first part referred to in the preceding paragraph thereof that they will be paid promptly upon the completion by each of the creditors of their respective work."

Counsel for the lien claimants construes these clauses as, in effect, requiring that the $5,000 should be deposited for the purpose of securing the creditors *other than* Goldberg, Rabinowitz and Schmidt and the New Jersey Fire Escape and Railing Co., whereas the meaning of those paragraphs, as construed by the parties, is that the $5,000 was to be paid *to* Goldberg, Rabinowitz and

Schmidt and the New Jersey Fire Escape and Railing Company, three of Mr. Heisley's clients, and, as matter of fact, that $5,000 *was* immediately paid to those three clients of Mr. Heisley to the knowledge of all parties concerned and a practical construction was put upon the agreement and that construction was never questioned.

Slaff testifies (p. 61) under cross examination by Mr. Heisley—

> "Q You spoke about $5,000 being put up; who put up the $5,000? A Mr. Goldstein.
> Q Slaff and Eichenbaum did not? A No.
> Q And that money was to be devoted to the payment of bills that should be contracted to complete the building, isn't that right? A No, this $5,000 is to go to three people only; $2,000 to Goldberg, $2,000 to Rabinowitz & Schmidt and $1,000 to the New Jersey Fire Escape & Railing Company." Pages 57 and 58.

Turning, now, to the testimony of Goldberg, one of the alleged lien claimants, we find him testifying (p. 220) in response to inquiry as to payments made to him—

> "Q You are not answering my question. A And $2,000 received by signing December 4, 1923, the contract."

And see the testimony of Rabinowitz (p. 260),

> "Q They (Slaff and Eichenbaum) finally made a promise to you to pay you $2,000 if you would do certain work? A That is the money.
> Q They promised to pay you $2,000 if you would do certain work? A Yes, sir."

And Slaff testified (p. 46)—

> "A Mr. Goldberg (one of the alleged lien claimants) did not go to work on this building until a $2,000 payment would be given, which our agreement calls for.
> Q Did he receive that payment? A He did."

On page 59 he again testified to the payment of $1,000 to the New Jersey Fire Escape and Railing Company out of the $5,000 provided for in paragraph 4.

Slaff testified (p. 71)—

> "Q My question is whether you paid any of the parties to the agreement of December 4, 1923, for any work which they had performed before December 4, 1923, except the payments which were made to Samuel Goldberg, Rabinowitz & Schmidt and the New Jersey Fire Escape and Railing Company, out of the $5,000? A No, we did not."

There is no testimony that the understanding of the parties as to the construction to be put upon paragraphs 3 and 4 of the agreement of December 4, 1923, was not that the $5,000 was to be paid to these three alleged lien claimants, now represented by Judge Heisley, and, acting upon that construction, the parties actually paid the $5,000.

The practical construction put upon the agreement by the parties is binding.

There is no testimony that Slaff and Eichenbaum paid any moneys to any of the parties to the agreement of December 4, 1923, for any work which they had performed before December 4, 1923, other than the $5,000 *as expressly provided for in the agreement.* There is no evidence to support the allegation of an alleged violation by Slaff and Eichenbaum of the terms of the third and fourth clauses of the agreement as alleged in paragraph 1 of the supplemental petition.

What Slaff and Eichenbaum actually did with the rents received by them will be considered under a separate head.

B.

There was no violation of the third and fourth paragraphs of the agreement so far as Simon Brothers are concerned.

In paragraph 2 of the supplemental petition the claim is made, on behalf of Simon Brothers, who had entered into a contract with Slaff and Eichenbaum to furnish electric fixtures for the building for the sum of $1,200 after the agreement of December 4, 1923, and which work was not included in their contract existing prior to December 4, 1923, that Slaff and Eichenbaum violated their duty under the third and fourth paragraphs of the agreement in making the payment of $5,000 to Goldberg, Rabinowitz and Schmidt and the New Jersey Fire Escape and Railing Company.

This is a repetition of the first claim with special reference to Simon Bros. and the reason for this is that those who were entitled to be protected by the third and fourth paragraphs of the agreement are those who furnished labor and material, subsequent to December 4, 1923, which was not included in their contracts existing prior to December 4, 1923, and we think that the testimony shows that *none* of the alleged lien claimants are in this position except Simon Bros. claiming for the installation of these electric fixtures.

None of the other alleged lien claimants could, therefore, take advantage of the alleged breach by Slaff and Eichenbaum set up in paragraph 1 of the supplemental petition so that, as matter of fact, the breach alleged in the second paragraph of the supplemental petition is a reiteration of that alleged in the first paragraph, *and the alleged breaches set up in both paragraphs*, one and two, are, in their effect, *confined to Simon Bros.*

The answer to the contention of the lien claimants, Simon Bros., made in paragraph 2 of the supplemental petition, is the same as that heretofore made with respect to the allegations of paragraph 1, *i. e.*, that this $5,000 was paid in strict accordance with the understanding of the parties.

Grossman, the representative of Simon Bros. witnessed the signatures to the agreement of December 4, 1923 (p. 3), and was one of the moving parties in getting it signed. There is no contention that he did not think that the $5,000 was to be paid as, in fact, it was paid and the contract which Simon Bros., subsequently made with Slaff and Eichenbaum for the furnishing of the electric fixtures subsequent to December 4, 1923, indicates that Simon Brothers knew that they had no claim upon this $5,000 for that agreement provides, p. 116 that—

> "The above moneys ($1,200) (consideration to be paid to Simon Brothers) be paid from the first moneys that come to the property whether *by rent or mortgage.*" (Nothing said as to the $5,000 which Judge Heisley now says was a fund particularly applicable to this claim.)

And a further clause is contained in the agreement (p. 116) as follows—

> " * * * it being expressly understood and agreed that the parties of the second part (Simon Bros.) are to be paid out of any moneys that may come into their hands (Slaff and Eichenbaum) *either from rent of Jefferson street building or from the proceeds of any mortgage loan* that they may raise on the said property in accordance with agreement made between the creditors of Max Goldstein and the parties of the first part (Simon Brothers) hereto, which agreement bears date December 24, 1923, and is in the possession of Harry Loeb."

It is true Grossman says that he did not know that this clause was in the agreement at the time it was signed (p. 116). He says it was added after it was signed, but he also says that he received a copy of the contract and retained possession of it (p. 117). The statements contained in this contract indicate that Simon Bros. did not consider that the $5,000, provided for in paragraph 4 of the agreement of December 4, 1923, was for their protection.

The inconsistent position taken by the alleged lien claimants, with respect to this matter of the payment of this $5,000 is what led Vice-Chancellor Foster, although he had no opportunity to read the testimony, to indicate in his memorandum (B. of P., p. 71) that if the parties should be permitted to defend they should be limited in their defense—"and particularly so in the case of Samuel Goldberg, Rabinowitz & Schmidt and the New Jersey Fire Escape Company, relating to the disbursement of Five Thousand dollars."

But we go further than contending that only these *three* alleged lien claimants who received the benefit of this $5,000 should be limited in their defenses. It is apparent, from the testimony, that this $5,000 was paid to these three lien claimants in strict accordance with the agreement, at least as construed by all of the parties at the time, and the payment of the $5,000 in the manner in which it was paid was, therefore, not a breach by Slaff and Eichenbaum of any of the conditions of the agreement and could not, therefore, form a basis for the repudiation by the lien claimants of the agreement for the purpose of resurrecting their liens.

C.

There was no breach of any duty on the part of Slaff and Eichenbaum towards Simon Brothers with respect to the payment of the $1,200.

The third paragraph of the supplemental petition has reference only to the claim of Simon Brothers and just what the contention is with respect thereto does not appear. The supplemental petition merely alleges that, according to the agreement made with Simon Brothers on May 6, 1924, $1,200 was to be paid to Simon Brothers out of the first moneys which came to Slaff and Eichenbaum from the rents of the property.

There is no breach alleged in the supplemental petition, with respect to this agreement, on the part of Slaff or Eichenbaum. We assume that counsel contends that Slaff and Eichenbaum did not, in accordance with that agreement, pay to Simon Bros. $1,200 "from the first moneys that come to the property whether by rent or mortgage."

The contract between Slaff and Eichenbaum and Simon Bros. was made May 16, 1924 (p. 142), or almost a year after the Weinberger and Hartstein and Slaff mortgages had been placed upon the property. Under the Mechanic's Lien Act, the lienor has no priority over a mortgage unless the mortgage be recorded subsequent to the commencement of work upon the building under the contract under which the lien arises.

The mortgages of Weinberger and Hartstein and Slaff having been recorded almost a year prior to the commencement of any work under this contract it is hard to conceive how Simon Bros. can, by virtue of any pretended lien that they may have for work performed under *that*

contract, assume to attack the mortgages, even if Slaff and Eichenbaum did not carry out their agreement with Simon Bros., which is denied.

The result is that Simon Bros. are not in a position to attack either the Weinberger and Hartstein or the Slaff mortgages by virtue of any claim that they may have under this contract.

Nor does the violation by Slaff and Eichenbaum of any obligation which they were under to Simon Bros. by virtue of the contract of May, 1924, permit Simon Bros. to repudiate the agreement of December 4, 1923.

It is true that it is provided by the third paragraph of that agreement that—

> "Those parties of the first part (the alleged lien claimants including Simon Bros.) who shall have labor or material to supply to said building which shall not be embraced in their contracts with the said Max Goldstein shall proceed to furnish the necessary labor or material or both requisite to complete the said building, and that such parties shall be preferred creditors, in that they shall be paid from the first moneys that come into the hands of the parties of the second part hereto (Slaff and Eichenbaum)."

But, at the time of the execution of the agreement of December 4, 1923, and it is *that* time which is to be looked at, Simon Bros. were not within that class.

But if they were within that class all that the agreement of December 4, 1923, means is that those who were obliged to furnish labor or material necessary to complete the building, beyond their contract obligation existing as of December 4, 1923, were to be paid for the labor and material so furnished before the alleged lien claimants were paid for such labor and material as

was furnished under contract obligations existing as of December 4, 1923, and when the contract provides that they should be paid from the first moneys that should come into the hands of the parties of the second part it means, as will be hereafter considered, moneys which are available for such payment, and the proofs show that no such moneys became available.

There is not a scintilla of evidence that Slaff and Eichenbaum paid those who were not preferred creditors. There is no evidence that any alleged lien claimant was paid on account of labor and material furnished under contract obligations existing on December 4th, 1923.

There is another provision, however, in the agreement between Simon Bros. and Slaff and Eichenbaum, reading as follows (p. 116)—

> "It is expressly covenanted, stipulated and agreed that the parties of the first part (Slaff and Eichenbaum) in entering into this agreement with the parties of the second part (Simon Bros.) do not assume any personal liability for the payment of the money to be paid hereunder, it being expressly understood and agreed that the parties of the second part are to be paid out of any moneys that may come into their hands either from rent of the Jefferson street building or from the proceeds of any mortgage loan that they may raise on the said property in accordance with agreement made between the creditors of Max Goldstein and the parties of the first part hereto, which agreement bears date December 24, 1923, and is in the possession of Harry Loeb."

Slaff and Eichenbaum were the holders of the fee as trustees for the creditors, including Simon Bros. No moneys came into their hands from rent or mortgages which could be used for the

payment of Simon Bros. There was no personal responsibility of Slaff and Eichenbaum. By the terms of the contract Simon Bros. agreed to accept payment in accordance with the agreement of December 4th, 1923. If Slaff and Eichenbaum did not have moneys to pay other creditors, neither did they have money to pay Simon Bros.

The effect of permitting Simon Bros. to file a lien for this $1,200, claimed to be due under the contract of May, 1924, would be to permit them to file a lien against themselves. What they were entitled to, and all that they were entitled to, was a preference in payment if there were monies available for payment.

By their contract they expressly relegated themselves to the rents or to the proceeds of any mortgage. They now desire to disregard this provision of the contract and hold the property.

But a complete answer to their claim as against the mortgagee is that this contract was entered into more than a year after the mortgages were placed upon the property and recorded.

D.

Slaff and Eichenbaum did not violate the provisions of paragraph 5 of the agreement of December 4th, 1923, which provides for a pro rata dividend.

The allegation of the 4th paragraph of the supplemental petition is that although Slaff and Eichenbaum collected thousands of dollars of rents, "they have not paid a dividend of any kind, nor have they paid any money whatever

to any of the petitioners, but, on the contrary, have misappropriated the money and paid to other parties of their own selection their claims in full in great detriment and injury to your petitioner's rights."

There is no evidence whatever to support this claim.

We do not know what counsel can be referring to unless he is harking back to the payment in December, 1923, of the $5,000 to Goldberg, the New Jersey Fire Escape and Railing Company and Rabinowitz & Schmidt.

A record of all rents collected was kept (pp. 104, 105). It was exhibited and a detailed statement was given (p. 104). It was proven by Miss Goldman who kept the books (p. 104). All receipts and disbursements are shown on Exhibits D. 14 and D. 15 (pp. 104, 105) (Exhibit D. 15, B. of P., p. 76).

Goldberg, one of the alleged lien claimants, was, on March 14th, 1923, paid $252.50 (Exhibit D. 6, p. 46) for work stated to be outside of his contract, he having claimed to have *completed* his contract at that time (p. 46).

Rabinowitz and Schmidt, one of the alleged lien claimants, was paid on October 8th, 1924, $240.20 (Exhibit D. 7, p. 48) for work, *outside of their contract,* necessary to do to complete the building.

Cohen was paid $158 on November 13th, 1924, for work upon the building necessary to complete it (Exhibit D. 8, p. 53).

Chanin was paid $35 on September 12, 1924, for work necessary to complete the building, *which should have been performed by the al-*

leged lien claimants, Rabinowitz and Schmidt (Exhibit D. 9, p. 52).

Katz was paid $216.62 (Exhibit D. 11, p. 55) on October 16th, 1924, to complete work which *should have been completed by Simon Bros.* (alleged lien claimant) *under their contract of May 16th, 1924* (p. 54).

Ac-Tin-o-Lyte Roofing Company (alleged lien claimant) was paid $48.63 on July 23rd, 1924, for work not included within their contract in existence on December 4th, 1923, *they having completed their contract long before that time* (Exhibit D. 12, p. 56).

The New Jersey Fire Escape and Railing Company (alleged lien claimant) was paid $145 for work on October 30th, 1924 (Exhibit D. 13, p. 57) for work outside of their contract obligations in existence December 4th, 1923 (p. 57).

All of these payments were proper under the third paragraph of the agreement of December 4th, 1923, which provided that those who should furnish labor and material, not contemplated by their contractual obligations existing on December 4th, 1923, should be preferred. *And everyone of these alleged lien claimants with the exception of Simon Bros., it would seem, got such payments, with respect to the making of which they now complain.*

There was no provision in the contract of December 4th, 1923, as to *dividends* upon claims which might arise for work and labor performed not contemplated by contractual obligations existing on December 4th, 1923. With respect to those claims Slaff and Eichenbaum were entitled to make payment as the work was done, and as they could.

All that Slaff and Eichenbaum were obliged not to do was to pay any of the parties to the agreement of December 4th, 1923, *for work performed under contracts existing as of that date* in preference to paying for work performed not contemplated by contracts existing as of that date, and as to this, and it is not denied, Slaff testified (p. 71)—

> "Q My question is whether you paid any of the parties to the agreement of December 4th, 1923, for any work which they had performed before December 4th, 1923, except the payments which were made to Samuel Goldberg, Rabinowitz & Schmidt, and the New Jersey Fire Escape and Railing Company out of the $5,000? A No, we did not."

The remainder of the rents went for water, gas, electric light, etc., necessary to pay in order to rent the buildings. Slaff testified (pp. 72, 73)—

> "Q You collected over $5,000? A We had to pay for water and gas and we had to pay for the electric and we had to pay the people that performed the labor that they didn't do under the contract.
>
> Q In other words, you took this money which came to you as rents and exhausted it in paying other bills, is that right? A To who?
>
> Q The bills you just mentioned, water, gas and other mechanics? A Yes, that is the proper thing to do.
>
> Q Water bills and other mechanics—what do you mean, other mechanics, mechanics who had performed any work before December, 1923? A We did not.
>
> Q Or did you pay other mechanics who performed any work except work to complete the contracts which these gentlemen did not, or failed to complete? A No, we didn't pay them."

It then transpired that Slaff and Eichenbaum as trustees for the lien claimants had contracted

debts for labor and material furnished which are not paid, and to pay which there is no money, to the extent of $19,427.25 (pp. 73, 77, Exhibit D. 15, B. of P., p. 78).

There is no evidence of misappropriation.

Questions were asked of Slaff (p. 80) designed to show that he had paid his own companies. There were no such payments (p. 80). The payments made to the alleged lien claimants were in the nature of payments for repairs, etc. (Eichenbaum, p. 89). As to one bill unpaid, that of Bohems, Slaff and Eichenbaum are personally responsible, Bohems having refused to go forward with his work unless they gave him security.

Judge Heisley devoted considerable time, from pages 98 to 100, in attempting to ascertain whether Eichenbaum thought he was personally responsible for these bills, or only as trustee for the creditors. It is immaterial. As against the creditors, for whom Slaff and Eichenbaum were acting as trustees, if it was necessary to contract bills in order to carry out the terms of the agreement of December 4th, 1923, and there is no contention to the contrary, Slaff and Eichenbaum are entitled to recoupment.

They were handling the property as trustees for the creditors (p. 97). The alleged lien claimants had full knowledge of what was going on and what expenditures were being made. There were meetings of the creditors during all of the time that the building was being erected. No charge is made but that every dollar that was actually paid out and every dollar of indebtedness that was actually incurred was required in order that the building should be completed.

E.

There is no evidence whatever that payments were made in full to claimants of the selection of Slaff and Eichenbaum as alleged in the fourth paragraph of the supplemental petition.

Slaff and Eichenbaum could not pay all charges and disbursements, taxes and interest upon the mortgages, for they did not have the funds to do so.

The bond requires (p. 22) Condition 1—

> "That they (Slaff and Eichenbaum) will receive and collect all the rentals and profits of said building and pay all charges and disbursements imposed upon said property."

The bond imposed no personal liability upon Slaff and Eichenbaum to pay charges and disbursements.

As Slaff said (p. 71)—

> "Q Now will you tell me, if you can, how you could pay interest and taxes and Simon Brothers when you didn't have any money to pay with? A We can't."

Whether Slaff and Eichenbaum should have paid taxes and interest in preference to paying for material not contracted for prior to December 4th, 1923, but which it was absolutely essential to obtain in order to complete the building, was a matter for their discretion. The building had to be kept up or no rents would be received and there would be no money to pay anyone.

It is easy to say now that they should have paid taxes and interest in preference to upkeep, but if they had not completed the building so as to permit tenants to get in they would not have gotten any rents to pay taxes and interest in any event.

F.

Slaff and Eichenbaum did not violate the conditions of the bond because they did not sell and convey the property for any sum not less than the sum of $181,000.

The clear intent of the provision of the bond (p. 21) is to require them to convey *if a purchaser should be obtained for any sum not less than $181,000.*

No witness says that anyone supposed that Slaff and Eichenbaum were assuming a personal obligation to secure a purchaser of this property for $181,000 or any other sum.

Counsel says, in the eighth paragraph of his supplemental petition, that they did not make any efforts to sell the property. The contrary is shown. Everybody concerned made efforts to sell. At a meeting of the alleged lien claimants held in August (p. 91),

> "Mr. Green motioned and seconded that a committee of seven be appointed by the chair purpose devising ways and means whereby the sum of $157,000 be raised or sell the new and old building for the price of $250,000.00."

Mr. Heisley's idea upon the subject seems to be expressed by his cross examination of Eichenbaum (p. 100)—

> "Q You say there has been no default in your agreement of December 4th? A No, sir.
>
> Q And you recall that you and Slaff gave a bond for $100,000? A Certainly did, yes, sir.
>
> Q You haven't sold the property, have you? A No, sir. Give me a buyer and I will.

Q Don't argue, if you please. You haven't sold the property for $181,000? A No, we did not.

* * * * * * * * * * * *

Q Nor have you mortgaged the property for enough to pay off these men? A No."

And then Eichenbaum shows (p. 103) the efforts he made to raise money sufficient to pay off the alleged lien claimants. And he was personally interested in securing a purchaser or a mortgage, for his corporation had one of the largest claims which has not yet been paid, amounting to the sum of $13,000 (p. 84).

G.

Slaff and Eichenbaum have administered the building with all due regard for the interests of the parties to the agreement of December 4th, 1923.

The tenth paragraph of the supplemental petition alleges, in general language, that Slaff and Eichenbaum have done absolutely nothing in performance of their promise, but, on the contrary, have neglected their said duties and have obtained title in their own name to the said property and are collecting the rents and profits for their own benefits.

The obtaining of title of the property in their names was in strict accordance with the provisions of the agreement of December 4th, 1923. There is no evidence whatever that they have collected the rents and profits of the building for their own benefit. There is no suggestion in the testimony that they have profited by the transaction to the extent of one dollar.

We cannot conceive upon what basis, so far as the testimony is concerned, the allegation is made.

We have now considered every alleged breach of duty by Slaff and Eichenbaum which it is contended gives the alleged lien claimants the right to repudiate the agreement of December 4th, 1923, and we submit that there is nothing in the testimony from which the court can hold that there has been any such breach. **Unless such breach is proven the parties are bound by the agreement of December 4th, 1923. They have no right, therefore, to file liens. They, therefore, have no interest in the subject matter of this suit.**

It is submitted that the Chancellor erred in not considering this matter before permitting intervention.

IV.

The proofs show that the last work was performed and the last materials furnished by the various lien claimants more than four months prior to the filing of their lien claims and that some of them deliberately went to the building after their work had been completed or abandoned and, without orders or instructions and without right, pretended to perform certain work upon the buildings or furnish certain materials for the express purpose of giving them the right to lien and that their conduct amounted in effect to the fabrication of claims and was fraudulent, and that statements were made by them and positions taken in the proceedings in this cause contrary to the facts known to them and that their conduct is so grossly inequitable as that, under the cases, they will not be heard whatever may be their strict legal right.

