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West Bergen Trust Company
Notice of Appeal.

(Filed January 29th, 1931.)
(Duly Served.)

In Chancery of New Jersey

67-391

Riverside Apartment Corporation, a corporation, Complainant,	On Bill to Foreclose.
vs.	On Distribution of Surplus Moneys.
Capital Construction Co., Inc., a corporation, *et al.*, Defendants.	On Final Decree, &c.
	Notice of Appeal.

The West Bergen Trust Company, one of the defendants in the above entitled cause, hereby appeals from the final decree, made in said cause on January 23rd, 1931, by the Chancellor on the advice of Honorable John O. Bigelow, Vice-Chancellor, and from the whole and every part of said final decree, to the Court of Errors and Appeals in the last resort in all causes.

Dated: January 28th, 1931.

Edward P. Stout,
Solicitor for and of Counsel with Defendant, West Bergen Trust Company.

I conceive there is good cause for appeal in the above-stated cause.

Edward P. Stout,
Of Counsel with Defendant, West Bergen Trust Company.

Petition of Appeal.

(Filed February 18th, 1931.)
(Duly Served.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

RIVERSIDE APARTMENT CORPORATION, a corporation, Complainant, *vs.* CAPITAL CONSTRUCTION CO., INC., a corporation, *et al.*, Defendants.	On Appeal from Court of Chancery. Petition of Appeal of Defendant, West Bergen Trust Company.

To the Honorable, the Court of Errors and Appeals, in the last resort in all causes:

The petition of West Bergen Trust Company, one of the defendants in the above-entitled cause, and an appellant hereto, respectfully shows that:

Your petitioner finds itself aggrieved by a Final Decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 23rd day of January, 1931, wherein the Riverside Apartment Corporation, was complainant, and the Capital Construction Co., Inc., and others, including the West Bergen Trust Company, were defendants, in this respect, to wit, that said decree adjudges:

> "that, from the funds now in the hands of the Clerk of this Court, in this cause, said Clerk shall pay, in the order below desig-

nated, and to the persons hereinbelow designated, the following sums, to wit:

First.—To Messrs. Seclow & Nessenbaum, solicitors of the defendants, Israel Shilowitz and Jacob Tucker, the taxed costs herein of said defendants, including a counsel fee of Three Hundred Dollars ($300.00).

Second.—To Israel Shilowitz and Jacob Tucker, or their solicitors herein, Messrs. Seclow & Nessenbaum, the sum of Eighty-Four Hundred and Twenty-Three Dollars and Eighty Cents ($8,423.80).

Third.—To Geo. F. Perry & Sons, Inc., a corporation, or its solicitors herein, Messrs. Kanter & Kanter, the sum of One Hundred Seven Dollars and Nineteen Cents ($107.19).

Fourth.—To A. S. Reid & Company, a corporation, or its solicitors herein, Messrs. Leavitt, Ulbrich & Talley, the sum of Fifty-Three Dollars ($53.00).

Fifth.—To Israel Shilowitz and Jacob Tucker, or their solicitors herein, Messrs. Seclow & Nessenbaum, the sum of Ten Hundred and Forty-Seven Dollars and Thirty-One Cents ($1,047.31).

Sixth.— To Messrs. Kanter & Kanter, solicitors of the defendant, Geo. F. Perry & Sons, Inc., a corporation, the sum of Two Hundred Dollars ($200.00) as a counsel fee herein.

Seventh.—To Messrs. Leavitt, Ulbrich & Talley, solicitors of the defendant, A. S. Reid & Company, a corporation, the sum of Two Hundred Dollars ($200.00) as a counsel fee herein.

Eighth.—To Geo. F. Perry & Sons, Inc., a corporation, or its solicitors, Messrs. Kanter & Kanter, the sum of Six Hundred Ninety-Two Dollars and Ninety-Six Cents ($692.96).

Ninth.—To A. S. Reid & Company, a corporation, or its solicitors, Messrs. Leavitt, Ulbrich & Talley, the sum of Three Hundred and Sixty-One Dollars and Eighty Cents ($361.80).

Tenth.—To Ira R. Crouse, or his solicitor, Aaron Kaufman, Esq., the sum of Twenty-Two Hundred and Thirty-Four Dollars and Thirty Cents ($2,234.20).

Eleventh.—To Louis Moore, or his solicitor, Aaron Kaufman, Esq., the sum of Twelve Hundred and Six Dollars and Ninety Cents ($1,206.90).

Twelfth.—To Joseph Machetto, or his solicitor, Walter C. Alberts, Esq., the sum of Nine Hundred and Twenty-One Dollars and Twenty-Six Cents ($921.26).

Thirteenth.—To Ralph Cianfrone and Ciro Castellano, partners trading as Venango Stone Company, or their solicitors, Messrs. Milberg & Milberg, the sum of Three Hundred and Twenty-Two Dollars and Six Cents ($322.06).

Fourteenth.—To A. W. Booth & Bro. or its solicitor, Walter C. Alberts, Esq., the sum of Four Hundred Twenty-Eight Dollars and Sixty-Two Cents ($428.62).

Fifteenth.—To Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Company, or their solicitor, Aaron Kaufman, Esq., the sum of Four Hundred and Eleven Dollars and Fifty-Seven Cents ($411.57).

Sixteenth.—To Alpheus S. Van Woeart, or his solicitor, Walter C. Alberts, Esq., the sum of Three Hundred and Two Dollars and Eighty-Seven Cents (($302.87).

Seventeenth.—To Roderick H. Crockett, the sum of Two Hundred and Sixty-Nine Dollars and Forty-Six Cents ($269.46).

Eighteenth.—To John Nicaretta, or his solicitor, Victor Samuel, Esq., the sum of Two Hundred and Fifty-One Dollars and Seventy-Four Cents ($251.74).

Nineteenth.—To Meyer & Ruh Company, or its solicitor, Aaron Kaufman, Esq., the sum of Ninety-One Dollars and Fifty-One Cents ($91.51).

Twentieth.—To Michael Tozzi and Joseph Marcasiano, or their solicitor, Walter C. Alberts, Esq., the sum of One Hundred and Ten Dollars and Forty-One Cents ($110.41).

Twenty-first.—To Royal Marble Works, Inc., a corporation, or its solicitor herein, Isadore Haber, Esq., the sum of One Hundred and Twenty-Six Dollars and Forty-Eight Cents ($126.48).

Twenty-second.—To Arthur G. Teweles, or his solicitors, Messrs. Hershenstein & Finnerty, the sum of Forty-One Dollars and Sixteen Cents ($41.16).

Twenty-Third.—To James E. Pyle, Esq., solicitor of the defendant, The Carteret Company, a corporation, the taxed costs of said defendant, and a counsel fee of Three Hundred Dollars ($300.00).

Twenty-fourth.—To the Carteret Company, a corporation, or its solicitor herein, James E. Pyle, Esq., the sum of Nineteen Thousand Eight Hundred and Eighty-Three Dollars and Seventy-Eight Cents ($19,883.78).

Twenty-fifth.—To Geo. F. Perry & Sons, Inc., a corporation, or its solicitors, Messrs. Kanter & Kanter, the sum of Two Hundred and Sixty-Seven Dollars and Forty-Nine Cents ($267.49).

Twenty-sixth.—To the Carteret Company, a corporation, or its solicitors herein, James E. Pyle, Esq., the sum of Three Thousand

and Ten Dollars and Ninety-Two Cents ($3,010.92).

Lastly.—To Geo. F. Perry & Sons, Inc., a corporation, or its solicitors herein, Messrs. Kanter & Kanter, the balance of all moneys in Court in this cause, and all accumulations thereon.

Your petitioner humbly appeals from said final decree as aforesaid, upon the ground that same is erroneous, in that said Decree should have adjudged:

(1) The amount due to the various parties to said cause, for principal and interest upon their several mortgages, mechanics' lien claims, judgments and other demands, and the order of priority of these several liens, and whether they embraced all of the premises mentioned and described in the bill of complaint herein;

(2) That the lien of the mortgage of the defendant, Capital Construction Co., Inc., to the defendant, West Bergen Trust Company, encumbering said premises, was prior in lien to the amount of $5,758.96, to the lien of the mortgage of said Capital Construction Co., Inc., to the defendant, Junction Milling Company, encumbering a part of said premises, for the reason that said West Bergen Trust Company mortgage was an advance-money mortgage to the extent of $5,758.96, and was recorded prior to the filing of any mechanics' liens claims, and was, therefore, prior in lien to all lien claims; while said Junction Milling Company mortgage was a general mortgage and was recorded prior to said West Bergen Trust Company mortgage, but subsequent to the commencement of the construction of the building in question and was, therefore, subsequent in lien to all lien claims;

(3) That the lien of said West Bergen Trust Company mortgage was prior in lien to

the judgment entered in the Union County Circuit Court by the defendant, Geo. F. Perry & Sons, Inc., upon its lien claim against said Capital Construction Co., Inc. (the owner of said premises), which attempted to determine thereby that said lien claim was prior to the lien of said West Bergen Trust Company mortgage for the reason that said judgment was entered after the said Capital Construction Co., Inc., had been adjudged insolvent and receivers appointed by the Court of Chancery and that Court had jurisdiction over the *res* and the parties' interest therein, and after an injunctive order made by that Court restraining the entry of such judgment.

