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Bergen County Circuit Court

Building Supply Company of Englewood, N. J., Inc., a corporation of New Jersey, Plaintiff, vs Joseph Greenberg and N. J. Cafarelli, Receivers of Teaneck Building Corp., a New Jersey Corporation, Builder and Owner, and East Rutherford Savings, Loan and Building Association, mortgagee, Defendants,	Action at Law on Mechanic's Lien Notice of Appeal

TO SOLOMON GOLDMAN,
Attorney for the Appellee:—

TAKE NOTICE, That the Appellant, East Rutherford Savings Loan and Building Association, mortgagee defendant in the above stated cause, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from all that part of the judgment entered in this cause which adjudges that the lien claim of the plaintiff is a prior lien on the lands described in the complaint to that of the mortgage debt of this defendant to the extent of five thousand seven hundred dollars ($5,700.00), upon the following grounds:

1. Because the Bergen County Circuit Court amended the Referee's report, although it was error to do so.

2. Because the Bergen County Circuit Court confirmed the Referee's report after amending the same, although it was error to do so.

3. Because Bergen County Circuit Court amended the schedule of priorities in the Referee's report so that the lien claim of the plaintiff became prior to five thousand seven hundred dollars ($5,-700.00) of the mortgage debt of this defendant on the lands and buildings described in the complaint, whereas the Referee's report should have been confirmed as filed.

4. Because Bergen County Circuit Court gave judgment in favor of the plaintiff for four thousand four hundred sixty-four dollars and seventy-three cents ($4,464.73), damages, with interest and costs, against Joseph Greenberg and N. J. Cafarelli, Receivers for Teaneck Building Corp., to be specially made of the lands and buildings described in the complaint, whereas a general judgment should have been rendered against the Receivers only.

JOHN M. BELL,
Attorney of Appellant

NOTICE OF APPEAL

ENDORSEMENTS

BERGEN COUNTY CIRCUIT COURT

BUILDING SUPPLY COMPANY OF ENGLEWOOD, N. J., INC., a corporation of New Jersey,

PLAINTIFF.

vs.

JOSEPH GREENBERG and N. J. CAFARELLI, RECEIVERS OF TEANECK BUILDING CORP., ET ALS,

DEFENDANTS,

ACTION AT LAW

ON MECHANIC'S LIEN

NOTICE OF APPEAL

JOHN M. BELL,
Atty. of Appellant,
East Rutherford Savings
Loan and Building Association

Service of within notice is hereby acknowledged this 12th day of March, 1930.

SOLOMON GOLDMAN,
Attorney for Plaintiff.

RECORD OF THE CASE

COMPLAINT

FILED MARCH 22, 1929

The plaintiff, Building Supply Company of Englewood, N. J., Inc., a corporation of New Jersey, with its principal office in the City of Englewood, County of Bergen and State of New Jersey, respectfully shows:

1. At the times hereinafter stated the defendant, Teaneck Building Corp., a corporation of New Jersey, was the owner of lots or curtilage of land situated

FIRST TRACT:—

In the Township of Teaneck, County of Bergen and State of New Jersey, and known and designated as parts of Lots numbers 46 and 47, block 5, as laid down and distinguished on a map entitled, "Map of Selvage Prospect Heights, Teaneck, N. J., Bergen County, N. J., 1901," filed in the Bergen County Clerk's Office May 26, 1902 as Map No. 852, and being further bounded and described as follows:—

Beginning at a point on the southwesterly side of Fairview Avenue, distant 336 feet southeasterly from the intersection of the southwesterly side of Fairview Avenue with the southeasterly side of Arlington Avenue, and from thence running (1) southwesterly and at right angles to Fairview Avenue 100 feet; thence (2) southeasterly and parallel with Fairview Avenue 36 feet; thence (3) northeasterly and parallel with the first course 100 feet to the southwesterly side of Fairview Avenue; and thence (4) northwesterly along the same 36 feet to the point or place of beginning.

SECOND TRACT:—

In the Township of Teaneck, County of Bergen and State of New Jersey, and known and designated as Lot number 45 and part of Lots 44 and 46, block

5, as laid down and distinguished on a map entitled, "Map of Selvage Prospect Heights, Teaneck, Bergen County, N. J., 1901," filed in the Bergen County Clerk's Office May 26, 1902 as Map No. 852, and being further bounded and described as follows:

Beginning at a point on the southwesterly side of Fairview Avenue distant 372 feet southeasterly from the intersection of the southwesterly side of Fairview Avenue with the southeasterly side of Arlington Avenue, and from thence running (1) southwesterly and at right angles to Fairview Avenue 100 feet; thence (2) southeasterly and parallel with Fairview Avenue 36 feet; thence (3) northeasterly and parallel with the first course 100 feet to the southwesterly side of Fairview Avenue; and thence (4) northwesterly along same 36 feet to the point or place of beginning.

THIRD TRACT:—

In the Township of Teaneck, County of Bergen and State of New Jersey, and known and designated as Lot 48 and part of Lot 47, Block 5, as laid down and distinguished on a map entitled, "Map of Selvage Prospect Heights, Teaneck, Bergen County, N. J., 1901," filed in the Bergen County Clerk's Office May 26, 1902 as Map No. 852, and being further bounded and described as follows:

Beginning at a point on the southwesterly side of Fairview Avenue distant 300 feet southeasterly from the intersection of the southwesterly side of Fairview Avenue with the southeasterly side of Arlington Avenue, and from thence running (1) southwesterly, at right angles to Fairview Avenue, 100 feet; thence (2) southeasterly and parallel with Fairview Avenue 36 feet; thence (3) northeasterly and parallel with the first course 100 feet to the southwesterly side of Fairview Avenue; thence (4) northwesterly along the same 36 feet to the point or place of beginning.

2. The name of the owner of said lands and the estate therein upon which the lien is claimed is

Teaneck Building Corp., who so far as is known to the plaintiff is the owner in fee simple thereof.

3. Between September 28, 1928 and January 18, 1929, the plaintiff supplied and delivered building materials to the defendant for the erection of three one-family dwellings for the sum of $4282.75, and the defendant is indebted to the plaintiff in the sum of $4282.75.

4. Joseph Greenberg and N. J. Cafarelli have been appointed receivers for the said Teaneck Building Corp. by order of the Chancellor in the New Jersey Court of Chancery by order dated February 25, 1929.

5. The defendant, Teaneck Building Corp., has not paid the said sum of $4282.75, and the whole of said sum is still due and unpaid.

6. The plaintiff furnished building materials on the first building and its lot or curtilage which is hereinafter described in the sum of $1437.05. The first building is a one-family frame dwelling house on the lot or curtilage situated

In the Township of Teaneck, County of Bergen and State of New Jersey, and known and designated as parts of Lots numbers 46 and 47, Block 5, as laid down and distinguished on a map entitled, "Map of Selvage Prospect Heights, Teaneck, Bergen County, N. J., 1901," filed in the Bergen County Clerk's Office May 26, 1902 as Map No. 852, and being further bounded and described as follows:—

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7. The plaintiff furnished building materials on the second building and its lot or curtilage which is hereinafter described in the sum of $1396.85. The second building is a one-family frame dwelling house on the lot or curtilage situated

In the Township of Teaneck, County of Bergen and State of New Jersey, and known and designated as Lot number 45 and part of Lots 44 and 46, Block 5, as laid down and distinguished on a map entitled, "Map of Selvage Prospect Heights, Teaneck, N. J., Bergen County, N. J., 1901," filed in the Bergen County Clerk's Office May 26, 1902 as Map No. 852, and being further bounded and described as follows:—

Beginning at a point on the southwesterly side of Fairview Avenue distant 372 feet southeasterly from the intersection of the southwesterly side of Fairview Avenue with the southeasterly side of Arlington Avenue, and from thence running (1) southwesterly and at right angles to Fairview Avenue 100 feet; thence (2) southeasterly and parallel with Fairview Avenue 36 feet; thence (3) northeasterly and parallel with the first course 100 feet to the southwesterly side of Fairview Avenue; and thence (4) northwesterly along the same 36 feet to the point or place of beginning.

8. The plaintiff furnished building materials on the third building and its lot or curtilage which is hereinafter described in the sum of $1448.85. The third building is a one-family frame dwelling house on the lot or curtilage situated

In the Township of Teaneck, County of Bergen and State of New Jersey, and known and designated as Lot 48 and part of Lot 47, Block 5, as laid down and distinguished on the map entitled, "Map of Selvage Prospect Heights, Teaneck, Bergen County, N. J., 1901," filed in the Bergen County Clerk's Office May 26, 1902 as Map No. 852, and being further bounded and described as follows:—

Beginning at a point on the southwesterly side of Fairview Avenue distant 300 feet southeasterly

from the intersection of the southwesterly side of Fairview Avenue with the southeasterly side of Arlington Avenue, and from thence running (1) southwesterly at right angles to Fairview Avenue 100 feet; thence (2) southeasterly and parallel with Fairview Avenue 36 feet; thence (3) northeasterly and parallel with the first course 100 feet to the southwesterly side of Fairview Avenue; thence (4) northwesterly along the same 36 feet to the point or place of beginning.

9. Said indebtedness is a lien on said lands and buildings by virtue of the statute entitled, "An act to secure to mechanics and others payment for their labor and materials in erecting any building and in making certain improvements to land," and the several supplements thereto and acts amendatory thereof.

10. East Rutherford Savings Loan and Building Association is made a defendant because it holds mortgages against the first, second and third houses each in the sum of $5,000.00, each dated November 28, 1928 and each mortgage is registered in the Bergen County Clerk's Office on December 8, 1928 in Book 1122 on pages 446, 447 and 449, but that the lien of the plaintiff herein is prior and paramount to the liens of said mortgages which will be cut off by a sale under the claimant's lien.

11. Jaeger Land Co. is made a defendant because it holds mortgages against the first, second and third houses each in the sum of $971.43, each dated December 13, 1928 and each mortgage is registered in the Bergen County Clerk's Office on December 26, 1928 in Book 1127, on pages 108, 112 and 116, but that the lien of the plaintiff herein is prior and paramount to the liens of said mortgages which will be cut off by a sale under the claimant's lien.

12. The following is a bill of particulars of the account due the plaintiff from the defendants:

COMPLAINT

Contract for supplying building materials for house No. 1	$1,280.45
Contract for supplying building materials for house No. 2	1,240.24
Contract for supplying building materials for house No. 3	1,292.24
Materials furnished to the defendant on three houses as itemized in the attached sheet	2,969.82
Total	$6,782.75
December 7, 1928, paid on account	2,500.00
Balance due Claimant	$4,282.75

All of the above materials were delivered to the defendant, Teaneck Building Corp., between September 28, 1928 and January 18, 1929.

Plaintiff demands judgment against the defendant for the sum of $4282.75, together with interest from January 18, 1929 and costs of this suit, and a judgment that said lien claim is a lien on the said lands by virtue of the act for the same.

SOLOMON GOLDMAN,
Attorney for Plaintiff.

ANSWER
FILED APRIL 10, 1929

The defendant, EAST RUTHERFORD SAVINGS LOAN AND BUILDING ASSOCIATION, having its office in East Rutherford, New Jersey. says:—

1. Defendant admits paragraph 1.
2. Defendant admits paragraph 2.
3. Defendant denies paragraph 3.
4. Defendant admits paragraph 4.
5. Defendant denies paragraph 5.
6. Defendant denies paragraph 6.
7. Defendant denies paragraph 7.

ANSWER

8. Defendant denies paragraph 8.

9. Defendant denies paragraph 9.

10. Defendant admits that it is the holder of the mortgages specified in paragraph 10, but denies that the alleged lien of the plaintiff is prior and paramount to the lien of the said mortgage and avers, on the contrary, that the alleged lien of the plaintiff is subject to that of defendant's said mortgages.

11. Defendant denies paragraph 12.

FIRST DEFENSE

That the plaintiff did not supply and deliver building materials for the erection of three one-family frame dwelling houses to the defendant, Teaneck Building Corp., for which said defendant owes to the plaintiff the sum of $4,282.75, as alleged in the complaint, or any other sum.

SECOND DEFENSE

That the plaintiff did not furnish building materials to the defendant, Teaneck Building Corp., toward the erection of the building mentioned in paragraph 6 of the complaint, for which said defendant owes to the plaintiff $1,437.05, or any other sum.