Notwithstanding the agreement of the alleged lien claimants, made by the contract of Decem-

ber 4th, 1923, to proceed with the work so as to complete the building, they failed to do so, and did not carry out their contracts.

Slaff (pp. 42, 43), Eichenbaum (pp. 85, 86).

Some of them performed *some* work under their contracts, but when the foreclosure of the Weinberger mortgage started in May of 1924 they *all stopped* (p. 86). Slaff and Eichenbaum go into details with respect to the defaults of the various lien claimants, and this includes *all of them.* Slaff and Eichenbaum are corroborated by Mr. Loeb, for it appears from his testimony (p. 26) that on March 25th he sent a letter to the various lien claimants (Exhibit D. 5, p. 27), calling a meeting of the alleged lien claimants "to take final action upon the completion of the building, at Nos. 72 to 78 Jefferson street, Passaic," in which he said,

> "It has been reported to me that certain of the creditors whose duties it was under their agreement to proceed with the completion of their work, have failed to do so, as result of which the progress and completion of the building have been seriously delayed."
>
> "This meeting is called primarily for the purpose of notifying those creditors that unless they proceed on Thursday morning with their particular work, that other mechanics and material men will be hired, and the additional expense thereof will be deducted from their respective accounts."

See pages 26, 27 and 28.

Slaff and Eichenbaum testify in detail to the various meetings of creditors and to their attempt to get the creditors to complete the building and their failure to induce them to do so.

Rabinowitz testifies (pp. 248-252) in effect, that they stopped, although at some portions of his testimony he says they did not.

And so does Goldberg (p. 208). See the question—

> P. 209. "Didn't you openly say you wouldn't finish the job unless you were protected well with money? A *I don't remember if I did.*"

Instead of performing their contracts, as indicated by the testimony of Rabinowitz (p. 257):

> "Q When you were at these meetings, everybody didn't want to work on account of the foreclosure—the men didn't want to work? A *We try our best. We have meetings.*
>
> Q Nobody wanted to work, though, because of the foreclosure? A Yes, sir."

The alleged lien claimants had conferences; they attempted to dispose of the property or to mortgage it, as indicated by the minutes of the meeting held in August, kept by Grossman, the representative of Simon Bros. (p. 91).

But, as proof conclusive that these alleged lien claimants ceased work upon their contracts and performed *the last work under their contracts long before the four months before they filed their claims,* is the testimony of payments made to them by Slaff and Eichenbaum for work performed *after they refused to go forward with their contracts* and also payments made to others for the purpose of completing the work.

As to this it is necessary to consider the several alleged lien claims separately.

GOLDBERG. On March 14th, 1924, he was paid $252.50 (Exhibit D. 6, p. 46) by Slaff and Eichenbaum for work performed by him after he had refused to do any further work without

being paid for it by Slaff and Eichenbaum, and the testimony of both Slaff and Eichenbaum is (p. 47) that after the payment of this bill Goldberg *did no further work upon the building.*

RABINOWITZ & SCHMIDT. On October 8, 1924, Rabinowitz and Schmidt were paid $240 (Exhibit D. 7, p. 48) for work performed upon the building after they had refused, at a time at least conincident with the institution of the foreclosure of Weinberger and Hartstein in May, 1924, to proceed with the work, and Slaff and Eichenbaum both testify (p. 48) that no work other than that covered by this receipted bill was performed by Rabinowitz and Schmidt by their orders upon the building. It was necessary to hire another man to complete the work of Rabinowitz and Schmidt, and the receipted bill, dated September 12, 1924 (Exhibit D. 9, p. 52), paid by Slaff and Eichenbaum, indicates that a man named Chanin was paid for completing the work.

SIMON BROS. This alleged lien claimant did not complete its work and Katz and Witty were employed to finish it, Slaff and Eichenbaum having a bill from Katz and Witty, dated October 16, 1924 (Exhibit D. 11, p. 55), which has not yet been paid, the amount of the bill being $216.62.

AC-TIN-O-LYTE ROOFING COMPANY. This concern completed its work in December, 1923 (p. 56). In June, 1924, a new order was given by Slaff and Eichenbaum for work not within the contract of the Ac-tin-o-lyte Roofing Company and for that work it gave a bill to Slaff and Eichenbaum for $48.63 (Exhibit D. 12, p. 56). This work has nothing to do with the original contract.

NEW JERSEY FIRE ESCAPE AND RAILING COMPANY. The work of this concern was completed longer than four months prior to the filing of the lien. Another order, however, was given by Slaff and Eichenbaum, having nothing to do with its original contract, the order having been given direct by Slaff and Eichenbaum, and, under the terms of that order, the New Jersey Fire Escape and Railing Company performed certain work for which they rendered a separate bill for $145 to Slaff and Eichenbaum, dated October 30, 1924 (Exhibit D. 13, p. 57). Its work under the contract had been completed in April, 1924 (pp. 57, 58).

PASKIEVITCH. This last named alleged lien claimant furnished the brick, and the testimony from Slaff (p. 55) is that no brick was ordered after December 4, 1923 (pp. 54, 55).

The fact that others were paid for completing the work of these alleged lien claimants and that bills of the alleged lien claimants were rendered, and some paid directly by Slaff and Eichenbaum, for work alleged to have been performed by these alleged lien claimants for repairs, etc., upon the work already performed by them is conclusive proof that the general statements of these alleged lien claimants, or some of them, that they continued to work under their contracts within the four months' period before they filed their liens, is entitled to no consideration whatever. If they had been working under their contracts Slaff and Eichenbaum certainly would not have made independent contracts with them to pay them.

The testimony of Eichenbaum is, in its essential details, the same as that of Slaff (p. 86). As Eichenbaum says—

> "Q Tell us who they were that defaulted, and what their default consisted in? A We

had our hands full the moment we signed this agreement. We were begging them on our knees."

And he mentions, then, all of the lien claimants.

And he testifies (p. 86)—

"Q What did you do to get them to go to work? A We got them after we have called up—we have tried to get together and have other meetings, why we don't progress with the work. We have sent them notices on several occasions. In fact we tried to make a different agreement with them. We have tried everything with them to get them to complete the building, and they wouldn't go ahead."

And he specified, as did Slaff, the different lien claimants who did not perform their work and what was done (pp. 87, 88). And he denies having made any request to the lien claimants to do the work which they subsequently did after Judge Heisley had been retained as counsel for them.

They did the work in order to create a situation where they might be entitled to file liens.

The very fact that it was considered necessary, just prior to the filing of these liens, that some of them at least seeking to file lien should go down and ostensibly perform some work upon this building, is proof positive that they had performed no work within the four months' period, for, if they had, it would not have been necessary to make the pretense of going down and performing work just prior to filing the liens.

It is necessary to consider the various lien claim separately.

THE AC-TIN-O-LYTE ROOFING COMPANY. It claims that on July 11, 1924, it performed work upon the roof of the building in value amounting to the sum of $28.88. The lien claim was filed November 3, 1924. In order to permit this lien claimant to file a lien it must have performed some work after July 3, 1924. An inspection of its lien claim shows that it claims a balance of $897.13, under a verbal contract made between the claimant and Max Goldstein on July 10, 1923, "for furnishing the roofing and putting on the roofing of the said building." There is no denial that this roofing was completed as testified to by Slaff before December 1, 1923. The lien claim then proceeds—

> "The balance of said bill was for repairs, as follows—June 1, 1924—Furnished roofing on account of alterations on said building,
>
> | | | |
> |---|---|---|
> | Lobar ..... | $10.50 | |
> | Material ..... | 9.25 | $19.75 |
>
> July 11, To work done on said roof, as follows—
>
> | | | |
> |---|---|---|
> | Labor ..... | 6.00 | |
> | Material ..... | 22.86 | 28.88 |
>
> It adds this $28.88 and $19.75 to the balance due under its contract of $897/13 and files a lien for $946.78." (B. of P., p. 34.)

There is no denial of the testimony of Slaff that these items of $19.75 and $28.88 had no connection whatever with the contract between the claimant and Goldstein of July 10, 1923. They were for repairs upon the roof which were not covered by the contract in any manner, shape or form, and the necessity for which arose more than six months after the original contract had been completed. These repairs were ordered by Slaff and Eichenbaum with no reference to the contract of the Roofing Company and that Com-

pany rendered a bill to Slaff and Eichenbaum for these repairs (p. 56, Exhibit D. 12).

But there is a further objection to this claim. The work done on July 11th was not work upon the new building which is the subject matter of the lien, but work upon the old building, adjacent to the new building (p. 56). There is no denial of this testimony. The last work on the new building in the nature of repairs was on June 1st, according to the lien claim in value amounting to the sum of $19.75. Even if this work could be construed to be work under the original contract, it was performed more than four months before the filing of the lien.

It therefore appears beyond dispute, it seems to us, that the Ac-tin-o-lyte Roofing Company has no interest whatever in the subject matter of this litigation, and its claim must be ignored.

NEW JERSEY FIRE ESCAPE RAILING COMPANY. The lien claim of this claimant was filed November 1, 1924. It alleges a written contract bearing date December 1, 1922, between claimants and Goldstein for the performance of the work at a price of $4,450. There was paid on account, according to the lien claim, $2,200, leaving a balance due of $2,250. The statement of the lien claim is (B. of P., p. 35)—

> "All the above labor was performed and materials furnished between the first day of December, 1922, and the fourth day of September, 1924."

This is one of the lien claimants who received $2,000 out of the $5,000 referred to in the agreement of December 4, 1923.

The last work done by the New Jersey Fire Escape and Railing Company under the contract was in April, 1924 (p. 57). Its work was

completed at that time. No work has been done by it under that contract since then (p. 58). There is no evidence to the contrary.

In September, 1924, Slaff and Eichenbaum ordered from the Railing Company nine beams. The price of these beams was billed to Slaff and Eichenbaum (p. 57). The beams had no connection whatever with the original contract. It was treated by the parties as a separate order and separately billed, the amount being $145 (p. 57).

Unless we have overlooked it, there is no evidence, on behalf of this alleged lien claimant, showing the performance of any work within four months before November 1, 1924.

The lien claim does not seem to rest upon the furnishing of these beams because it will be noted that it is stated in the claim that the amount of the original contract was $4,450, and that there was received on account $2,200 leaving a balance due of $2,250. It may be that the lien claimant is now taking the position that these beams were furnished under the original contract but that being so, why was the bill for the item rendered to Slaff and Eichenbaum on October 30, 1924? (Exhibit D. 13, p. 57.)

RABINOWITZ AND SCHMIDT. This lien claim was filed November 1, 1924. It alleges a contract between Goldstein and the claimants bearing date 15th day of November, 1922, for $23,500 and alleges that there is a balance due on the contract of $5,000.00 (B. of P., p. 36). The work is alleged to be done between the 15th day of November, 1922, and the 10th day of October, 1924. We will deal with this claim with the two following.

SAMUEL GOLDBERG. This lien claim alleges a written contract between Goldstein and Goldberg dated November 17, 1922, for "the carpenter and labor work for the sum of $27,000, upon which there has been paid $18,100 leaving a balance due of $8,900" and a verbal contract made July, 1923, for the putting in of four doors for $100 making the amount due $9,000, and the allegation is that the work was performed and materials furnished between the 17th day of November, 1922, and the 9th day of July, 1924. The lien claim was filed October 24, 1924 (B. of P., p. 37). This will be considered with the next.

ALBERT PASKEVITCH. This alleged lien claimant is the person who furnished the brick. The last brick furnished is stated to be on October 13, 1924, 2,000 brick. The last brick furnished before that item was on June 6th, 3,000 brick. The lien claim was filed November 1, 1924 (B. of P., p. 41).

The claimant relies upon the brick furnished October 13, 1924, to bring his claim within the four months' period.

The last three lien claims will be considered together.

Slaff testifies that the last work performed by Goldberg was prior to March 14, 1924. He supports this testimony by showing a receipt signed by Goldberg under date March 14, 1924 (Exhibit D. 6, p. 46), acknowledging receipt by him of $252.50 (p. 46). He had declined to do any work under his contract (p. 46). All of the work he did after about the 1st of January, 1924, he insisted upon being paid for as he did it. Slaff is supported by the documentary evidence. Slaff says that this receipt was for payment of

the last work ordered by either Slaff or Eichenbaum upon this building.

And so with the lien claimant Rabinowitz and Schmidt. The last work performed by them was in June, some patch work (p. 49). This was the last work under the contract. There was some subsequent work but not under the contract, and the work which was subsequently performed was billed directly to Slaff and Eichenbaum by Rabinowitz and Schmidt (Exhibit D. 7, p. 48), bill dated October 8, 1923, and reference to the lien claim will indicate that Rabinowitz and Schmidt do not claim that this work was done under the contract.

Paskevitch, within the four months' period, delivered no bricks to the building under orders of Slaff and Eichenbaum (p. 53).

Slaff testifies that one day in October, 1924, he went to the building (p. 49) and found Goldberg busy putting up a partition, and Rabinowitz busy putting up a pier, and found some bricks lying around. Slaff asked them what it was all about and (pp. 49-50)—

> "'What is that for; who ordered the brick?' Rabinowitz said he did. I say 'At whose request?' 'Oh, we got to do that to put up for the plumbing work,' I say, 'Mr. Goldberg, how you come to put up this work?' I say, 'We hire another carpenter to do it, a man named Mr. Chanin to do the work and complete the building.' He said, 'I am going to do one partition; I will not make all the coal bins and wood sheds; I am going to do just one well, and I will be through; I won't be in the way.' And he left."

Cohen had been employed prior thereto to finish the work of Goldberg and his bill was paid (Exhibit D. 8, p. 52). The following con-

versation took place between Goldberg and Slaff (p. 51)—

> "Q What did he say? A He said he sees no further defects in his work, and getting the money, he is going to file a lien on the property. I said to him, 'Is that the reason you come to finish the work, or to do the work?' He said, 'I will tell you later, I am not ready to talk now.' "

The value of this partition set up by Goldberg at this time was about five or six dollars (p. 50).

Rabinowitz and Schmidt at the same time built a pier about three feet high and twelve by twelve, using bricks furnished by Paskevitch (p. 51). The value of this pier for labor was about one dollar. It was not ordered by Slaff and Eichenbaum. It is not necessary and will have to be taken out. A man named Chanin had been employed to finish the work of this contractor (Exhibit D. 9, p. 52). The bricks from Paskevitch were not ordered either by Slaff or Eichenbaum (pp. 53, 54).

Tnrning to the testimony of Rabinowitz for an explanation as to how this work came to be done at that late day we find him saying that about four weeks before the work was done the lien claimants had retained Judge Heisley to represent them (p. 253). From p. 253 to p. 259 Rabinowitz attempts to show why he went to build the piers and he seeks to bind Slaff and Eichenbaum. He then goes to the extent of saying that Slaff "directed him to do the work" which is denied by Slaff and Eichenbaum. He denies that he spoke to Goldberg about building the piers, although Goldberg was there with him. He denies ordering the bricks (p. 256). Slaff and Eichenbaum did not order them. Who did? He first says that about ten or twelve piers were

necessary and he started to build them (p. 252). But he only built one and a half piers (p. 252). This took a day (p. 252). If he had been actually attempting to perform his work why did he stop before he had completed the ten or twelve piers which he says were necessary? But he says (p. 252) that *the piers were not called for either by the contract or specifications* (p. 252).

"Q Did the specifications or the contract call for piers? A It does not.

Q What did you put them up for? A Because it was necessary.

Q Why did you put them up for? A That is necessary."

His testimony (p. 254) is that at the time the lien claimants retained Judge Heisley, which was about four weeks before he did this work, his contract had been completed.

"Q Then you were through with the job when you hired the Judge—you wanted the money then, didn't you? A Yes, sir.

Q You had enough money in that job then and you didn't want to put in any more money? A We would like to get out money anyway. When we finished the building, we tried to get our money.

Q You tried all right, but I am not asking you how you tried; I am asking you if it is not true that when you got Judge Heisley, and the other creditors, in September, that then and there you gave your claim to the judge to start a suit? A Yes, sir.

Q And about four weeks after, you went back to do some more work? A Yes, sir.

Q Why did you go back to do more work? A You want I should explain that?

Q That is what I am trying to get. A If I didn't furnish one brick, I knew Mr. Slaff would put up a bill on my work for $5,000. If you will tell me now, I will go there to do anything necessary under my contract.

Q Is that the reason? A Yes, that is the reason."

But he had already testified that *these piers were not within the terms of the contract or specifications.*

The purpose of his going to perform this work *not required by the contract* is at last told by him on page 258—

> "Q But you found out it couldn't be done; why did you go back and do any more work? A I went to do more work, *so I could put a lien on the building for my full contract.*"

Page 262—

> "Q So that you decided to file liens, at one of the meetings you held? A Yes, sir.
>
> Q At whose house was that meeting? A Mine.
>
> Q After you decided to do that, you went back and made a pier and a half? A Yes, sir.
>
> Q Paskevitch got an order for 2,000 bricks? A Yes, sir.
>
> Q Who gave the order, you or Goldberg? A I didn't."

All of the alleged lien claimants were at this meeting, including the Actinolyte Roofing Company (pp. 262, 263).

And see the cross examination of Schmidt (pp. 271, 275), when an attempt was made to show that there was some work done within the four months period. His testimony is entitled to no consideration whatever.

See his testimony (p. 271) when, caught in an apparent attempt to impose upon the court, he says—

> "I made a mistake."

And his testimony (p. 275)—

> "Q Then they don't owe you for the piers because it is not a credit; you don't claim any money for the piers you put in

there in October, do you? A *No—I don't know.*"

And his testimony (p. 276)—

"Q Will you state on the record whether the piers were part of your contract and were in your contract? A I cannot tell you."

And see his cross examination (p. 279) indicating that no reliance whatever is to be placed upon his supposed records. And, again, on cross examination (p. 282).

The testimony of Green, representing the Paterson Glass Company, is illuminating. He first says that Slaff and Eichenbaum instructed Rabinowitz and Schmidt to build certain piers in the cellar at a meeting of creditors held in August, 1924. He then testifies (p. 237)—

"Q You filed a lien claim against Goldstein and certain mortgagees, Mr. Green, as an officer of the Paterson Glass Company? A Yes, we directed our lawyer to do so.

Q And you were instrumental in getting these men to file their lien?"

That question was not answered.

"Q Did you as a matter of fact point out to Rabinowitz & Schmidt and Goldberg and Simon Brothers, or any of the men, the fact, that they had to file lien claims, and it would be worth while? A *I didn't say that in those words.*

Q What was said? A I just talked with them and we thought it was the proper proceeding to take."

Reference to his testimony on page 240 will indicate that he is not telling the truth when he says that Slaff and Eichenbaum in August directed Rabinowitz and Schmidt to build the piers. And see his testimony (pp. 239, 240). On page 241—

"Q And did you in concert with Mr. Goldberg, go down to see Judge Heisley? A We did.

Q Isn't it a fact that after you went to see Judge Heisley Goldberg went on the job to put up these bins? A I presume he did. Q Don't you know? A According to his testimony, yes."

He denies that the building of the bins or piers was discussed at the meetings held with Judge Heisley in September, 1924 (p. 241), and yet in his testimony (p. 242) he says—

"A We were endeavoring to find means to prevent Slaff and Eichenbaum getting the building."

It is significant that, shortly after this meeting, Goldberg built the partition and Rabinowitz and Schmidt built the piers and Paskevitch furnished the brick. And none of it is included within any contract.

Goldberg denies (p. 154) that at any of the meetings there was any agreement or suggestion that any of them should, for the purpose of getting their claims within the four months period, perform any work or furnish any material on the property, but the answer to that denial is—why, following that meeting, did two lien claimants go down and perform inconsequential work not within their contracts, and more than four months after they had performed any work upon the building, and why was the two thousand brick delivered by Paskevitch so that Rabinowitz and Schmidt might so some work within the four months period? But three hundred brick were used (p. 157). Goldberg says that he ordered the brick (p. 157). Goldberg says that the piers were not within the contract (p. 159).

Goldberg first attempts to say that he never stopped work. It is demonstrated by his cross examination that he is not telling the truth (p. 163). He produces a book. See the cross ex-

amination on this book (pp. 167, 168); re-direct examination (pp. 165 to 166); re-cross examination (pp. 173 to 179), when the following question is asked—

"Q Isn't it true that you came back on the 28th of April? A Yes.

Q And then stopped until you saw Judge Heisley? A No, sir.

Q When did you next go back? A May 6th."

Further cross examination (pp. 179, 180, 181, 182, 183) indicates that the book is filled with erasures and it is clear *from the book* that the last work in fact done upon this building was *on April 28th.* Although he testifies that the piers built by Rabinowitz and Schmidt were not within the contract, on page 186 he says that they were necessary under the contract.

"Q Who ordered that work? A It was under their contract.

Q Who ordered that work? A I ordered it."

And then see his testimony (p. 179)—

"Q Had you seen Judge Heisley with some of these men who filed claims before you gave the order? A I don't remember.

Q Will you say you didn't? A I won't say yes or no; I don't remember.

Q Will you say that after you had your meeting with Judge Heisley and some of these creditors, that you didn't then give an order to Rabinowitz and Schmidt? A No, sir.

Q What? A I didn't give them any afterwards. I was after him all the time to put in—

Q Will you answer my question? A I don't remember it."

He gave these orders without instructions from Slaff and Eichenbaum (pp. 179, 180). He

tells about the meetings of the lien claimants with Judge Heisley. And then (p. 184)

"Q Didn't you give an order? A I don't remember it.

Q You didn't give an order for bricks? A I don't remember; I did give an order, but not at that time. After I called Paskevitch—"

And see his testimony (pp. 188 to 191)—

"Q On top of the money that they already had in that building do you mean to say that you gave orders for more? A I did give them an order that they should bring 2,000 brick, *if he wants to; that is all, it is up to him.*

Q You didn't do it because you knew that he had no right to file a lien, and if he wanted to file one he had to make delivery there, did you? A No.