(4) That the lien of said West Bergen Trust Company mortgage, to the extent of $5,758.96, was third in priority in the distribution of said surplus moneys, and subsequent only to the balance owing with interest on the Shilowitz and Tucker mortgage, and to the balance owing with interest on The Carteret Company mortgage, and that from the funds in the hands of the Clerk in Chancery in this cause, said Clerk should pay these liens in the order and to the extent above designated, and the remainder of said fund *pro rata* to the mechanics' lienors whose claims were duly filed and proven.

Your petitioner, therefore, prays that said decree of said Court of Chancery, may be in the particulars aforesaid reversed, set aside and for nothing holden; and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

And your petitioner will ever pray &c.

EDWARD P. STOUT,
Solicitor for and of Counsel with
Defendant, West Bergen Trust
Company.

Junction Milling Company.
Notice of Appeal.

(Filed January 29th, 1931.)
(Duly Served.)

IN CHANCERY OF NEW JERSEY

67/391

Between

RIVERSIDE APARTMENT CORPORATION,

Complainant,

and

CAPITAL CONSTRUCTION CO., *et als.*,

Defendants.

On Bill to Foreclose.
On Surplus Money Proceedings.
Notice of Appeal.

Decree made by Chancellor on advice of Biegelow, Vice Chancellor.

TAKE NOTICE, that Junction Milling Company, hereby appeals from the order and decree made in the above-entitled cause on the 23rd day of January, 1931, and from the whole and every part thereof, to the Court of Errors and Appeals and the last resort in all causes.

Dated January 28th, 1931.

CHAS. RUBENSTEIN,
Solicitor for and of Counsel with
Junction Milling Company.

I conceive there is a good cause for appeal in the above-entitled causes.

CHAS. RUBENSTEIN,
Of Counsel with
Junction Milling Company.

Petition of Appeal.

(Filed February 17th, 1931.)
(Duly Served.)

NEW JERSEY COURT OF ERRORS & APPEALS

RIVERSIDE APARTMENT CORPORATION, Complainant, *and* CAPITAL CONSTRUCTION CO., *et als.*, Defendants.	On Appeal from the Court of Chancery. Petition of Appeal of Junction Milling Company.

The Honorable, the Court of Errors and Appeals, in the last resort in all causes.

The petition of Junction Milling Company, the appellant in the above-entitled cause, respectfully shows that:

1. The petitioner finds itself aggrieved by the final decree made in the Court of Chancery made by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 23rd day of January, 1931, wherein and whereby the Clerk of the Court of Chancery was directed to pay from the funds in his hands in this cause to the following persons designated and in the following order to wit:

> *First.*—To Messrs. Seclow & Nessanbaum, Solicitors of the defendant, Israel Shilowitz and Jacob Tucker, the taxed costs herein of said defendants, including a counsel fee of Three Hundred Dollars ($300.00).

Second.—To Israel Shilowitz and Jacob Tucker, or their solicitors herein, Messrs. Seclow & Nessanbaum, the sum of Eighty Four Hundred and Twenty Three Dollars and Eighty Cents ($8,423.80).

Third.—To Geo. F. Perry & Sons, Inc., a corporation, or its solicitors herein, Messrs. Kanter & Kanter, the sum of One Hundred and Seven Dollars and Nineteen Cents ($107.19).

Fourth.—To A. S. Reid & Company, a corporation, or its solicitors herein, Messrs. Leavitt, Ulbrich & Talley, the sum of Fifty-three Dollars ($53.00).

Fifth.—To Israel Shilowitz and Jacob Tucker, or their solicitors herein, Messrs. Seclow & Nessanbaum, the sum of Ten Hundred Forty-seven Dollars and Thirty-one cents ($1,047.31).

Sixth.—To Messrs. Kanter & Kanter, solicitors of the defendant, Geo. F. Perry & Sons, Inc., a corporation, the sum of Two Hundred Dollars (200.00) as a counsel fee herein.

Seventh.—To Messrs. Leavitt, Ulbrich & Talley, solicitors of the defendant, A. S. Reid & Company, a corporation, the sum of Two Hundred Dollars ($200.00) as a counsel fee herein.

Eighth.—To Geo. F. Perry & Sons, Inc., a corporation, or its solicitors, Messrs. Kanter & Kanter, the sum of Six Hundred and Ninety-two Dollars and Ninety-six cents ($692.96).

Ninth.—To A. S. Reid & Company, a corporation, or its solicitors, Messrs. Leavitt, Ulbrich & Talley, the sum of Three Hundred and Sixty-one Dollars and Eighty Cents ($361.80).

Tenth.—To Ira R. Crouse, or his solicitor, Aaron Kaufman, Esq., the sum of Twenty-two Hundred and Thirty-four Dollars and Thirty cents ($2,234.30).

Eleventh.—To Louis Moore, or his solicitor, Aaron Kaufman, Esq., the sum of Twelve Hundred and Six Dollars and Ninety Cents ($1,206.90).

Twelfth.—To Joseph Machetto, or his solicitor, Walter C. Alberts, Esq., the sum of Nine Hundred and Twenty-one Dollars and Twenty-six Cents ($921.26).

Thirteenth.—To Ralph Cianfrone and Ciro Castellano, partners trading as Venango Stone Company, or their solicitors, Messrs. Milberg & Milberg, the sum of Three Hundred and Twenty-two Dollars and Six Cents ($322.06).

Fourteenth.—To A. W. Booth & Bro., or its solicitor, Walter C. Alberts, Esq., the sum of Four Hundred and Twenty-eight Dollars and Sixty-two Cents ($428.62).

Fifteenth.—To Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Company, or their solicitor, Aaron Kaufman, Esq., the sum of Four Hundred and Eleven Dollars and Fifty-seven Cents ($411.57).

Sixteenth.—To Alpheus S. Van Woert, or his Solicitor, Walter C. Alberts, Esq., the sum of Three Hundred and Two Dollars and Eighty-seven Cents ($302.87).

Seventeenth.—To Roderick H. Crockett, the sum of Two Hundred and Sixty-nine Dollars and Forty-six Cents ($269.46).

Eighteenth.—To John Nicaretta, or his solicitor, Victor Samuel, Esq., the sum of Two Hundred and Fifty-one Dollars and Seventy-four Cents ($251.74).

Nineteenth.—To Meyer & Ruh Company, or its solicitor, Aaron Kaufman, Esq., the sum of Ninety-one Dollars and Fifty-one Cents ($91.51).

Twentieth.—To Michael Tozzi and Joseph Marcasiano, or their solicitor, Walter C. Alberts, Esq., the sum of One Hundred and Ten Dollars and Forty-one Cents ($110.41).

Twenty-first.—To Royal Marble Works, Inc., a corporation, or its solicitor herein, Isadore Haber, Esq., the sum of One Hundred and Twenty-six Dollars and Forty-eight Cents ($126.48).

Twenty-second.—To Arthur G. Teweles, or his solicitors, Messrs. Hershenstein & Finnerty, the sum of Forty-one Dollars and Sixteen Cents ($41.16).

Twenty-third.—To James E. Pyle, Esq., Solicitor of the defendant, the Carteret Company, a corporation, and taxed costs of said defendants, and a counsel fee of Three Hundred Dollars ($300.00).

Twenty-fourth.—To the Carteret Company, a corporation, or its solicitor herein, James E. Pyle, Esq., the sum of Nineteen Thousand Eight Hundred and Eighty-three dollars and Seventy-eight Cents ($19.883.78).

Twenty-fifth.—To Geo. F. Perry & Sons, Inc., a corporation, or its solicitors, Messrs. Kanter & Kanter, the sum of Two Hundred and Sixty-seven Dollars and Forty-nine Cents ($267.49).

Twenty-sixth.—To the Carteret Company, a corporation, or its solicitors herein, James E. Pyle, Esq., the sum of Three Thousand Ten Dollars and Ninety-two Cents ($3,010.92).

Lastly.—To Geo. F. Perry & Sons, Inc., a corporation, or its solicitors herein, Messrs. Kanter & Kanter, the balance of all moneys

in Court in this cause, and all accumulations thereon.

2. The petitioner appeals from the decree of the Chancellor as aforesaid upon the ground that the same is erroneous, for, that, the said decree is contrary to law, equity and statutes in such case made and provided, and that the said decree should not have directed the payment to the above-named persons in preference to the petitioner herein; but the decree should have directed a division of the moneys in the hands of the Clerk of the Court of Chancery into two funds, as follows:

FIRST FUND—Eleven Thousand Four Hundred ($11,400.00) Dollars as proceeds of the tract covered by the Junction Milling Company mortgage, which tract or tracts are otherwise referred to as the "wings".

SECOND FUND—Balance of the moneys as proceeds of balance of the tract sold by the Sheriff, which tract or parcel is otherwise referred to as the "center" tract.

and the decree should have marshalled the said funds and directed distribution in the following order:

1. To Shilowitz and Tucker for principal of mortgage..... $20,000.00

For interest at rate of 6% per annum to time of moneys deposited with the Clerk of the Court of Chancery, and 2% per annum thereafter.