THIRD DEFENSE

That the defendant did not furnish building materials to the defendant, Teaneck Building Corp., toward the erection of the building mentioned in paragraph 7 of the complaint, for which said defendant owes to the plaintiff $1,396.85, or any other sum.

FOURTH DEFENSE

That the plaintiff did not furnish building materials to the defendant, Teaneck Building Corp., toward the erection of the building mentioned in paragraph 8 of the complaint, for which the said defendant owes to the plaintiff $1,448.85, or any other sum.

FIFTH DEFENSE

That the said lands are not liable to a mechanics lien for the alleged debt.

ANSWER

SIXTH DEFENSE

That the lien claim of the plaintiff is subject to the lien of defendant's mortgages.

JOHN M. BELL,
Attorney of Defendant.

REPLY TO ANSWER
FILED APRIL 22, 1929

The plaintiff, Building Supply Company of Englewood, N. J., Inc., joins issue with the defendant, East Rutherford Savings, Loan & Building Association, upon its answer filed in the above cause.

SOLOMON GOLDMAN,
Attorney for Plaintiff.

ORDER OF REFERENCE
FILED JUNE 7, 1929

The above entitled cause being regularly upon the calendar at this September term, and it appearing to the Court that matters of account are involved in said cause:

It is ordered that the same be referred to Herman Vanderwart, Esquire, to take and state the account between the parties, and to report the same to the Court within forty days hereafter.

Rule entered June 7, 1929.

NEWTON H. PORTER,
Judge.

The plaintiff, Building Supply Company of Englewood, N. J., Inc., dissents to the above reference, and hereby reserves the right to a trial by jury.
Dated, June 7, 1929.

SOLOMON GOLDMAN,
Attorney for Plaintiff.

TESTIMONY FILED OCT. 3, 1929
BERGEN COUNTY CIRCUIT COURT

Building Supply Company of Englewood, N. J., Inc., a corporation of New Jersey, Plaintiff, vs Joseph Greenberg and N. J. Cafarelli, Receivers of Teaneck Building Corp., et als., Defendants.	Action at Law Mechanics Lien Testimony

Testimony in the above entitled cause before me, Herman Vanderwart, Esq., a Supreme Court Commissioner, the 9th day of July, 1929, at my office in Peoples Trust & Guaranty Company Building, 210 Main Street, Hackensack, New Jersey, in pursuance of a Rule in this cause entered the 7th day of June, 1929, in the presence of Solomon Goldman, Esq., attorney for the plaintiff, and John M. Bell, Esq., attorney for East Rutherford Savings Loan and Building Association, one of the defendants.

HERMAN VANDERWART,
Supreme Court Commissioner.

TESTIMONY

STATE OF NEW JERSEY }
COUNTY OF BERGEN } ss:

I, Nellie J. C. Kerkhof, do solemnly swear that I will faithfully and truly take stenographically and reproduce in typewriting the testimony to be given in the above cause.

NELLIE J. C. KERKHOF
Sworn and subscribed to before me this 9th day of July, A. D. 1929.

HERMAN VANDERWART,
Supreme Court Commissioner.

Appearances:

Solomon Goldman, Attorney for plaintiff.

John M. Bell, attorney for East Rutherford Savings, Loan and Building Association.

No appearance for defendant Builder and Owner.

A discontinuance on file as to Jaeger Land Company, defendant mortgagee.

Lien claim offered in evidence. Admitted without objection and marked Exhibit P-1.

Plaintiff offers in evidence deed recorded in Book 1621, page 271, showing title in Teaneck Building Corporation for lots 39 to 48 inclusive in Block No. 5 "Map of Selvage's Prospect Heights, Teaneck Township, Bergen County, N. J., 1901." Marked Exhibit P-2.

Plaintiff produces copy of an Order in Chancery of New Jersey in an action between Philip Slotnick and Teaneck Building Corporation, providing for leave given to the plaintiff Building Supply Company of Englewood, Inc. to bring action in the Bergen County Circuit Court against the defendants Joseph Greenberg and N. J. Cafarelli, receivers of Teaneck Building Corporation, for building materials supplied and delivered in the erection of three

one-family dwelling houses. Admitted without objection. Marked Exhibit P-3.

George L. Murray, being duly sworn, testifies as follows:

Examination by Mr. Goldman:

Q. Mr. Murray, are you connected with the Building Supply Company of Englewood?

A. Yes, sir.

Q. In what capacity?

A. At the present time as secretary and treasurer.

Q. Are you acquainted with the transaction between Teaneck Building Corporation and Building Supply Company?

A. Yes, sir.

Q. And can you tell us what is the full amount due for materials supplied to the Teaneck Building Corporation?

A. The full amount due is $4282.75.

Q. Now will you explain whether there is a contract for any part or parts of that material?

A. These materials were delivered to Philip Slotnick and Teaneck Building Corporation under three contracts. We had an estimate of materials for each house.

Q. Have you that list with you?

A. I have the list here.

Q. Show us list No. 1.

A. Here is list No. 1 (witness produces list).

Q. What is the full amount of this contract?

A. The material delivered on that was $1280.45.

Q. Can you tell us when the first delivery was made on that contract?

A. September 28, 1928.

Mr. Goldman offers estimate and contract on House No. 1 in evidence.

By Mr. Vanderwart:

Q. That is all of the contract?

A. On No. 1.

Admitted without objection. Marked P-4.

By Mr. Goldman:

Q. Have you contract for No. 2 house?

A. Yes.

Q. What is the total amount delivered on No. 2 house?

A. $1240.24.

Q. Now when was the first delivery made on that contract?

A. That would be October first.

Mr. Goldman offers estimate and contract for No. 2 house in evidence. Admitted without objection. Marked P-5.

By Mr. Goldman:

Q. Have you contract for No. 3 house?

A. Yes.

Q. What is the total amount of that?

A. $1292.24. First material delivered October 2, 1928.

Mr. Goldman offers estimate and contract for No. 3 house in evidence. Admitted without objection. Marked P-6.

By Mr. Goldman:

Q. Have you the delivery tickets signed by anybody of the Teaneck Building Corporation for all of these materials on contracts 1, 2 and 3?

A. We have the delivery tickets there all signed. There may be a few exceptions.

By Mr. Goldman: I offer those tickets in evidence.

Mr. Vanderwart: Which one is that?

Witness: All the three houses.

Mr. Vanderwart: What are those offered for? For what purpose?

Mr. Goldman: For proving delivery.

Mr. Bell: There are some of these deliveries, I notice, that are not signed for by anybody. Are we supposed to admit these in evidence without reading? Have you personal knowledge of these deliveries?

A. (Witness) Yes. I have personal knowledge

of passing on the orders before they were delivered.

Q. But you have no actual knowledge that these goods were delivered as stated herein, have you?

A. I believe that I have. I did not personally deliver them, no. But we have the drivers here who did deliver them. It is very often after 4:30 in the afternoon when a truck will get to a job. The average time required for the delivery of materials is at least two hours—so that the second delivery which the large trucks make in the afternoon usually get there after 4:30, and people will not stay around to sign the ticket. You can't find a mechanic within two miles of the job.

Q. Did Philip Slotnick have any other business with your company? Did you supply any materials to any other house?

A. Afterwards. Not before. This was our first.

Q. Can you say how long afterward you furnished materials for other buildings?

A. Followed it right up.

Q. Followed it right up?

A. Yes.

Q. On Fairview Avenue?

A. Fairview Avenue is the only development.

Q. On the item here of October 10, 1928, against Philip Slotnick, Fairview Avenue jobs 1, 2, 3, 4, 5, 6 and 7. Were all those jobs going at the same time? (refers to ticket No. 31798).

A. All started right after the other, yes.

Q. In October?

A. In October.

Q. There is a charge of $399. here. Does that cover these three jobs or all of them?

A. It is apportioned against these three houses.

All delivery tickets admitted by Mr. Bell.

Plaintiff offers in evidence delivery tickets which purport to prove delivery of all materials stated in the complaint to three houses described in the

lien claim. Received. Marked P-7. Counsel for defendant admits the delivery to the individual houses up to the amounts described in the complaint.

By Mr. Goldman:

Q. Mr. Murray, can you tell us when the last delivery of materials was made?

A. Approximately January 18, 1929.

Q. From these tickets can you tell us when the last delivery was made on each job?

A. Last delivery house No. 3, January 18, 1929; house No. 2, January 18, 1929; house No. 1, January 16, 1929.

Q. What is the total due from Teaneck Building Corporation from these three houses?

A. $4282.75.

Q. How much would you say is due on each house? Do you know? How much is due on the first house?

A. $1437.05.

Q. How much is due on the second house?

A. $1396.85.

Q. On the third house?

A. $1448.85.

Q. Has any part of the sum of $4282.75 been paid?

A. No, sir.

By Mr. Vanderwart:

Q. Mr. Murray, when an order comes in how is it brought in, by a salesman, or over the telephone, or how?

A. The majority of Slotnick's orders came in direct through Mr. Slotnick driving over to the office. They had no telephone on the job.

Q. So when the order came in how many of these are made out?

A. These delivery slips—three. The original and a duplicate go on the truck. The original is signed and returned to the office, and the duplicate is handed to the builder. And the third or office copy is merely kept in the office in the event the original is lost—to be sure we get back our original

ticket.

Q. Have you any ledger sheet to show the amount due?

A. I haven't that with me.

Q. How do you know the amount due as you have given it to me?

A. From our lien claims.

By Mr. Goldman:

Q. Is this bill an exact copy of your ledger sheet?

A. Yes.

By Mr. Vanderwart:

Q. You have such a ledger sheet?

A. Yes, we have ledger cards and also all duplicate slips. Copy of bill submitted is a true copy of monthly statement rendered.

Q. Is this a true copy of the ledger sheet?

A. That would not be a copy of our ledger sheet.

Q. Where would this be taken from?

A. That would be taken as a copy of the monthly statement.

Q. Where are they filed?

A. At the office.

Q. In a book?

A. No, in folders—regular letter file.

Q. And then the totals of these monthly statements are put in the ledger?

A. On to a ledger card.

By Mr. Vanderwart: Opportunity will be given counsel for plaintiff to produce monthly statements and ledger sheets proving the account in the complaint.

Plaintiff Rests.

James Millar, for the defendant East Rutherford Savings Loan and Building Association, being duly sworn, testifies as follows:

JAMES MILLAR, DIRECT

Examination by Mr. Bell:

Q. Mr. Millar, are you connected with the East Rutherford Savings Loan and Building Association?

A. Yes, sir.

Q. In what capacity?

A. Vice President and Acting Secretary.

Q. As Acting Secretary the applications for loans that are made by members are handled by you?

A. Yes, sir.

Q. Have you got in your possession an application made by Philip Slotnick on November 1st, I think the date is, for a loan?

A. I have. Here it is. (Witness produces application).

By Mr. Bell: I offer application of Philip Slotnick for a loan of $5500 on property on the south side of Fairview Avenue, 300 feet east of Arlington Avenue, Teaneck, New Jersey, dated October 25, 1928, in evidence.

Mr. Goldman: For what purpose, Mr. Bell?

Mr. Bell: The purpose is to show the surroundings of the granting of the loan.

Mr. Goldman: It is not material because you admit the mortgages of record.

By Mr. Bell: We are a corporation and we have to do everything according to Hoyle.

Application admitted without objection and marked D 1. (Covering one house).

By Mr. Bell:

Q. Mr. Millar, the application reads: "I desire to obtain 7 loans (construction) of $5500 each on 55 shares and offer to give said shares and the following property as security"—that is the property I read.

A. Yes.

Q. What action was taken on that application?

A. There was a loan of $5000 granted on it.

Q. A loan of $5000 was granted?

A. Yes, for one.

Q. The application also reads that plans and

specifications are filed herewith. Were plans actually filed? And specifications?

A. Yes.

Q. Had the work been started?

A. Yes.

Q. The Association knew that work had been started?

A. Yes.

Q. The application contains under date of November 1, 1928, the following: "To the Board of Directors of East Rutherford Savings Loan and Building Association: We have viewed the property described in the above application, and believe the fair market value of the lot described to be $1000, and the buildings when completed we estimate to be worth $5500. Signed; Wm. Black, Chas. A. Van Winkle, W. Gramlich, appraising committee." Are Mr. Black, Mr. Van Winkle and Mr. Gramlich an Appraising Committee of your Association?