Q And that wasn't talked about there? A No, not that I know of."

According to Goldberg, the $9,000 which he claims now to be due was, in fact, due on December 4th, 1923 (p. 191), and yet he says he did work subsequent to December 4th, 1923. If he did how could the money be due to him as of that date?

And see the testimony of Grossman with respect to the meetings at Rabinowitz' house before this work was done (p. 126). When asked with respect to whether the suggestions were not made that these lien claimants should go and do some work so as to bring their lien claims within the four months period Grossman testifies—

"To my recollection no suggestion like that was made."

And see his testimony (p. 129).

On page 140—

"Q I will reframe that; was there any talk on the part of the other claimants with

reference to the time for their liens having expired? A I don't remember.

Q There may have been? A They may have been, yes."

On September 27th, 1924, Judge Heisley had appeared before the Master (B. of P., p. 30) and had *then* stated that it was the duty of the alleged lien claimants either to apply to the court to be made parties or to ignore the chancery proceedings and file liens. After that statement why was it necessary to have these lien claimants do more work?

We submit that a consideration of the testimony will indicate beyond question, that these lien claimants deliberately went to the building, without orders, and pretended to perform certain work upon the building not within their contracts and after they had abandoned their work, for the *sole purpose of having it appear that they had performed work within the four months period, and that this was done in pursuance of a plan participated in by all of the lien claimants, and it is such conduct as will induce the court to deny relief.*

In addition to this conduct on the part of the alleged lien claimants we have them in their original petition, which petition was verified, asserting that the deed to Slaff and Eichenbaum, which was made under the contract of December 4th, 1923, was made for the purpose of *securing* Slaff and Eichenbaum, and we have them in their supplemental petition in February, 1925, *changing their positions* and asserting that Slaff and Eichenbaum took title to the property as trustees for them. When they filed their original petition they knew the facts. They must have deliberately misrepresented these facts to the court.

In addition to this we have them taking no steps to perfect their rights during the course of the foreclosure.

As an apparent excuse for laches, the counsel for the lien claimants in his brief below said:

> "All the claimants and the trustees being worried, caused meetings to be held, continuing along through the summer and into the early fall, in the endeavor to secure a new mortgage to pay off Weinberger. They got a delay from him and he permitted his foreclosure to be quiescent until October 15th, when he proved up his mortgage before the Master * * * Up to October 15th, there certainly was no cause for action by these petitioners. * * * *These petitioners could not afford to file* their liens and antagonize Weinberger by attacking his mortgage. *But,* the dangerous and unwise thing to have done would have been to file a single lien claim, because under paragraph 13 of the agreement, the effect of a single claim being filed would have been to cancel a thoroughly good bond for $100,000."
>
> "On October 15th and 16th, it appearing that Weinberger and Slaff were moving in their foreclosure, the petitioners promptly filed their claims."

The fact is that the Master's report in the Lobsenz suit was filed on October 3rd, 1924 (B. of P., p. 31). The hearing before the Master in the Weinberger case took place September 27th, 1924. At that hearing Judge Heisley appeared. Notwithstanding the notice that Weinberger and Hartstein were proceeding, at least as early as the 27th day of September, 1924, nothing was done until the 14th day of October, 1924, when the Paterson Glass Company filed its application, and the other claimants did not make any application until the 31st day of October, 1924.

New Jersey State Library

The excuse for non-action is that the lien claimants could not afford to file their liens and antagonize Weinberger by attacking his mortgage. But this is no excuse. Rather it is an aggravation of laches for, for their own purposes, first, because they did not desire to antagonize Weinberger and then because they were in doubt as to whether they desired to intervene in the suit or rely upon the bond, which they would sacrifice if they did intervene in this suit, the lien claimants permitted this cause to proceed to interlocutory decree, and then, *having finally made up their minds,* they ask the court to open that interlocutory decree and permit them to answer. This conduct certainly does not commend itself to a court of equity and is not at all in accord with the duty which is cast upon parties situated as these lien claimants say they were by what the Chancellor said in *Raymond* v. *Post,* 25 N. J. E. 447—

> "The provisions of that act (section 58) require *diligence and action* on the part of those who may have claims against mortgaged premises which may be recorded * * * to protect their interest in those premises in case of proceedings for foreclosure." (Italics mine.)

There was in this case more than mere laches. For purposes of their own, the lien claimants *elected not to file their liens* and permitted this foreclosure to proceed. They did this, according to their own counsel, because they did not desire to antagonize Weinberger, and also because they did not desire to take a position which would forfeit the bond. They now desire, in effect, to re-elect.

Upon the foregoing record, we urge that it appears that the alleged lien claimants have no right to file liens and that, therefore, they have

no interest in the subject matter of this litigation and, secondly, that the conduct of the alleged lien claimants with respect to their attempts to perfect their liens and with respect to their conduct in this very litigation is such as to deprive them of any right to relief.

In *Clickner* v. *Clickner,* decided by Vice-Chancellor Buchanan, 95 N. J. Eq. 479, he applied the doctrine of unclean hands in an annulment case under the following circumstances: The suit was by a husband against a wife for annulment. In the petition the husband set forth that the wife had concealed the fact of pregnancy by another man and likewise the fact of previous intercourse. The wife replied alleging that she had disclosed both previous intercourse and the fact of pregnancy. The Vice-Chancellor held that she had disclosed the fact of previous intercourse but not the fact of pregnancy.

The Vice-Chancellor said—

> "This attempt to deceive the court was obviously made in the belief that it was necessary or advisable in making out his right to decree and for the purpose of endeavoring to obtain such decree. It seems to me therefore that denial of relief to petitioner might well be rested upon that ground, somewhat akin to the ordinary application of the equitable principles which require a suitor for equitable relief to do equity and to come into court with clean hands."

And 21 Corpus Juris, title "Equity" sec. 169, p. 186 states the rule—

> "One may be barred from relief by misconduct with reference to the suit itself. Thus equity, may refuse to protect one who fails to make a full and free disclosure of all the facts relating to his case."

And the rule is no better expressed, perhaps, than by the excerpt from *Commonwealth* v. *Fila-*

treaux, Court of Appeals of Ky. 170 S. W. 1182, quoted by Corpus Juris—

> "The maxim 'He who comes into equity must come with clean hands' imposes alike upon him who defends and upon him who prosecutes a suit in equity; and its requirements are not satisfied by a fulfillment of the literal language of its demand. Be his hands as spotless as they may, he does not merit the protection of the Chancellor who fails to make a full and free disclosure of all facts relating to his claim. The maxim is broad enough to demand that he who prays from the Chancellor protection, as well as he who seeks affirmative aid, must openly and frankly, without reservation or evasion, yield to the Chancellor that full measure of confidence and truth which is pre-requisite to the assertion and exercise of chancery powers and the lack of which must necessarily repel him from a forum whose very foundation is mutual confidence and good faith."

Vice-Chancellor Berry in the case of *Gluck* v. *Rynda Development Company,* 4 N. J. Advance Reports 1338, at p. 1348 carefully reviewed the cases in this State and elsewhere bearing upon the matter of unclean hands. He cited with approval *Clickner* v. *Clickner,* 95 N. J. E. 479, prefacing his remarks as to what the cases hold he said (p. 1347)—

> "The complainants have sought relief in in a court of equity. A court of equity is a court of conscience. The conscience of the applicant for relief in this court is always open to the scrutiny of the chancellor. One of the most wholesome and beneficient principles of a court of equity finds voice in the maxim that 'he who comes into equity must come with clean hands' and this maxim means that, not only must one seeking relief enter the portals of this court with clean hands, but he must keep them clean after his entry and until the final determination of the issue."

The Vice-Chancellor went so carefully into the subject that it would be an act of super-arrogation to attempt to enlarge upon what he said. This court affirmed him at the present term upon his opinion.

V.

With respect to the limitation of defenses.

If the alleged lien claimants should have been permitted to intervene their defenses should have been strictly limited.

(a) No advantage should be permitted to be taken of the payment of the $5,000 by Slaff and Eichenbaum in accordance with the terms of the agreement of December 4, 1923, the benefit of which was received by three of the alleged lien claimants. The practical construction put upon the agreement by the parties should bind them.

(b) They should be prevented from pleading usury.

Vineland v. *Maretti,* 93 N. J. E. 513.

(c) Weinberger and Hartstein should not be compelled to follow the money advanced upon the mortgage into the property.

If the court will read the testimony of Goldberg (pp. 152 to 162, to 165, 211 to 214, 226, 227), it will appear that an attempt was made to have him testify that certain moneys, which he received from these mortgagees, did not go into the property upon which the alleged lien claimants performed work, but was applied by Goldberg upon work which he was doing for Goldstein upon property on Monroe street. It is charged that a deliberate attempt was made by Goldberg to have it appear that these credits were made when, in fact, they should have been

credited to Jefferson street, and that the books which he produces indicate upon their face an attempt to impose upon the court. This will appear from his examination at the pages referred to. Finally (on p. 231) he says—

"Q When you got $2,000 on March 22nd, on what property did you credit that? A Which year?

Q 1923. A Well, it was—

Q Which property? A I don't remember; my intention was to credit first 27-272 Monroe street for that amount of the contract, and then to credit to Jefferson street.

Q What account did you credit? A I don't remember which account I credited.

Q That is your best answer? A Yes, sir.

Q You got $6,000 on April 19th; to which account did you credit that? A I don't remember.

Q Is that the best answer you can give? A That is the best answer.

Q Will you say you did not intend to credit Jefferson street? A Perhaps I did.

Q You don't know? A I don't know.

Q On May 4th, $3,000—which did you intend to credit, Jefferson or Monroe street? A I don't remember.

Q Will you say you didn't intend to credit Jefferson street? A Perhaps I did."

And, then to indicate what the contention will be, if Weinberger is obliged to show that the money upon this mortgage actually went into this property, the following question asked of Goldberg on re-direct by Judge Heisley is illustrative (p. 232)—

"Q Mr. Goldberg, did Goldstein at any time, when he gave you any of these payments, tell you to apply it on account of the Jefferson street property? A He never did."

And the way in which this book is kept (pp. 194, 195, 196) illustrates the difficulty which

will be put in the way of Weinberger if the burden is placed upon him to follow the application of these moneys. This attempt on the part of the alleged lien claimants, by the production of the testimony of Goldberg to confuse the situation with respect to where these moneys went is another example of inequitable conduct on their part which goes to the question as to whether they should be permitted to be made parties defendant at all.

It was these considerations which led Vice-Chancellor Foster in his memorandum to say what he did with respect to the limitation of defenses. (B. of P. p. 71.)

The Chancellor has not limited the defenses in any way. (B. of P., p. 14.)

VI.

As ordinary judgment creditors the alleged lien claimants cannot come in. If they do come in as such they are bound by all of the proceedings before they come in and it is therefore useless for them to come in.

As simple judgment creditors of Goldstein the rights of the judgment creditors can rise no higher than those of Goldstein. Goldstein was a party to the suit, and under all of the cases, the judgment creditors must come in bound by everything which has been done as against him.

We think that this is too clear for argument and the order below was not in anywise based upon the rights of the lien claimants as simple judgment creditors and the matter therefore will not be further argued.

It is respectfully submitted that for the reasons hereinabove set forth the order brought up

should be reversed and the record remitted to the end that an order be made denying the application of the alleged lien claimants to intervene, or if they be permitted to intervene limiting the matters which they may set up as herein indicated.

Respectfully submitted,

MERRITT LANE,
Of Counsel, Weinberger & Hartstein.

WARD & McGINNIS,
Of Counsel, Slaff, Eichenbaum.

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In Chancery of New Jersey

Heard below before the CHANCELLOR.

Filed April 30, 1926.

Between HARRY H. WEINBERGER, *et als.*, Complainants, *and* MAX GOLDSTEIN, *et als.*, Defendants.	55-659. On Bills, &c.
Between SIDNEY LOBSENZ, Complainant, *and* MAX GOLDSTEIN, *et als.*, Defendants.	56-119.

Notice of Appeal of Slaff, *et als.*

Samuel Slaff, Samuel Eichenbaum and Superior Finance Corporation hereby appeal from so much of the order made in the above entitled cause on the 30th day of March, 1926, as reads as follows—"Ordered, that the said petitioners,

Albert Paskevitch; Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz & Schmidt; Samuel Goldberg; Herman Simon and Isadore Simon, partners trading as Simon Brothers; Ac-in-o-lyte Roofing Company, a New Jersey Corporation and Joseph Leschinsky and Stanislaw Karpinsky, partners trading as New Jersey Fire Escape Railing and Construction Company and each of them, be admitted as parties in said causes to the end and for the purposes aforesaid and for those purposes may file any and all proper answers and counter-claims apt and sufficient to put in issue between them and all parties to the suit, except Sidney Lobsenz, their claims to so much of the net proceeds of the sale of that portion of the mortgaged premises to which their lien claims *prima facie* attached as remained after payment of Lobsenz and wife, as aforesaid," "Further ordered, that the said lien claimants and all other parties are hereby permitted to plead, answer and set up in their proper pleadings any and all facts material to the issues and which they might have pleaded, or set up, had they been made originally parties to said causes, or either of them," to the Court of Errors and Appeals in the last resort in all causes.

WARD & MCGINNIS,
Solicitors of Samuel Slaff,
Samuel Eichenbaum and
Superior Finance Corporation.

Dated, April 29th, 1926.

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

PETER J. MCGINNIS,
Of Counsel Samuel Slaff,
Samuel Eichenbaum and
Superior Finance Corporation.

A true copy,

THOMAS BARBER, Clerk.

Petition of Appeal of Slaff, Eichenbaum and Superior Finance Company

NEW JERSEY COURT OF ERRORS AND APPEALS.

Filed May 5, 1926.

To the Honorable, The Court of Errors and Appeals, in the Last Resort in all Causes.

The petition of Samuel Slaff, Samuel Eichenbaum and Superior Finance Corporation, respectfully show that your petitioners find themselves aggrieved by an order made in the Court of Chancery by Hon. Edwin Robert Walker, Chancellor of New Jersey, on the 30th day of March, 1926, in consolidated causes in one of which Harry H. Weinberger, *et als.*, were complainants and in the other of which Sidney Lobsenz was complainant, and in both of which, the respondents on appeal who are Albert Paskevitch; Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz and Schmidt, Samuel Goldberg. Herman Simon and Isadore Simon, partners trading as Simon Brothers; Ac-in-o-lyte Roofing Company, a New Jersey Corporation and Joseph Leschinsky and Stanislaw Karpinsky, partners trading as New Jersey Fire Escape Railing and Construction Company; obtained the order appealed from permitting them to be made parties defendant to said causes and to file answers and counter-claims, in this respect to wit: that the said order directs that the said above named Albert Paskevitch and others be admitted as parties to said causes to the end and for the purposes aforesaid and that they be permitted to file any and all proper an-

swers and counter-claims apt and sufficient to put in issue between them and all parties to the suit, except Sidney Lobsenz, their claims to so much of the net proceeds of the sale of that portion of the mortgaged premises to which their lien claims *prima facie* attached as remained after payment to Lobsenz and wife and in this respect, to wit: that the said order directs that the said lien claimants and all other parties, be permitted to plead, answer and set up in their proper pleadings any and all facts material to the issues and which they might have pleaded or set up, had they been made parties to the original causes or either of them. And your petitioners humbly appeals from the portions of the order aforesaid upon the ground that the same are erroneous for that the said Albert Paskevitch and others who were permitted to intervene and file answers and counter-claims were barred by reason of the signing of the stipulation of May 19th, 1924, and the circumstances surrounding the making of that stipulation, and by their laches from making the application which was granted by the order appealed from and for that during the course of the foreclosure proceedings the said lien claimants were represented by the said Slaff and Eichenbaum as their trustees and said Slaff and Eichenbaum faithfully performed their duties as such trustees as appears from the proofs upon which said order was made, and for that the said Paskevitch and others did not show that any event set forth in paragraph 13th of the agreement of December 4, 1923, which, according to that agreement, would permit them to file

liens, had in fact occurred, on the contrary the proofs showed that the said Slaff and Eichenbaum faithfully performed all of the terms and conditions of said agreement; and for that the proofs showed that the last work was performed and the last materials furnished by the various alleged lien claimants more than four months prior to the filing of the alleged lien claims and the proofs further show that some of the lien claimants deliberately went to the building after their work had been completed and abandoned and, without orders or instructions and without right, pretended to perform certain work on the building or furnish materials, for the express purpose of giving them the right to file lien claims and their conduct amounted, in effect, to the fabrication of claims and was fraudulent and their conduct, as disclosed by the proofs, was so grossly inequitable as that the order should not have been made permitting them to be heard in the said causes and your petitioners further show that if the said Paskevitch and others should have been permitted to intervene, in any event, they should have been strictly limited in their defense and should not have been permitted to plead usury or to take advantage of the payment of $5,000.00 by Slaff and Eichenbaum in accordance with the terms of the agreement of December 4th, 1923, the benefit of which was received by certain of alleged lien claimants and should not have been permitted to depart from the practical construction put upon that agreement by the parties and should not have been permitted to require that your petitioners

should be compelled to follow the moneys advanced upon your petitioners' mortgages into the property and your petitioners show that for other reasons said order is erroneous and that an order should have been made either denying the application of the said Paskevitch and others or limiting them in the matters which they might set up in their pleadings.

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

WARD & MCGINNIS,
Solicitors for and of Counsel
with Appellants.

Notice of Appeal of Weinberger.

IN CHANCERY OF NEW JERSEY.

Heard below before WALKER, *C.*

Filed April 30th, 1926.

Between

HARRY H. WEINBERGER, *et als.*,
Complainants,

and

MAX GOLDSTEIN, *et als.*,
Defendants.

55-659. On Bills, &c.

Between

SIDNEY LOBSENZ,
Complainant,

and

MAX GOLDSTEIN, *et als.*,
Defendants.

56-119.

Harry H. Weinberger and Benjamin A. Hartstein hereby appeal from so much of the order made in the above entitled cause on the 30th day of March, 1926, as reads as follows:—"Ordered, that the said petitioners, Albert Paskevitch; Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz & Schmidt; Samuel Goldberg; Herman Simon and Isadore Simon, partners trading as Simon Brothers; Ac-in-o-lyte

Notice of Appeal of Weinberger.

Roofing Company, a New Jersey corporation and Joseph Leschinsky and Stanislaw Karpinsky, partners trading as New Jersey Fire Escape Railing and Construction Company and each of them, be admitted as parties in said causes to the end and for the purposes aforesaid and for those purposes may file any and all proper answers and counter-claims apt and sufficient to put in issue between them and all parties to the suit, except Sidney Lobsenz, their claims to so much of the net proceeds of the sale of that portion of the mortgaged premises to which their lien claims *prima facie* attached as remained after payment to Lobsenz and wife, as aforesaid." "Further ordered, that the said lien claimants and all other parties are hereby permitted to plead, answer and set up in their proper pleadings any and all facts material to the issues and which they might have pleaded, or set up, had they been made original parties to said causes, or either of them," to the Court of Errors and Appeals in the last resort in all causes.

MERRITT LANE,
Solicitor of Harry H. Weinberger,
and Benjamin A. Hartstein.

Dated, April 29th, 1926.

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

MERRITT LANE,
Of Counsel Harry H. Weinberger
and Benjamin A. Hartstein.

A true copy,

THOMAS BARBER, Clerk.

Petition of Appeal of Weinberger and Hartstein.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Filed May 5, 1926.

To the Honorable, The Court of Errors and Appeals, in the Last Resort in all Causes.

The petition of Harry A. Weinberger and Benjamin A. Hartstein, respectfully show that your petitioners find themselves aggrieved by an order made in the Court of Chancery by Hon. Edwin Robert Walker, Chancellor of New Jersey, on the 30th day of March, 1926, in consolidated causes in one of which your petitioners were complainants and in the other of which one Sidney Lobsenz was complainant and in both of which, the respondents an appeal who are Albert Paskevitch; Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz and Schmidt; Samuel Goldberg; Herman Simon and Isadore Simon, partners trading as Simon Brothers. Ac-in-o-lyte Roofing Company, a New Jersey Corporation and Joseph Leschinsky and Stanislaw Karpinsky, partners trading as New Jersey Fire Escape Railing and Construction Company; obtained the order appealed from, permitting them to be made parties defendant to said causes and to file answers and counter-claims, in this respect to wit: that the said order directs that the said above named Albert Paskevitch and others be admitted as parties to said causes to the end and for the purposes aforesaid and or that they be permitted to file any and all proper papers and counter-claims and

sufficient to put in issue between them and all parties to the suit, except Sidney Lobsenz, their claims to so much of the net proceeds of the sale of that portion of the mortgaged premises to which their lien claims *prima facie* attached as remained after payment to Lobsenz and wife and in this respect, to wit: that the said order directs that the said lien claimants and all other parties, be permitted to plead, answer and set up in their proper pleadings any and all facts material to the issues and which they might have pleaded or set up, had they been made parties to the original causes or either of them. And your petitioners humbly appeal from the portions of said order as aforesaid upon the ground that the same are erroneous for that the said Court of Chancery should either have denied in toto the applications of the said parties above specifically mentioned as having obtained said order to file answer and counter-claims, for the reason that the said lien claimants were barred by reason of the signing of the stipulation of May 19th, 1924, and the circumstances surrounding the making of that stipulation and by their laches from making the said application to become parties to said cause and to file answers and counter-claims; and for the reason that by the agreement of December 4th, 1923, the alleged lien claimants abandoned their claims or, if it be held that they did not, the lien claims were held by the defendants, Slaff and Eichenbaum, during the foreclosure proceedings and said Slaff and Eichenbaum were parties to the said suits and, if the said Paskevitch and others who have obtained said order, were permitted to come in,

they are, by the express language of the statute, bound to the same extent as Slaff and Eichenbaum would be bound at the time they were permitted to intervene and that therefore they should not be permitted to file answers and counterclaims raising issues which the said Slaff and Eichenbaum might not raise and by reason that the said alleged lien claims did not show that the events set forth in paragraph 13 of the agreement of December 4th, 1923, which, under the terms of said agreement, would permit them to file liens had in fact occurred and therefore it did not appear that the said Paskevitch and others, who have obtained said order, had any interest in the property which they should be permitted to intervene to protect and by reason that it appeared that the said Paskevitch and others were not entitled to file lien claims and had no interest in said property because the last work performed and the last materials furnished by the various lien claimants was performed and furnished, as the case may be, more than four months prior to the filing of the lien claims and that some of them deliberately went to the building after their work had been completed or abandoned and, without orders or instructions and without right, pretended to perform work on the building or furnish materials for the express purpose of giving them the right to file liens, and by reason that the proofs showed that the conduct of said Paskevitch and others amounted to the fabrication of claims and was fraudulent and their conduct was so grossly inequitable as that they should not have been permitted to intervene in these suits in equity; or,

if the said parties should be permitted to intervene as aforesaid, they they should have been limited in the matters which they were permitted to set up and should have been prohibited from setting up usury and they should not have been permitted to take advantage of the payment of $5,000.00 mentioned in the proofs as having been paid by Slaff and Eichenbaum in accordance with the terms of the agreement of December 4th, 1923, and they should not have been permitted to depart from the technical construction of said agreement placed upon it by the parties and your petitioners should not have been compelled to follow the moneys advanced upon the mortgage of your petitioners into said property and said order is for other reasons, erroneous and the said Court of Chancery should have denied the application of the said Paskevitch and others, who obtained said order, or should have strictly limited them in the matters which they were permitted to set up in any pleading they were permitted to file.