This payment to be chargeable to the Second Fund.

2. To Junction Milling Company, for principal of mortgage.... $ 7,973.00

For interest at rate of 6% per annum to time of moneys deposited with the Clerk of

the Court of Chancery, and 2% per annum thereafter.

This payment to be chargeable to the First Fund.

3. To Carteret Company, for principal of mortgage..... $35,000.00

For interest at rate of 6% per annum to time of moneys deposited with the Clerk of the Court of Chancery, and 2% per annum thereafter.

This payment to be chargeable to the both funds.

4. To Max Platt, for lien claim $ 5,000.00

For interest at rate of 6% per annum to time of moneys deposited with the Clerk of the Court of Chancery, and 2% per annum thereafter.

This payment to be chargeable to the Second Fund.

5. To Mowre Lager, for lien claim ..... $ 3,000.00

For interest at rate of 6% per annum to time of moneys deposited with the Clerk of the Court of Chancery and 2% thereafter.

This payment to be chargeable to the Second Fund.

6. To West Bergen Trust Company, for principal of mortgage.... $ 6,000.00

For interest at rate of 6% per annum to time of moneys deposited with the Clerk of the Court of Chancery, and 2% per annum thereafter.

This payment to be chargeable to the both funds.

7. Balance, if any, to the remaining claimants; for the following reasons:

(1) The lien claims of all lien claimants excepting Platt and Lager are invalid and void in that the curtilage described and included therein exceed half an acre and cover lands unconnected with and independent of the curtilage appropriated and intended for the use of the apartment house building. Curtilage described in lien claims should have been limited to center tract.

(2) West Bergen Trust Co. mortgage having been made, executed and recorded after the commencement of the apartment building, and the proceeds of same having not been paid out in conformity with Sections 14 and 15 of the Mechanic's Lien Act, all valid mechanic's lien claims have priority over the said mortgage.

(3) The mortgage of the Junction Milling Company was made, executed and recorded prior to the execution and recording of the mortgages to Carteret Company and West Bergen Trust Co. therefore the milling company mortgage should be paid before the latter mortgages could be paid.

(4) To allow interest on prior encumbrances or liens beyond 2% per annum, the amount earned on the fund while in the hands of the Clerk of the Court of Chancery is unconscionable.

The petitioner therefore prays that the decree of the said Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden; and that the petitioner may have such other and further relief in the premises as to this Honorable Court shall seem meet.

CHAS. RUBENSTEIN,
Solicitor for and of Counsel with
Appellant.

Mowre Lager and Max Platt
Notice of Appeal.

(Filed January 29th, 1931.)
(Duly Served.)

IN CHANCERY OF NEW JERSEY

67/391

Between

RIVERSIDE APARTMENT CORPORATION,
Complainant,

and

CAPITOL CONSTRUCTION CO., *et als.*,
Defendants.

On Bill to Foreclose.
On Surplus Money Proceedings.
Notice of Appeal.

Decree made by Chancellor on advice of Bigelow, Vice-Chancellor.

TAKE NOTICE that Mowre Lager and Max Platt, hereby appeal from the order and decree made in the above-entitled cause on the 23rd day of January, 1931, and from the whole and every part thereof, to the Court of Errors and Appeals and the last resort in all causes.

Dated January 28th, 1931.

AARON A. MELNIKER,
Solicitor for and of Counsel with
Mowre Lager and Max Platt.

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

AARON A. MELNIKER,
Of Counsel with Mowre Lager and
Max Platt.

Petition of Appeal.

(Filed February 17th, 1931.)
(Duly Served.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

RIVERSIDE APARTMENT CORPORATION, a corporation, Complainant, *against* CAPITOL CONSTRUCTION CO. *et al.*, Defendants.	On Appeal from the Court of Chancery. Petition of Appeal of Defendants Max Platt and Mowre Lager.

The Honorable, the Court of Errors and Appeals, in the last resort in all causes.

The petition of Max Platt and Mowre Lager, the appellants in the above-entitled cause, respectfully show that:

1. The petitioners find themselves aggrieved by the final decree made in the Court of Chancery made by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 23rd day of January, 1931, wherein and whereby the Clerk of the Court of Chancery was directed to pay from the funds in his hands in this cause to the following persons designated and in the following order, to wit:

First.—To Messrs. Seclow & Nessanbaum Solicitors to the defendants, Israel Shilowitz and Jacob Tucker, the taxed costs herein of said defendants, including a counsel fee of Three Hundred Dollars ($300.00).

Second.—To Israel Shilowitz and Jacob Tucker, or their solicitors herein, Messrs.

Seclow & Nessanbaum, the sum of Eighty-four Hundred and Twenty-three Dollars and Eighty Cents ($8,423.80).

Third.—To Geo. F. Perry & Sons, Inc., a corporation, or its solicitors herein, Messrs. Kanter & Kanter, the sum of One Hundred and Seven Dollars and Nineteen Cents ($107.19).

Fourth.—To A. S. Reid & Company, a corporation, or its solicitors herein, Messrs. Leavitt, Ulbrich & Talley, the sum of Fifty-three Dollars ($53.00).

Fifth.—To Israel Shilowitz and Jacob Tucker, or his solicitors herein, Messrs. Seclow & Nessanbaum the sum of Ten Hundred and Forty-seven Dollars and Thirty-one Cents ($1,047.31).

Sixth.—To Messrs. Leavitt, Ulbrich & Talley, Solicitors of the defendant, A. S. Reid & Company, a corporation, the sum of Two Hundred Dollars ($200.00) as a counsel fee herein.

Seventh.—To Messrs. Kanter & Kanter, Solicitors of the defendant, Geo. F. Perry & Sons, Inc., a corporation, the sum of Two Hundred Dollars ($200.00) as a counsel fee herein.

Eighth.—To Geo. F. Perry & Sons, Inc., a corporation, or its solicitors, Messrs. Kanter Kanter, the sum of Six Hundred and Ninety-two Dollars and Ninety-six Cents ($692.96).

Ninth.—To A. S. Reid & Company, a corporation, or its solicitors, Messrs. Leavitt, Ulbrich & Talley, the sum of Three Hundred and Sixty-one Dollars and Eighty Cents ($361.80).

Tenth.—To Ira R. Crouse, or his solicitor, Aaron Kaufman, Esq., the sum of Twenty-two Hundred and Thirty-four Dollars and Thirty Cents ($2,234.30).

Eleventh.—To Louis Moore, or his solicitor, Aaron Kaufman, Esq., the sum of Twelve Hundred and Six Dollars and Ninety Cents ($1,206.90).

Twelfth.—To Joseph Machetto, or his solicitor, Walter C. Alberts, Esq., the sum of Nine Hundred and Twenty-one Dollars and Twenty-six Cents ($921.26).

Thirteenth.—To Ralph Cianfrone and Ciro Castellano, partners, trading as Venango Stone Company, or their solicitors, Messrs. Milberg & Milberg, the sum of Three Hundred and Twenty-two Dollars and Six Cents ($322.06).

Fourteenth.—To A. W. Booth & Bro., or its solicitor, Walter C. Alberts, Esq., the sum of Four Hundred and Twenty-eight Dollars and Sixty-two Cents ($428.62).

Fifteenth.—To Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Company, or their solicitor, Aaron Kaufman, Esq., the sum of Four Hundred and Eleven Dollars and Fifty-seven Cents ($411.57).

Sixteenth.—To Alpheus S. Van Woort, or his solicitor, Walter C. Alberts, Esq., the sum of Three Hundred and Two Dollars and Eighty-seven Cents ($302.87).

Seventeenth.—To Roderick H. Crockett, the sum of Two Hundred and Sixty-nine Dollars and Forty-six Cents ($269.46).

Eighteenth.—To John Nicaretta, or his solicitor, Victor Samuel, Esq., the sum of Two Hundred and Fifty-one Dollars and Seventy-four Cents ($251.74).

Nineteenth.—To Meyer & Ruh Company, or its solicitor, Aaron Kaufman, Esq., the sum of Ninety-one Dollars and Fifty-one Cents ($91.51).

Twentieth.—To Michael Tozzi and Joseph Marcasiano, or their solicitor, Walter C. Alberts, Esq., the sum of One Hundred and Ten Dollars and Forty-one Cents ($110.41).

Twenty-first.—To Royal Marble Works, Inc., a corporation, or its solicitor herein, Isadore Haber, Esq., the sum of One Hundred and Twenty-six Dollars and Forty-eight Cents ($126.48).

Twenty-second.—To Arthur G. Teweles, or his solicitors, Messrs. Hershenstein and Finnerty, the sum of Forty-one Dollars and Sixteen Cents ($41.16).

Twenty-third.—To James E. Pyle, Esq., solicitor of the defendant, the Carteret Company, a corporation, the taxed costs of said defendants, and a counsel fee of Three Hundred Dollars ($300.00).

Twenty-fourth.—To the Carteret Company, a corporation, or its solicitor herein, James E. Pyle, Esquire, the sum of Nineteen Thousand Eight Hundred and Eighty-three Dollars and Seventy-eight cents ($19,883.78).