A. They are the official appraisers.

Q. Were they such on November 1st, 1928?

A. They were.

Q. Have you got in your possession the checks that were issued for this loan?

A. Here is the first check paid on that loan.

By Mr. Bell: I offer in evidence check of East Rutherford Savings Loan and Building Association, East Rutherford, N. J., dated December 13, 1928, to the order of John M. Bell, attorney, on Rutherford Trust Company, Rutherford, N. J., for $3000, signed by W. Gramlich, president; J. Millar, acting secretary; and Eva M. Harteman, treasurer; No. 53004, endorsed for deposit, John M. Bell, Attorney East Rutherford Savings Loan and Building Association.

By Mr. Goldman: Mr. Millar, do you know how this money was disbursed?

A. No, the attorney disburses that.

Q. You know nothing about the disbursements?

A. No.

By Mr. Goldman: I object because it is not

made to any party to this suit. It is made out to John M. Bell, Attorney.

Check admitted by Mr. Vanderwart. Marked D-2

By Mr. Bell:

Q. Have you in your possession check for second payment on this loan?

A. Here it is (witness produces check).

Mr. Bell: I offer in evidence check of East Rutherford Savings, Loan and Building Association, East Rutherford, N. J., dated December 21, 1928, payable to the order of John M. Bell, attorney, on Rutherford Trust Company, Rutherford, N. J., for $1500, No. 53133, signed by W. Gramlich, president; James Millar, acting secretary; Eva M. Hartemann, treasurer. Endorsed for deposit to the credit of John M. Bell, attorney for East Rutherford Savings, Loan and Building Association.

Check admitted and marked D-3.

Q. Have you got a check for the third payment on this loan?

A. Here it is (witness produces check).

Mr. Bell: I offer in evidence check of East Rutherford Savings, Loan and Building Association, East Rutherford, N. J., dated January 4, 1929, payable to the order of John M. Bell, attorney, for $400, signed by W. Gramlich, president; George A. Duncan, secretary; and Eva M. Hartemann, treasurer; No. 53334, and endorsed for deposit to the credit of John M. Bell, attorney for East Rutherford Savings Loan and Building Association. This was for the third payment.

Mr. Goldman: How can you tell it is the third payment?

Mr. Bell: I can tell from the appraisers' order.

No. objection. Check admitted and marked in evidence D-4.

By Mr. Bell:

Q. Prior to the granting of each of these checks did you have an appraisal report by the appraisal committee?

A. They make the inspeection, yes, and then

order the payment.

Q. Have you such a report?

A. Yes.

Q. Did you get the report before the first check was issued?

A. Here is the report for the first payment.

Mr. Bell: I offer in evidence a paper writing as follows: "East Rutherford Savings, Loan and Building Association, No. 6856, December 6, 1928, To the Secretary. We report that the building now being erected for Teaneck Building Co. on No. 1 Fairview Avenue, Teaneck, 300 feet northerly from Arlington Avenue, has sufficiently advanced to entitle the contractor to his first payment, the terms and conditions of the plans, specifications and contract having been complied with. You are therefore authorized to issue an order on the Treasurer for the sum of $3000. First Payment $3000. Signed: Wm. Black, W. Gramlich, Chas. A. Van Winkle, Building Committee."

Mr. Goldman: I object to the admission of the report on the ground that it is not made by the witness. He has no actual control of the instrument and it is a self-served declaration entirely immaterial to the issue, and no defense that the money was put in the buildings, or admission that they hold mortgages of record.

Admitted by Mr. Vanderwart for the purpose of showing payment on account of the mortgage on the first house.

By Mr. Bell:

Q. Have you got the report for the second payment?

A. Yes, sir.

Mr. Bell: Without reading it all over again I have a similar report, dated December 20, 1928, No. 6893, for $1500, signed by Wm. Black, Chas. A. Van Winkle and W. Gramlich, Building Committee.

Mr. Goldman: I object to the admission on the same grounds as before, and the additional grounds that this witness is not the proper person to testify

as to the execution of the inspection report.

Admitted with exception. Marked D-6.

By Mr. Bell:

Q. Have you a similar report for the third payment?

A. Yes.

Mr. Bell: I have a similar report, dated January 3, 1929, for $400 signed Wm. Black, Chas. A. Van Winkle, W. Gramlich, Building Committee. No. 6920. Third payment.

Mr. Goldman: Same objections as before and in addition that it is purely hearsay evidence. This objection applies to all three reports.

Admitted with exceptions. Marked D-7.

Mr. Bell:

Q. Mr. Millar, have you a copy of the Constitution and By-Laws of East Rutherford Savings Loan and Building Association?

A. Yes, sir.

Mr. Bell: I want to offer the Constitution of East Rutherford Savings Loan and Building Association, as amended August 16, 1928, in evidence. Under Article XXIV, Appraising Committee:

Section 4. Should the borrowing member decide to build upon or improve his property, he shall submit plans and specifications of the proposed building with a contract for its erection by a reputable builder or contractor; and such contract shall be secured by a bond in terms and amount satisfactory to the Solicitor of the Association for the faithful performance of said contract.

Section 5. The money shall be advanced in instalments, as the work progresses, on the inspection and approval of the appraisers.

Section 6. No payments shall be made until the first tier of beams is laid; and the subsequent payments must be so arranged that at least one-quarter of the whole amount of the loan shall be retained for the last payment.

Section 7. The report of at least two of the appraisers on the completion of the work must be

made, and the certificate of the Solicitor must be given that the property is clear of all building liens, before the final payment is made.

Those are sections which apply.

By Mr. Goldman: Objection that it is purely hearsay and not binding on the plaintiff.

By-Laws admitted and marked D-8.

By Mr. Bell:

Q. What is the aggregate of those several payments, Mr. Millar?

A. $4900.

Q. And $100 of that amount has been retained?

A. Has been with-held, yes.

Q. Why was it retained, do you know?

A. Some minor details had not yet been completed.

Q. Have you in your possession an application for a loan by the Teaneck Building Corporation on property at Fairview Avenue, Teaneck?

A. Yes. (witness produces application).

It is stipulated that the same questions, answers and objections are asked and made with reference to house No. 2, the application for which is marked D-9, the checks are marked D-10, D-11 and D-12, and the Building Committee's reports being marked D-13, D-14 and D-15.

Q. Mr. Millar, what is the aggregate of the three checks paid out on House No. 2 ?

A. $4900.

Q. And the Association retained $100 for the same reason as before?

A. Yes.

It is stipulated that the same questions, answers and objections are asked and made with reference to house No. 3, the application for which is marked D-16, the checks are marked D-17, D-18 and D-19, and the Building Committee's reports being marked D-20, D-21 and D-22.

Q. Mr. Millar, what is the aggregate of the three checks of the Association on house No. 3 ?

A. $4900.

Q. The loan was for $5000?

A. Yes.

Q. The Association retained $100 for the same reason as given before?

A. Yes, sir.

Q. All of those checks have been endorsed by John M. Bell, Attorney?

A. Yes, sir.

CROSS-EXAMINATION BY MR. GOLDMAN:

Q. You don't know how the money was disbursed, do you?

A. I do not know.

Q. You do not know whether the houses were ever completed?

A. I happen to know because I have seen the place about two weeks ago.

Q. Have they been completed?

A. Not altogether.

Q. Who is in possession of the $300 representing the balance of the loans?

A. We have that. No check has been drawn for that yet.

Q. Do you know whether the Englewood Building Supply furnished materials on these three houses?

A. I do not know.

Nelson D. Hendershot, being duly sworn, testifies as follows:

Direct examination by Mr. Bell:

Q. Mr. Hendershot, what is your occupation?

A. Title officer in the office of John M. Bell.

Q. Where are you employed?

A. John M. Bell, 19 Park Avenue, Rutherford.

Q. Were you employed by John M. Bell on December 13, 1928?

A. I was.

Q. And how long prior thereto?

A. About nineteen or twenty years.

Q. In your employment in Mr. Bell's office you handle the business of East Rutherford Savings Loan and Building Association?

A. I do.

Q. Can you explain why the application of Philip Slotnick for a loan from East Rutherford Savings Loan and Building Association, dated October 28, 1928, was never executed and no mortgage given under that by Slotnick?

A. Mr. Slotnick was not the record owner of the property.

Q. At the time the application was made, or after?

A. That I do not recall. At the time the mortgage was executed, he was not the owner.

Q. You searched the title when the application came over and you found Teaneck Building Corporation to be the owner?

A. I found Teaneck Building Corporation to be the owner.

By Mr. Vanderwart: Was that true of all of them?

A. The first application was made by Slotnick and the other two by the Teaneck Building Corporation.

By Mr. Bell: And the mortgage for the loan was given by the Teaneck Building Corporation?

A. By Teaneck Building Corporation.

Three mortgages from Teaneck Building Corporation to East Rutherford Savings Loan and Building Association introduced in evidence by Mr. Bell, as follows:
Book 1122, page 446, marked D- 23
Book 1122, page 447, marked D-24
Book 1122, page 449, marked D-25

Q. You remember the receipt of the checks from the Association that are in evidence and they were deposited to the credit of John M. Bell, attorney, by you?

A. Yes, sir.

Q. Now on these mortgages—they were proved on the 7th day of December, 1928? By Paul Beyer?

By Mr. Vanderwart: All of them?

A. All the same day, yes.

By Mr. Bell: Q. Was any money paid on them at the date of the execution of the mortgages?

A. No.

Q. How soon after?

A. I think the first payment was made on the 13th of December.

Q. I have a series of checks here representing our disbursements and I will ask Mr. Hendershot to identify them or look them over.

Counsel produces checks for identification to the witness on house No. 1 showing disbursements of John M. Bell, attorney—six checks on house No. 1:

A. Check dated December 13, 1928, to Teaneck Building Corporation, $1387.20, and endorsed by Teaneck Building Corporation to N. J. Cafarelli attorney for Jaeger Land Company. That was for the purpose of paying off the mortgage on the property.

Check dated December 13, 1928, for $50.00, payable to Teaneck Building Corporation, and endorsed to East Rutherford Savings Loan and Building Association, to pay the first month's Building and Loan dues on the loan.

Check dated December 13, 1928, for $27.36, payable to Teaneck Building Corporation, and endorsed to John M. Bell, to pay the balance of the legal fees on that loan.

Check dated December 13, 1928, for $1538.44, payable to Teaneck Building Corporation and delivered to Mr. Slotnick, and endorsed by Teaneck Building Corporation.

Check dated December 21, 1928, for $1500, payable to Teaneck Building Corporation and endorsed by that corporation.

Check dated January 4, 1929, for $400, payable to Teaneck Building Corporation and endorsed by that corporation.

Checks marked in evidence D-26.

Q. The first check offered in evidence was endorsed to the Jaeger Land Company by Philip Slotnick, president. What was that for?

A. To pay off a mortgage on the property.

Q. Did you get a release from that mortgage?

A. A release of the mortgage, yes.

Q. I show you a release and ask you if that is the instrument that you received on account of that payment from the Jaeger Land Company?

A. Yes.

Release offered in evidence and marked D-27.

Q. Check No. 7384 for $50 was endorsed to East Rutherford Savings Loan and Building Association by Philip Slotnick, president. What was that for?

A. To pay the first month's Building and Loan dues on the loan.

Q. Check No. 7385 to the order of Teaneck Building Corporation for $27.36, endorsed to John M. Bell by Philip Slotnick, president. What was that for?

A. To pay the balance of the legal fees—search fees &c.—on the loan.

Q. What is the aggregate of those checks?

A. $4900.

Counsel produces checks for identification to the witness on house No. 2, showing disbursements of John M. Bell, attorney.

Witness: Check dated December 13, 1928, for $1512.00 made payable to Teaneck Building Corporation and endorsed by that corporation to Edward Citron, which was for the purpose of paying off a mortgage on the property.

Check dated December 13, 1928, for $50.00, payable to Teaneck Building Corporation and endorsed by that corporation to East Rutherford Savings Loan and Building Association to pay the first month's Building and Loan dues on account of the loan.

Check dated December 13, 1928, for $4.36, pay-

able to Teaneck Building Corporation and endorsed to John M. Bell for the balance of the legal fees in connection with that loan.

Check dated December 13, 1928, payable to Teaneck Building Corporation for $933.64, and endorsed by Teaneck Building Corporation.

Check dated December 21, 1928, payable to Teaneck Building Corporation for $1000, and endorsed by that corporation to Fred Conrad—in payment of plumbing bill I think it was.