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

MERRITT LANE,
Solicitor of Appellants and of Counsel.

Order Appealed From.

IN CHANCERY OF NEW JERSEY.

Filed March 30, 1926.

Between

HARRY H. WEINBERGER, *et als.*,
Complainants,

and

MAX GOLDSTEIN, *et als.*,
Defendants.

55-659.
On Bill, etc.

Between

SIDNEY LOBSENZ,
Complainant,

and

MAX GOLDSTEIN, *et als.*,
Defendants.

This matter coming on upon due notice to all parties on the petition and supplemental petitions of Albert Paskevitch, Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz & Schmidt; Samuel Goldberg; Herman Simon and Isadore Simon, partners trading as Simon Brothers; Ac-tin-o-lyte Roofing Company, a New Jersey Corporation, and Joseph Leschinsky and Stanislaw Karpinsky, partners trading as New Jersey Fire Escape Railing and Construction Company.....duly filed in said causes praying, among other things, that they may be admitted as parties to said causes

and each of them, and the Chancellor having duly considered said petition and the various depositions taken pursuant to orders made in said causes, and having heard the arguments thereon of counsel of the respective parties, and being of opinion that the prayers of the said several petitions should be granted and that an order should be made in each of said causes admitting said petitioners as parties in said causes to the end and for the purpose of asserting and enforcing their claims, if any, against so much of the net proceeds of the sale of that portion of the mortgaged premises to which their several mechanics' lien claims *prima facie* attached, as remains after the payments made by the Special Master to the said Sidney Lobsenz and his wife, and the Chancellor being also of the opinion that the said two causes should be consolidated and prosecuted as one cause,

It is on this 30th day of March, 1926, on motion of Wilbur A. Heisley, of counsel with the said petitioners, ORDERED, that the said petitioners, Albert Paskevitch; Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz & Schmidt; Samuel Goldberg, Herman Simon and Isadore Simon, partners trading as Simon Brothers; Ac-tin-o-lyte Roofing Company a New Jersey Corporation, and Joseph Leschinsky and Stanislaw Karpinsky, partners trading as New Jersey Fire Escape Railing and Construction Company, and each of them, be admitted as parties in said causes to the end and for the purposes aforesaid and for those purposes may file any and all proper answers and counter-claims at and sufficient to put in issue between them and all parties to the suit, except

Sidney Lobsenz, their claims to so much of the net proceeds of the sale of that portion of the mortgaged premises to which their lien claims *prima facie* attached as remained after payment to Lobsenz and his wife, as aforesaid. The adverse parties may set up in their counter-pleadings and all facts upon which they rely to establish as against the lien claimants loss by the latter of rights or defenses through waivers, extinguishment, laches, estoppel or fraud of any kind; and it is

FURTHER ORDERED, That the said lien claimants and all other parties are hereby permitted to plead, answer and set up in proper pleadings any and all facts material to the issues and which they might have pleaded, or set up, had they been made originally parties to said causes or either of them.

And it is FURTHER ORDERED that the lien claimants and each of them be and they are hereby restrained and enjoined from the further prosecution of their suits upon their respective lien claims until the further order of the Chancellor; the said claimants having the right to continue by postponement from term to term of the Passaic Circuit Court of their said suits until final disposition is made of these causes;

It is FURTHER ORDERED that the depositions heretofore taken in said causes before Nicholas W. Bindseil, Special Master, may be used by either parties on the final hearing, but this shall not limit or restrict either party from offering other and additional evidence to prove the same or other facts referred to in said depositions.

E. R. WALKER,
C.

Opinion of the Chancellor.

IN CHANCERY OF NEW JERSEY.

On petitions to be admitted as parties defendant, &c.

Mr. Wilbur A. Heisley, for Petitioners.
Mr. Merritt Lane, for Mortgagees Weinberger, *et al., contra.*

Syllabus.

1. Persons claiming, as holders of filed mechanics' liens, rights in mortgaged premises superior to complainant in foreclosure suit—where such liens were not and could not have been filed until after decree *pro confesso,* and application being made promptly after filing of the liens—will be admitted as parties to the foreclosure suit and given leave to litigate, as against complainant and all other parties, their claims to the proceeds of sale of the mortgaged premises.

2. At the hearing on such an application the court will not undertake a complete trial of petitioner's alleged rights; the issue is simply as to whether or not the petitioners are asserting *bona fide* claims which they ought equitably to be permitted to have tried in the cause.

3. The Chancery Act of 1915 provides that the Chancellor shall by rules regulate and determine all questions as to parties, pleadings and procedure in Chancery suits; such rules will therefore prevail over inconsistent provisions of the Chancery Act of 1902.

Opinion of the Chancellor.

WALKER, *C.*

May 8, 1924, complainants filed bill to foreclose a mortgage of $80,000 given by defendant Goldstein (then the owner of the mortgaged premises) to Weinberger (who later assigned a part interest to his co-complainant), dated July 19, 1923, bringing in as defendants Samuel Slaff, holding a $35,000 mortgage (one month prior in date but subordinated to complainants' mortgagee); Shelkowitz, a subsequent lessee; Superior Finance Company, holder of a subsequent $16,000 mortgage; Spindel, holder of a subsequent $5,000 mortgage; Samuel Slaff and Samuel Eichenbaum, as subsequent grantees under deed from Goldstein alleged to be only by way of security, and Goldstein and wife, as the alleged real owners of the equity of redemption; also Paterson Glass Company and Samuel Zaentz, mechanics' lien claimants.

After decree *pro confesso,* and reference, a master's hearing was held October 15, 1924, and report was filed October 20, 1924, that there was due to complainants $73,196.30; to Slaff, $37,776.67; to Superior Finance Company, $16,720.00; to Spindel, $5,276.67; to Zaentz, $276.67.

Nothing further has since been done in this cause except the filing of the petitions of the parties applying to come in as defendants, and the interim proceedings on such petitions; this was because this Weinberger suit was, from a practical, if not a technical, standpoint superseded by a foreclosure suit commenced June 20, 1924, by Sidney Lobsenz, the holder of a mortgage of $30,000, comprising the same premises, and prior in lien to all of the encumbrances in-

volved in the Weinberger suit. All the parties in the Weinberger suit (and one or two others) were brought in as defendants in the Lobsenz suit. Decree *pro confesso* was taken against all, and on a reference to a master, hearing was held September 9, 1924, and a report filed October 3, 1924, that there was due to Lobsenz $30,825.84; to Weinberger and Hartstein, $73,677.75; to Slaff, $37,660; to Superior Finance Company, $16,666.66. On this report final decree was entered February 16, 1925. Prior to that date the present applying lien claimants had petitioned to be made parties and for leave to file answers and counter-claims attacking the amounts due on, and priority of, the Weinberger, Slaff and Superior Finance Company mortgages. The final decree tentatively reserved to them such rights, if any, as they might prove to have. The *fi. fa.* directed that payment be made to Lobsenz for his mortgage; also (by consent) to his wife some $20,000.00 for the amount due on a mortgage held by her antedating all the others; and also to Weinberger, Slaff and Superior Finance Company on their giving bond of $40,000 conditioned to pay the present applying lien claimants such moneys, if any, as might be directed by this Court. The bond was given; the sale was had, and Slaff became the purchaser. The proceeds of sale were not quite sufficient to pay Slaff in full; and of course not the Superior Finance Company.

The application of the lien claimants is based upon the allegation that they furnished labor and materials in the erection of a building on a portion of the mortgaged premises; that they com-

menced furnishing such labor and materials before the date of the Weinberger mortgage; that they had not completed the furnishing of such labor and materials until just prior to the filing of their lien claims; that they filed their lien claims for unpaid balances due them the last of October, 1924, and then apromptly applied to be admitted as parties to this suit.

Weinberger and Hartstein, and Slaff, resist the application; and secondly insist that if the claimants be admitted they must be limited as to the defenses and claims which they may set up.

A little simplification may help in the solution of the question. At the time the present application was made the situation was essentially this: A bill to foreclose by a first mortgagee (Weinberger) against a second mortgagee, a third mortgagee and the owner; decree *pro confesso;* master's report adjudicating the rights accordingly; application by lien claimants to become parties to the suit and to litigate their claim to the proceeds of sale against the first, second and third mortgagees and the owner; the claim of the lien claimants being that they furnished labor and materials for the construction of a building on lands comprised in the mortgage, under contracts made (and work commenced) prior to the giving of the first mortgage, which contracts were not completed by them until after the decree *pro confesso;* and that immediately upon completing their contracts they had filed lien claims under the statute for the moneys due them and promptly applied to be admitted in the cause; and that the moneys for which the mortgages purport to be security were not used

to pay for labor and materials in the construction of the building.

Assuming the facts as to the lien claims to be as above set forth, it seems clear that the lien claimants are entitled to be admitted as parties and given an opportunity to establish their claims, for their rights or liens would be superior to those of complainant first mortgagee and all other parties. To deny the application might result in depriving them of the superior right given them by the mechanics' lien act.

If they did not come in to this suit could they enforce their lien claims against the purchaser at the foreclosure sale? If they could not, it would be obviously unjust to deny them admission; and even if they could, it would be better for all concerned to admit them. The purchaser at foreclosure sale might well know nothing of the lien claims and bid a price which would not take them into account. The claims might be invalid, but in a subsequent suit by them against the purchaser the latter would find it difficult to procure the evidence to prove them invalid.

That these lien claimants have a right (unless forfeited or lost by them in some way) to litigate their claims to the proceeds of sale as against all parties to these suits (except Lobsenz) there can be no doubt. *Stiles* v. *Galbreath,* 69 N. J. Eq. 222 (aff'd 71 *Id.* 299). The present case is even stronger than that one, for there apparently the lien claimants had liens which could have been, but were not, recorded at the time of the filing of the foreclosure bill, while here (*prima facie*) the lien claims could not

have been filed until just before the present application was made. I think it is also quite apparent from that decision (see 69 N. J. Eq. at 233), and section 58 of the Chancery Act that these claimants could have the right to be admitted to this suit for the purpose of such litigation of their claims, even if their lien claims had been recordable at the time of the filing of the bill: so much the more must they have that right when their claims could not have been filed until after the foreclosure bill.

It is contended that under sections 29 and 30 of the Chancery Act, the claimants, if admitted, are precluded from asserting claims adverse to the complainants. Not so. Section 30 provides only that decrees already made shall not *ipso facto* be opened or set aside by the subsequent admission of a party—it does not prevent the Court from opening or setting aside such decrees by special order for the benefit of the admitted party, where such a course is requisite or equitable.

The provision in section 29 that the admitted party shall be bound by all orders and proceedings in the cause against the party whose interest he has acquired applies only where that interest was acquired after suit was commenced. The lien claimants acquired their interest from the owner, but they acquired that interest in inchoate form, prior to the foreclosure bill, to wit, when the owner contracted with them to do the work and furnish the materials. The filing of the lien claim was not the transfer of interest from the owner, but the perfecting of his inchoate lien. I have no hesitating in holding that

section 29 does not mean that a lien claimant admitted under such circumstances as those now being considered must be so bound by the prior proceedings and orders as to prevent his being able to litigate his claim to rights in the proceeds of sale superior to those of the complainant. But even if I took a contrary view on this point, section 29 would be no barrier in view of sections 3, 11 and 13, of the Chancery Act of 1915, and the present Chancery Rules hereinafter referred to.

In *Riverside Building & Loan Association* v. *Bishop,* 3 N. J. Adv. 1846, it was held by Vice-Chancellor Buchanan that one who, pending foreclosure suit, recovers judgment against the mortgagor is entitled to be admitted as a party even after final decree in order that he may have an opportunity to have determined his interest and priority as against the other defendants. The petitioning party there claimed to have acquired priority over senior judgment creditors because he had levied and they had not. In the present instance the application simply goes one step further—to admit petititioner to litigate his claim of rights superior to those of complainant. The difference is not one of principle but is a question merely of convenience and orderly prosecution of suits. If a trustee in bankruptcy of a mortgagor, appointed after decree *pro confesso;* or even final decree, in a foreclosure suit, applied for admission and for leave to file counter-claim to set up that complainants' mortgage was in fraud of creditors, is there any good reason why he should not be permitted to do so? If denied admission, he would assuredly have

the right to file an original bill, and undoubtedly on his application the proceeds of sale would be impounded in the foreclosure suit pending the determination of his separate bill. So in the present instance, the lien claimants have a right to have their claims as against the complainant Weinberger litigated in some suit, and since it may be done in this suit, conveniently and without prejudice to other parties, it should be done here.

Counsel have referred to a number of reported cases, prior to 1915, as authority for the denial of this application, which however are not now controlling in view of the Chancery Act of 1915. By section 3, of that act it is provided that the Chancellor, by rules, may regulate and determine all questions relating to the subject of parties to all suits and proceedings in Chancery, and all pleadings and proceedings in such suits. Chancery Rules 6, 13, paragrphs 3, 23, 24 and 28 (all of which had their origin in the Chancery Act of 1915, appendix) afford ample authority for the conclusion herein reached.

It is said however that the petitioners have lost their right to become parties, for several reasons—first, because by agreement among themselves and Slaff (the mortgagee) and Goldstein (the owner) Goldstein conveyed the property to Slaff and Eichenbaum as trustees, and the present petitioners assigned or purported to assign to the same trustees, December 4, 1923, all their right, claim or interest as inchoate mechanic lien holders, in order to extinguish all such lien claims, so that the trustee might manage the property for the interests of all parties to that

agreement, and mortgage or sell it to raise money to pay all the claims. The agreement however expressly provides in case of breach of agreement by the trustees, the right to file lien claims should revive in the lien claimants. There are disputed questions of fact as to whether or not the trustees did breach the agreement in several instances. It does not seem that the agreement should necessarily prejudice them so far as concerns the Weinberger-Hartstein mortgage, since it appears that it was not intended to be an irrevocable extinguishment of the lien claims under all circumstances. Moreover Weinberger and Hartstein were no parties to the agreement; it was in nowise intended for their benefit; nor is there any showing of facts to raise an estoppel in favor of Weinberger and Hartstein because of the agreement. Nor should it necessarily prejudice them so far as the Slaff mortgage is concerned, for Slaff was one of the trustees, and he cannot be permitted to take a position contrary to the interests of his *cestuis que trustent* which is contrary to his express agreement in the trust instrument.

It is contended that there was no breach of the agreement so as to revive the lien claims. The claimants say there were a number of such breaches. There are thus disputed questions of fact on these issues under the affidavits and depositions before the Court on this motion. Those issues however are fairly in dispute and it is not the function of the Court to determine them on this motion. The hearing on this motion is not intended to be an actual trial of the applicants' whole case. All that the Court is required to

do—all that it should do—is to satisfy itself that the petitioners have a *bona fide* claim of or to such an interest as entitles them to be made parties to the suit—that they are asserting *bona fide* a claim which they ought equitably to be permitted to have tried out. This was the law under the old practice—*Conard* v. *Mullison,* 24 N. J. Eq. 65, at 68; it is equally true under the present practice—*Boehm* v. *Rieder,* 96 N. J. Eq. 167, at 171, 172; aff'd. 3 N. J. Adv. 1679.

It is further contended that by virtue of this trust agreement Slaff and Eichenbaum as trustees holding the lien claims, legally represented the lien claimants in the foreclosure suit; that the latter were thereby in legal contemplation actually brought into court in the persons of Slaff and Eichenbaum, and hence are bound by the decree *pro confesso* against Slaff and Eichenbaum.

It does not seem to me that this contention is sound, because, for one reason, on the showing made by the claimants, their right to file liens did not accrue until after the decree *pro confesso.* Suppose they had made no attempted assignment, and suppose they had held mortgages entirely dissociated from their lien claims and had been made parties defendant as such mortgagees—could their application now, having become lien holders of record, to set up claims by virtue of such mechanics' liens be denied on the ground that a prior decree *pro confesso* against them as mortgagees also barred them on lien claims which they could not then have set up because not then existent? I think not. A decrees is *res adjudicata* it is true not only on mat-

ters set up in the pleadings but also on matters not set up which could have been set up—but not on matters which could not have been set up.

It is also contended that it appears from the affidavits and depositions that these lien claimants filed their lien claims fraudulently. There seems ground for grave suspicion in this behalf, but I think it is not so clear as to require denial of their application to be heard on a plenary trial.

They will be given leave to be admitted as parties defendant in both suits, and to file answers and counter-claims apt and sufficient to put in issue between them and all parties to the suits except Lobsenz, their claims to so much of the net proceeds of the sale (of the portion of the mortgaged premises to which their lien claims *prima facie* attached) as remained after payment of Lobsenz and his wife. The adverse parties may set up in their counter-pleadings any and all facts upon which they rely to establish as against the lien claimants loss by the latter of rights or defenses through waiver, extinguishment, laches, estoppel or fraud of any kind.

I am inclined to think it may be advisable to consolidate the two suits. The form of order may be settled on notice. Costs will abide the result on final hearing.

Abridgement of Pleadings, etc., by Stipulation.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

HARRY H. WEINBERGER, *et al.*,
Complainants-Appellants,

and

MAX GOLDSTEIN, *et als.*,
Defendant,

and

ALBERT PASKEVITCH, *et als.*,
Respondents.

Between

SIDNEY LOBSENZ,
Complainant,

and

MAX GOLDSTEIN, *et als.*,
Defendant,

and

HARRY H. WEINBERGER, *et als.*,
Defendants-Appellants,

and

ALBERT PASKEVITCH, *et als.*,
Respondents.

IT IS STIPULATED between counsel that the pleadings, etc., hereinafter referred to, need not be printed in full but that the following shall be considered as an abridgement thereof.

Abridgment of Pleadings, etc., by Stipulation.

MERRITT LANE,
Solicitor of Weinberger & Hartstein.

WARD & MCGINNIS,
Solicitor of Slaff, Eichenbaum,
and Superior Finance Corp.

WILBUR A. HEISLEY,
Solicitor of Lienors.

The bill in the first above entitled cause was filed on May 8th, 1924, to foreclose a mortgage made July 19th, 1923, by Max Goldstein and Lena Goldstein, his wife, to Harry Weinberger, to secure the payment of the sum of $80,000, on July 19th, 1924, and it was alleged that the entire principal was due.

Prior to the filing of the bill complainant Hartstein had acquired an interest in said mortgage foreclosed.

On June 19th, 1923 Goldstein had given a mortgage to Samuel Slaff to secure the payment of the sum of $35,000 which mortgage had been subordinated to the Weinberger mortgage and Samuel Slaff was made a party defendant in said foreclosure suit.

On October 19th, 1923 Goldstein had given a mortgage to Superior Finance Corporation to secure the payment of the sum of $16,000 and the Superior Finance Corporation was made a party defendant.

On December 21st, 1923 Goldstein made a deed to Samuel Slaff and Samuel Eichenbaum, which deed was made under and for the purpose of performing or executing the agreement of December 4th, 1923, between Slaff and Eichenbaum

and various lien claimants, including the appellees. Slaff and Eichenbaum were made parties defendant, but they filed no answers to the bill of complaint.

The bill recited that, on November 27th, 1923, the Paterson Glass Company had filed a mechanic's lien against Goldstein, Weinberger and Hartstein and it was made a party defendant.

Decrees *pro confesso* were taken against all of the then defendants on August 27, 1924.

There was a hearing before a Master at which Mr. Weinberger made an affidavit, a copy being hereto annexed, and marked Exhibit 6, and at which also Mr. Slaff made an affidavit, a copy being hereto annexed and marked Exhibit 7, and the Master filed a report on October 20th, 1924, reporting that there was due to Weinberger and Hartstein for principal and interest upon their mortgage the sum of $73,196.30; and to Superior Finance Company upon its mortgage the sum of $16,720, and to Samuel Slaff upon his mortgage the sum of $37,776.67, and advised that the properties be sold in one parcel.

At a Master's hearing, held on the 27th day of September, 1924, Mr. Heisley, representing the appellees, alleged lien claimants appeared and said—

> "I do not think that the agreement of December 4th, 1923, precludes my clients from filing liens. They have not been made parties to this foreclosure and therefore their rights are not affected. In the present status of the suit, they have no standing before the Master, and I conceive that their duty is to

> either apply to the Court for leave to be made parties and to file answers setting up their alleged priorities or else ignore the Chancery proceedings and file their mechanic's liens."