Twenty-fifth.—To Geo. F. Perry & Sons, Inc., a corporation, or its solicitors, Messrs. Kanter & Kanter, the sum of Two Hundred and Sixty-seven Dollars and Forty-nine Cents ($267.49).

Twenty-sixth.—To the Carteret Company, a corporation, or its solicitors herein, James E. Pyle, Esq., the sum of Three Thousand and Ten Dollars and Ninety-two Cents ($3,010.92).

Lastly.—To Geo. F. Perry & Sons, Inc., a corporation or its solicitors herein, Messrs. Kanter & Kanter, the balance of all monies in Court in this Cause, and all accumulations thereon.

2. The petitioners appeal from the decree of the Chancellor as aforesaid upon the ground that

the same is erroneous, for that, the said decree is contrary to law, equity and statutes in such case made and provided, and that the said decree should not have directed the payment to the above-named persons in preference to the petitioners herein; but the decree should have directed a division of the moneys in the hands of the Clerk of the Court of Chancery into two funds, as follows:

FIRST FUND—Eleven thousand Four Hundred ($11,400.00) Dollars as proceeds of the tract covered by the Junction Milling Company mortgage, which tract or tracts are otherwise referred to as the "wings".

SECOND FUND—Balance of the moneys as proceeds of balance of the tract sold by the Sheriff, which tract or parcel is otherwise referred to as the "center" tract.

and the decree should have marshalled the said funds and directed distribution to the following order:

1. To Shilowitz and Tucker for principal of mortgage..... $20,000.00

For interest at rate of 6% per annum to time of moneys deposited with the Clerk of the Court of Chancery, and 2% per annum thereafter.

This payment to be chargeable to the Second Fund.

2. To Junction Milling Company, for principal of mortgage.... $ 7,973.00

For interest at rate of 6% per annum to time of moneys deposited with the Clerk of the Court of Chancery, and 2% per annum thereafter.

This payment to be chargeable to the First Fund.

3. To Carteret Company, for principal of mortgage..... $35,000.00

For interest at rate of 6% per annum to time of moneys deposited with the Clerk of the Court of Chancery, and 2% per annum thereafter.

This payment to be chargeable to the Both Funds.

4. To Max Platt, for Lien Claim $ 5,000.00

For interest at rate of 6% per annum to time of moneys deposited with the Clerk of the Court of Chancery, and 2% per annum thereafter.

This payment to be chargeable to the Second Fund.

5. To Mowre Lager, for Lien Claim ..... $ 3,000.00

For interest at rate of 6% per annum to time of moneys deposited with the Clerk of the Court of Chancery, and 2% thereafter.

This payment to be chargeable to the Second Fund.

6. To West Bergen Trust Company for principal of mortgage.... $ 6,000.00

For interest at rate of 6% per annum to time of moneys deposited with the Clerk of the Court of Chancery, and 2% per annum thereafter.

This payment to be chargeable to the Both Funds.

7. Balance, if any, to the remaining claimants; for the following reasons:

(1) The lien claim of all lien claimants excepting Platt and Lager are invalid and void in that the curtilage described and included

therein exceed half an acre and cover lands unconnected with and independent of the curtilage appropriated and intended for the use of the apartment house building. "Curtilage described in lien claims should have been limited to center tract."

(2) West Bergen Trust Co. mortgage having been made, executed and recorded after the commencement of the apartment building, and the proceeds of same having not been paid out in conformity with Sections 14 and 15 of the Mechanic's Lien Act, all valid mechanic's lien claims have priority over the said mortgage.

(3) To allow interest on prior encumbrances or liens beyond 2% per annum, the amount earned on the fund while in the hands of the Clerk of the Court of Chancery is unconscionable.

The petitioners therefore pray that the decree of the Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden; and that the petitioners may have such other and further relief in the premises as to this Honorable Court shall seem meet.

AARON A. MELNIKER,
Solicitor for and of Counsel
with Appellants.

Bill of Complaint.

(Filed March 3rd, 1928.)

IN CHANCERY OF NEW JERSEY

To His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey:

The complainant RIVERSIDE APARTMENT CORPORATION, a corporation of the State of New Jersey, respectively shows that:

1. On March 30th, 1927, Jacob Starr and Hyman Silverman and Harry Starr, being indebted to complainant in the sum of $21,000.00 executed to it a bond of that date to secure that sum, payable March 30, 1928, with interest at the rate of six percentum per annum, payable half-yearly from the date of the bond.

2. To secure the payment of said bond said Jacob Starr and Hyman Silverman executed to complainant a mortgage of even date with the bond, thereby conveying to it in fee the land hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond, which mortgage, having been first duly acknowledged, and the certificate of acknowledgment duly endorsed thereon, was recorded in the Office of the Register of Union County in Book 857 of Mortgages page 98 &c.

3. The mortgaged premises are described as follows:

> "All that certain tract of land and premises situate in the Township of Cranford in the County of Union and State of New Jersey
>
> Beginning at the point formed by the intersection of the northeasterly side of Riverside

Drive with the southeasterly side of Prospect Avenue; thence north forty-seven (47) degrees thirty six (36) minutes, east along said side of Prospect Avenue three hundred fifty-eight and thirty one-hundredths (358.30) feet to a point; thence south forty-two degrees (42) twenty four (24) minutes east two hundred (200) feet to a point; thence north forty-seven (47) degrees thirty-six (36) minutes east thirteen and seventy-six (13.76) one-hundredths feet to a point; thence south forty-two (42) degrees twenty-four (24) minutes east one hundred ninety-five and ninety-eight one-hundredths (195.98) feet to the northwesterly side of Union Avenue; thence south forty-nine (49) degrees sixteen (16) minutes west eighty-seven and ninety-seven one-hundredths (87.97) feet along said side of Union Avenue to a point; thence still along said side of Union Avenue south forty-one degrees (41) fifty-one (51) minutes west one hundred and fifty-two and thirty-four one-hundredths (152.34) feet to said side of Riverside Drive; thence northwesterly along said side of Riverside Drive its various courses, four hundred forty-three (443) feet more or less to the point or place of beginning.

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

5. On March 30, 1927, said Jacob Starr and Hyman Silverman and Harry Starr, being further indebted to complainant in the sum of $30,000.00, executed to it, its bond of that date to secure that sum, payable on March 30, 1928, with interest at the rate of six percentum per annum, payable half-yearly from the date of the bond.

6. To secure payment of said last mentioned bond, said Jacob Starr and Hyman Silverman executed to complainant, a mortgage of even date with said bond and thereby conveyed to it, in fee, the lands hereinabove described on the express condition that such conveyance should be void if payment should be made according to the terms of the bond, which mortgage, having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon was recorded in the Office of the Register of Union County in Book 857 of Mortgages for said County on page 100, &c.

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

8. The mortgage first above mentioned given to secure the said bond of $21,000.00 was given by said Jacob Starr and Hyman Silverman to secure part of the consideration or purchase price of the lands and premises hereinabove described.

9. On May 25th, 1927, said Jacob Starr and Sadie Starr, his wife, and Hyman Silverman and Annie Silverman, his wife, conveyed said lands by deed of that date to Capitol Construction Co., Inc. a corporation, which deed was on June 28th, 1927 recorded in the Registers Office of Union County, in Book 1112 of deeds page 171.

10. In order to correct some deficiency in the deed of conveyance in the next preceding paragraph herein mentioned or otherwise, the said

Jacob Starr and Sadie Starr, his wife, and Hyman Silverman and Annie Silverman, his wife, conveyed said lands by deed dated May 25, 1927 to said Capitol Construction Co. Inc. a corporation, in fee, which deed was on October 24, 1927 recorded in the Office of the Register of Union County in Book 1121 of deeds page 328.

Any interest which said Capitol Construction Co. Inc. has in said lands is subject to the liens of complainant's mortgages as aforementioned.

11. On July 29, 1927 said Capitol Construction Co. Inc. a corporation, mortgaged said lands to Israel Shilowitz and Jacob Tucker for $20,000.00, which mortgage was, on August 2, 1927 recorded in the Office of the Register of the County of Union in Book 878 of mortgages page 347.

Any interest which said Israel Shilowitz and Jacob Tucker or either of them may have in said lands is subject to the liens of complainant's said mortgages.

12. On October 14, 1927 said Capitol Construction Co. Inc. a corporation, mortgaged said lands to Carteret Company, a corporation, for $35,000.00, which mortgage was on October 24, 1927 recorded in the Office of the Register of Union County in Book 892 of Mortgages page 89.

Any interest which said Carteret Company, a corporation, may have in said lands is subject to the liens of complainant's said mortgages.

13. On August 22, 1927 said Capitol Construction Co. Inc. mortgaged said lands to Louis Schwartz for $5,150.00 which mortgage was on August 25, 1927 recorded in the Office of the Register of Union County in Book 884 of Mortgages page 127.

Any interest which said Louis Schwartz may have in said lands is subject to the liens of complainant's said mortgages.