Check dated December 21, 1928, for $1000, payable to Teaneck Building Corporation and endorsed by that corporation.

Check dated January 4, 1929, for $400, payable to Teaneck Building Corporation and endorsed by that corporation.

Q. What is the aggregate of those several checks.

A. I presume $4900.

Checks marked in evidence as D-28.

Q. The first check endorsed to Edward Citron was for the release of a mortgage on the premises. I show you the release. Is that the release?

A. That is the release.

Release marked in evidence as D-29.

Counsel produces checks for identification to the witness on house No. 3, showing disbursements of John M. Bell, attorney.

Witness: Check dated December 13, 1928, for $50.00, payable to Teaneck Building Corporation and endorsed by that corporation to East Rutherford Savings Loan and Building Association in payment of the first month's dues on the loan.

Check dated December 13, 1928, for $4.36, payable to Teaneck Building Corporation and endorsed to John M. Bell in payment of the balance of the search fees on that loan.

Check dated December 13, 1928, for $1945.64, payable to Teaneck Building Corporation and endorsed by that corporation.

Check dated December 21, 1928, for $1500, pay-

able to Teaneck Building Corporation and endorsed by Teaneck Building Corporation.

Check dated January 4, 1929, for $1400, payable to Teaneck Building Corporation and endorsed by Teaneck Building Corporation.

Q. What is the aggregate of those checks?

A. $4900.00.

Checks marked in evidence as D-30.

Q. The $4900 paid out by you in each instance represents the moneys received by the checks from the Building and Loan Association, payable to the order of John M. Bell, attorney?

A. Yes.

Q. Prior to the making of the payments just testified to by you, did you take any steps to have the parties who might be entitled to mechanics' liens under the Mechanic's Lien Act of New Jersey stipulate that their lien should be subsequent to that of the mortgage to the Building and Loan Association?

A. I required a stipulation in each instance as to each house before the first payment was made.

Q. And prior to the making of each payment you required the Teaneck Building Corporation to furnish an affidavit that all parties who had furnished labor or material for or towards the building had been paid?

A. Yes.

Q. I show you three papers and ask you if those are the stipulations referred to?

A. Yes.

Stipulation on House No. 1 marked D-31.

By Mr. Goldman: Stipulation provides signature of the Building Supply Company of Englewood, N. J., Inc., the plaintiff in this case, signed as to first payment only, and signed "Herman Kesser, Secretary and Treasurer."

Stipulation as to House No. 2 Marked D-32

Stipulation as to House No. 3 marked D-33

By Mr. Goldman: Same provision as to signature of the plaintiff on all three stipulations.

NELSON D. HENDERSHOT, CROSS

Stipulations are dated November 27, 1928. The affidavit for the first payment is December 13, 1928, on the second payment December 21, 1928, and on the third payment January 4, 1929.

Mr. Bell: I offer the three stipulations in evidence for what they are worth.

CROSS-EXAMINATION BY MR. GOLDMAN:

Q. Mr. Hendershot, do you know how much the first payment on each house was to be? Do you know the amount authorized as first payment by the Inspection Committee?

A. Except as to the check which the Association sent me.

Q. I call your attention to the first inspection order dated December 6, 1928, for $3000, D-5 authorized to pay $3000 on first payment. House No. 1.

A. If the check for the first payment is $3000 then that is the first payment that I received.

Q. And that is the amount you disbursed?

A. Yes. I believe there were three payments ordered at one time on the three houses.

Q. To whom did you deliver those checks on House No. 1, Mr. Hendershot—the first payment?

Q. One check of D-26, No. 7383, in the sum of $1387.20, I ask to whom that check was delivered?

A. Mr. Cafarelli.

Q. Was he present at the closing?

A. Yes.

Q. And it was in payment of a mortgage?

A. Yes.

Q. I show you check No. 7386—$1535.44, and ask you to whom you delivered that check?

A. To Mr. Slotnick.

Q. Personally?

A. Yes, sir.

Q. Do you know of your own knowledge how that money was disbursed?

A. No. It was delivered to Mr. Slotnick.

Q. Outside of that you do not know where the

money went to?

A. It was delivered to Mr. Slotnick as president of the Teaneck Building Corporation.

Q. You do not know whether it was in payment of the claims of the men who signed the release?

A. No.

Q. That applies to all the checks you delivered to Mr. Slotnick?

A. To him as president of the Teaneck Building Corporation.

Q. The same questions and answers for all the checks you disbursed?

A. All that were not endorsed to persons other than the Teaneck Building Corporation. Check to Mr. Citron was delivered personally to him.

Q. At the time you accepted the stipulation signed by the Building Supply as to the first payment, did you make a payment to the Building Supply?

A. No.

Q. But did you know that they were furnishing materials to the job?

A. No. Mr. Slotnick brought in the stipulation signed by the corporation, so I presumed that they were furnishing materials.

Q. Did you examine the stipulation when you received it from Mr. Slotnick?

A. Yes.

Q. Did you notice that the signature was conditioned as to the first payment only?

A. That I do not recall whether I noticed it at that time or not.

Q. When was that signature first brought to your attention?

A. Mr. Greenberg was in my office to examine the stipulations some time after the third payment had been made and he called my attention to it, although I may have had knowledge of it before that.

Q. Did you make any further payments?

A. No.

NELSON D. HENDERSHOT, CROSS

Q. All the money had been disbursed?

A. With the exception of $100.

Q. That stipulation had not been altered in any respect from the time of delivery?

A. No.

Q. Then you made payments after the first payment—that is, you made payments of moneys after release had been given to you?

A. Yes.

Q. Payments made on December 21st on three houses?

A. Yes, sir.

Q. And you had that stipulation?

A. Yes, sir.

Q. Now can you tell us the exact amount that the Teaneck Building Corporation actually got out of this mortgage?

A. Well I can calculate it here for you. They got the whole thing—$4900 in each instance.

Q. You don't know whether all the money went into the construction of the house?

A. That I don't know.

Q. Did anybody make any demands for money after you received the stipulation?

A. No.

Q. No one put in any Stop Notices?

A. No.

Q. Anybody file lien claims against the property?

A. A lien claim was filed by the Supply Company.

Q. I mean exclusive of ours?

A. No. No one else.

Q. No one demanded money from you?

A. No.

RE-DIRECT EXAMINATION BY MR. BELL:

Q. The money was all paid out before the lien claim was filed?

A. Yes.

Q. And the mortgages were recorded before the lien claim was filed?

NELSON D. HENDERSHOT, REDIRECT

A. Yes.

By Mr. Goldman: But the money had not been disbursed at the time of the acceptance of these stipulations?

A. No. At the time they were delivered. The money was not paid until after the stipulations were delivered.

Q. Do you know whether materials had been delivered after the stipulation had been signed?

A. No.

Q. You were never on the job?

A. Never on the job.

FINDINGS AND REPORT OF REFEREE
FILED OCTOBER 3, 1929

This matter having been referred to me by Order dated June 7, 1929, and testimony having been taken, I do Find and Report as follows:

Plaintiff supplied material at the instance and request of the defendant, Teaneck Building Corporation, between September 28, 1928, and January 18, 1929, in the total sum of $4282.75, which materials were used in the construction of three houses, one being situated upon the first tract, one upon the second tract, and one upon the third tract described in the lien claim filed and the complaint; and of this amount the fact is uncontested that materials were supplied to the house upon the first tract in the sum of $1437.05, to the house upon the second tract in the sum of $1396.85, and to the house upon the third tract in the sum of $1448.85, to each of these amounts interest should be added from January 18, 1929, making the total amount due as follows:

First House	$1498.12
Second House	1456.18
Third House	1510.43
Total due	$4464.73

I further find that Joseph Greenberg and N. J. Cafarelli have been appointed receivers of Teaneck Building Corporation in the Court of Chancery of New Jersey, and that plaintiff has been given leave

by Order in the Court of Chancery of New Jersey to bring this action.

Judgment for default, therefore, should be entered generally against the defendant Teaneck Building Corporation and the receivers, Joseph Greenberg and N. J. Cafarelli, in the total sum of $4464.73, as above outlined.

I further find that under date of December 7, 1928, three mortgages were executed to the East Rutherford Savings Loan and Building Association, recorded as follows: Book 1122, Page 446; Book 1122, page 447; Book 1122, page 449. in the sum of $5000 each.

The undisputed testimony is that the application for one of these mortgages had been made by P. Slotnick on October 25, 1928, and for each of the others by Teaneck Building Corporation under date of November 10, 1928.

No money was paid at the time of the execution of these mortgages to either party, although after the application Teaneck Building Corporation had become the owner of all three tracts.

I therefore find that these were advance money mortgages, and the advances were governed by Article 24 of the Constitution of the mortgagee Association.

The payments made upon the $5000 mortgage upon the first house by the mortgagee Association, were as follows:

Date	Amount	Payee	Purpose
12-13-28	$1387.20	Teaneck Bldg. Corp.	Payment of mtge. on property
12-13-28	$ 50.00	Teaneck Bldg. Corp.	Dues on loan
12-13-28	$1535.44	Teaneck Bldg. Corp.	
12-13-28	$ 27.36	Teaneck Bldg. Corp.	Legal fees on loan
12-21-28	$1500.00	Teaneck Bldg. Corp.	
1-4-29	$ 400.00	Teaneck Bldg. Corp.	
	$4900.00		

The payments made upon the $5000 mortgage upon the second house by the mortgagee Associa-

tion, were as follows:

Date	Amount	Payee	Purpose
12-13-28	$1512.00	Teaneck Bldg. Corp.	Payment of mtge. on property
12-13-28	$ 50.00	Teaneck Bldg. Corp.	Dues on loan
12-13-28	$ 933.64	Teaneck Bldg. Corp.	
12-21-28	$1000.00	Teaneck Bldg. Corp.	Pl'b'g Contractor
1-4-29	$ 400.00	Teaneck Bldg. Corp.	
12-13-28	$ 4.36	Teaneck Bldg. Corp.	Legal fees on loan
12-21-28	$1000.00	Teaneck Bldg. Corp.	
	$4900.00		

The payments made upon the $5000 mortgage upon the third house by the mortgagee Association, were as follows:

Date	Amount	Payee	Purpose
12-13-28	$ 50.00	Teaneck Bldg. Corp.	Dues on loan
12-13-28	$ 4.36	Teaneck Bldg. Corp.	Legal fees on loan
12-13-28	$1945.64	Teaneck Bldg. Corp.	
12-21-28	$1500.00	Teaneck Bldg. Corp.	
1-4-29	$1400.00	Teaneck Bldg. Corp.	
	$4900.00		

The lien claim of the plaintiff was filed March 11, 1929, and summons was issued thereon on March 20, 1929.

It is my opinion that the mechanics' lien claim rights of the plaintiff in this action rest upon Section 14 of the Mechanics' Lien Law, which in its preamble describes an advance money mortgage and makes the section applicable to the comparative rights of mechanics' lien claims over advance money mortgages. The Section provides that in all advance money mortgage transactions the buildings shall be liable for the payment of the debt contracted and owing for labor performed or materials furnished prior to the lien of a mortgage to secure advances in money to be used in the construction of the building to the extent only of the moneys remaining to be advanced by the mortgagee under such agreement, with the further requirement that the recording of the mortgage shall precede the filing of the lien claim.

REPORT OF REFEREE

Under this Section it seems to be settled law of this State that advance money mortgages are prior to mechanics' liens to the extent of all moneys advanced prior to the time when the lien claim is filed. I cannot find that the opinion of the Court of Errors and Appeals in the case of Franklin Society vs. Thornton, 85 New Jersey Equity 525, has ever been changed and it is clear that the facts in this case bring the comparative rights of the parties within the Provisions of Section 14 of the Act.

I therefore find that the plaintiff should recover a special lien against the premises described in the lien claim as follows:

FIRST TRACT: In the sum of $1498.12, subject to the lien of the mortgage of East Rutherford Savings Loan and Building Association in the sum of $4900.

SECOND TRACT: In the sum of $1456.18 subject to the lien of the mortgage of East Rutherford Savings Loan and Building Association in the sum of $4900.

THIRD TRACT: In the sum of $1510.43, subject to the lien of the mortgage of East Rutherford Savings Loan and Building Association in the sum of $4900.

The papers show that the action has been discontinued as to Jaeger Land Co.

One hearing was held at which 54 folios of testimony were stenographically taken.