On June 20th, 1924 the bill in the second above entitled cause was filed to foreclose a mortgage prior in lien to the Weinberger and Hartstein mortgage, to secure the payment of the sum of $30,000. The same defendants were made parties to the foreclosure in the *Lobsenz* suit, as in the *Weinberger* suit and Weinberger and Hartstein were also made parties defendant. Slaff and Eichenbaum filed no answers. Decrees *pro confesso* were taken against all the defendants on July 30th, 1924.

A Master's hearing was held September 9th, 1924. A Master's report was filed on October 3rd, 1924, and he reported that there was due to complainant Lobsenz $30,825.84; to Weinberger and Hartstein $73,677.75 and to Slaff $37,660 and to the Superior Finance Company $16,666.66.

On or about October 14th, 1923 Mr. Heisley, representing the Paterson Glass Company, he having then recently been substituted as attorney of record, presented a petition, which in substance was the same as the petition of Goldberg and Simon Brothers and concluded with the same prayer as Exhibit 2.

Upon the presentation of that petition, the late Vice Chancellor Foster advised an order requiring the parties to show cause on November 5th, why the prayer of the petition

should not be granted, and restraining the complainants from further prosecution of the cause.

On October 31st, 1924 in the same cause Mr. Heisley presented a petition on behalf of Samuel Goldberg and Herman Simon and Isidore Simon, partners trading as Simon Brothers, a copy of which petition is annexed hereto and marked Exhibit 2, and is printed in full.

Upon the presentation of that petition an order to show cause, with like restraint, was made requiring the parties to show cause on November 5th, 1924, why the prayer of that petition should not be granted.

On November 3rd, in the case of *Weinberger* v. *Goldstein,* a petition was presented by Mr. Heisley on behalf of Albert Paskevitch, Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz and Schmidt, Ac-tin-o-lyte Roofing Co., A New Jersey corporation, and Joseph Leschinsky and Stanislau Karpinsky, partners trading as New Jersey Fire Escape Railing and Construction Company, a copy of which said petition is hereto annexed and marked Exhibit 3 and is printed in full.

On February 9, 1925, in both cases, Mr. Heisley presented a supplemental petition on behalf of Albert Paskevitch, Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz and Schmidt; Samuel Goldberg; Herman Simon and Isidore Simon, partners trading as Simon Brothers; Ac-tin-o-lyte Roofing Company, a New Jersey Corporation, and Joseph Leschinsky and Stanislaw Karpinsky, partners, trading as New Jersey Fire Escape

Railing and Construction Company, and Paterson Glass Company, a copy of which is annexed and marked Exhibit 3½ and is printed in full.

Upon hearings of the orders to show cause hereinbefore referred to, affidavits were read before Vice Chancellor Foster, and reference was made to take testimony. Testimony was taken before the Master, which is printed and returned to the Court. On the 26th day of February, 1925, by consent of all concerned, a decree was made in the case of *Sidney Lobsenz against Max Goldstein* and others, a copy of which said decree is annexed hereto and marked Exhibit 4, and is printed.

The property was sold under the terms of the decree and there was paid to the complainants Weinberger and Hartstein, $77,395.14 and to Samuel Slaff $35,343.29. These payments exhausted the fund.

The property described in the two foreclosure bills are the same.

At the Master's sale the property was sold as one parcel at a total price of $172,000. The liens of the lien claimants affected but one parcel, whereas the mortgages of Lobsenz and Weinberger and Hartstein and of Slaff covered all three parcels, consisting of a vacant lot and two apartment houses.

Vice Chancellor Foster died, (after filing a memorandum, a copy of which is printed and annexed hereto and marked Exhibit 5,) before he could determine the matter and the case was taken up by the Chancellor.

After argument he delivered an opinion which is printed and upon that opinion the order was made which is appealed from and which is printed.

The lien of the Ac-tin-o-lyte Roofing Company was filed November 3rd, 1924. The statement of claim contained therein is as follows:

"Third: The name of the person who contracted the said debt, and for whom and at whose request the said labor was performed, and materials furnished, for which the aforesaid lien is claimed, is the said Max Goldstein.

Fourth: The following is a bill of particulars of the aforesaid labor performed and materials furnished by the said Ac-Tin-o-lyte Roofing Co., the amount and kind of labor performed, and of materials furnished, and the prices at which and times when the same were performed and furnished, and giving credit for all the payments thereupon, and deductions that ought to be made therefrom, and exhibiting the balance just due to *him* from the said Max Goldstein viz.:

A verbal contract was made between the claimant and the said Max Goldstein on July 10, 1923 for furnishing the roofing and putting on the roofing on the said building, being estimated that there were 10,090 sq. ft. for which claimant was to be paid by said Max Goldstein, 8½c. per foot and 564 sq. ft. of metal strips @ 7c. per foot, making a total of $897.13

The balance of said bill was for repairs as follows:

1924			
June 1,	Furnishing roofing on account of alterations on said building,		
	Labor	$10.50	
	Material	9.25	19.75
July 11,	To work done on said roof, as follows:		
	Labor	6.00	
	Material	22.88	28.88
	DUE CLAIMANT		$945.76

All the above labor was performed and the materials furnished between the tenth day of July, 1923, and the eleventh day of July, 1924."

The lien claim of the New Jersey Fire Escape Railing and Construction Company was filed November 1, 1924. The statement of the claim contained therein is as follows:

"Third.—The name of the person who contracted the said debt, and for whom and at whose request the said labor was performed, and materials furnished, for which the aforesaid lien is claims, is the said Max Goldstein.

Fourth:—The said work and material for which the said lien is claimed was done and furnished pursuant to a written contract bearing date December 1, 1922, be-

tween the said claimants and said Max Goldstein, whereby the said claimants agreed to furnish and erect all the iron work for the building described as aforesaid, in consideration of which the said Max Goldstein agreed to pay the said claimants the sum of $4,450.00, at the times and in the manner set forth in said contract, all of which work and material was performed by the said claimants $4,450.00

And the claimants received on account thereof the sum of 2,200.00

Leaving due them the sum of $2,250.00

And interest, for which this lien is claimed.

All the above labor was performed and materials furnished between the first day of December, 1922, and the fourth day of September, 1924."

The lien claim of the Rabinowitz and Schmidt was filed November 1st, 1924. The statement of the claim contained therein is as follows:

"Third:—The name of the person who contracted the said debt, and for whom and at whose request the said labor was performed, and materials furnished, for which the aforesaid lien is claimed, is the said Max Goldstein.

Fourth:—The work and material for which the said lien is claimed by the claim-

ants was done by contract in writing made between the said Max Goldstein and the said claimants, bearing date November 15, 1922, whereby the said Max Goldstein obligated himself to pay to the claimants the sum of $23,500.00, at the times and in the manner in said contract stated, in consideration of the claimants doing all the mason work, brick work and concrete work, in the erection and construction of said building, and that the balance due upon said contract is the sum of $5,000.00.

All the above labor was performed and materials furnished between the fifteenth day of November, 1922, and the Tenth day of October, 1924."

The lien claim of Samuel Goldberg was filed October 24th, 1924. The statement of the claim contained therein is as follows:

"Third:—The name of the person who contracted the said debt, and for whom and at whose request the said labor was performed, and materials furnished, for which the aforesaid lien is claimed, is the said Max Goldstein.

The work and material for which this lien is claimed was done by two contracts made between the said Max Goldstein and the said claimant, as follows: One in writing and dated November 17, 1922, providing for all the carpenter labor work for the erection and construction of the building described as aforesaid and for other

services to be performed by the said claimant and as mentioned in said contract, in consideration of which the said Max Goldstein was to pay the said claimant the sum of $27,000.00
Upon which there has been paid the sum of 18,100.00

$8,900.00

The other contract was verbal between the said Max Goldstein and the said claimant, made on or about July, 1923, whereby the said Max Goldstein was to pay the claimant the sum of $100.00 for four doors which were furnished and used in the exterior halls of said building; nothing has been paid upon said last mentioned contract 100.00

Amount due claim .. $9,000.00

All the above labor was performed and materials furnished between the seventeenth day of November, 1922, and the ninth day of July, 1924."

Two lien claims were filed by Herman Simon and Isidore Simon, partners trading as Simon Brothers, each was filed on October 24th, 1924. The statement of claim contained in one of the lien claims is as follows:

"Third:—The name of the person who contracted the said debt, and for whom and

at whose request the said labor was performed, and materials furnished, for which the aforesaid lien is claimed, is the said Max Goldstein.

Fourth:—The said work and materials for which this lien is claimed was the furnishing and doing of all the electric wiring in the said building upon said premises, and that the said work and materials were done by a verbal contract between the said Max Goldstein and the said claimants, on or about May 18th, 1923, for an agreed price of $1,800.00
Upon which has been paid the sum of 500.00

Leaving due a balance of and interest thereon $1,300.00

All the above labor was performed and materials furnished between the Eighteenth day of May, 1923, and the twenty-sixth day of June, 1924."

The statement of claim contained in the other of the lien claims is as follows:

"Third:—The names of the persons who contracted the said debt, and for whom and at whose request the said labor was performed, and materials furnished, for which the aforesaid lien is claimed, are the said Samuel Slaff and Samuel Eichenbaum.

Fourth:—The said work for which this lien is claimed was the providing of all the electric fixtures of every kind and nature necessary for the said building and installing same, and that said work was done by contract in writing made the 16th day of May, 1924, between the said Samuel Slaff and Samuel Eichenbaum and said claimants for the price of $1,200.00.

All the above labor was performed and materials furnished between the sixteenth day of May, 1924, and the twenty-sixth day of June, 1924."

The lien claim of Albert Paskevitch was filed November 1st, 1924. The statement of claim contained therein is as follows:

"Third:—The names of the persons who contracted the said debt, and for whom and at whose request the said labor was performed, and materials furnished, for which the aforesaid lien is claimed, are the said Max Goldstein, Samuel Slaff and Samuel Eichenbaum.

Fourth:—The material for which the said lien is claimed is brick which was furnished by the claimant, at the request of the said Max Goldstein, Samuel Slaff and Samuel Eichenbaum, at an agreed price of $20.50 per thousand brick, and which was fulfilled by the claimant on the dates and at the times as follows:

Abridgment of Pleadings, etc., by Stipulation.

Max Goldstein, Samuel Slaff and
Samuel Eichenbaum

to

Albert Paskevitch, Dr.

1922		$20.50 per M.				
Nov.	28	3000	Hard	Brick	61.50	
Nov.	29	3000	"	"	61.50	
Dec.	26	6000	"	"	123.00	$246.00
1923						
Jan.	2	6000	"	"	123.00	
"	3	6000	"	"	123.00	
"	4	3000	"	"	61.50	
"	5	3000	"	"	61.50	
"	6	9000	"	"	184.50	
"	9	3000	"	"	61.50	
"	10	15000	"	"	307.50	
"	11	12000	"	"	246.00	
"	12	9000	"	"	184.50	
"	16	12000	"	"	246.00	
"	18	3000	"	"	61.50	
"	19	9000	"	"	184.50	$1,845.00
"	20	3000	"	"	61.50	
"	22	12000	"	"	246.00	
"	25	6000	"	"	123.00	
"	26	12000	"	"	246.00	
"	27	9000	"	"	184.50	
"	29	6000	"	"	123.00	
"	31	3000	"	"	61.50	$1,045.50

	Mar.	5	15000	"	"	307.50	
	"	9	3000	"	"	61.50	
	"	15	6000	"	"	123.00	
	"	16	6000	"	"	123.00	
	"	17	9000	"	"	184.50	
10	"	19	9000	"	"	184.50	
	"	20	15000	"	"	307.50	
	"	21	15000	"	"	307.50	$1,599.00
	"	22	15000	"	"	307.50	
	"	23	9000	"	"	184.50	
	"	24	9000	"	"	184.50	
	"	26	15000	"	"	307.50	
	"	27	9000	"	"	184.50	
20	"	29	6000	"	"	123.00	
	"	30	6000	"	"	123.00	$1,414.50
	Apr.	3	9000	"	"	184.50	
	"	5	6000	"	"	123.00	
	"	9	12000	"	"	246.00	
	"	10	3000	"	"	61.50	
	"	11	9000	"	"	184.50	
	"	12	15000	"	"	307.50	
30	"	13	15000	"	"	307.50	
	"	17	9000	"	"	184.50	$1,599.00
				Forwarded			$7,749.00
				Brought forward ..			7,749.00

40

1923						
Apr.	18	6000	Hard	Brick	123.00	
"	19	9000	"	"	184.50	
"	20	12000	"	"	246.00	
"	21	6000	"	"	123.00	
"	23	27000	"	"	553.50	
"	28	3000	"	"	61.50	
"	30	6000	"	"	123.00	$1,414.50
May	1	9000	Hard	Brick	184.50	
"	2	6000	"	"	123.00	
"	3	15000	"	"	307.50	
"	15	6000	"	"	123.00	
"	17	1000	"	"	20.50	
"	18	3000	"	"	61.50	
"	21	3000	"	"	61.50	
"	22	3000	"	"	61.50	943.00
"	23	1000	"	"	20.50	
"	23	6000	"	"	123.00	
		2000	"	"		
		@ $22	per	M.	44.00	187.50
June	4	9000	"	"	198.00	
"	6	3000	"	"	66.00	264.00
1924						
Oct.	13	2000	"	"		
		@ 20c.	per	M.		40.00
						$10,598.00
				Cr.		
On account April 17, 1923						3,000.00
Balance due						$7,598.00

All the above labor was performed and materials furnished between the twenty-eighth day of November, 1922, and the fourteenth day of October, 1924."

The lien claim of Samuel Goldberg is entitled against Max Goldstein, Builder, and Samuel Slaff and Samuel Eichenbaum, Owners.

The lien claim of Rabinowitz and Schmidt, is entitled against Max Goldstein, Builder and Samuel Slaff and Samuel Eichenbaum, Owners.

The lien claim of the New Jersey Fire Escape Railing and Construction Company, is entitled against Max Goldstein, Builder and Samuel Slaff and Samuel Eichenbaum, Owners.

The lien claim of the Ac-tin-o-lyte Roofing Co., is entitled against Max Goldstein, Builder, and Samuel Slaff and Samuel Eichenbaum, Owners.

The lien claim of Albert Paskievitch is entitled against Max Goldstein, Samuel Slaff and Samuel Eichenbaum, Builders, and Samuel Slaff and Samuel Eichenbaum, Owners.

The lien claim of Herman Simon and Isidore Simon, partners trading as Simon Brothers, which claims $1,200.00, is entitled against Samuel Slaff and Samuel Eichenbaum, Builders, and Samuel Slaff and Samuel Eichenbaum, Owners.

The lien claim of Herman Simon and Isidore Simon, partners trading as Simon Brothers, which claims $1,300.00, is entitled against Max Goldstein, Builder, and Samuel Slaff and Samuel Eichenbaum, Owners.

No reference is made in any of the lien claims to mortgages.

Exhibit 2.

IN CHANCERY OF NEW JERSEY.

Between HARRY H. WEINBERGER AND BENJAMIN A. HARTSTEIN, Complainants, *and* MAX GOLDSTEIN, *et als.*, Defendants.	55, 659. On Bill &c.

Petition.

The petition of Samuel Goldberg and Herman Simon and Isidore Simon, partners trading as Simon Brothers, respectfully shows unto your Honor:

1. That in the year 1922, and continuous thereafter until December 21, 1923, Max Goldstein, defendant in the above stated cause, was the owner of a certain tract of land and premises, situate, lying and being in the City of Passaic, in the County of Passaic and State of New Jersey, and more particularly described as follows:

BEGINNING on the Northerly side of Jefferson Street at a point distant two hundred and forty feet and eighty-eight hundredths of a foot North Easterly from the North East corner of Columbia Avenue and Jefferson Street; and running thence (1) North Westerly one hundred and thirty-six feet; thence (2) North Easterly and

at right angles with the first course one hundred and eight feet; thence (3) in a Southerly course, or nearly so, but parallel with the first course, one hundred and thirty-six feet to the North side of Jeffesron Street; thence (4) along the North side of Jefferson Street one hundred and eight feet, be the same more or less, to the point or place of BEGINNING.

2. That on December 21st, 1923, the said Max Goldstein conveyed the said premises to Samuel Slaff and Samuel Eichenbaum, who continuously, down to the present time, have held the title thereto.

3. That at various times during the ownerships by the said Max Goldstein, and the said Samuel Slaff and Samuel Eichenbaum of said premises, your petitioner furnished labor and material which were used in the erection and construction of a certain four story brick apartment, containing fifty-six apartments, being erected by the said Max Goldstein and the said Samuel Slaff and Samuel Eichenbaum upon the said premises and for which each of your said petitioners have an inchoate lien upon said building and upon said land and premises, by virtue of a statute entitled: "An Act to secure to mechanics and others, payment for their labor and materials in erecting any building," and the several supplements thereto.

4. That after the making of contracts between the said Max Goldstein and your petitioners, and also between said Samuel Slaff and

Exhibit 2.

Samuel Eichenbaum and some of your petitioners, and after your petitioners had furnished either all or a large part of the labor and material for which they had said inchoate lien, certain indentures of mortgages were placed upon said premises, all of them being made by said Max Goldstein and wife, and which are briefly referred to as follows: (a) mortgage to Harry H. Weinberger for $50,000.00, dated February 26, 1923, conditioned for the payment of the said sum of $50,000.00 and interest, (b) mortgage to Harry H. Weinberger and Benjamin A. Hartstein, dated July 19, 1923, conditioned for the payment of $80,000.00 in one of said two mortgages the defendant, Benjamin A. Hartstein, claims some interest; (c) mortgage to Samuel Slaff, dated June 19, 1923, conditioned for the payment of the sum of $35,000.00; (a) mortgage to Superior Finance Corporation, Body Corporate, dated October 19, 1923, conditioned for the payment of the sum of $16,000.00. and (e) mortgage to the Progressive Realty Corporation, Body Corporate, for either $25,000.00 or $2,500.00, or some other sum.

5. The liens of said mortgagees, by reason of the premises above set forth, and because the moneys, the payment of which was intended to be secured by said mortgage, was not applied to the payment of bills for labor and material used in the erection and construction of the said building, are subsequent and subject to the liens of your petitioners under said statute, for the payment to your petitioners of the sums due and owing to them for materials and labor so furnished, as aforesaid.

Exhibit 2.

6. Your petitioners have not been made party defendants in said cause.

7. Your petitioners, having such inchoate liens, as aforesaid, did, for the purpose of enforcing such liens, file their certain lien claims within the time mentioned, and according to the terms, of the said statute in the County Clerk's Office of Passaic County, and caused summons to be issued thereon out of the Circuit Court of said County, on the dates and for the amounts as follows:

(a) Lien claim of Samuel Goldberg for $9,000.00 filed October 24, 1924 and summons issued thereon October 24, 1924.

(b) Lien claims of Herman Simon and Isidore Simon, partners trading as Simon Brothers, one for $1,200.00 and one for $1,300, filed October 24, 1924 and summons issued therein October 24, 1924.

Your petitioners respectfully pray that they may be made party defendants in the above stated cause and that they may have the privilege of filing answers and answers by way of counter claims against the complainants and the mortgage defendants in said cause, setting up the foregoing facts and such other facts as they may be advised are necessary for their protection and claiming priority over all of the said mortgages, by reason of their lien under the statute, as aforesaid.

And your petitioners will ever pray &c.

(Signed) Wilbur A. Heisley,
Solicitor of Petitioners.

Petition Duly Verified.

Exhibit 3.

IN CHANCERY OF NEW JERSEY.

Between HARRY H. WEINBERGER AND BENJAMIN A. HARTSTEIN, Complainants, *and* MAX GOLDSTEIN, *et als.*, Defendants.	55-659. On Bills &c.

Petition.

The petition of Albert Paskievitch, Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz & Schmidt, Ac-tin-o-lyte Roofing Co., a New Jersey Corporation, and Joseph Leschinsky and Stanislau Karpinsky, partners trading as New Jersey Fire Escape Railing and Construction Company, respectfully shows unto your Honor:

1. That in the year 1922, and continuous thereafter until after December 21, 1923, Max Goldstein, defendant in the above stated cause, was the owner of a certain tract of land and premises, situate, lying and being in the City of Passaic, in the County of Passaic and State of New Jersey, and more particularly described as follows:

BEGINNING on the Northerly side of Jefferson Street at a point distant two hundred and forty

feet and eighty-eight hundredths of a foot North Easterly from the North East corner of Columbia Avenue and Jefferson Street; and running thence (1) North Easterly one hundred and thirty-six feet; thence (2) North Easterly and at right angles with the first course one hundred and eight feet; thence (3) in a Southerly course, or nearly so, but parallel with the first course, one hundred and thirty-six feet to the North side of Jefferson Street; thence (4) along the North side of Jefferson Street one hundred and eight feet, be the same more or less, to the point or place of BEGINNING.

2. That on December 21st, 1923, the said Max Goldstein conveyed the said premises to Samuel Slaff and Samuel Eichenbaum, who continuously, down to the present time, have held the title thereto.

3. That at various times during the ownerships by the said Max Goldstein, and the said Samuel Slaff and Samuel Eichenbaum of said premises, your petitioners furnished labor and material which were used in the erection and construction of a certain four story brick apartment, containing fifty-six apartments, being erected by the said Max Goldstein and the said Samuel Slaff and Samuel Eichenbaum upon the said premises and for which each of your said petitioners have an inchoate lien upon said building and upon said land and premises, by virtue of a statute entitled: "An Act to secure to mechanics and others, payment for their labor and materials in erecting any building," and the several supplements thereto.

Exhibit 3.

4. That after the making of contracts between the said Max Goldstein and your petitioners, and also between said Samuel Slaff and Samuel Eichenbaum and some of your petitioners, and after your petitioners had furnished either all or a large part of the labor and material for which they had said inchoate lien, certain indentures of mortgages were placed upon said premises, all of them being made by said Max Goldstein and wife, and which are briefly referred to as follows: (a) mortgage to Harry H. Weinberger for $50,000.00, dated February 26, 1923 and conditioned for the payment of the said sum of $50,000.00 and interest, (b) Mortgage to Harry H. Weinberger and Benjamin A. Hartstein, dated July 19, 1923, conditioned for the payment of $80,000.00, in one of said two mortgages the defendant, Benjamin A. Hartstein, claims some interest; (c) mortgage to Samuel Slaff, dated June 19, 1923, conditioned for the payment of the sum of $35,000.00; (d) mortgage to Superior Finance Corporation, Body Corporate, dated October 19, 1923, conditioned for the payment of the sum of $16,000.00; and (e) mortgage to the Progressive Realty Corporation, Body Corporate, for either $25,000.00 or $2,500.00, or some other sum.