14. By agreement dated October 20, 1927 and recorded in the Office of the Register of Union County on October 24, 1927 in Book 67 of Releases page 178 said Louis Schwartz did agree with said Carteret Company to subordinate the lien of the mortgage of said Louis Schwartz to the lien of the mortgage of said Carteret Company and by virtue thereof said Carteret Company claims priority of the lien of the aforesaid mortgage to the lien of said mortgage of the said Louis Schwartz.

15. On September 16, 1927 said Capitol Construction Co. Inc. mortgaged said lands to Junction Milling Co. a corporation for $11,619.34, which said mortgage was, on October 6, 1927 recorded in the Office of the Register of Union County in Book 886 of Mortgages page 390.

Any interest which said Junction Milling Co. may have in said lands is subject to the liens of complainant's mortgages.

16. On October 25, 1927 said Capitol Construction Co. Inc. mortgaged said lands to West Bergen Trust Company, a corporation, for $6,000.00 which mortgage was on October 26, 1927 recorded in the Office of the Register of Union County in Book 895 of Mortgages page 38.

Any interest which said West Bergen Trust Company may have in said lands is subject to the liens of complainant's said mortgages.

17. On October 28, 1927 said Capitol Construction Co. Inc. mortgaged said lands to The Trust Company of New Jersey for $16,000.00 which mortgage was on November 8th, 1927 recorded in

the Office of the Register of Union County in Book 894 of Deeds page 257.

Any interest which said The Trust Company of New Jersey may have in said lands is subject to the liens of complainant's said mortgages.

18. On November 1, 1927, said Capital Construction Co., Inc., mortgaged said lands to Edward P. Stout, trustee, for $7,500.00 which mortgage was on November 12, 1927, recorded in the Office of the Register of Union County in Book 891 of Mortgages, page 194.

Any interest which said Edward P. Stout, trustee, may have in said lands is subject to the liens of complainant's mortgages.

19. On October 28, 1927, said Capital Construction Co., Inc., mortgaged said lands to The Trust Company of New Jersey, a corporation, for $16,000.00, which mortgage was on December 1, 1927, recorded in the Office of the Register of Union County in Book 898 of Mortgages, page 306.

Any interest which said The Trust Company of New Jersey may have in said lands is subject to the liens of complainant's mortgages.

20. On November 12, 1927, Geo. F. Perry & Sons, Inc., a corporation, filed in the Office of the Clerk of Union County a mechanic's lien claim against said lands and the building thereon erected in the sum of $5,792.25 and thereafter, to wit, on January 13, 1928, entered judgment in the Union County Circuit Court in the sum of $5,965.00 besides costs to be taxed, which said costs were taxed at the sum of $63.37 and which said judgment was generally against said Capital Construction Co., Inc., and specially to be made of the lands and buildings in the complaint and lien claim in said action described, which consti-

tute part of the above described mortgaged lands and premises.

Any interest which said Geo. F. Perry & Sons, Inc., may have in said lands is subject to the lien of complainant's said mortgages.

21. On November 18, 1927, A. S. Reid & Company, a corporation, filed in the office of the Clerk of Union County a mechanic's lien claim against said Capital Construction Co., Inc., wherein and whereby said A. S. Reid & Company claims a lien upon the said mortgaged lands for the sum of $2,991.68 or other sum.

Any interest which said A. S. Reid & Company, a corporation, may have in said lands is subject to the liens of complainant's said mortgages.

22. On December 15, 1927, Royal Marble Works, Inc., a corporation, filed in the Office of the Clerk of Union County, a mechanic's lien claim against said Capital Construction Co., Inc., wherein and whereby said Royal Marble Works, Inc., claims a lien upon the said mortgaged lands for the sum of $3,700.00 or some other sum.

Any interest which said Royal Marble Works, Inc., a corporation, may have in said lands is subject to the liens of complainant's said mortgages.

23. On December 30, 1927, Bayonne Supply Co., a corporation, filed in the Office of the Clerk of Union County, a mechanic's lien claim against said Capital Construction Co., Inc., wherein and whereby said Bayonne Supply Co. claims a lien upon the said mortgaged lands for the sum of $1,100.00 or some other sum.

Any interest which said Bayonne Supply Co., a corporation, may have in the said lands is subject to the liens of complainant's said mortgages.

24. On December 31, 1927, Bayonne Supply Co., a corporation, filed in the Office of the Clerk of Union County, a mechanic's lien claim against said Capitol Construction Co., Inc., wherein and whereby said Bayonne Supply Co. claims a lien upon the said mortgaged lands for the sum of $1,100.00 or some other sum.

Any interest which said Bayonne Supply Co., a corporation, may have in said lands is subject to the liens of complainant's said mortgages.

25. On December 31, 1927, Winchester & Muhlberg, Inc., a corporation, filed in the office of the Clerk of Union County, a mechanic's lien claim against said Capital Construction Co., Inc., wherein and whereby said Winchester & Muhlberg, Inc., claims a lien upon the said mortgaged lands for the sum of $677.40, or some other sum.

Any interest which said Winchester & Muhlberg, Inc., a corporation, may have in said lands, is subject to the liens of complainant's said mortgages.

26. On January 3, 1928, McCabe Bros. Co., a corporation, filed in the Office of the Clerk of Union County, a mechanic's lien claim against said Capital Construction Co., Inc., wherein and whereby said McCabe Bros. Co. claims a lien upon the said mortgaged lands for the sum of $1,950.00 or some other sum.

Any interest which said McCabe Bros. Co., a corporation, may have in said lands, is subject to the liens of complainant's said mortgages.

27. On January 3, 1928, Max Platt filed in the Office of the Clerk of Union County, a mechanic's lien claim against said Capital Construction Co., Inc., wherein and whereby said Max Platt claims a lien upon the said mortgaged lands for the sum of $3,950.00, or some other sum.

Any interest which said Max Platt may have in said lands is subject to the liens of complainant's said mortgages.

28. On January 3, 1928, John Nicaretta filed in the Office of the Clerk of Union County, a mechanic's lien claim against said Capital Construction Co., Inc., wherein and whereby said John Nicaretta claims a lien upon the said mortgaged lands for the sum of $2,175.00 or some other sum.

Any interest which said John Nicaretta may have in said lands, is subject to the liens of complainant's said mortgages.

29. On January 3, 1928, Benj. Parnis filed in the Office of the Clerk of Union County, a mechanic's lien claim against said Capital Construction Co., Inc., wherein and whereby said Benj. Parnis claims a lien upon the said mortgaged lands for the sum of $4,688.00 or some other sum.

Any interest which said Benj. Parnis may have in said lands, is subject to the liens of complainant's said mortgages.

30. On January 3, 1928, Harry Siegel and Isador Levin, co-partners trading as Siegel & Levin, filed in the Office of the Clerk of Union County, a mechanic's lien claim against said Capitol Construction Co., Inc., wherein and whereby said Harry Siegel and Isador Levin, co-partners trading as Siegel & Levin claim a lien upon the said mortgaged lands for the sum of $1,575.00 or some other sum.

Any interest which said Harry Siegel and Isador Levin, co-partners trading as Siegel & Levin may have in said lands, is subject to the liens of complainant's mortgages.

31. On January 3, 1928, Joseph Machetto filed in the Office of the Clerk of Union County, a mechanic's lien claim against said Capitol Construction Co., Inc., wherein and whereby said Joseph Machetto claims a lien upon the said mortgaged lands for the sum of $8,000.00 or some other sum.

Any interest which said Joseph Machetto may have in said lands is subject to the liens of complainant's said mortgages.

32. On January 5, 1928, Roderick M. Crocket & Co., a corporation filed in the Office of the Clerk of Union County a mechanic's lien claim against said Capitol Construction Co., Inc., wherein and whereby said Roderick M. Crocket & Co. claims a lien upon the said mortgaged lands for the sum of $3,233.75 or some other sum.

Any interest which said Roderick M. Crocket & Co. may have in said lands, is subject to the liens of complainant's said mortgages.

33. On January 12, 1928, Arthur G. Teweles filed in the Office of the Clerk of Union County, a mechanic's lien claim against said Capitol Construction Co., Inc., wherein and whereby said Arthur G. Teweles claims a lien upon the said mortgaged lands for the sum of $355.00 or some other sum.

Any interest which said Arthur G. Teweles may have in said lands, is subject to the liens of complainant's said mortgages.

34. On January 12, 1928, Louis Moore filed in the Office of the Clerk of Union County, a mechanic's lien claim against said Capitol Construction Co., Inc., wherein and whereby said Louis Moore claims a lien upon the said mortgaged lands for the sum of $10,500.00 or some other sum.

Any interest which said Louis Moore may have in said lands, is subject to the lien of complainant's said mortgages.

35. On January 12, 1928, Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co., filed in the office of the Clerk of Union County, a mechanic's lien claim against said Capitol Construction Co., Inc., wherein and whereby said Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co., claim a lien upon the said mortgaged lands for the sum of $3,700.00 or some other sum.

Any interest which said Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co., may have in said lands is subject to the liens of complainant's said mortgages.

36. On January 12, 1928, Ira R. Crouse filed in the Office of the Clerk of Union County, a mechanic's lien claim against Capitol Construction Co., Inc., wherein and whereby said Ira R. Crouse claims a lien upon the said mortgaged lands for the sum of $19,383.79 or some other sum.