Oct. 3, 1929.

Respectfully submitted,

HERMAN VANDERWART,
Referee.

EXCEPTIONS TO REFEREE'S REPORT
FILED OCTOBER 9, 1929

The said plaintiff Building Supply Co. of Englewood, N. J., Inc., by Solomon Goldman, its attorney, excepts to the report of Herman Vanderwart, Esquire, to whom the matters in controversy in the above stated cause were referred to take and state the account between the said plaintiff and the defendants, and to report the same to the said Court for the following reasons:

1. The said Referee did not allow the said plaintiff a priority of its lien claim over the mortgages of the defendant, East Rutherford Savings, Loan & Building Association.

2. That the said findings of the Referee are errors in law with reference to the priority of a mechanics lien of the plaintiff over the mortgages of the defendant East Rutherford Savings, Loan & Building Association.

And the plaintiff respectfully prays that the report of the Referee be revised in favor of the plaintiff insofar as priority of its lien claim over the mortgages of the defendant East Rutherford Savings, Loan & Building Association, as a matter of law.

SOLOMON GOLDMAN,
Attorney for Plaintiff.

Dated October 8, 1929.

ORDER FOR JUDGMENT
FILED FEBRUARY 24, 1930

The above matter having been referred to HERMAN VANDERWART, ESQ., Supreme Court Commissioner on June 7, 1929, to take and state the account between the parties and to make and report the same: and the said HERMAN VANDERWART, ESQ., having filed his report with the Clerk of the Bergen County Circuit Court, wherein he reports that he finds for the plaintiff in the total sum of Four Thousand Four Hundred and Sixty-Four Dol-

lars and Seventy-Three Cents ($4464.73) against the defendant TEANECK BUILDING CORP., and its receivers JOSEPH GREENBERG and N. J. CAFARELLI: he further finds that the defendant EAST RUTHERFORD SAVINGS, LOAN AND BUILDING ASSOCIATION was entitled to priorities of its mortgages over the lien claim of the plaintiff on three (3) tracts of land and premises and that the plaintiff's lien claim is subject to the said mortgages: exceptions to said Masters report having been filed by the plaintiff BUILDING SUPPLY CO., OF ENGLEWOOD, N. J., through its attorney SOLOMON GOLDMAN, and the court having decided that the said report of the referee should be amended so that the schedule of priorities shall be as follows:

House No. 1—		
East Rutherford Savings, Loan and Building Association—first for		$3,000.00
Plaintiff—second for		1,498.12
Plus interest from October 3, 1929, to February 7, 1930		30.96
East Rutherford Savings, Loan and Building Association—third for		1,900.00
House No. 2—		
East Rutherford Savings, Loan and Building Association—first for	3,000.00	
Plaintiff—second for	1,456.18	
Plus interest from October 3, 1929, to February 7, 1930	30.08	
East Rutherford Savings, Loan and Building Association—third for	1,900.00	
House No. 3—		
East Rutherford Savings, Loan and Building Association—first for	3,000.00	
Plaintiff—second for	1,510.43	
Plus interest from October 3, 1929, to February 7, 1930	31.21	

East Rutherford Savings, Loan and Building Association—third for 1,900.00

And a judgment in the sum of Four Thousand Four Hundred and Sixty-Four Dollars and Seventy-Three Cents ($4464.73) be entered generally against the defendant TEANECK BUILDING CORP., and JOSEPH GREENBERG and N. J. CAFARELLI, receivers for said Company and specially to be made of the lands and premises described in the complaint for the said sums reported by the referee in accordance with the schedule of priorities hereinbefore mentioned.

It is on this 24th day of February, Nineteen Hundred and Thirty, on motion of SOLOMON GOLDMAN attorney for the plaintiff, ORDERED that the said report be amended so that the order of priorities shall be as follows:

House No. 1—

East Rutherford Savings, Loan and Building Association—first for $3,000.00
Plaintiff—second for 1,498.12
Plus interest from October 3, 1929, to February 7, 1930 ..... 30.96
East Rutherford Savings, Loan and Building Association—third for 1,900.00

House No. 2—

East Rutherford Savings, Loan and Building Association—first for $3,000.00
Plaintiff—second for 1,456.18
Plus interest from October 3, 1929, to February 7, 1930 ..... 30.08
East Rutherford Savings, Loan and Building Association—third for 1,900.00

House No. 3—

East Rutherford Savings, Loan and Building Association—first for $3,000.00
Plaintiff—second for 1,510.43

ORDER FOR JUDGMENT

Plus interest from October 3, 1929, to February 7, 1930	31.21
East Rutherford Savings, Loan and Building Association—third for	1,900.00

And that the said report do stand confirmed, and it is FURTHER ORDERED that judgment final for the sum of Four Thousand Four Hundred and Sixty-Four Dollars and Seventy-Three Cents ($4464.73) damages together with interest as set forth in schedule of priorities heretofore mentioned, costs to be taxed be entered in favor of the plaintiff against the defendants JOSEPH GREENBERG and N. J. CAFARELLI, receivers for TEANECK BUILDING CORP., and specially to be made on the lands and building described in the complaint.

And it is FURTHER ORDERED that the compensation of the referee be fixed at Fifty Dollars ($50.00) which shall be added to the costs to be paid by the defendants.

EDWIN C. CAFFREY,
Judge.

Rule entered February 24, 1930.

JUDGMENT

ENTERED FEBRUARY 24, 1930

Damages on Referee's amended report $4464.73; interest $92.25; costs $114.00, generally against the defendant, Teaneck Building Corp. and Joseph Greenberg and N. J. Cafarelli, Receivers for said Company, and specially to be made out of the lands and premises described in the complaint:

Damages	$ 4,464.73
Interest	92.25
Costs	114.00
Total	$ 4,670.98

NEW JERSEY COURT OF ERRORS AND APPEALS

Building Supply Company of Englewood, N. J., Inc., a corporation of New Jersey, Plaintiff-Respondent, vs Joseph Greenberg and N. J. Cafarelli, Receivers for Teaneck Building Corp., a New Jersey Corporation, Builder and Owner, East Rutherford Savings Loan and Building Association, Mortgagee, Defendants-Appellant,	Action at Law —— On Mechanic's Lien

STATEMENT OF THE CASE

The question involved in this case is between the plaintiff-respondent, Building Supply Company of Englewood, N. J., Inc., a mechanic's lien claimant, and the defendant-appellant, East Rutherford Savings Loan and Building Association, mortgagee.

The plaintiff-respondent furnished and supplied certain building materials to Teaneck Building Corp., a New Jersey Corporation, for the erection of three one-family dwelling houses on Fairview Avenue, in the Township of Teaneck, in the County of Bergen and State of New Jersey, aggregating six thousand seven hundred eighty-two dollars and seventy-five

cents ($6,782.75), upon which account Teaneck Building Corp. paid on December 7, 1928 the sum of two thousand five hundred dollars ($2,500.00), leaving a balance of four thousand two hundred eighty-two dollars and seventy-five cents ($4,282.75) unpaid. On February 25, 1929 Teaneck Building Corp. was declared insolvent by decree of the Court of Chancery of New Jersey, and Joseph Greenberg and N. J. Cafarelli were appointed receivers for the creditors and stockholders of said Company.

The defendant-appellant is a corporation of New Jersey, incorporated under the Building and Loan Act, and is engaged in the business of making loans to its shareholders for the purpose, among other things, of erecting dwellings. On November 1, 1928 the defendant association received an application from P. Slotnick, dated October 25, 1928, for seven loans of five thousand five hundred dollars ($5,500) each, on seven parcels of property on the southerly side of Fairview Avenue, Teaneck, New Jersey, and offering to give fifty-five shares of the capital stock of the said defendant association and one parcel of land as security for each loan, and accompanied by plans and specifications for the dwellings to be erected on said plots. Only one loan of five thousand dollars ($5,000.00) was granted on this application on the approval of the Appraisal Committee of the Association, and subsequently, on December 7, 1928, a mortgage was executed by Teaneck Building Corp. to the said Association for five thousand dollars ($5,000.00), covering what is known as the first tract in the complaint, Teaneck Building Corp. having succeeded to the title of Philip Slotnick in the meantime.

In the same way applications were received by the defendant association for two additional loans of five thousand five hundred dollars ($5,500.00) each from the Teaneck Building Corp. accompanied by plans and specifications for the erection of dwellings

on said plots, upon which applications two loans of five thousand dollars ($5,000.00) each were granted by the Association on the approval of the Appraisal Committee, and mortgages executed by the Teaneck Building Corp. to said Association on December 7, 1928 for five thousand dollars ($5,000.00) each, covering what is known as the second and third tracts mentioned in the complaint. The three mortgages were registered in the Bergen County Clerk's Office on December 8, 1928.

The loans granted by the Association were known to the Association as construction loans, and no money was paid to the mortgagor at the time of the execution and delivery of the mortgages, the By-Laws of the defendant association requiring an appraisal of the amount of work performed and materials used in the construction of the building before a payment could be authorized on account of the mortgage debt. On the recommendation of the Appraisal Committee of the Association a payment of three thousand dollars ($3,000.00) was authorized, and on December 13, 1928 the sum of three thousand dollars ($3,000.00) was paid to Teaneck Building Corp. by the attorney for the Association, as the first payment on house number 1. Subsequent payments were made in a like manner to Teaneck Building Corp., as builder and owner, on house number 1 on December 21, 1928, one thousand five hundred dollars ($1,500.00), and on January 4, 1929 four hundred dollars ($400.00), making the total payments on house number 1 four thousand nine hundred dollars ($4,900.00).

Payments were made to Teaneck Building Corp., as builder and owner, in like manner on house number 2 on December 13, 1928 two thousand five hundred dollars ($2,500.00); December 21, 1928 two thousand dollars ($2,000.00), and on January 4, 1929 four hundred dollars ($400.00), making the

total payments on house number 2 four thousand nine hundred dollars ($4,900.00).

Payments were made to Teaneck Building Corp., as builder and owner, on house number 3 in like manner on December 13, 1928, two thousand dollars ($2,000.00); December 21, 1928, one thousand five hundred dollars ($1,500.00), and on January 4, 1929, one thousand four hundred dollars ($1,400.00), making the total payments on house number 3 four thousand nine hundred dollars ($4,900.00).

One hundred dollars ($100.00) was retained in each case from the third payment on recommendation of the Appraisal Committee of the defendant association, because some outside work on each house had not been completed in accordance with the plans and specifications submitted by the borrower.

The lien claim of the plaintiff-respondent was filed March 11, 1929 and summons was issued thereon March 20, 1929. An order of reference under the statute, by consent, was made to Herman Vandewart, to take and state the account between the parties and to report the same to the Court within forty days thereafter, on June 7, 1929.

This date was afterwards extended by order of the Court, dated September 2, 1929, to October 5, 1929, but the order extending the time to file the Referee's report was inadvertently omitted from the printed case.

The Referee appointed July 9, 1929 for a hearing between the parties and taking testimony, and on October 3, 1929 filed his report with the Clerk of the Bergen County Circuit Court. The Referee found that the plaintiff should recover a special lien against the premises described in the lien claim as follows:

FIRST TRACT: In the sum of one thousand four hundred ninety-eight dollars and twelve cents ($1,498.12), subject to the lien of the mortgage of

East Rutherford Savings Loan and Building Association in the sum of four thousand nine hundred dollars ($4,900.00).

SECOND TRACT: In the sum of one thousand four hundred fifty-six dollars and eighteen cents ($1,456.18), subject to the lien of the mortgage of East Rutherford Savings Loan and Building Association in the sum of four thousand nine hundred dollars ($4,900.00).

THIRD TRACT: In the sum of one thousand five hundred ten dollars and forty-three cents ($1,510.43), subject to the lien of the mortgage of East Rutherford Savings Loan and Building Association in the sum of four thousand nine hundred dollars ($4,900.00).