5. The liens of said mortgages, by reason of the premises above set forth, and because the moneys, the payment of which was intended to be secured by said mortgage, was not applied to the payment of bills for labor and material used in the erection and construction of

the said building, are subsequent and subject to the liens of your petitioners under said statute, for the payment to your petitioners of the sums due and owing to them for materials and labor so furnished, as aforesaid.

6. Your petitioners have not been made party defendants in said cause.

7. Your petitioners, having such inchoate liens, as aforesaid, did, for the purpose of enforcing such liens, file their certain lien claims within the time mentioned, and according to the terms, of the said statute in the County Clerk's Office of Passaic County, and caused summons to be issued thereon out of the Circuit Court of said County, on the dates and for the amounts as follows:

(a) Lien claim of Albert Paskievitch for $7,598.00 filed November 1, 1924 and summons issued thereon November 1, 1924.

(b) Lien claim of Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz & Schmidt, for $5,000.00 filed November 1, 1924 and summons issued thereon November 1, 1924.

(c) Lien Claim of Ac-tin-o-lyte Roofing Co. for $945.76 filed November 3, 1924 and summons issued thereon November 3, 1924.

(d) Lien Claim of Joseph Leschinsky and Stanislau Karpinsky partners trading as New Jersey Fire Escape Railing and Construction Company for $2,250.00 filed November 1, 1924 and summons issued thereon November 1, 1924.

Exhibit 3.

Your petitioners respectfully pray that they may be made party defendants in the above stated cause and that they may have the privilege of filing answers and answers by way of counter claims against the complainants and the mortgage defendants in said cause, setting up the foregoing facts and such other facts as they may be advised are necessary for their protection and claiming priority over all of the said mortgages, by reason of their lien under the statute, as aforesaid.

And your petitioners will ever pray &c.

(Signed) Wilbur A. Heisley,
Solicitor of Petitioners.

Petition Duly Verified.

Exhibit 3½.

IN CHANCERY OF NEW JERSEY.

Between
HARRY H. WEINBERGER AND
BENJAMIN A. HARTSTEIN,
Complainants,

and

MAX GOLDSTEIN, *et als.*,
Defendants.

55-659.
On Bill &c.

Supplemental Petition.

IN CHANCERY OF NEW JERSEY.

Between
SIDNEY LOBSENZ,
Complainant,

and

MAX GOLDSTEIN, *et als.*,
Defendants.

56-119.
On Bill &c.

Supplemental Petition.

TO HIS HONOR, EDWIN ROBERT WALKER, CHANCELLOR OF THE STATE OF NEW JERSEY:

Your petitioners, Samuel Goldberg, Herman Simon and Isidore Simon, partners trading as Simon Brothers; Albert Paskievitch; Louis Rabinowitz and Joseph Schmidt, partners trad-

Exhibit 3½.

ing as Rabinowitz & Schmidt; Ac-tin-o-lyte Roofing Company, a New Jersey Corporation; Joseph Leschinsky and Stanislau Karpinsky, partners trading as New Jersey Fire Escape, Railing and Construction Company, and Paterson Glass Company, body corporate, respectfully show:

That they have heretofore filed petitions in said causes praying to be made parties defendants and granted leave to answer for the reasons set forth in said petitions.

Your petitioners desire to file an amended and supplemental petition in addition to the ones already filed, and respectfully show:

1. That on December 4th, 1923 a certain agreement was entered into between your petitioners and others, as parties of the first part, and Samuel Slaff and Samuel Eichenbaum, parties of the second part, and in said agreement, among other things, it was stated as follows:

> "3. That those parties of the first part who shall have labor or material to supply to said building which shall not be embraced in their contracts with the said Max Goldstein shall proceed to furnish the necessary labor or material or both requisite to complete the said building, and that such parties shall be preferred creditors, in that they shall be paid from the first moneys that come into the hands of the parties of the second part hereto, except Samuel Goldberg and Rabinowitz & Smith & N. J. Fire Escape Co."

Exhibit 3½.

"4. This agreement shall not become binding and effective unless and until there shall be deposited with Harry Loeb and Joseph A. Feder, as trustees on and behalf of said creditors Five Thousand Dollars to assure those of the parties of the first part referred to in the preceding paragraph hereof that they will be paid promptly upon the completion by each of the creditors of their respective work."

Your petitioners allege that since the filing of said petitions, depositions have been taken in said two causes and it has been proven that the said Samuel Slaff and Samuel Eichenbaum, who, under the terms of said agreement, were acting as trustees for your petitioners, have, in violation of the said third and fourth clauses, paid moneys which they had received as rents and also the $5,000, or a large part thereof, mentioned in paragraph 4, to persons who had furnished labor or material, or both, which was embraced in the contracts of such persons with said Max Goldstein and have not paid said rents and moneys to those persons who have supplied labor and material which was not embraced in the contract of such persons with the said Max Goldstein.

2. That your petitioners, Simon Brothers, entered into a written contract dated May 16, 1924, with the said Samuel Slaff and Samuel Eichenbaum, in and by which they agreed to furnish electric fixtures for said building for the sum of $1,200.00; that said electric fixtures

were not labor or materials embraced in the contract of Simon Brothers with said Max Goldstein, and that by virtue of said contract with said Samuel Slaff and Samuel Eichenbaum and of the furnishing of the said fixtures by said Simon Brothers they became entitled to all the benefits of paragraphs 3 and 4 above quoted of the said agreement of December 4th; notwithstanding that fact and the additional fact that the said Samuel Slaff and Samuel Eichenbaum have collected many thousands of dollars of rent and have appropriated a large sum of the said sum of $5,000.00, mentioned in paragraph 4, they have not paid Simon Brothers anything on account of their said contract, but they have laid large sums of money out of said sum of $5,000.00 to Samuel Goldberg, Rabinowitz & Schmidt and New Jersey Fire Escape Railing and Construction Company and others, to the great detriment and loss of said Simon Brothers.

3. That in and by the terms of said agreement of May 6th, the said Samuel Slaff and Samuel Eichenbaum agreed to pay the said sum of $1,200.00 to Simon Brothers, as follows, to wit:

> "According to an agreement entered into between the creditors of Max Goldstein, former owner of the above property, to wit, that the above moneys $1,200.00 be paid from the first money that come to the property, whether by rent or mortgage."

4. The fifth paragraph of said agreement of December 4th, particularly provides that all the

creditors, including your petitioners, shall be paid by the said Samuel Slaff and Samuel Eichenbaum, on account of their debts, a *pro rata* dividend quarterly and it was expressly stated as follows; in said paragraph 5.

> "It is mutually understood and agreed herewith that the *pro rata* dividends referred to above shall be construed to mean that each creditor shall receive an amount equal in percentage to that received by all the remaining creditors up to that time."

Your petitioners allege, and it has been shown by the said affidavits, that Samuel Slaff and Samuel Eichenbaum have violated the said fifth paragraph of said agreement in this, that although they have collected thousands of dollars of rents, they have not paid a dividend of any kind, nor have they paid any money whatever to any of your petitioners, but, on the contrary, have mis-appropriated said moneys and paid to other parties of their own selection their claims in full in great detriment and injury to your petitioners' rights.

5. That paragraph 9 of said agreement of December 4th, provided that the said Samuel Slaff and Samuel Eichenbaum should furnish a bond to the parties of the second part mentioned in said agreement in the sum of $100,000.00, conditioned for the faithful performance by them with the terms of said agreement.

6. That said bond was executed, bearing date December 21, 1923, the conditions of said bond being as follows:

"1. That they (meaning the said Slaff and Eichenbaum) will receive and collect all the rentals and profits of said building and pay all charges and disbursements imposed upon said property."

Your petitioners allege that by said affidavits it has been disclosed that they have utterly failed to pay any of the taxes assessed upon said property, or of interest accruing upon the said mortgages.

7. Another condition of said bond reads, that they will faithfully comply with the terms and conditions expressed in the agreement of December 4th above referred to, but your petitioners allege that they have not complied with said agreement, but have violated the same in the manner hereinbefore set forth.

8. Paragraph 3 of said bond provided, that they would sell and convey the said property for any sum not less than the sum of $181,000.00, but by said affidavit it appears they have not sold said property, nor have they made any efforts so to do.

9. Your petitioners further show that in said agreement of December 4th, which was duly signed by the said Samuel Slaff, he stated that the amount due on a certain mortgage therein mentioned and held by him was the sum of $27,000.00, but by said affidavits, and by the records of this Court, it will appear that in these two causes, the said Samuel Slaff has testified before the Masters to whom said causes were referred, that there is due him upon said mortgage the full sum of $35,000.00 but your

Exhibit 3½.

petitioners say that there is not more than $27,000.00 due said Samuel Slaff on said mortgage, and that they verily believe it to be much less.

10. That in said bond it is expressly stated that the said Samuel Slaff and Samuel Eichenbaum should administer the said building with all due regard for the interest of your petitioners and others mentioned in said agreement, but your petitioners allege that they have done absolutely nothing in performance of that promise, but, on the contrary, have neglected their said duties and have obtained title in their own name to the said property and are collecting the rents and profits theerof for their own benefits.

11. That since the filing of said petitions by your petitioners, they have all caused to be recovered final judgment upon their said lien claims and in their said suits against the said Max Goldstein, in the Passaic County Circuit Court, and by virtue of said judgments have acquired liens upon the said premises described in the bills of complaints in said causes.

Your petitioners respectfully pray that they may be permitted to file answers and answers in the way of counter claims against all of the mortgage defendants mentioned in said bills of complaint, setting up the foregoing facts, and such other facts as they may be advised are necessary for their protection and the preservation of their interests in said property.

WILBUR A. HEISLEY,
Solicitor for Petitioners.

Duly Verified.

Exhibit 4.

IN CHANCERY OF NEW JERSEY.

Between

SIDNEY LOBSENZ,
Complainant,

and

MAX GOLDSTEIN, *et als.*,
Defendants.

On Bill, &c.

Decree.

This case being opened to the Court by Meyer Lobsenz, of counsel, with the complainant, and it appearing that process of subpoena for the appearance of the defendants has been duly issued; and that the defendants have failed to file any pleadings to the bill within the time limited by law and that the bill has been taken as confessed against the respective defendants and that a report has been made by one of the Masters of this Court bearing date the twenty-fifth day of September, 1924, finding that there is due to the complainant for principal and interest on his mortgage the sum of $30,825.84 and that there is due to the defendants, Harry H. Weinberger and Benjamin A. Hartstein, for principal and interest upon their mortgage the sum of $73,677.75 and that there is due to the defendant, Samuel Slaff, for principal and interest upon his mortgage the sum of $37,660.00, and that there is due to the defendant, Superior Finance Corporation, a corporation, for principal

Exhibit 4.

and interest upon its mortgage the sum of $16,666.66, and the said Master having also reported with respect to the amounts due upon various other alleged encumbrances subsequent in priority to the said complainant and the said Harry H. Weinberger and Benjamin A. Hartstein and Samuel Slaff and Superior Finance Corporation, and application having been made to the Court by the Paterson Glass Company, Inc., one of the defendants herein against whom a decree *pro confesso* has gone and Samuel Goldberg, Albert Paskievitch, Joseph Leschinsky and Stanislaw Karpinsky, partners trading as New Jersey Fire Escape Railing and Construction Company; Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz & Schmidt; Herman Simon and Isidore Simon, partners trading as Simon Brothers and Ac-tin-o-lyte Roofing Co., a New Jersey Corporation, none of whom were made parties defendant hereto, for permission to open the decree *pro confesso* against the Paterson Glass Company, Inc., and to permit the Paterson Glass Company, Inc., to file an answer and counter-claim and for permission for the said Samuel Goldberg; Albert Paskievitch; Joseph Leschinsky and Stanislaw Karpinsky, partners trading as New Jersey Fire Escape Railing and Construction Company; Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz & Schmidt; Herman Simon and Isidore Simon partners trading as Simon Brothers and Ac-tin-o-lyte Roofing Co., a New Jersey Corporation to intervene and be made parties defendant hereto to the end that they may file answers and counter-claims attacking the

priority and the amount due upon the mortgage of the defendants, Harry H. Weinberger and Benjamin A. Hartstein and Samuel Slaff and Superior Finance Corporation, and likewise the priority and amounts due upon the other encumbrances reported upon by the said Master and no cause appearing why the report of the said Master with respect to the amount due the complainants should not be confirmed and the Court having taken under advisement the matter of permitting the said applicants above named to answer or counter-claim in the said suit and that, save only with respect to the rights of the said applicants, if any rights they have, there is no cause shown or appearing against the confirmation of the report of the said Master with respect to the amount due to the defendants, Harry H. Weinberger and Benjamin A. Hartstein and Samuel Slaff and Superior Finance Corporation upon their mortgages, and it appearing to the Court that the property mortgaged is of such character and so situated as to make it liable to deteriorate in value pending this suit and to make its care or preservation difficult and expensive and that the rights of the respective parties may be preserved by this order and the sale as herein directed, petition for said sale being made in open Court by the said complainant;

It is, on the 26th day of February, 1925, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED AND DECREED that the finding of the said Master with respect to the amount due to the complainant for principal and interest on his mortgage do stand confirmed; and that the complainant is entitled

to have the said sum of $30,825.84, with lawful interest thereon to be computed from the date of said report, together with his costs of this suit, raised and paid out of the mortgaged premises; and that the finding of the said Master with respect to the amount due to the defendants, Harry H. Weinberger and Benjamin A. Hartstein upon their mortgage, and the finding of the said Master with respect to the amounts due to the defendants, Samuel Slaff and Superior Finance Corporation, upon their respective mortgages, except as against the Paterson Glass Company, Inc., and Samuel Goldberg; Albert Paskievitch; Joseph Leschinsky and Stanislaw Karpinsky, partners trading as New Jersey Fire Escape Railing and Construction Company; Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz & Schmidt; Herman Simon and Isidore Simon, partners trading as Simon Brothers and Ac-tin-o-lyte Roofing Co., a New Jersey Corporation, do stand confirmed; and that the said defendants, Harry H. Weinberger & Benjamin A. Hartstein are entitled to have the said sum of $73,677.75, with lawful interest thereon, to be computed from the date of said report, together with their costs of this suit, raised and paid out of the mortgaged premises subject only to such rights as the Paterson Glass Company, Inc., and Samuel Goldberg; Albert Paskievitch; Joseph Leschinsky and Stanislaw Karpinsky, partners trading as New Jersey Fire Escape Railing and Construction Company; Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz & Schmidt; Herman Simon and Isidore Simon, partners trading as Simon

Exhibit 4.

Brothers and Ac-tin-o-lyte Roofing Co., a New Jersey Corporation may have in the premises; and that the said defendants, Samuel Slaff and Superior Finance Corporation are entitled Samuel Slaff to have the said sum of $37,660 and Superior Finance Corporation to have the said sum of $16,666.66 with lawful interest thereon, to be computed from the date of said report, together with their costs of this suit, raised and paid out of the mortgaged premises subject only to such rights as the Paterson Glass Company, Inc., and Samuel Goldberg; Albert Paskievitch; Joseph Leschinsky and Stanislaw Karpinsky, partners trading as New Jersey Fire Escape Railing and Construction Company; Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz & Schmidt; Herman Simon and Isidore Simon, partners trading as Simon Brothers and Ac-tino-lyte Roofing Co., a New Jersey Corporation; and

It is accordingly ORDERED, ADJUDGED AND DECREED that so much of the said mortgaged premises as will be sufficient to raise and satisfy the said debt, interest and costs of the complainant and of the said Harry H. Weinberger and Benjamin A. Hartstein, and Samuel Slaff and Superior Finance Corporation, defendants, be sold; that a writ of *fiere facias* be issued for that purpose out of this Court directed to William I. Lewis, one of the Special Masters of this Court commanding him to make sale according to law of so much of the mortgaged premises as will be sufficient to satisfy the said debts, interest and costs, and that he pay the said debt, interest and

costs of the complainant to the complainant or to his solicitor; and that he pay the said debt, interest and costs of the defendants, Harry H. Weinberger and Benjamin A. Hartstein, or their solicitors, upon their furnishing the bond hereinafter set forth; and that he pay the said debts, interest and costs of the defendants, Samuel Slaff and Superior Finance Corporation, or their solicitors, upon their furnishing the bond hereinafter set forth; and that in case more money shall be raised at the sale than shall be sufficient to answer said payment, such surplus money be brought into this court and deposited with the Clerk to abide the further order of this Court unless previously disposed of by order of the Court. and the said Special Master is to make return to this court of his proceedings by virtue of the said writ;

And it is further ORDERED that the said Special Master in making sale of said property offer said property first in parcels, in the following order, the first parcel to be described as follows:

All that certain tract, parcel of land and premises, situate, in the City of Passaic, in the County of Passaic and State of New Jersey, particularly described as follows:

BEGINNING on the northerly side of Jefferson Street at a point distant 198.88 feet northerly from the northeast corner of Columbia Avenue and Jefferson Street, and running thence (1) northwesterly from the line of lands now or formerly of August Wederich and Stephen Corn 156 feet, more

or less; thence (2) northeasterly parallel with Jefferson Street 42 feet; thence (3) southeasterly parallel with the first course 155 feet, more or less, to the northerly side of Jefferson Street; thence (4) southwesterly along the same 42 feet to the point or place of beginning.

the second parcel to be described as follows:

All that certain tract or parcel of land and premises, situate in the City of Passaic, in the County of Passaic and State of New Jersey, particularly described as follows:

Beginning on the northerly side of Jefferson Street at a point distant 240.88 feet northeasterly from the northerly corner of Columbia Avenue and Jefferson Street, and running thence (1) northwesterly at about right angles with Jefferson Street 156 feet, more or less; thence (2) northeasterly parallel with Jefferson Street 53 feet; thence (3) southeasterly parallel with the first course 20 feet; thence (4) northeasterly parallel with Madison Street 55 feet; thence (5) southeasterly parallel with the first course 136 feet, more or less, to the northerly side of Jefferson Street; and thence (6) southwesterly along the northerly line of Jefferson Street 108 feet to the point or place of beginning.

and that the said Master shall then offer the said property as a whole and the property shall be sold under such method of sale as shall bring the highest price.

Exhibit 4.

And it is further ORDERED that the said Harry H. Weinberger and Benjamin A. Hartstein and Samuel Slaff and Superior Finance Corporation shall give bond in the sum of $40,000.00 dollars, with sufficient surety to be approved by the said Special Master to the Chancellor of the State of New Jersey conditioned that the said Harry H. Weinberger and Benjamin A. Hartstein and Samuel Slaff and Superior Finance Corporation will pay to the said Paterson Glass Company, Inc.; Samuel Goldberg; Albert Paskievitch; Joseph Leschinsky and Stanislaw Karpinsky, partners trading as New Jersey Fire Escape Railing and Construction Company; Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz & Schmidt; Herman Simon and Isidore Simon, partners trading as Simon Brothers and Ac-tin-o-lyte Roofing Co., a New Jersey Corporation such moneys as the Court of Chancery, subject to appeal, may direct to be paid by the said Harry H. Weinberger and Benjamin A. Hartstein and Samuel Slaff and Superior Finance Corporation, to them or either or any of them as the result of the determination of the rights of the said Harry H. Weinberger and Benjamin A. Hartstein and Samuel Slaff and Superior Finance Corporation and the said Paterson Glass Company, Inc.; Samuel Goldberg; Albert Paskievitch; Joseph Leschinsky and Stanislaw Karpinsky, partners trading as New Jersey Fire Escape Railing and Construction Company; Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz & Schmidt; Herman Simon and Isidore Simon, partners trading as Simon Brothers and Ac-tin-o-lyte Roofing

Co., a New Jersey Corporation, as between themselves, arising out of the mortgage of said Harry H. Weinberger and Benjamin A. Hartstein and the mortgages of Samuel Slaff and Superior Finance Corporation, the amount due upon which mortgage is directed by this decree to be made, raised and paid out of the mortgaged premises, and the alleged claims of the said Paterson Glass Company, Inc.; Samuel Goldberg; Albert Paskievitch; Joseph Leschinsky and Stanislaw Karpinsky, partners trading as New Jersey Fire Escape Railing and Construction Company; Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz & Schmidt; Herman Simon and Isidore Simon, partners trading as Simon Brothers and Ac-tin-o-lyte Roofing Co., a New Jersey Corporation with respect thereto; and

It is further ORDERED that said bond shall contain a provision that the parties thereto, including the surety, submit to the determination of the amount due thereon by this Court, subject to appeal, in this cause and to process issued out of this Court in this cause to enforce compliance therewith;

And it is further ORDERED, ADJUDGED and DECREED that the said defendants and all parties hereto, including the said Paterson Glass Co., Inc.; Samuel Goldberg; Albert Paskievitch; Joseph Leschinsky and Stanislaw Karpinsky, partners trading as New Jersey Fire Escape Railing and Construction Company; Louis Rabinowitz and Joseph Schmidt, partners trad-

ing as Rabinowitz & Schmidt; Herman Simon and Isidore Simon, partners trading as Simon Brothers and Ac-tin-o-lyte Roofing Co., a New Jersey Corporation stand absolutely debarred and foreclosed of and from all equity and redemption of, in and to so much of the said mortgaged premises as shall be sold by virtue of this decree.

Respectfully submitted,

JOHN E. FOSTER,
V. S.

E. R. WALKER,
C.

We hereby consent to the entry of the foregoing decree.

WEINBERGER & WEINBERGER,
Solicitors of Harry H. Weinberger and Benjamin A. Hartstein.