Any interest which said Ira R. Crouse may have in said lands, is subject to the liens of complainant's said mortgages.

37. On January 13, 1928, Hudson Fireproof Block Co. filed in the Office of the Clerk of Union County, a mechanic's lien claim against said Capitol Construction Co., Inc., wherein and whereby said Hudson Fireproof Block Co. claims a lien upon the said mortgaged lands for the sum of $730.06 or some other sum.

Any interest which said Hudson Fireproof Block Co. may have in said lands, is subject to the liens of complainant's said mortgages.

38. On January 13, 1928, Julius Stenkauskas filed in the Office of the Clerk of Union County, a mechanic's lien claim against Capitol Construc-

tion Co., Inc., wherein and whereby said Julius Stenkauskas claims a lien upon the said mortgaged lands for the sum of $1,172.24 or some other sum.

Any interest which said Julius Stenkauskas may have in said lands is subject to the liens of complainant's said mortgages.

39. On January 21, 1928, Meyer and Ruh Company, a corporation, filed in the Office of the Clerk of Union County a mechanic's lien claim against said Capitol Construction Co., Inc., wherein and whereby said Meyer and Ruh Company claims a lien upon the said mortgaged lands for the sum of $791.19 or some other sum.

Any interest which said Meyer and Ruh Company have in said lands, is subject to the liens of complainant's said mortgages.

40. On February 7, 1928, Alpheus S. Van Woeart filed in the Office of the Clerk of Union County a mechanic's lien claim against said Capitol Construction Co., Inc., wherein and whereby said Alpheus S. Van Woeart claims a lien upon the said mortgaged lands for the sum of $2,518.00 or some other sum.

Any interest which said Alpheus S. Van Woeart may have in said lands, is subject to the liens of complainant's said mortgages.

41. On February 7, 1928, Michael Tozzi and Joseph Marcasiano, partners trading as M. Tozzi and J. Marcasiano, filed in the Office of the Clerk of Union County, a mechanic's lien claim against said Capitol Construction Co., Inc., wherein and whereby said Michael Tozzi and Joseph Marcasiano, partners trading as M. Tozzi and J. Marcasiano claim a lien upon the said mortgaged lands for the sum of $956.00 or some other sum.

Any interest which said Michael Tozzi and Joseph Marcasiano, partners trading as M. Tozzi and J. Marcasiano may have in said lands, is

subject to the liens of complainant's said mortgages.

42. On February 21, 1928, Mowre Lager filed in the Office of the Clerk of Union County, a mechanic's lien claim against said Capitol Construction Co., Inc., wherein and whereby said Mowre Lager claims a lien upon the said mortgaged lands for the sum of $5,500.00 or some other sum.

Any interest which said Mowre Lager may have in said lands, is subject to the liens of complainant's said mortgages.

43. On February 25, 1928, Alfred W. Booth & Bro., a corporation, filed in the Office of the Clerk of Union County, a mechanic's lien claim against said Capitol Construction Co., Inc., wherein and whereby said Alfred W. Booth & Bro. claim a lien upon the said mortgaged lands for the sum of $3,714.14 or some other sum.

Any interest which said Alfred W. Booth & Bro., a corporation, may have in said lands, is subject to the liens of complainants.

44. On January 9, 1928, John P. Grady recovered judgment in the New Jersey Supreme Court against Hyman Silverman, Harry Starr, Jacob Starr and Capitol Construction Co., Inc., in the sum of $1,124.61 against said Harry Starr besides $66.02 costs of suit.

Any interest which said John P. Grady may have in said lands is subject to the liens of complainant's said mortgages.

45. On November 21, 1927, Abraham Shilling docketed from the Hudson County Court of Common Pleas in the New Jersey Supreme Court, a judgment recovered by him, said Abraham Shilling against said Hyman Silverman and Jacob Starr in the sum of $2,555.00 damages and $56.12 costs of suit.

Any interest which said Abraham Shilling may

have in said lands is subject to the liens of complainant's said mortgages.

46. On February 27, 1928, Cranford Trust Company, a corporation, recovered judgment in the New Jersey Supreme Court against said Hyman Silverman and Jacob Starr and Harry Starr for $1,075.96 damages and $62.02 costs of suit.

Any interest which said Cranford Trust Company, may have in said lands is subject to the liens of complainant's said mortgages.

47. On September 30, 1927, one-half year's interest fell due on complainant's bond and mortgage of $21,000.00 hereinabove firstly referred to, and remained unpaid for more than thirty days thereafter, and no part thereof has as yet been paid. Complainant has elected that the whole principal sum with all unpaid interest shall be now due.

48. On September 1st, 1927, one-half year's interest fell due on complainant's bond and mortgage of $30,000.00 hereinabove secondly referred to and remained unpaid for more than thirty days thereafter, and no part thereof has as yet been paid. Complainant has elected that the whole principal sum with all unpaid interest shall be now due.

49. In a certain cause pending in this court wherein Ralph Cianfrone and Ciro Castellano, partners trading as Venango Stone Company, are complainants and said Capitol Construction Co., Inc., a corporation, is defendant, such proceedings were had that said Capitol Construction Co., Inc., was duly adjudged to be an insolvent corporation, and by order duly made therein, Ira R. Crouse and Benjamin Heyman were appointed receivers of said Capitol Construction Co., Inc., and have qualified as such receivers, and assumed the burdens of their trust.

50. Before the filing of this bill by an order duly made by the Chancellor of the State of New Jersey, in the cause in the next preceding paragraph hereof mentioned, complainant was granted leave to make said receivers parties to this suit.

51. Said Jacob Starr and Hyman Silverman and Capitol Construction Co., Inc., a corporation, and Ira R. Crouse and Benjamin Heyman, as receivers of said Capitol Construction Co., Inc., a corporation, and Ira R. Crouse and Benjamin Heyman, as receivers of said Capitol Construction Co., Inc., or one or some of them, have always been in possession of the mortgaged premises.

52. The whole amount of principal, to wit: the sum of $21,000.00 with interest thereon from March 30, 1927, is due upon complainant's bond and mortgage hereinabove firstly mentioned and described, and the whole amount of principal, to wit, the sum of $30,000.00 with interest thereon from March 30, 1927, is due upon complainant's bond and mortgage secondly hereinabove mentioned and described.

53. Complainant is without adequate remedy in the courts of law and therefore prays:

1. That Capitol Construction Co., Inc., and Ira R. Crouse and Benjamin Heyman, receivers of said Capitol Construction Co., Inc., and Israel Shilowitz and Jacob Tucker; and Carteret Company, a corporation; and Louis Schwartz; and Junction Milling Co., a corporation; and West Bergen Trust Company, a corporation; and Edward P. Stout, trustee; and Geo. F. Perry & Sons, Inc., a corporation; and A. S. Reid & Company, a corporation; and Royal Marble Works, Inc., a corporation; and Bayonne Supply Co., a corporation; and Winchester & Muhlberg, Inc., a corporation; and McCabe Bros. Co., a corporation; and Max Platt;

and John Nicaretta; and Benj. Parnis, and Harry Siegel & Levin; and Joseph Machetto; and Roderick M. Crocket & Co., a corporation; and Arthur G. Teweles; and Louis Moore; and Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co.; and Ira R. Crouse; and Hudson Fireproof Block Co.; and Julius Stenkauskas; and Meyer and Ruh Company, a corporation; and Alpheus S. Van Woeart; and Michael Tozzi and Joseph Marcasiano, partners trading as M. Tozzi and J. Marcasiano; and Mowre Lager; and Alfred W. Booth & Bro., a corporation; and John P. Grady; and Abraham Shilling; and Cranford Trust Company, a corporation, who are the defendants to this suit, may answer this bill of complaint and each statement therein made;

2. That an account may be taken of the amount due on complainant's two mortgages in this bill mentioned;

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

4. That a decree may be made for the sale of the mortgaged premises to raise and pay to complainant the amounts so found due on their said mortgages with interest and costs;

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

GROSS & GROSS,
Solicitors and Counsel with Complainant.

Answer of Defendant, West Bergen Trust Company, to Complaint.

(Filed Mar. 24th, 1928.)

IN CHANCERY OF NEW JERSEY.

RIVERSIDE APARTMENT CORPORATION, a Corporation of New Jersey, Complainant, *vs.* CAPITOL CONSTRUCTION CO., INC., a corporation, *et al.*, Defendants.	On Bill, &c. Answer of Defendant, West Bergen Trust Company.

The answer of defendant, West Bergen Trust Company, a corporation of New Jersey:

This defendant, West Bergen Trust Company, answering the bill of complaint, says that:

1. It has no knowledge or information sufficient to form a belief as to the statements of Paragraphs 1-5 inclusive and 17-53 inclusive.