The plaintiff-respondent filed exceptions to the Referee's report on October 9, 1929, and on October 18, 1929 the exceptions were argued before Edwin C. Caffrey, Circuit Court Judge, and on February 24, 1930 the said Circuit Court Judge made an order amending and confirming said Referee's report, and for judgment in favor of the plaintiff-respondent as follows:

HOUSE NO. 1:

Defendant-appellant, first for	$3,000.00
Plaintiff-respondent, second for	1,498.12
Plus interest from October 3, 1929 to February 7, 1930	30.96
Defendant-appellant, third for	1,900.00

HOUSE NO. 2:

Defendant-appellant, first for	$3,000.00
Plaintiff-respondent, second for	1,456.18
Plus interest from October 3, 1929 to February 7, 1930	30.08
Defendant-appellant, third for	1,900.00

HOUSE NO. 3:

Defendant-appellant, first for	$3,000.00
Plaintiff-respondent, second for	1,510.43

Plus interest from October 3, 1929 to February 7, 1930 ..... 31.21
Defendant-appellant, third for 1,900.00

Judgment was entered in favor of the plaintiff-respondent according to the terms of the above order on February 24, 1930 for $4,464.73
Interest 92.25
Costs 114.00
against the defendant, Teaneck Building Corp., and Joseph Greenberg and N. J. Cafarelli, receivers for said Company, and specially to be made out of the lands and buildings described in the complaint. The total judgment in favor of the plaintiff-respondent is four thousand six hundred seventy dollars and ninety-eight cents ($4,670.98).

GROUNDS OF APPEAL

Defendant-appellant appeals from the judgment of the Bergen County Circuit Court in the above stated cause on the following grounds:

1. Because the Bergen County Circuit Court amended the Referee's report, although it was error to do so.
2. Because the Bergen County Circuit Court confirmed the Referee's report after amending the same, although it was error to do so.
3. Because Bergen County Circuit Court amended the schedule of priorities in the Referee's report so that the lien claim of the plaintiff became prior to five thousand seven hundred dollars ($5,700.00) of the mortgage debt of this defendant on the lands and buildings described in the complaint, whereas

the Referee's report should have been confirmed as filed.

4. Because Bergen County Circuit Court gave judgment in favor of the plaintiff for four thousand four hundred sixty-four dollars and seventy-three cents ($4,464.73), damages, with interest and costs, against Teaneck Building Corp. and Joseph Greenberg and N. J. Cafarelli, receivers for said Company, whereas a general judgment should have been rendered against the receivers only.

ARGUMENT

I

Because the Bergen County Circuit Court amended the Referee's report, although it was error to do so:

The reference in this case was made under Section 155 of the Practice Act of 1903, page 579. A dissent was annexed to the rule by the plaintiff, reserving the right to a trial by jury. (Page 11, printed case).

After the filing of the Referee's report on October 3, 1929 (Page 34, printed case), plaintiff-respondent filed exceptions thereto on October 9, 1929, wherein it prays that the report of the Referee be revised in favor of the plaintiff in so far as priority of its lien claim over the mortgages of the defendant, East Rutherford Savings Loan and Building Association, as a matter of law. (Page 38, printed case).

Subsequently argument was heard by the Court on plaintiff's motion against confirming the Referee's report, and on February 24, 1930 the Court made an order amending the Referee's report in the following particulars, viz: reducing the lien of defendant-appellant's three mortgages on the lands described in the complaint from four thousand nine hundred dollars ($4,900.00) each to three thousand

dollars ($3,000.00) on each house, and giving priority to the lien claim of the plaintiff-respondent over the balance of one thousand nine hundred dollars ($1,900.00) of said mortgage debt on each of said three houses, and that judgment be entered for four thousand four hundred sixty-four dollars and seventy-three cents ($4,464.73) with interest and costs, in favor of the plaintiff-respondent against the defendant, Teaneck Building Corp. and the receivers for said Company, and specially to be made out of the lands and buildings described in the complaint. (Page 38, printed case).

The reference in this case was made by consent of parties, and was general in form, and, therefore, the Referee's report must be treated as the verdict of a jury. (Runyon v. Hodges, 46 L. 359; Clayton v. Levy, 49 L. 577; Naumschaug, Inc. v. Kennedy, 147 At. 723).

The Circuit Court was without power to amend the Referee's report in the manner attempted, or in any other manner, the only remedy for erroneous decisions of the Referee is by motion to set aside the report and grant a new trial. (Clayton v. Levy, Supra.; Runyon v. Hodges, Supra.).

Plaintiff-respondent should have moved to set aside the Referee's report, or demanded a trial by jury, neither of which was done.

II.

Because the Bergen County Circuit Court confirmed the Referee's report after amending the same, although it was error to do so:

Section 155 of the Practice Act of 1903 does not authorize the Court making the reference to take any action relative to the Referee's report, other than confirming the same. There is no power vested in the Circuit Court, either by law or by rule of court, to amend the Referee's report in any particular before confirming the same, and it was error for the Court to amend the Referee's report by order in

this case before confirmation. The only remedy for erroneous decisions of the Referee is by motion to set aside the report and grant a new trial. (Clayton v. Levy, Supra.; Runyon v. Hodges, Supra.; Naumschaug, Inc. v. Kennedy, Supra.).

III.

Because Bergen County Circuit Court amended the schedule of priorities in the Referee's report so that the lien claim of the plaintiff became prior to five thousand seven hundred dollars ($5,700.00) of the mortgage debt of this defendant on the lands and buildings described in the complaint, whereas the Referee's report should have been confirmed as filed:

The evidence before the Referee showed that the applications for the loans granted to Philip Slotnick and Teaneck Building Corp. by the defendant-appellant, specified that they desired construction loans. The defendant association granted loans in accordance with the applications, except that only three loans were granted out of the original seven asked for. (Page 19, line 39, printed case).

The Constitution of the defendant association provides the method of payment for construction loans, and this method was followed in each case. (Page 28, printed case).

The loans granted were for five thousand dollars ($5,000.00) in each instance, and the proof shows that four thousand nine hundred dollars ($4,900.00) of this amount has been advanced by the defendant-appellant to the mortgagor on each loan in three payments, one on December 13, 1928, one on December 21, 1928 and the third on January 4, 1929. (Pages 27, 28, 29 and 30, printed case).

All of these payments were made on the recommendation of the Appraisal Committee of the defendant-appellant after examination of the work performed on the buildings. (Pages 22, 23 and 24, printed case).

Each of the mortgages of the defendant-appellant were executed and delivered December 7, 1928 and were registered in the Bergen County Clerk's Office on December 8, 1928. (Pages 27 and 35, printed case).

No money was advanced on any of the mortgages until December 13, 1928. The lien claim of the plaintiff-respondent was filed in the Bergen County Clerk's Office on March 11, 1929, after four thousand nine hundred dollars ($4,900.00) of the five thousand dollar ($5,000.00) loan, represented by a mortgage for that amount in each case, had been advanced by the mortgagee to the Teaneck Building Corp. (Pages 35 and 36, printed case).

That a Building and Loan mortgage, given under circumstances as in this case, is an advance money mortgage within the meaning of Section 14 of the Mechanics Lien Act of this State, has been decided in Germania Building & Loan Association v. Fraenkel Realty Company, et als, 82 E. 49, affirmed 84 E. 164; Franklin Society v. Thornton, 85 E. 37, affirmed 85 E. 525.

In Germania Building & Loan Association v. Fraenkel Realty Company, et als, the circumstances connected with the granting of the loans were very similar to those of the present case. Applications were filed by the borrower before the granting of the loans, in which the applicant stated that the loan was "to be used to erect houses." In the present case the applicants stated that they desired construction loans, and accompanied their applications with plans and specifications for buildings to be erected with the funds loaned by the Association. (Page 19, printed case).

No money was advanced to the borrower at the time of the execution and delivery of the mortgages in either case, and work had commenced on the buildings before the execution and delivery of the respective mortgages, but Vice-Chancellor Emory

held that in view of the application for the loan and the granting thereof, and the actual execution and delivery of the bonds and mortgages, it is clear that the mortgagee, the association, was obligated on its part to make advances to the Realty Company to the extent of the mortgages. (Page 59, ibid).

By practically the same proceedings had between Teaneck Building Corp. and East Rutherford Savings Loan and Building Association, the defendant-appellant was bound to make the advances provided for by its By-Laws as the work on the buildings progressed. (Page 28, printed case).

There is no proof that any work had been done upon or materials furnished to any of the houses at the time the Appraisal Committee of the defendant association examined the premises and recommended that a loan of five thousand dollars ($5,000.00) on each house be made, on houses 1, 2 and 3 to Teaneck Building Corp. (Pages 20, 22 and 24, printed case).

At the time of the examination by the Committee, about November 1, 1928, Philip Slotnick, against whom all of the building materials were charged, had seven jobs under way at one time, and the plaintiff-respondent apportioned the cost between all seven houses. (See testimony of George L. Murray, page 16, printed case).

At the time the bonds and mortgages of the defendant-appellant were executed by Teaneck Building Corp., the defendant association had no actual notice that the plaintiff-respondent had furnished any materials toward the construction of houses 1, 2 and 3 and, therefore, the defendant-appellant was bound to make the advances in accordance with its By-Laws to the extent of the mortgage in each case, provided the borrower proceeded with the work of erecting and completing the buildings on the mortgaged property in conformity with the plans and specifications upon which the loans were grant-

ed. (Germania Building & Loan Association v. Fraenkel Realty Company, Supra.).

It is well settled that a mortgage given to secure future advances, if duly registered or recorded, is good, not only as against the mortgagor, but is entitled to priority over all encumbrancers whose liens attached subsequent to its creation, for all advances made prior to notice of such subsequent encumbrance, and also for all advances made after such notice when the mortgagee, previous to such notice, had obligated himself to make them. (Griffin v. New Jersey, etc. Company, 3 Stock 49; Bell v. Fleming's Executors, 1 Beas, 13-490).

The notice must be actual, not merely constructive. (Ward v. Cook, 2 C. E. Gr. 93; Heintze v. Bentley, 7 Stew. 562).

The first actual notice received by the Association was on the presentation of a stipulation to the Attorney of the Association at the time of the first payment made to Teaneck Building Corp., which contained the name of the plaintiff-respondent signed to the postponement of its lien for materials furnished to houses 1, 2 and 3 to the mortgages of the defendant-appellant, but only to the extent of the first payment. (Page 32, line 25, printed case).

The rule thus established is as applicable to mechanic's lien claims as to any other kind of encumbrance. (Taylor v. LeBar, 10 C. E. Gr. 222).

Under the above statement of facts and law the Referee's report should have been confirmed by the Court as filed.

IV.

Because Bergen County Circuit Court gave judgment in favor of the plaintiff for four thousand four hundred sixty-four dollars and seventy-three cents ($4,464.73), damages, with interest and costs, against Joseph Greenberg and N. J. Cafarelli, Receivers for Teaneck Building Corp., to be specially made of the lands and buildings described in the

complaint, whereas a general judgment should have been rendered against the Receivers only:

No judgment should have been rendered in favor of the plaintiff-respondent in this suit, to be specially made out of the lands and buildings described in the complaint unless made subject to the lien of the defendant-appellant's mortgage debt. As stated before the proceedings taken up to the execution and delivery of the three mortgages of the defendant-appellant were similar to the proceedings had and taken by Germania Building & Loan Association in granting the loans to the Fraenkel Realty Company, which were held to be advance money mortgages by Vice-Chancellor Emory, and his decision in this case was approved by the Court of Errors and Appeals. (82 E. 49, affirmed 84 E. 164).

Being advance money mortgages they were subject to the provisions of Section 14 of the Mechanics Lien Law of 1898, which provides that liens under that act "shall be a prior lien to the lien of any mortgage executed on such building or buildings and lot or tract of ground to secure either in whole or in part any advances in money to be used in and about the construction of such building or buildings, but to the extent only of the moneys remaining to be advanced by the mortgagee under such agreement; provided, such mortgage shall be recorded or registered before the filing of any claim in pursuance of this act." (Laws of 1898, page 543, section 14).

The mortgages of the defendant-appellant were executed, delivered and money advanced thereon from time to time as the work on the buildings progressed, to the extent of four thousand nine hundred dollars ($4,900.00) in each instance of the five thousand dollars ($5,000.00) loaned by the Association on houses 1, 2 and 3 to Teaneck Building Corp., the last payment being made in each case on January 4, 1929. (Testimony of N. D. Hendershot, pages 27, 29 and 30, printed case).

The mortgages of the defendant-appellant were registered in the Bergen County Clerk's Office on December 8, 1928. (Page 26, printed case). Plaintiff-respondent's lien claim was filed in the Bergen County Clerk's Office on March 11, 1929. (Page 36, printed case, line 20).

The above state of facts brings the mortgages of the defendant-appellant squarely within the provisions of Section 14 of the Mechanics Lien Act, and entitles the defendant-appellant to judgment declaring its mortgages to be a prior lien to the lien of the plaintiff-respondent's lien claim.