WARD & MCGINNIS,
Solicitors of Superior Finance Corporation, Samuel Slaff and Samuel Eichenbaum.

WILBUR A. HEISLEY,
Solicitor of Paterson Glass Company, Inc.; Samuel Goldberg; Albert Paskievitch; Joseph Leschinsky and Stanislaw Karpinsky, partners &c.; Louis Rabinowitz and Joseph Schmidt partners &c.; Simons and Ac-tin-o-lyte Roofing Co.

Exhibit 5.

Memorandum.

FOSTER, V. C.

After listening to argument of counsel on this application this morning, and not having time to read the record in the transcript taken before Mr. Bindseil, I have indicated to counsel that I think an order should be advised permitting the so-called lien claimants, represented by Judge Heisley, to file their respective answers in this cause; and I think the defenses to be presented in such answers should be subject to the control of the Court and should be limited; qualified or modified as a consideration of the transcript mentioned may warrant, and particularly so in the case of Samuel Goldberg, Rabinowitz & Schmidt, and the New Jersey Fire Escape Company, relating to the disbursement of Five thousand dollars, and also on the question of estoppel against the last-named with respect to the payment of the Five thousand dollars, and possibly other matters in connection with the transaction, and also shifting the burden of proof from Weinberger, as second mortgagee, to the shoulders of the lien claimants, merely requiring Weinberger to prove the advancement of the moneys for which he claims a decree, to the mortgagor, in ordinary course and not compelling him to follow the application of the same to the payment of claims for labor and materials on the buildings in question, and also reserving the right, when an order is prepared and advised, to either strike out or to limit any defense that may be interposed

on the question of usury, in view of the contention made by Mr. Lane, that these lien claims have had several opportunities to answer and that they are now in default, and that the request to answer at this late date is merely an appeal to the favor of the Court, and not as a matter of right, and that they should not be permitted to interpose the defense of usury.

I am also adopting the suggestion of counsel that no formal order of any kind be advised at this time, in view of the fact that an agreement was reached this morning for the sale of the premises on terms stated in a bond to be advised and approved in connection therewith, and the question of advising an order is to be taken up upon the return of counsel and Court from a vacation.

The right is also reserved to counsel of the parties to suggest any enlargement or further qualification or modification of the defenses to be presented by the answers at the time the order for the same may be advised.

It is also agreed that in connection with the sale of the mortgaged premises which are to be sold both in parcels and in bulk as may be found most advantageous for the parties concerned, that the sale should be conducted by William I. Lewis, Esq., a Special Master, of Paterson, New Jersey.

Dated, February tenth, 1924.

Dictated by Vice Chancellor Foster.

Exhibit 6.

STATE OF NEW JERSEY, }
COUNTY OF PASSAIC.. } SS.:

HARRY H. WEINBERGER, being, upon his oath, sworn, says that he is the mortgagee in the the mortgage made by Max Goldstein and Lena Goldstein, his wife, dated July 19th, 1923, given to secure the sum of $80,000.00 in one year with interest at 6% payable semi-annually, said mortgage being given to secure a bond in the penal sum of $160,000.00 bearing even date. Deponent says that on September 5th, 1923, he assigned a three-eighths interest in said bond and mortgage to the said Benjamin A. Hartstein, one of the complainants, which assignment was duly recorded in the Register's Office of Passaic County in Book B-4 of Assignments of Mortgages, page 382. Deponent says that said mortgage was given for the purpose of securing moneys advanced and to be advanced for the erection of a building upon the premises described in the bill of complaint and interest charges thereon and that deponent held the said sum of $80,000.00 less the prior payment and interest thereon from the date of said mortgage, ready and available for application to said mortgage loan to be advanced as the building progressed. Deponent says that there is due upon said bond secured by said mortgage the principal sum of $67,000.00 and that there is interest due upon $80,000.00 from the date of said bond, to the date of the filing of the bill of complaint in said cause and there is due interest on $67,000 from the last mentioned date to the date hereof. Deponent further says that to secure the

moneys advanced on said building he procured insurance and has obligated himself to pay insurance premises covering said building in the sum of $665.64, said policy being effected in accordance with agreement made with the mortgagors and in accordance with the terms of said bond and mortgage and which deponent is informed is now $589.80 due to cancellation and change of policies of insurance, which fact deponent learned on the date hereof.

HARRY H. WEINBERGER.

Sworn and subscribed to before me this 15th day of October, 1924.

VERA GLASS,
Notary Public of N. J.

Exhibit 7.

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

Samuel Slaff, being duly sworn says that he is one of the defendants in the above entitled cause; that he is the mortgagee in a bond and mortgage made by Max Goldstein and Lena Goldstein, his wife, to him, given to secure the sum of $35,000.00 and more particularly described in the bill of complaint filed; deponent says that said bond has been lost or misplaced; that it has never been paid nor any part thereof; that the amount due upon said bond and mortgage is the principal sum of $35,000.00 with interest from June 19th, 1923.

Samuel Slaff.

Sworn and subscribed to before me
this 16th day of October, 1924.

Joseph P. Betz,
Attorney at Law of N. J.

Exhibit 15.

SAMUEL EICHENBAUM & SAMUEL SLAFF
72-78 Jefferson St.,

	Collections on the New Building from July, 1924 to November 31st, 1924			$5,699.00
	Bills paid for New Buildings: 72-78 Jefferson St.,			
	Apr. 29	I. Turak—Digger	$375.00	
	Apr. 29	I. Turak—Digger	100.00	
	Apr. 29	Chas. Ellison—Watchman	25.00	
	Apr. 29	S. Goldberg—Carpenter..	252.50	
	May 6	Chas. Ellison—Watchman	3.00	
	May 13	Chas. Ellison—Watchman	25.00	
	May 20	Salary—Watchman	30.00	
	May 20	Salary—Watchman	20.00	
	June 3	M. Roth—Watchman ...	25.00	
		M. Roth—Watchman ...	20.00	
	June 14	J. Balthrop—Janitor ...	20.00	
	June 30	Miles & Antuzzi—Marble	10.00	
	July 15	Passaic Glass Co. acct. of Note	213.15	
	July 10	N. Rabinowitz—Glass ...	143.00	
	July 28	J. Balthrop—Janitor ...	20.00	
	Aug. 6	J. Balthrop—Janitor ...	50.00	
	Aug. 12	S. Zeantz & Son—Hardware	400.02	
	Aug. 16	L. Bohen—Painting	200.00	
	Aug. 18	J. Balthrop—Janitor ...	3.65	
	Sept. 15	B. Tobias—Painter	88.00	
	Sept. 19	M. Chanin—Plasterer ...	35.00	
	Sept. 19	A. Davin—Janitor	40.00	
	Sept. 19	J. Balthrop—Mason	125.00	
	Sept. 22	Passaic Daily Herald ...	2.40	
	Sept. 23	L. Bohen—Painting ...	200.00	
	Oct. 1	A. R. Barton Co.— Hardware	135.02	

Exhibit 15.

Oct.	6	S. B. Goldman—Bookkeeper	30.00
Oct.	6	A. Davin—Janitor	84.63
Oct.	9	Miles & Antuzzi—Marble	92.00
Oct.	9	W. K. Brown—Kalsomining	35.00
		Salary—Watchman	25.00
		J. Balthrop—Janitor ...	30.00
Oct.	11	S. B. Goldman—Bookkeeper	5.00
Oct.	15	Passaic Glass Co.—Acct. of Note	100.00
Oct.	16	Rabinowitz & Schmidt—Mason	242.00
Oct.	16	Newark Fireproof Co.—Ashcans	79.38
Oct.	20	B. Tobias—Painter	118.00
Oct.	17	S. B. Goldman—Bookkeeper	5.00
Oct.	21	Public Service Gas & Elec. Co.	29.39
Oct.	25	S. B. Goldman—Bookkeeper	5.00
Oct.	25	M. Gurtman	238.00
Oct.	31	S. B. Goldman—Bookkeeper	5.00
Nov.	6	S. Cohen—Carpenter ...	30.00
Nov.	6	A. Davin—Janitor	100.00
Nov.	8	S. B. Goldman—Bookkeeper	5.00
Nov.	13	Modern Sign Co.—To Let Sign	20.00
Nov.	15	S. B. Goldman—Bookkeeper	5.00
Nov.	15	L. Bohen—Painter	200.00
Nov.	18	Public Service Gas & Elec. Co.	23.40

Exhibit 15.

Nov. 18	S. Cohen—Carpenter ...	128.00	
Nov. 18	B. Tobias—Painter	52.00	
Nov. 18	J. Balthrop—Patching ..	40.00	
Nov. 19	E. Judlow—Salary	40.00	
Nov. 22	S. B. Goldman—Bookkeeper	5.00	
	H. Loeb—Lawyers Fees	250.00	$4,582.54

Bills due but not paid:

Actinolyte Roofing Co. ..	$48.63	
A. R. Barton Co.—Hardware	22.16	
L. Bohen—Painting	2,045.00	
Katz & Wittie—Electrician	216.62	
E. S. Mercer—Insurance	146.26	
N. J. Fire Escape & Railing Co.	145.00	
Passaic Plumbing Supply Co.	4,738.92	
Passaic Glass Co.—Sash	700.00	
Rosenberg & Bearman—Stationary	7.10	
N. Rabinowitz—Glass ..	28.75	
Minkoff—Iron Plates on Sidewalk	36.00	
Simon Bros.—Electrician	1,200.00	
Slaff & Ostuw—Coal	1,172.08	
Columbia Metal Box Co. —Med. Cab.	416.00	
J. Donkersloot—Sand ..	214.00	
Taxes	5,282.40	
Wilensky Bros.—Coal ..	149.75	
Yellow Pine Lumber Co. Inc.	2,724.58	
S. Zeantz & Sons—Hardware	21.12	
Commission on Rents Collected	113.98	$19,427.95

Exhibit D 16.

PASSAIC CIRCUIT COURT.

On Application to Discharge Lien.

PATERSON GLASS COMPANY, a corporation of the State of New Jersey,
Plaintiff,
vs.
MAX GOLDSTEIN, Builder, MAX GOLDSTEIN, Owner, HARRY H. WEINBERGER, BENJAMIN A. HARTSTEIN and SUPERIOR FINANCE CORPORATION and SAMUEL SLAFF, Mortgagees,
Defendants.
} Decision.

For the Applicants,—WEINBERGER & WEINBERGER.
For the Plaintiff,—WILBUR A. HEISLEY.

NEWMAN, *J.*:

This is a motion to discharge lands from the lien of a mechanics lien. There are numerous grounds, but the only one which requires comment is the ground that the plaintiff has failed to prosecute his claim diligently within one year from the date of issuing such summons. The summons in this case was issued on November 27, 1923, and was served on Goldstein, the builder and owner, on December 3, 1923, and on the mortgagees on November 29, 1924. Whether service upon the mortgagee Wienberger was legal is not before me at this time. Application

is made in behalf of the mortgagees Weinberger and Hartstein to discharge the lien so far as they are concerned.

Plaintiff urges that this course is not open to mortgagees and suggests that the form of the answer by a mortgagee is prescribed by the statute. The answer to this is that this is not a matter which ordinarily could be raised by answer but is the subject matter of a motion. I can see no reason why this course is not as available to a mortgagee as to an owner. The owner may discharge his land from the lien if stale, and the same course ought to be open for the same reasons to a mortgagee. The lien of a mortgagee which is attacked by the plaintiff ought not to be subject to attack longer than the time prescribed by the statute.

It is further urged by the plaintiff that this matter can not be adjudicated until final trial. If this were so the lien might be permitted by the plaintiff to remain indefinitely unless the cause were moved by the defendant and might be used as an instrument to vex and harass a defendant.

I am convinced that the matter may be brought up prior to the final trial of the cause by motion if the trial is delayed for more than a year.

In the case of *Buchanon and Smock* v. *Dougherty,* 88 N. J. L., 356, there was a motion preliminary to the trial to discharge the lien for the same reason, and in that case the court said: "If he allows the year to pass without judgment, and without a court extension of time order procured within the year, he does so at his peril. If he is afterwards able to convince the trial judge, upon adequate evidence, that the lien was dili-

gently prosecuted on his part, the court may make an extension of time order or permit a trial, and if there was evidence to support such action, it will not be disturbed by this court * * * But to permit the year to expire without either a judgment or an extension of time order from the court is a most dangerous proceeding. *Prima facie*, such release should be discharged upon application to the court."

This excerpt from the opinion of the Court of Errors and Appeals seems to be ample authority for the trial judge to dspose of the matter upon motion; and where there has been no judgment or an extension of time order within the year, to discharge the lien, unless the plaintiff can show by adequate evidence that he has prosecuted the lien with diligence.

In this case plaintiff requests permission to show diligent prosecution, which is, of course, a comparative term and must rest upon the facts in each case. This necessitates the taking of testimony. I will, therefore, permit the plaintiff to take his testimony in that respect, before me, at the Court House in Paterson, on Monday, the 29th day of December, 1924, at 10:30 in the forenoon, and at the same time the mortgagees represented on this motion may take their testimony in rebuttal, and I will then dispose of the motion. In case the plaintiff at that time does not proceed to take his evidence, unless further time be granted by the court, the motion of the mortgagees to discharge the lien will be granted. I desire each counsel to write me acknowledging receipt of a copy of this memorandum, so that I may know that they have received notice of the time and place of taking the testimony.

24 FEB.T.1927

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

BENJAMIN A. HARTSTEIN, *et al.*,
Complainants-Appellants,

and

MAX GOLDSTEIN, *et als.*,
Defendants,

and

ALBERT PASKEVITCH, *et als.*,
Respondents.

Between

SIDNEY LOBSENZ,
Complainant,

and

MAX GOLDSTEIN, *et al.*,
Defendant,

and

BENJAMIN A. HARTSTEIN, *et al.*,
Defendant-Appellant,

and

ALBERT PASKEVITCH, *et als.*,
Respondents.

On Appeal from an Order Directed by the Chancellor.

Case #24, February Term, 1927.

BRIEF FOR PASKEVITCH, et. als.

History.

In 1922, Max Goldstein owned three adjoining tracts of land in Passaic, upon one of which

was an apartment house. He commenced, in that year, the erection of a 56 apartment house, upon one of the vacant tracts. In 1923, after the building was well advanced, he became financially involved, his difficulties culminating in all of his creditors, being mechanics and material men who then had claims against him of approximately $60,000 (see p. 9, state of case), executing, on December 4, 1923, an agreement which appears on page 3 of the state of the case, with Samuel Slaff and Samuel Eichenbaum, whereby the latter were appointed trustees for the purpose therein expressed, that purpose being, in substance, to complete the building and to see that the creditors continued finishing their uncompleted contracts and also empowering them to employ others if more material and work was necessary for the completion of the building.

The parties to the agreement resumed the completion of the building, but, on May 8, 1924, the complainant, Weinberger, filed his bill in the Court of Chancery to foreclose a mortgage for $80,000.00, dated July 26, 1923, and which, of course, was placed upon the property many months after the erection of the building had been commenced. The institution of this foreclosure alarmed the creditors named in the agreement and some of them refused to furnish more material or labor until they knew the probable outcome of the foreclosure, to which none of them had been made parties.

By paragraphs 1 and 10 of the agreement, the creditors assigned their claims to these trustees, but by paragraph 13 of the agreement it appears that the assignment was contingent upon the trustees faithfully executing their trust, the latter provision giving the creditors the right to lien the building if the trustees breached the

agreement or the bond for $100,000 given by the trustees as surety for the performance of their trust and referred to in paragraph 13.

It was obviously the purpose of this agreement to preserve the property so that these creditors should be paid and to more effectually enable the trustees to perform their agreement, Goldstein conveyed the property to these two trustees, by warranty deed, free from any conditions, on December 21, 1923. The bond appears at page 21 of the state of the case.

The trustees proceeded with the completion of the building, but in an indifferent manner and made some contracts in their own names as late as the Fall of 1924 (p. 47, l. 19, l. 40; p. 48, l. 27; p. 15, l. 8, l. 30; p. 54, l. 37; p. 57, l. 13), and actually did finally complete the building (p. 79).

As the trustees did not pay the interest on Weinberger's mortgage, or sell or mortgage the property according to the agreement of the bond, section 3 page 23, Weinberger started his foreclosure, although it appears that the trustees had collected $5,000.00 in rents (p. 72, l. 20) which would have been more than sufficient to pay any interest due Weinberger. Weinberger having started his foreclosure, Sidney Lobsenz, who owned a prior mortgage on the same premises for $30,000, filed his foreclosure bill in the following June.

The foreclosures dragged along until the following October, during which time the creditors, having by the agreement assigned their liens and Goldstein having conveyed the property to the trustees, were unable to do anything to protect their claims, unless they could show breaches by the trustees as per paragraph 13 of the agreement. In addition to this, they also had

the right to rely upon the security of the bond, but which, as will be seen later, was of no, or very little, value. On October 15th, Weinberger proved his mortgage for the sum of $73,196.30, although in his bill of complaint he alleged that the whole sum of $80,000.00 was due. October 16th, Slaff the Trustee, who had utterly failed to execute the trust, proved his mortgage for $38,343.29, which was many thousand in excess of the amount due him.

The mortgages having been placed after the commencement of the erection of the building, were subject to section 15 of the Mechanic's Lien Act, Comp. Stat. Vol. 3, page 3303, but the trustees did nothing for the purpose of asserting in the foreclosure, the priority of the creditors' claims over these mortgages, filing no answers, but Slaff even aided in the confiscation of this property by means of this foreclosure, because he actually went before a Master on October 16th, proving the amount due him without ever giving the creditors notice thereof.

Late in September, 1924, the creditors learned of the movement in the foreclosure because of a hearing before the Master set for September 27th and realizing they had been abandoned by the trustees, they employed counsel to protect their interest.

One of the creditors, the Paterson Glass Company, had, prior to the making of the agreement of December 4, 1923, filed a Mechanic's Lien claim and joined with the other creditors in employing counsel who, on October 14, 1924, filed a petition in the Court of Chancery for the Paterson Glass Company in both of the foreclosures, praying to be made parties to the foreclosures under Section 58 of the Chancery Act, obtained rules to show cause with restraint

against complainants proceeding farther in either foreclosure. Before the return day of that order, to wit, in the month of October, and the first day of November, all of the creditors now involved in this litigation, filed their Mechanic's Lien claims and also similar petitions to that of the Paterson Glass Company and obtained similar rules and orders of restraint. In the suits brought by them upon their liens, they attacked the mortgages of Weinberger and Slaff, and asserted that their liens were prior to the mortgages.

The creditors (p. 261, l. 16, p. 262 top), first considered suing on the bond, rather than filing liens, but, unfortunately, into the agreement of December 4th, had been inserted a clause which, in part, read as follows:

> "Provided, however, that in the event that any liens shall be filed by any of the parties hereto, that all right and resource of the parties of the first part, or any one of them, upon the said bond shall be extinguished, and the parties of the second part shall be thereby released and discharged from any and all liabilities by reason of having entered into said bond."

This cunningly devised clause, of course, made it possible for these trustees to procure any one of the creditors having the smallest claim, one at least less than $200.00, to file a lien in case suit had been brought on the bond, thereby cancelling the bond, and the time for filing liens would have expired in the meantime. Consequently, the creditors resorted to their right of lien, which must be predicated upon their showing breaches by the trustees under Section 13 and which breaches will be shown by reference to the depositions taken under the order to show cause.

The trustees having, by the agreement of December 4th, secured an assignment of the liens and a deed for the property, neither the creditors nor Goldstein could do anything, except petition the Court of Chancery to be made parties to the foreclosure in case they filed Mechanic's Liens. The trustees having failed to execute their trust and evidently thinking that the creditors were bound hand and foot, Slaff actually joined complainants in the prosecution of the Weinberger foreclosure and then united in a vigorous opposition to the petition of the lienors to be made parties in this cause and, of course, if they did succeed, or do succeed in this Honorable Court, these mechanics and materialmen will lose the entire amount of their claims, aggregating nearly $35,000.

Even after the trustees had defaulted and after Slaff had proven his mortgage on October 16th, he was successful enough in his evident desire to eventually possess this property, to induce outside people to furnish labor and material on this building, which would, of course, enhance the security for his mortgage and also make the property more valuable in case he ultimately purchased it at the foreclosure, as he did, and by p. 77, l. 20, of the state of the case it appears that the amount of bills due such persons, *and still unpaid,* is approximately $20,000.

In other words, we assert that this appeal presents trustees who have utterly failed to perform their duties, but worse yet, one of them actively joining in the prosecution of a foreclosure to sell the property free of the claims of their *cestui que trusts,* and in his zeal, proving his mortgage for many thousand dollars in excess of the sum due on it; one who never filed, or did the slightest thing to protect our liens in the

foreclosure, but who had the hardihood to appear before the Chancellor asking him, and now this Court, to deny the *cestui que trustents* he had deserted and betrayed, a day in court, the one and only chance of having a court protect their claims.

It also presents a mortgagee who placed his mortgage *after* the commencement of the building and upon whom under Section 15 of the Mechanic's Lien Act rests the burden of proving his moneys were *actually applied to the payment of bills,* asking the Court to relieve him from that task, but letting him, without proof, assert this mortgage as a lien prior to that of these lienors.

Worse yet, he attempted to collect the entire principal sum of $80,000, p. 29, l. 19 of "Abridgment of Pleadings," when he afterwards swore that only $67,000 was due, see p. 73 of "Abridgment of Pleadings."

In the agreement of December 4th, section 7, p. 6, Slaff was to cancel his $35,000 mortgage when he received 76% of $27,000—$20,520, but he secured a decree for $37,776.67, p. 18 of "Abridgment of Pleadings" Slaff always admitted that at most, his mortgage was for $27,000. See Goldberg, p. 154, Grossman, pp. 107, 108 and Green, p. 245, l. 20 of State of Case.

See Slaff's affidavit before Master on p. 75 of "Abridgment of Pleadings."

We would like the Court to look at this affidavit saying "*nothing had been* paid upon it" and then see his deposition at p. 75 of State of Case about the fluctuating value of this perambulatory security.