2. It admits Paragraph 16, but says that this defendant's mortgage has priority over the lien claims mentioned in Paragraphs 20-43 inclusive, because the money due or to grow due on defendant's mortgage was actually advanced and paid by this defendant to defendant, Capitol Construction Co., Inc., and applied by it to the erection of a certain building on said mortgaged premises, and said mortgage was recorded before the filing of said lien claims; and defendant's mortgage has priority over the mortgages mentioned in Para-

graphs 13, 15, 17, 18, 19, because said mortgages are not advance money mortgages, nor did they encumber said mortgaged premises prior to the commencement of the construction of said building; and, as to the mortgage mentioned in Paragraph 12, this defendant claims priority over said mortgage to so much thereof as has not been advanced thereon and paid to defendant, Capitol Construction Co., Inc.

EDWARD P. STOUT,
Sol'r. for Deft. West Bergen Trust Company.

Answer of Defendant, Joseph Machetto.

(Filed Mar. 24th, 1928.)

The answer of defendant, Joseph Machetto:

This defendant, Joseph Machetto, answering the bill of complaint, says that:

1. He has no knowledge or information sufficient to form a belief as to the statements of Paragraphs 1-30 inclusive and 32-53 inclusive.

2. He admits Paragraph 31, and says that his said mechanic's lien has priority over the mortgages mentioned in Paragraphs 13, 15, 17, 18, 19 because said mortgages are not advance money mortgages, nor did they encumber said mortgaged lands prior to the commencement of the construction of the building thereon, nor did this defendant subrogate his said mechanic's lien to the lien of said mortgages; and, as to the mortgage mentioned in Paragraph 12, this defendant claims priority over said mortgage to so much thereof as has not been advanced thereon and paid to defendant, Capitol Construction Co., Inc.; and as to the mortgage mentioned in Paragraph 16 this defendant claims priority over said mortgage to so much thereof as has not been advanced thereon and applied by defendant, Capitol Construction Co., Inc., to the erection of said building.

WALTER C. ALBERTS,
Sol'r. for Defendant, Joseph Machetto.

Answer of Defendant, Alpheus S. Van Woeart.

(Filed March 24th, 1928.)

The Answer of Defendant, Alpheus S. Van Woeart.

This defendant, Alpheus S. Van Woeart, answering the bill of complaint, says that:

1. He has no knowledge or information sufficient to form a belief as to the statements of Paragraphs 1-39 inclusive and 41-53 inclusive.

2. He admits Paragraph 40, and says that his said mechanic's lien has priority over the mortgages mentioned in Paragraphs 13, 15, 17, 18, 19 because said mortgages are not advance money mortgages, nor did they encumber said mortgaged lands prior to the commencement of the construction of the building thereon, nor did this defendant subrogate his said mechanic's lien to the lien of said mortgages; and, as to the mortgage mentioned in Paragraph 12, this defendant claims priority over said mortgage to so much thereof as has not been advanced thereon and paid to defendant, Capitol Construction Co., Inc.; and as to the mortgage mentioned in Paragraph 16, this defendant claims priority over said mortgage to so much thereof as has not been advanced thereon and applied by defendant, Capitol Construction Co., Inc., to the erection of said building.

WALTER C. ALBERTS,
Sol'r. for Defendant, Alpheus S.
Van Woeart.

New Jersey State Library

Answer of Defendants, Michael Tozzi and Joseph Marcasiano.

(Filed March 24th, 1928.)

The Answer of Defendants, Michael Tozzi and Joseph Marcasiano, partners trading as M. Tozzi & J. Marcasiano.

These defendants, Michael Tozzi and Joseph Marcasiano, partners trading as M. Tozzi & J. Marcasiano, answering the bill of complaint, say that:

1. They have no knowledge or information sufficient to form a belief as to the statements of Paragraphs 1-40 inclusive and 42-53 inclusive.

2. They admit Paragraph 41, and say that their said mechanic's lien has priority over the mortgages mentioned in Paragraphs 13, 15, 17, 18, 19 because said mortgages are not advance money mortgages, nor did they encumber said mortgaged lands prior to the commencement of the construction of the building thereon, nor did these defendants subrogate their said mechanic's lien to the lien of said mortgages; and, as to the mortgage mentioned in Paragraph 12, these defendants claim priority over said mortgage to so much thereof as has not been advanced thereon and paid to defendant, Capitol Construction Co., Inc.; and as to the mortgage mentioned in Paragraph 16, these defendants claim priority over said mortgage to so much thereof as has not been advanced thereon and applied by defendant, Capitol Construction Co., Inc., to the erection of said building.

Walter C. Alberts,
Sol'r. for Deft. Michael Tozzi and Joseph Marcasiano, partners trading as M. Tozzi and J. Marcasiano.

Answer of Defendant, A. W. Booth and Brother.

(Filed March 24th, 1928.)

The answer of defendant, A. W. Booth & Bro., a corporation of New Jersey:

This defendant, A. W. Booth & Bro., a corporation, answering the bill of complaint, says that:

1. It has no knowledge or information sufficient to form a belief as to the statements of paragraphs 1-42 inclusive and 44-53 inclusive.

2. It admits paragraph 43, and says that its said mechanic's lien has priority over the mortgages mentioned in paragraphs 13, 15, 17, 18, 19 because said mortgages are not advance money mortgages, nor did they encumber said mortgaged lands prior to the commencement of the construction of the building thereon, nor did this defendant subrogate its said mechanic's lien to the lien of said mortgages; and, as to the mortgage mentioned in paragraph 12, this defendant claims priority over said mortgage to so much thereof as has not been advanced thereon and paid to defendant, Capitol Construction Co., Inc.; and as to the mortgage mentioned in paragraph 16, this defendant claims priority over said mortgage to so much thereof as has not been advanced thereon and applied by defendant, Capitol Construction Co., Inc., to the erection of said building.

WALTER C. ALBERTS,
Solicitor for Defendant,
A. W. Booth & Bro.,
a corporation.

Answer of Defendant, Edward P. Stout, Trustee.

(Filed as in time.)

The answer of defendant, Edward P. Stout, Trustee.

This defendant, Edward P. Stout, Trustee, answering the bill of complaint, says:

1. He admits paragraphs 1-8 inclusive and paragraphs 47-52 inclusive.

2. He admits paragraph 18, and says that there is due and owing on his said mortgage the sum of $7,500 with interest thereon from the date of said mortgage.

3. He has no knowledge or information sufficient to form a belief as to the encumbrances stated in the other paragraphs of the answer, nor as to the amount owing thereon, nor the order and priority of the subsequent encumbrances as stated in the bill of complaint herein.

This defendant, therefore, prays that this court may determine the amount owing on said subsequent encumbrances, and the order and priority thereof.

Edward P. Stout,
Solicitor for Defendant,
Edward P. Stout, Trustee.

Answer of Defendant, Arthur G. Teweles.

(Filed May 14th, 1928.)

The defendant, Arthur G. Teweles, answering the Bill of Complaint, says:

1. The defendant admits the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the bill of complaint.

2. Answering paragraphs #11, 12, 13, 14, 15, 16, 17, 18 and 19, this defendant admits the allegations therein with regard to the execution and recording of the mortgages as therein alleged, but in each instance denies that there was due, or that there is now due, the principal sum of said mortgages as is alleged; and this defendant further alleges that the said mortgages described in the said paragraphs just enumerated are subordinate to the mechanic's lien of this defendant.

3. The defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs #20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46 of the Bill of Complaint, but leaves the complainant to its proof.

4. The defendant admits paragraph 33, except that he denies that the interest in Arthur G. Teweles is subject to a lien of the complainant's mortgages.

5. The defendant admits the allegations of paragraphs #47, 48, 49 and 50.

6. The defendant has no knowledge or information sufficient to form a belief as to paragraphs #51 and 52.

Hershenstein & Finnerty,
Solicitors for Defendant, Arthur
G. Teweles.

Notice in Lieu of Answer of Defendants, Israel Shilowitz and Jacob Tucker.

(Duly Served.)
(Filed March 20th, 1928.)

To Gross & Gross, Solicitors of the Complainant:

Sirs:

TAKE NOTICE, that the defendants, Jacob Tucker and Israel Shilowitz, do not dispute the priority of the complainant's mortgage to their mortgage and give notice that they desire that their encumbrance be reported upon subject to the said priority.

Dated—March 15th, 1928.

Yours, &c.,

SECLOW & NESSANBAUM,
Solicitors of Defendants, Jacob Tucker and Israel Shilowitz.

Notice in Lieu of Answer of Defendant, Louis Schwartz.

(Duly Served.)
(Filed Apr. 3rd, 1928.)

PLEASE TAKE NOTICE that the defendant, Louis Schwartz, in lieu of his answer, hereby requests that his encumbrance be reported upon at the same time and place that the complainant's encumbrance is reported upon.

BENNY & CRUDEN,
Solicitors for Defendant, Louis Schwartz.

To

GROSS & GROSS,
Solrs. for Complt.,
#15 Exchange Place,
Jersey City, N. J.

Notice in Lieu of Answer of Defendant, The Trust Company of New Jersey.

(Duly Served.)
(Filed Apr. 24th, 1928.)

To Gross & Gross, Solicitors for Complainant:

TAKE NOTICE that the defendant, The Trust Company of New Jersey, a corporation of New Jersey, does not dispute the priority of the complainant's mortgage or the order and priority of the subsequent encumbrances as stated in the Bill of Complaint, and the said The Trust Company of New Jersey desires to have its encumbrances reported upon.