In Franklin Society v. Thornton, 85 E. 37, in discussing the case Vice-Chancellor Stevenson says: "The complainant's case comes within the provisions of Section 14 and, it follows, that the complainant's mortgage is entitled to priority over the liens which the Master gave to it." Also: "The Mechanics Lien Law is to be construed strictly so far as it establishes an encumbrance upon the property of one person for another person's advantage".

In the Court of Errors and Appeals, where the case was brought on appeal, the opinion was written by Justice Swayze. (85 E. 527). The Court discussed the question at considerable length, and points out the difference between Sections 14 and 15 of the Mechanics Lien Act of 1898. He writes as follows: "Both Section 14 and 15 of the Mechanics Lien Act are necessary to the complete scheme of the act. The difference between them is marked. Section 14 deprives the mortgagee of a legal right he otherwise would have by recording his mortgage before the commencement of the building, and protects him only to the extent of actual advances, but it does not require that these advances shall have been applied to the erection of the new building. Section 15, on the other hand, gives the mortgagee a right he otherwise would not have since his mortgage is not recorded before the commencement of the building

but, in order that he may have that right, he must show that his advances have been applied to the erection of the building".

In further discussion of the case (page 531) the Court said: "The fact that the building had been already begun cannot enlarge the right of the lien claimant under Section 14".

The third paragraph of the headnote to Franklin Society v. Thornton (Supra.) gives a wrong impression of the question actually decided. The case clearly shows that the mortgage of Franklin Society had been given long after the building had been commenced and the inchoate lien of the lien claimants attached but it was held, nevertheless, that the mortgage of the Franklin Society was an advance money mortgage and for that reason was prior to the lien claim to the amount actually advanced thereon.

Mr. Luce, in his New Jersey Mechanics Liens, Edition of 1928, page 208, commenting on Franklin Society v. Thornton, writes as follows: "In as much as the mortgage was clearly recorded after the commencement of the building, it would seem, therefore, that the case plainly decides that under Section 14 it is immaterial whether the mortgage is recorded before or after such commencement." On page 207 he writes: "The case indicates that the clause of Section 14 is to be construed as though it read 'To the extent only of the money remaining, at the time the lien claim is filed, to be advanced by the mortgagee under such agreement'."

Under the authority of Franklin Society v. Thornton the three mortgages of the defendant-appellant were advance money mortgages, upon each of which the Association had advanced four thousand nine hundred dollars ($4,900.00) of the five thousand dollar ($5,000.00) loan granted to Teaneck Building Corp., and were duly registered before the lien claim of the plaintiff-respondent was filed in the Bergen

County Clerk's Office, and are therefore entitled to priority of lien over the lien claim of the plaintiff-respondent to the extent of such advances in each case.

On the above state of facts and law the lien claim of the plaintiff-respondent can only be prior and paramount to the one hundred dollars ($100.00) of the loan in each case, still to be advanced by the mortgagee to the mortgagor by the terms of its mortgage in each case, under the provisions of Section 14 of the Mechanics Lien Act of this State, and judgment should have been rendered as set forth in the Referee's report.

Respectfully submitted,

JOHN M. BELL,

Attorney and Counsel with

Defendant-Appellant.

New Jersey Court of Errors and Appeals

BUILDING SUPPLY COMPANY OF ENGLEWOOD, N. J., INC., a corporation of New Jersey, *Plaintiff-Respondent,* *v.* JOSEPH GREENBERG and N. J. CAFARELLI, RECEIVERS FOR TEANECK BUILDING CORP., a New Jersey Corporation, *Builder and Owner,* EAST RUTHERFORD SAVINGS, LOAN AND BUILDING ASSOCIATION, *Morgagee,* *Defendants-Appellants.*	On Mechanics' Lien. On Appeal from Bergen County Circuit Court. Appeal of East Rutherford Savings, Loan and Building Association.

BRIEF ON BEHALF OF THE PLAINTIFF-RESPONDENT.

This case comes up on appeal of the appellant, East Rutherford Savings, Loan and Building Association, from the Bergen County Circuit Court upon entering judgment for the plaintiff-respondent on a mechanics' lien suit and upon grounds of appeal (State of Case, pp. 1-2).

Statement of Facts.

The respondent filed a lien claim and instituted suit thereon within time, to recover the sum of four thousand two hundred and eighty-two dollars and seventy-five cents ($4,282.75) besides interest from January 8, 1929, for supplying building

materials for three (3) houses erected by the defendant, Teaneck Building Corp. The said lien claim was filed March 11, 1929. The appellant, East Rutherford Savings, Loan and Building Association granted three (3) mortgage loans to the defendant-builder, Teaneck Building Corp., each loan in the sum of five thousand ($5,000.00) dollars and said mortgages are dated November 28, 1928, and recorded in the Bergen County Clerk's office on December 6, 1928. Issue had been joined on the cause, and the matter was listed on the calendar of said Court. A rule for reference was ordered by the Circuit Court Judge referring the matter to a referee, to state and report the account set forth in the complaint, within a period of forty (40) days (State of Case, p. 11), and the respondent dissented to the said reference which was filed the same date as the rule for reference. Subsequently, an order was entered with the consent of the attorney for the appellant herein, extending the time of the referee to report.

In pursuance to the order of reference, testimony was taken before the referee on behalf of the plaintiff-respondent, and for the defendant-appellant, East Rutherford Savings, Loan and Building Association, no appearance for the builder and owner. The defendant Teaneck Building Corp. was declared insolvent and receivers were appointed. The respondent obtained an order from the Court of Chancery permitting this suit to be brought.

At the hearing before the referee, the respondent proved all the allegations set forth in the complaint. The appellant proved the execution of its three (3) mortgages dated and recorded as hereinbefore mentioned. The appellant proved the payment of the money for said mortgages, all the money having been paid to the Teaneck Building Corp. (State of Case, pp. 35-36). The referee

reported that the rights of the plaintiff-respondent in this action rested upon Section 14 of the Mechanics Lien Law and citing the case of *Franklin Society* against *Thornton,* 85 N. J. E. 525, found that the lien claim of the respondent was subordinate to the mortgages of the appellant; he also found that the respondent was entitled to a special lien against the premises for the sums mentioned in the complaint (State of Case, p. 37). The referee entered a general judgment against the defendant, Teaneck Building Corp., and the receivers (State of Case, p. 35).

Within the time limited by the rules, the respondent filed exceptions to the referee's report (State of Case, p. 38), alleging that the referee erred in not allowing a priority of the respondent's lien claim over the mortgages of the appellant as a matter of law. Due notice of the said exceptions was served upon the appellant, and the matter was argued before the Judge of the Bergen County Circuit Court, and after hearing the argument, the Court permitted the appellant to furnish a memorandum of law proving that the mortgagee (appellant) did not have to prove or trace the mortgage money into the building. Both the appellant and respondent submitted briefs on the question of whether or not the mortgagee had to prove or trace the mortgage money into the building. The said Judge of the Bergen County Circuit Court having found as a matter of law that the appellant failed to establish at the hearing before the referee, that all the mortgage money had gone into the construction of the buildings, the lien claim of the respondent had priority over all the mortgage money after the first payment, since the respondent released or waived the first payment to the builder and owner. Accordingly, an order

was entered (State of Case, pp. 38, 39, 40, 41) giving the respondent a priority of its lien claim over the mortgages of the appellant after the first payment, and that the said referee's report be confirmed in its other respects, and that a judgment for the sum of $4,464.73 with interest and costs be entered generally in favor of the respondent against the defendants Teaneck Building Corp., and its receivers, and specially to be made on the lands and buildings described in the complaint. The appellant did not reserve the right to trial by jury.

POINT I.

The defendant-appellant has lost its right of appeal.

The appellant brings this appeal from the action of the trial court in amending a referee's report as to a question of law and confirming the rest of the report, and entering a general judgment in favor of the respondent and against the defendants, and a special judgment against the lands and buildings described in the complaint. After the report was filed, the respondent filed exceptions to the referee's report maintaining that, since the appellant herein failed to prove that all of the mortgage money had gone into the construction of the buildings, the lien claim of the respondent was a prior lien to the lien of the mortgagee, the trial court after hearing the argument of counsel for both parties decided that the referee erred as a matter of law, and that the respondent was entitled to a priority. The appellant now appeals from the decision of said Court. In the case of *Camp Namaschaug, Inc.* v. *Kennedy,* 7 N. J. Misc. 1060, a case involving an appeal from the con-

firmation of a referee's report, where the defendant did not file a reservation of trial by jury, the Court said:

> "It seems to us that the appeal is without merit, for two reasons. First, we think that for any error of law that might have been committed the sole mode of redress was on application to the Circuit Court to set aside the report and grant a new trial (Clayton *v.* Levey, 49 N. J. L. 577)."

The law of New Jersey seems to be clear that in the absence of any statement in the rule of reference by consent, whether the award of the referee was to have the effect of the finding by arbitration or the force of a verdict, and must be treated as a verdict (Supreme Court Rule No. 80). The remedy for a dissatisfied party is to move to set aside the award as a verdict and grant a new trial (*Beattie* v. *David,* 40 N. J. L. 102; *Runyon* v. *Hodges,* 46 N. J. L. 359; *Children's Home* v. *Hall,* 47 N. J. L. 152; *Harper Machine* v. *Sinclair,* 76 N. J. L. 99).

It appears from the examination of these cases that upon filing exceptions to the referee's report, the said exceptions are treated as a rule to show cause and since a trial court has power to amend the verdict of a jury where it is contrary to law, the same reasoning may be applied to the present case.

The referee after hearing the testimony, found that all the materials had been delivered by the respondent for the construction of the three houses, found that the appellant advanced monies for the said construction, decided that the appellant did not have to show where the mortgage money went to. This is clearly a mistake of law, and the trial court has the power in the cases cited

above to amend that portion of the report which is contrary to law.

The appellant, feeling dissatisfied that the trial court erred as a matter of law, did not move for a new trial, but now takes this appeal, and in accordance with the settled cases in this State the appeal will not lie.

Chief Justice BEASLEY in the case of *Runyon* v. *Hodges, supra,* says:

> "It will be observed that, by this rule, the legal nature of a report of referees has been materially altered. Its effect has been to put such procedure much more under the supervisory control of the court ordering the reference than was formerly the case. Antecedently to the making of the rule in question, it was well settled that a report of referees stood on the same plane with the award of arbitrators, and that neither could be annulled by the court except upon the plainest grounds, for it was declared, in the case of Stoll's Admr. *v.* Price Zab., 32, 2 *Id.* 578, that such a procedure could be avoided only for the reason that the finding was contrary to law, or that such officers had been corrupt, or had proceeded on principles contrary to natural justice, or had founded themselves on a mere mistake, which, if shown to them, they themselves would admit. Such a procedure was obviously much less tractable than a verdict, and when, consequently, by the rule of court, the former was put on the same footing with the latter, it lost something of its original nature. It is to be taken with the force of a verdict, and the consequence is, the only remedy against errors or misconduct in the referees is by motion to set it aside, which is a proceeding that cannot be supervised by this court on writ of error."

In *Hoboken* v. *Laverty,* 60 N. J. L. 86, there were two assignments of error both of which were spe-

cially and pointed to supposed errors of law committed by the referee. It was stated there that before the adoption of Rule 84 the Court would control the report as the verdict of a jury, but that since the rule, in the absence of a stipulation to the contrary, the report would be treated as a verdict, and that a report could be objected to, only by opposition to the confirmations or by motion to set it aside, and that the rulings are not open to exceptions nor subject to review by writ of error.

It will be therefore noticed that the respondent herein filed proper exceptions on matters of law, and which were fully argued before the trial court, and the Court entered a judgment in favor of the respondent.

In the case of *Paulison* v. *Halsey,* 38 N. J. L., on page 488, the Court in discussing an amended *postea* says, on page 493:

> "The plaintiffs insist that this *postea*—the amended *postea*—so-called, is unlawful, because it was made on the order of the court, and not by the judge alone, who tried the cause. It clearly was made by that judge; it is signed by him; and, as clearly, it was made, not by order of the court, but by leave merely. No practice is more common, nor more thoroughly established than this, that the *postea* is susceptible of amendment by the circuit court judge, until it conforms to his understanding of the transactions at *nisi prius.* Since the time of Charles I the practice has been constant, and it is now indisputable. Die *v.* Perkins, 3 T. R. 749; Richardson *v.* Mellish, 3 Bing, 334-346."