At p. 76, l. 7, of State of Case, he says he gave Goldstein "*an order* on Yellow Pine Co. for material" for the $8,000.00 involved. He repeats it at p. 81, l. 12, and yet at top of p. 82 he is uncertain how he paid this trifling sum of $8,000.00, "*whether by check or cash.*"

This is the trustee to whose tender care the lienors had entrusted their interests—to whom Goldstein assigned his all.

Slaff acted in complete accord with complainants from start to finish. He even subrogated his $35,000 mortgage to Weinberger's $80,000.00, p. 18, l. 12, "Abridgment of Pleadings" for what reason we do not know, but it is worthy of thought under the circumstances.

He joined with complainants in pressing the foreclosure. Why? And then his loyalty to complainants is attested by his joining in this attempt to have complainants' mortgage decreed a lien prior to the lienors. Complainants reciprocated by acting as Slaff's solicitor in these proceedings (see depositions).

The movements of complainants and the trustees synchronise perfectly and with charming harmony from the beginning down to the present moment.

It is to be remembered that Slaff did not object in any way to the Master reporting upon the sale of the property, directing that these two aparment houses one of 12 and the other of 56 apartments and vacant land should be sold *in one parcel.*

It must also be remembered that these mortgagees, under section 15 of Mechanic's Lien Act, are under the duty of proving that their moneys were actually applied to the payment of con-

struction bills, see *Franklin Society* v. *Thornton*, 85 Eq. 525 (E. & A.).

By reference to Weinberger's affidavit on p. 73, l. 32, of the "Abridgment of Pleadings," it will be seen that he has collected hundreds of dollars as interest on money which he claims he held for Goldstein and $589.80 on insurance premiums on policies covering the property; surely neither of these items were "applied to the payment of construction bills."

The desire to escape this duty, is one of the main objects of this opposition by the mortgagees. *If they could show such application they would have no cause for fear and it is because they know they cannot show it they put forth this bitter opposition.*

Finally, by consent, a decree for the sale was consented to and Weinberger and Slaff received their moneys, but only after having executed a bond to the Chancellor conditioned for the payment to these lienors such sum as the Chancellor should direct. See the final decree p. 68 of "Abridgment of Pleadings."

It is worthy of note that the Chancellor directed the selling Master to offer the property for sale in parcels and then as a whole.

ARGUMENT.

We concede these lienors in order to succeed must show:

(A) That they have performed their contracts and have a right of lien under the Mechanic's Lien Statute.

(B) That the trustees have violated the agreement of December 4th, or the provisions of the bond. See section 13 of agreement.

We will discuss, first (B). The trustees violated the second clause of the bond found at the bottom p. 22, of State of Case reading:

> "That they will faithfully comply with the terms and conditions expressed in a certain agreement."

And that portion of the bond found on page 22 and beginning at line 28, reading:

> "In consideration that the latter (meaning the trustees) will administer the said building with all due regard for the interest of the said parties of the second part" (meaning the creditors).

That they have not done so is proven by the fact that although they had the title to this property, they have not preserved the interest of the creditors and in their opposition to the creditors' petitions to have their claims adjudicated, they evince a purpose not to allow the creditors to receive the least consideration for executing the agreement of December 4th; not only that, but Slaff has actively aided in the attempt to have the claims of his *cestui que trust* eliminated by a foreclosure in which he participated.

They incurred bills for labor and material on the property, all of which are still unpaid, amounting to the sum of $19,427.95, page 77, l. 20 of State of Case. By so doing, they conferred a right upon the new creditors to file liens which would be prior to any lien of the petitioners, unless the petitioners always had the right to file a lien. We charge that while the contracting of such debts was an imposition upon certain credulous people, *it was done by Slaff for the purpose of enhancing the security of his mortgage and also of the value of the property in case he eventually became the purchaser at the foreclosure, which he did.*

They also violated the first condition of the said bond found at page 22, line 33 of State of Case, providing:

> "That they will receive and collect all the rentals and profits of said building and pay all charges and disbursements imposed upon said property."

They have collected $5,000 of rents on the new building and $725.00 on the old, p. 72, State of Case, but have only paid $4,582.54, p. 77, but instead of devoting this to the payment of "charges and disbursements imposed upon said property" they have misapplied it to other bills, p. 72.

They violated section 3 of the bond, found on p. 23, providing:

> "That they will sell and convey said property for any sum not less than the sum of $180,000."

It was for the purpose *of either selling or mortgaging the property to raise funds to pay creditors,* that a part of the tenth clause of the agreement, found on p. 7, of State of Case, says, that the object of the agreement is "to vest a complete fee simple interest in the said parties of the second part" and Goldstein did so by his warranty deed of December 21, 1923.

We respectfully, but most earnestly, urge that the first condition of the bond *imposed upon these trustees the absolute and unqualified obligation to "pay all charges* and disbursements imposed upon said property," and it is utterly immaterial whether the property produced sufficient income to do so. Their obligation was *not to pay "out of* rents," but *their unqualified promise was to pay.* To the same effect, is the condition 3, whereby they agreed to sell for not less than $181,000.00—a sum sufficient to pay off all mortgages and creditors.

How unjust it would be to relieve these men of their unequivocal promises, appears when we remember that the owner had *absolutely divested himself of his title to most valuable property* and *the creditors by signing the agreement of December 4th had for the time being, rendered themselves powerless to protect their interest,* which they had confided, absolutely, to these trustees.

That the law requires the above construction to be placed upon these conditions of the bond is beyond dispute and we refer the Court to the following cases:

School Trustees v. *Trenton,* 27 L. 513, *519*;

Board of Education v. *Empire, &c.,* 83 L. 293, and bottom of page 296;

Kupforsnuth v. *Del. Ins. Co.,* 84 L. 271, especially pages 274, 275.

The trustees violated the agreement of December 4th.

In the following respects:

They violated section 3, found on p. 5, of State of Case, providing in substance, that any person who should furnish labor or material *not embraced in their contracts with the former owner, Max Goldstein,* should be preferred creditors, *"in that they shall be paid from the first money that come into the hands of the party of* the second part hereto," except Goldberg, Rabinowitz & Schmidt, and New Jersey Fire Escape and Railing Company and section 4 required the payment of $5,000.00 as security for the payment of such preferred creditors.

At page 61, l. 10, and p. 72 of State of Case, it appears that the trustees in direct violation of

section 3, referred to, paid this money *to the excepted persons.*

At p. 70, there is set forth pertinent portions of a written agreement these trustees made with Simon Brothers and at page 71, l. 35, it clearly appears that Simon Brothers were doing work *"not embraced in any contract with Goldstein"* and that they were *of the class for whose benefit* the $5,000.00 were deposited and yet, at p. 66, State of Case, all of p. 67, it appears that Simon Brothers *did not get a* dollar, *either of the $5,000.00 of rents or of the $5,000.00 mentioned in section 3 of* the agreement and which the poor dupe Goldstein was induced to contribute, p. 61, l. 10, in addition *to the gift of all his real estate.* At p. 72, l. 20, it will appear that the $5,000.00 was applied, to general bills, such as water and gas and other purposes.

It also appears that Slaff failed to get any extension of the mortgage of the Superior Finance Company, as required by section 8 of the agreement, on p. 6.

Well may it be asked why did not the trustees devote the money received from rents to paying the interest on these mortgages and stopping the foreclosures? With the building completed as it was, p. 79, why could they not have refunded these mortgages by getting a loan? The property must have been ample security if these trustees had acted in a businesslike way upon which to have borrowed sufficient funds, because on October 19, 1923, *long before the creditors'* agreement of December 4th was signed, Slaff thought the uncompleted building sufficient security to have the Superior Finance Corporation, of which he was Vice-President and Treasurer, p. 69, l. 33, of State of Case, to loan $16,000 upon it on a

fourth mortgage, being subject to the mortgage of Lobsenz for $30,000.00, of Weinberger's for $80,000 and Slaff's for $35,000. The only answer is that Slaff did not intend to act in the interest of the creditors, *but his purpose was to eliminate them and their claims and secure the property for himself.*

Have lienors a right of lien unless precluded by the Agreement of December 4th?

That they all filed liens within four months after the last date when they respectively furnished labor or material, is shown on pp. 34 to 44 of the "Abridgment of Pleadings." The depositions taken under the rules to show cause are replete with proof of doing so, and we briefly refer to the various lienors.

Samuel Goldberg was in charge of the construction of this building under a contract with the former owner Goldstein. He did all the supervising p. 162, l. 35, State of Case. The great powers conferred upon Goldberg are expressed in a clause of the agreement with Goldstein found on p. 152, l. 23, State of Case, reading:

> "It is hereby further mutually understood and agreed that the said Samuel Goldberg shall, in consideration of the price hereinbefore mentioned, supervise, manage, control and direct the entire construction of the entire buildings, which services shall be along the following lines: Purchase materials, sub-contract work, supervise the construction of building while in progress, obtain help, dictate to all employees and sub-contractors as to the method of construction and manner of erection of said building, and do all other work necessary and incidental to the proper construction and erection of said buildings jointly with the owner aforementioned."

The effect of this clause *was to make Goldberg the agent of Goldstein* and *this agency was not destroyed by the* agreement of December 4th, because that agreement expressly provides secton 2, p. 4, *that all of the signors thereto will continue to carry out their contracts and finish the building and Goldberg was one of the signors.* It also appears that he continued to act in that capacity after the agreement of December 4th, p. 153, l. 8, State of Case.

But whether these lienors did complete their contract and were entitled to file liens, we submit *are not questions to be determined on depositions, but at a trial,* either in the Passaic Circuit or in Chancery, and the Chancellor has directed that they be tried in Chancery, p. 24, l. 10 "Abridgment of Pleadings." However Goldberg the supervisor says they all did finish. Bottom p. 153; p. 156, l. 10.

The 58th section of the Chancery Act, says, that persons under certain conditions "may cause themselves to be made parties" to a litigation. These lienors filed their liens in due form, instituted suits thereon and are entitled to be admitted to this litigation if they show a prima facie case, but their case is not to be tried on depositions, nor are they to satisfy the Chancellor that they ultimately will win and if they are admitted, we insist there is no power to limit their defenses as suggested in the memorandum *of V.-C.* Foster, p. 72 of "Abridgment of Pleadings," because if they are in court they are there for all purposes *and by right, rather than an act of grace;* they are to have the right to plead anything pleadable by the law of the land and the usual course of judicial procedure and that right may not be abridged. Such we think was the conclusion of the learned Chancellor.

The reasons assigned in opposition to the granting of the petition

are as follows:

FIRST, that the agreement of December 4th, absolutely extinguished petitioners' liens. We reply that section 13 of that very same agreement clearly shows that the right of lien was merely in suspension and so the Chancellor held. It can't be possible that these creditors for over $30,000 intended to donate those claims to the trustees, or that Goldstein intended to give them all his property and an additional $5,000, referred to in paragraph 4 of agreement, p. 5.

SECOND, that the petitioners were guilty of laches in not filing their liens promptly and applying to the Chancellor. It appears sometime in September, the creditors learned of a Master's meeting for the purpose of having claims reported in the foreclosure. This meeting was September 27th and it is sought to show that the counsel of these creditors from that time on was guilty of laches in filing liens and petitions. It appears on p. 45 of the "Abridgment of pleadings," that a petition was filed October 14, 1923, in the Paterson Glass case in both of these foreclosure and *that the complainants in each were restrained from further prosecuting their causes until the Chancellor ordered otherwise.* During that month, and not later than the first day of November, all liens were filed and similar petitions and order of restraint in both causes, were obtained.

This involved a vast amount of work, obtaining searches in the Clerk's Office, preparing claims and pleadings in the Circuit Court and petitions and numerous orders and service upon many parties in the Court of Chancery and we submit

there is no evidence of any undue delay. *In addition, the important question was to be determined whether the creditors' remedy was by lien or an action on the bond.* Not only that, if it could have been done quicker there was no necessity for speedier action and no harm whatsoever was done the complainant so they may invoke the doctrine of estoppel. *Their suits, by virtue of the restraint, were held in abeyance and there was no occasion for any more vigilant action on the part of the creditors than was taken.* Decree *pro confesso* in the Weinberger case was taken on the 27th day of August, 1924, p. 30, l. 15 of "Abridgment of Pleadings," but he never proved his mortgage until October 15th, the day after he had been restrained from further prosecuting his cause. The decree *pro confesso* in the Lobsenz case was entered on the 30th day of July, 1924, p. 31, l. 19 of the "Abridgment of Pleadings," but no proof of his mortgage was made until the 3rd day of October, 1924, so it is evident that no harm was done as no final decree was entered in either cause until long after the filing of all of the liens claims and petitions. To wit Feb. 26, 1925, see p. 33, l. 15, of "Abridgment of Pleadings."

By the depositions, Weinberger and Slaff sought to prove inactivity upon the part of the petitioners during the Summer of 1923. It is true the creditors held numerous meetings trying to devise ways and means for mortgaging or selling this property, but the reason they held such meetings *was because of the failure of the trustees to sell or mortgage.* They also sought to show that these petitioners had obtained through a solicitor, Mr. Loeb, a stipulation for an extension of time in the foreclosure of the Weinberger mortgage and they very unfairly

tried to have Loeb say that he represented all the petitioners, but a reference to his stipulation, at p. 18, will show clearly that he never represented a single petitioner, excepting the Paterson Glass Company whose lien claim has long ago (to wit: Dec. 9, 1924), been dismissed by the Passaic Circuit, p. 82, l. 20 and at p. 30, Loeb testified that he got this extension at the request of the trustees and at p. 16, l. 25 of State of Case, he distinctly *says that he was not acting for any one else.*

But these petitioners' bills during the Summer and Fall of 1923, were in great peril. Two possible remedies were open to them.

A. Sue their Trustees on the bond *before they had the conclusive evidence of trustees' breaches* which they obtained later.

B. File liens attacking the priority of the mortgages, antagonizing Weinberg and Slaff as mortgagees *and nullifying the bond pursuant to Section 13 of the Agreement* of December 4th.

Decrees *pro confesso* had already been taken, but no final decree entered—there had only been a Master's report. These applicants did act promptly when the crisis arose in October. *It would have been sheer rashness to have filed liens sooner.*

BUT *They could not file liens sooner because they had not completed their contracts* as building was not completed. The completion of their contracts was a condition precedent. See Chancellor's opinion.

THE THIRD GROUND of opposition is the allegation of a so-called conspiracy among the petitioners whom these mortgagees and trustees say had lost their right of lien by lapse of time

and that for the purpose of *reviving* their lien they had done some trival amount of work in the Summer or Fall of 1924, and then filed their liens within the statutory period of four months. The fallacy of this allegation appears by the fact that while there are *seven* lien claims filed, *only two* of them show work, or material furnished, *after the creditors had employed counsel* and *they refer to the claim of Paskevitch for brick,* and *Rabinowitz & Schmidt* for building piers with those bricks in the cellar in the month of October. *It is these two acts which constitute the sole reliance of these mortgagees to sustain their allegation of conspiracy.* We submit that if these bricks and this work were furnished under their contracts and *was a part of the original* building, or contract *it is wholly immaterial with what motive* Paskevitch and Rabinowitz & Schmidt did work in October. That would not be done for the purpose of *reviving, but of preserving* their liens and would not be a conspiracy. Paskevitch received his order from Goldberg, who was still acting and had general power, p. 152, bottom p. 158, l. 35; p. 162, l. 35; p. 157, l. 30; p. 184; p. 161 and top p. 162; p. 185.

His contract was to furnish *all of the brick* for the building and was made with Goldstein, p. 157, l. 4, and Goldberg ordered the last bricks October 13, 1924, p. 185, and see p. 157, l. 30 and p. 184, p. 161 and top 162. *The building was two years in course of erection and long intervals occurred between the delivery of brick and while the building was still being erected, in October, 1924,* he delivered bricks on the order of Goldberg, p. 185. *Goldberg was still acting as the agent of Goldstein,* p. 153, l. 8. Not only the general supervisor of the building, but the general agent of the owner, with almost unlimited

powers in purchasing materials, p. 152. His contract and authority was still in force.

The building was not yet finished and these bricks for piers had been ordered, not only in October, but in August, as appears by the testimony of Mr. Green, p. 236, l. 19, p. 239. Goldberg, p. 157, l. 31 and of others at p. 256, 262, l. 33. There is nothing to show that Paskevitch entered into any agreement to revive his lien and the presumption is that he did not, p. 184, l. 10, p. 185, p. 188.

As to Rabinowitz & Schmidt, it appears from the testimony, pp. 251, l. 29 to 40, bottom 178, they worked there *every month during that Summer,* including the month of August, and, therefore, there was no reason for their entering into any conspiracy to do a little extra work in October. The work they did was a part *of their original contract,* it was not "extra," p. 250, l. 30, 251, l. 29 to 40. So says Goldberg, bottom 178. See p. 251, 254, l. 25 to 40, 258, l. 28, p. 252. See p. 250 as to stop notice served by the trustees Oct. 9, 1924. A "stop notice" must refer to an original contract. See also p. 251, l. 29 to 40 bottom p. 178. But the trustees actually deducted the stop notice from Rabinowitz & Schmidt contract p. 283, l. 30. Much will be attempted to be made of this illiterate man's expression on p. 258, l. 7, as to why he went back to work in October, but see p. 254, ll. 25 to 40 and if it be true *that he went there to complete his contract* so he could file a lien, this will not work to his prejudice, especially if he had done work within four months, as is proven.

Let us remember that these illiterate men who speak English with difficulty are dealing with educated men, fully desirous of taking every

unfair advantage. A specimen of illiteracy appears at the bottom of p. 266.

Goldberg, the supervisor, says at bottom p. 153 and at p. 156, l. 10 "they all completed their contracts."

But this is a question *to be determined upon the trial,* not on depositions in advance of a trial. *If there was a conspiracy, at most it could only apply to Paskevitch and Rabinowitz & Schmidt. It cannot possibly involve others.*

Another reason assigned is that the Chancellor had no authority under the statute to make the order appealed from.

It would be presumptious for us to attempt to convince the Court of the Chancellor's authority, in view of the learned and illuminating opinion he has filed in this matter. We will not attempt to fortify his reasons other than call attention to section 13 of the Chancery Act of 1915, p. 188, authorizing the Chancellor *"to add parties at any stage of the proceedings,"* closing this brief suggesting that these statutes were made for the *furtherance of justice and are to be liberally construed.* That the power of the Chancellor is of a discretionary nature and he has not abused it, nor has he "adjudicated" anything against complainants. *Adams* v. *Adams,* 80 Eq. 178.

See last clause of Sec 13

If petitioners do not succeed at the trial they will have to pay complainants' costs and complainants will not be injured. If, however, the petitioners are not admitted with meritorious claims they would suffer a grievance without a remedy.

If there be any doubt as to his authority, justice requires that it should be resolved in

favor of giving citizens at least one day in court. We believe it is the policy of the Court to open, rather than close, the door of justice, especially when to close it would entail consequences so serious as they would be in this case, to wit, *the confiscating of supposedly preferred mechanic's bills* approximating $35,000, without a single hearing on the merits.

Respectfully submitted,

WILBUR A. HEISLEY,
Counsel with Applicants.

(Here follows a resume of the foregoing):

RESUME.

For the purpose of facilitating the consideration of the points attempted to be made in this brief, we summarize them with references to relevant evidence.

1. The agreement of December 4th merely suspended, but did not extinguish, the right of lien. See sections 1 and 13 of the agreement, p. 2 of State of Case.

2. Upon a breach of either agreement or bond, the right to lien was restored. Section 13 of agreement. The agreement was breached as follows: Section 3, at p. 61, l. 10, p. 72; State of Case, in not paying Simon Brothers, p. 61, l. 10, pp. 66, 67, 70, 71, l. 35 and particularly p. 72, l. 20; Slaff did not secure extension of mortgage of Superior Finance, see section 8 of the agreement and he was its Vice-President and treasurer, p. 69, l. 33, State of Case.

BREACHES OF THE BOND.

1. Trustees did not "administer * * * with all due regard for the interest, etc. * * *." See Condition in Bond, page 66, line 28, page 77, line 20 of State of Case and page 10 of this brief; Slaff foreclosed his mortgage for excessive amount. Section 7 of agreement, p. 75, 76, l. 7, p. 81, l. 12, top of p. 87, 107, 108, 154, 245, l. 20. Without protest he permitted Master to advise sale of three properties in one parcel. He relied on the vicious clause in the agreement by which bond would be nullified, p. 8, l. 28. Contracted lienable bills still unpaid of $19,427.95 to the prejudice of these applicants, p. 77, l. 20 and p. 10 of this brief. Permitted Weinberger to

collect every dollar he claimed without proving application of moneys to the payment of construction bills. Section 15 of Mechanic's Lien Act construed by this Court in 85 Equity 525.

MISAPPLIED RENTS,

p. 72, 77 and 11 of brief.

Misapplied the $5,000.00 out of which Simon Brothers should have been paid, p. 13 of this brief. Did not sell or mortgage property, p. 23 and p. 11 of brief. (And this, although the building was actually completed, p. 79 and he had loaned $16,000 on October 19, 1923, p. 13.) Adjudications construing these conditions are found on p. 12 of brief.

APPLICANTS HAD INCHOATE RIGHT OF LIEN

as they had finished their contract under Goldberg, p. 162, l. 35, pp. 153, 156, l. 10, p. 250, l. 30, p. 251, ll. 29-40, p. 254, l. 25 and his powers are defined at p. 152, l. 23, p. 153, l. 8.

In preamble to the agreement of December 4th, p. 2, State of Case, Slaff by signing that agreement admitted that at *that* time they had lienable bills.

APPLICANTS NOT GUILTY OF LACHES,

pp. 16 to 18 of this brief and *could not file their liens until they had fulfilled their contracts.*

NO CONSPIRACY.

See pp. 18 to 21 of this brief.

APPLICANTS ARE ONLY REQUIRED TO SHOW A PRIMA FACIE CASE ON THIS APPLICATION.