A referee is an officer of the Court appointing him, and the Court has full authority to supervise and control his report by setting it aside or con-

firming or modifying it, as the facts and the law require. 23 R. C. L. 300, Sec. 21.

It is a fundamental rule that trial courts have sufficient jurisdiction over the law, and that the jury has jurisdiction over the facts in the case at bar, the referee sitting as a jury, found as a fact that the materials were delivered by the respondent, but made a mistake in the law of mechanics' liens. It is therefore clear that the trial court has the right to modify the report of the referee on a question of law.

The trial court confirmed the report of the referee in all other respects, excepting, allowing the respondent herein a priority over the mortgage lien of the appellant after its first payment, as set forth in the State of Case, pages 38, 39, 40, 41.

In the case of *Willis* v. *Irvington Varnish Co.*, 88 N. J. L. 184, a matter was referred to a referee to state the account between the parties. The case was tried before a referee finding in favor of the plaintiff, the defendant objected to the confirmation because of alleged errors of the referee in his rule on evidence and his misapplication of legal rules in determining the plaintiff's damage. The Court after hearing the argument on the objections, overruled them, confirmed the report and directed judgment to be entered thereon. From the judgment so entered the defendant appealed.

> "By rule 99 of the Supreme Court it is provided that all rules of reference entered by consent of parties in that court, or in the Circuit, may state whether the award of the referee is to have the effect of a finding of arbitrators, or merely the force of a verdict, and that in the absence of such statement the award shall be treated as a verdict. This rule was adopted at the June Term, 1873, and merely crystallized the doctrine earlier laid down

by the Supreme Court in the case of Fitch *v.* Archibald, 29 N. J. L. 160, and followed by it in Excelsior Carpet Lining Co. *ads.* Potts, 36 *Id.* 301. After its promulgation Chief Justice BEASLEY, speaking for that court in Runyon *v.* Hodges, 46 *Id.* 359, held that by force of it where the order of reference was a general one, made by consent of the parties, and containing no statement of the effect to be given to the report of the referee, such report stood before the Circuit Court possessed of all the characteristics of a verdict according to the common law; and that, consequently, the only remedy against errors of, or misconduct in, the referee 'is by motion to set aside, which is a proceeding that cannot be supervised on writ of error,' the writ of error was, therefore, dismissed.

"Later a judgment of the Somerset Circuit Court, entered under similar conditions, was brought before this court on writ of error of Children's Home Association *v.* Hall, 47 N. J. L. 152, and Mr. Justice VAN SYCKEL, delivering the opinion of the court, declared that by force of this cited rule of the Supreme Court, the only remedy of the party aggrieved by the action of the referee was an application to the Circuit Court to set aside the report, and grant a new trial; that, on the refusal of the court to grant such application, the plaintiff in error was in the precise position he would have occupied if the verdict of a jury had been rendered against him, and the court had refused to grant a new trial; and that a writ of error would not lie to review a judgment entered upon the referee's report after the motion to set it aside had been denied.

"Since the pronouncement by this court in the case last cited, it is entirely settled that where the reference is a general one, made by consent of the parties, and the order directing it contains no statement of the effect that the referee's report is to have, neither the rulings of the referee on matters which arise during

> the trial before him, nor those of the court upon the application to set aside the referee's report, are subject to be reviewed by writ of error. Hoboken *v.* Laverty, 60 N. J. L. 86."

In the case of *Yale Electrical Corp.* v. *Morrissey,* 8 N. J. Adv. Reports 128, Justice CAMPBELL in the Court of Errors and Appeals in affirming a judgment of the Supreme Court says: "The appeal also purports to be from an order confirming a referee's report. This latter is not the subject of an appeal. As was said in Consolidated Electric Lamp Co. *v.* Lux Manufacturing Co., 94 N. J. L. 1, 'the language of the statute is perfectly plain and does not call for judicial construction.' And that language is that the report of the referee 'shall be final and conclusive between the parties' unless there shall have been entered in the minutes of the Court a reservation of trial by jury at the time of ordering the reference. This was not done in the case before us."

POINT II.

The trial court did not err in allowing the respondent a priority of its mechanics' lien over the mortgages of the appellant after the first payment.

In the case of *Young* v. *Haight,* 69 N. J. L. 453, the Court says on pages 455-456:

> "The rights of the parties to this litigation sprang into existence in 1902. At that time there had been a complete revision of the Mechanics' Lien Law in which not only was the sixth section of the supplement of 1895 retained (Mechanics' Lien Law Pamph., L. 1898, p. 543, par. 15), but section 23 of the original

> act was modified so as to provide that, upon a sheriff's sale under a judgment upon a lien claim, the purchaser shall acquire the estate which the owner had in the lands at the commence of the building, subject to such mortgages as had been created and recorded prior to that event, AND ALSO SUBJECT TO THE LIEN OF ANY MORTGAGE GIVEN AND RECORDED, OR REGISTERED, UNDER THE CIRCUMSTANCES CONTEMPLATED BY, AND IN CONFORMITY WITH, THE PROVISIONS OF SECTION 15 of the act. The manifest object of these changes in the statute was to make the lien of a mortgage, given for moneys advanced for the erection of a building, and actually used for that purpose, superior to a mechanics' lien filed upon the property subsequent to the recording of the mortgage, notwithstanding the fact that the moneys had been advanced and the mortgage had been executed while the building was in the course of erection. And this priority is given whether the mortgage be made to secure future advances or money already advanced, *the only test is whether the money has been loaned for the erection of, or alteration, repair or addition to, the building, and has been actually applied to that purpose.* When such is the case, the mortgage has priority over the mechanics' lien filed subsequent to the date of its recording."

The case of *Porch* v. *Agnew Co.*, 70 N. J. E. 329, reiterates the same rule of law as above.

In the case of *Improved Building & Loan Association* v. *Larkin*, 88 N. J. E., page 52, Vice-Chancellor STEVENS, on page 56, held as follows:

> "While the mortgages precede the lien claims in point of date they are attacked on the ground that the money lent thereon, or part of it, did not go into the building. As I have found that the contract made between Kelly and the Latin American Construction

> Company of itself affords no protection against liens, the mortgages must be dealt with as provided for in section 15 of the Mechanics' Lien Act. They were all made after the building was commenced. The mortgagees must therefore prove that the moneys secured were actually advanced and paid by them and applied to the erection of the building built upon the land mortgaged. Since the decision of the court of errors and appeals in Franklin Society *v.* Thornton, 96 Atl. Rep. 922, and of the Supreme Court in Young *v.* Haight, 69 N. J. Law 453, there can be no doubt as to the rule. Says Chief Justice GUMMERE, in the latter case: 'The only test is whether the money has been loaned for the erection of * * * the building and has been actually applied to that purpose.' If labor or materials have gone into the building, money lent to pay for such labor or material would, of course, be within the rule, and equally, it seems to me, would be money lent to pay a contractor or sub-contractor to whom, under his contract, payment is due for work actually done. But money paid to a person charged with the duty of paying such contractor does not come within the rule, unless it be further proved that such money was actually paid over."

In the recent case of *Thirteenth Ward Building and Loan Association* v. *Kanter,* 105 N. J. E. 338, Vice-Chancellor BACKES, on page 341, says:

> "The Master misconceived the quality of proof required to sustain the burden cast upon the complainant in its effort to supersede the statutory priority of lien claimants. A mortgage executed after the commencement of a building is not entitled to priority over mechanics' liens for money advanced on the mortgage unless it is actually applied to the erection of the building. The proof must trace the money from the mortgagee into the hands of labor or material men, Young *v.* Haight, 69

> N. J. L. 453. Mortgage money paid to a builder who used it to repay monies he had borrowed and applied to the construction of a building is not an item earning priority under Section 15 of the mechanics' lien law. To displace the statutory priority of mechanics' lien by a mortgage given for money to be used for the construction of the building, the proof must be clear, certain and convincing that the money was actually used for labor and material in the construction."

The same rules of law were discussed by the same Court in the case of *Fischgrund* v. *Eriksen R. E. Co.*, 105 N. J. E. 345.

It appears from an examination of the testimony of the appellant (State of Case, p. 31, fol. 40, p. 32, fol. 10, p. 33, fol. 20) that proof was entirely lacking as to whether or not the money was used in the erection of the buildings, in fact it was admitted by the appellant that it did not know whether or not the money had gone into the erection of the buildings. It seems clear from the said testimony that the rules of law laid down in this State regarding the proof of mortgage money, have not been demonstrated by the appellant. As a further argument that the appellant did not prove where the mortgage money went to, after the argument before the trial court on the exceptions filed by the respondent, oral leave was granted to the appellant herein to offer further testimony showing where the money went to, and of course the appellant failed to produce such further testimony, but now takes this appeal claiming error on the part of the trial court in amending the referee's report as to a question of law, and confirming the report on questions of fact.

POINT III.

The trial court did not err in entering a general judgment in favor of the plaintiff and a special judgment against the lands and buildings.

The appellant sets up in the notice of appeal an alleged error on the part of the trial court that only a general judgment should have been entered against the receivers, whereas, in fact, a general and special judgment was entered. The same question was raised in an appeal to the Supreme Court in the case of *Crane* v. *Brighton Mills,* 98 N. J. L. 308, in which case Chief Justice GUMMERE on page 311 says:

> "The other ground upon which the motion to nonsuit was rested was based upon the fact, which appeared in evidence, that at the time of the trial of this suit, insolvency proceedings were pending in the Court of Chancery against the Berridge Company, under which a receiver had been appointed; that, for this reason, no general judgment could be recovered against it; and that no special judgment could be recovered against the Brighton Mills unless a general judgment was also recovered against the contractor. The contention that no general judgment was recoverable against the Berridge Company is based upon section 2 of the supplement of 1919 or our Corporation act (p. 455). The provision of that section, so far as it is applicable to the present question, is that 'all levies, judgments, attachments or other liens obtained through legal proceedings against a corporation shall be deemed null and void in case a receiver shall be appointed by the court' (of Chancery) and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly

discharged and released from the same, and shall pass to the receiver as a part of the estate of the corporation. In considering the effect of a similar legislative provision in the original statute, it was held by the Court of Errors and Appeals in Taylor *v.* Gray, 59 N. J. Eq. 621, that 'A pending action against a corporation may regularly proceed, notwithstanding an adjudication of insolvency and appointment of a receiver to wind up its affairs and distribute its assets among its creditors and stockholders.' This judicial declaration seems to us dispositive of the question we are now considering. But in the absence of any precedent, we would have no doubt that the motion to nonsuit upon the ground secondly stated was properly refused. The purpose of the Mechanics' Lien Law, as stated in its title, is to secure to mechanics and materialmen payment for their labor and materials in the erection of any building; and to accomplish this purpose a lien is given upon the building for the value of the labor or materials in the event of the failure of the principal contractor to make payment for the same. For the protection of the owner against false claims, the statute requires the materialmen or laborer, when seeking to enforce by suit his claim against the building, to join the owner and contractor as co-defendants; and, for the purpose of demonstrating his right to a lien and its amount, to prove not only that the labor upon or the material furnished to the building which was being erected by the owner, but that the amount of the lien was the sum which the principal contractor owed for such labor and material; and to prove these facts conclusively by the recovery of a judgment against the contractor. This being the purpose of the Mechanics' Lien Law, that statute and the provision of the Corporation act which has been appealed to by the defendant must be construed so as to render them both effective, if possible; and this is accomplished

> by permitting the materialmen or laborer to recover a judgment against the contractor, not for the purpose of collecting the same from him or the receiver, but solely for the purpose of establishing the existence of and the amount of the lien which he is entitled to enforce against the building. This evidently was the view of the trial judge which led him to refuse the motion to nonsuit upon this latter ground, and we have no doubt of its soundness."

The referee allowed the respondent a general judgment (State of Case, p. 35) and a special lien (State of Case, p. 37) to which report or finding the appellant herein did not at any time except, and therefore, the appellant is bound by the said report.

CONCLUSION.

The action of the Circuit Court Judge in amending a referee's report, as a matter of law having been permitted to do so in accordance with the decisions of this Court, it is respectfully submitted that the defendant-appellant has no right of appeal in this Court, and that the judgment of the Bergen County Circuit Court should be affirmed.

Respectfully submitted,

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