PERKINS & DREWEN,
Solicitors for Defendant,
The Trust Company of New Jersey.

Notice in Lieu of Answer of Defendant, A. S. Reid & Company.

(Filed Apr. 10th, 1928.)

To the Complainant, Riverside Apartment Corporation, a corporation of New Jersey:

A. S. Reid & Company, a corporation, one of the defendants in the above entitled cause, in which cause there are no infant defendants, hereby notifies you that it does not dispute the priority of the mortgage, but that it does dispute the order and priority of the subsequent encumbrance but hereby gives its consent to have the order and priority of its encumbrance reported and determined by the Master to whom this cause is referred.

LEAVITT, ULBRICH & TALLEY,
Solicitors of Defendant,
A. S. Reid & Company.

Notice in Lieu of Answer of Defendant, Royal Marble Works, Inc.

(Duly Served.)
(Filed March 27th, 1928.)

To Gross & Gross, Esqs.,
Solicitors of Complainant.

Royal Marble Works, Inc., a corporation, one of the defendants in the above entitled cause in which there are no infant defendants hereby notify you that it does not intend to dispute the priority of your mortgage, and that it desires to have its encumbrances reported upon.

Dated March 21st, 1928.

Isador Haber,
Solicitor for Defendant
Royal Marble Works, Inc.

Notice in Lieu of Answer of Defendant, Bayonne Supply Company.

(Duly Served.)
(Filed April 26th, 1928.)

To the Complainant Riverside Apartment Corporation, a corporation of New Jersey:

We, Bayonne Supply Company, a corporation of the State of New Jersey, one of the defendants in the above entitled cause in which there are no infants defendants who have been made a defendant as subsequent encumbrancer, hereby notify you that we do not dispute the priority of your mortgage, as stated in the bill of complaint herein, and that we desire to have encumbrance reported upon.

Bayonne Supply Company.

By G. E. Keenen.

Notice in Lieu of Answer of Defendant, Winchester & Muhlberg, Inc.

(Duly Served.)
(Filed April 3rd, 1928.)

To the Complainant RIVERSIDE APARTMENT CORPORATION, a corporation of the State of New Jersey, or their Solicitors:

We, Winchester & Muhlberg, Inc., a corporation of the State of New Jersey, one of the defendants in the above entitled cause, in which there are no infant defendants, who have been made a defendant as a subsequent encumbrance reported upon.

VICTOR SAMUEL,
Solicitor of the Defendant
Winchester & Muhlberg, Inc.,
a corporation of the State of
New Jersey.

Notice in Lieu of Answer of Defendant, John Nicaretta.

(Duly Served.)
(Filed April 3rd, 1928.)

To the Complainant RIVERSIDE APARTMENT CORPORATION, a corporation of the State of New Jersey, or their Solicitors:

I, John Nicaretta, one of the defendants in the above entitled cause, in which there are no infant defendants who have been made a defendant as a subsequent encumbrancer, hereby notify you that I desire to have my encumbrance reported upon.

VICTOR SAMUEL,
Solicitor of the Defendant
John Nicaretta.

Notice in Lieu of Answer of Defendant, Benjamin Parnis.

(Filed March 15th, 1928.)

To the Complainant, Riverside Apartment Corporation:

I, Benj. Parnis, one of the defendants in the above entitled cause in which cause there are no infant defendants, who have been made a defendant as a subsequent encumbrancer, hereby notify you that I do not dispute the priority of your mortgage or the order and priority of the subsequent encumbrances as stated in the bill of complaint herein, and that I desire to have my encumbrance reported on.

Stanley M. Tucker,
Solicitor of Defendant,
Benj. Parnis.

Notice in Lieu of Answer of Defendant, Harry Siegel and Isador Levin.

(Duly Served.)
(Filed April 3rd, 1928.)

To the Complainant Riverside Apartment Corporation, a corporation of the State of New Jersey, or their Solicitors:

We, Harry Siegel and Isador Levin, co-partners trading as Siegel and Levine, one of the defendants in the above entitled cause, in which there are no infant defendants who have been made a defendant as a subsequent encumbrancer, hereby notify you that we desire to have our encumbrance reported upon.

Victor Samuel,
Solicitor of the Defendants, Harry Siegel and Isador Levine co-partners trading as Siegel and Levine.

Notice in Lieu of Answer of Defendant, Abraham Shilling.

(Duly Served.)
(Filed March 30th, 1928.)

To the above named complainant, or its solicitors:

TAKE NOTICE that the defendant, Abraham Shilling wishes to have his encumbrance referred to in the bill of complaint upon the lands and premises described therein reported upon.

Respectfully yours,

A. A. MILNIKER,
Solicitor of Abraham Shilling.

Notice in Lieu of Answer of Defendant, Carteret Company.

(Duly Served.)
(Filed April 10th, 1928.)

To Gross & Gross, Solicitors of the Complainant:

TAKE NOTICE, that the defendant Carteret Company desires to have its mortgage claim reported upon by the Master or other officer to whom the above entitled matter may be referred.

JAS. E. PYLE,
Sol'r of Defendant, Carteret Company.

Answer of Defendant, Carteret Company.

(Filed July 10th, 1928.)

The defendant, Carteret Company, a corporation of New Jersey having its principal office in Jersey City in this State, answering the Bill of Complaint says that:

1. It admits the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 of the Bill of Complaint.

2. It admits the allegations of paragraph 11 of the Bill of Complaint except that there is $20,000 due upon said mortgage, as to which this defendant has no information sufficient to form a belief and therefore leaves the parties to proof thereof.

3. It admits the allegations of paragraph 12 of the Bill of Complaint and this defendant further says, that the consideration for said mortgage was moneys actually advanced by this defendant and applied to the erection of a new building then being erected upon the premises described in the Bill of Complaint or part thereof.

4. It admits the allegations of paragraphs 13 and 14 of the Bill of Complaint.

5. It admits the allegations of paragraph 15 of the Bill of Complaint but this defendant has no knowledge sufficient to form a belief as to the amount due upon said mortgage of the Junction Milling Co., and therefore leaves the parties to proof thereof; and furthermore that the said mortgage of the Junction Milling Co. was given in whole or in part to secure to said Junction Milling Co. the payment of moneys due or to become due to it for materials furnished or to be furnished by it in the erection of the building then being erected upon the premises described in the

Bill of Complaint, or a part thereof, by the said Junction Milling Co., filed in the Union County Clerk's office a mechanic's lien claim upon the premises covered by its said mortgage or some part thereof for moneys due it for the same debt or a part of the same debt secured by said mortgage viz.—for materials furnished by it in the erection of said building, thereby waiving and abandoning its rights under said mortgage to the extent of the moneys claimed under said lien claim, this defendant further says, that on October 18th, 1927, the said Junction Milling Co., a corporation of New Jersey, executed and delivered to the said Capitol Construction Co., Inc., a release in writing bearing date on that day and recorded in the Register's office of the County of Union in this State on October 24th, 1927, in Book 67 of Releases of Mortgaged Premises for said County on pages 180 etc., whereby and by which the said Junction Milling Co. released from the lien of its aforesaid mortgage, the following described premises:

ALL that certain lot, tract or parcel of land and premises situate, lying and being in the Township of Cranford, in the County of Union and State of New Jersey,

BEGINNING at a point in the Northeasterly side of Riverside Drive distant thereon Ninety-four and ninety eight hundredths (94.98) feet southeasterly from the corner formed by the intersection of the Northeasterly side of Riverside Drive with the southeasterly side of Prospect Avenue; thence running (1) North 37 degrees, 36 minutes east Three hundred seventy-one and ninety-three hundredths (371.93) feet; thence (2) South 42 degrees 24 minutes east One hundred and six (106) feet; thence (3) 47 degrees 36 minutes east, Thirteen and seventy-six hun-

dredths (13.76) feet; thence (4) South 42 degrees 24 minutes east, Eighty-five and ninety-eight hundredths (85.98) feet; thence (5) South 47 degrees 36 minutes West, One hundred Ninety-nine and sixty-five hundredths (199.65) feet; thence (6) South 22 degrees nine minutes west Ninety-six and fifty-seven hundredths (96.57) feet to the said side of Riverside Drive; thence (7) North 72 degrees 39 minutes west along said side of Riverside Drive, Ninety-one (91) feet to a point; and thence (8) Continuing Northwesterly along the Northeasterly side of Riverside Drive and its various courses, One hundred and fifty-seven (157) feet to the point or place of beginning.

6. As to the allegations of paragraphs 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, and 52, this defendant has no information sufficient to form a belief and therefore leaves the proper parties to make proof thereof.

JAS. E. PYLE,
Sol'r for Defendant, Carteret Company.

Notice in Lieu of Answer of Defendant, Junction Milling Company.

(Duly Served.)
(Filed May 15th, 1928.)

To Gross & Gross,
Solicitors for Complainant.

Gentlemen:

Please to take notice that Junction Milling Company desires to prove amount due on its mortgage, as the defendant in the above entitled matter and wishes to make proof thereof before the master or the court as the court may direct.

Respectfully yours,

Charles E. Hendricksen,
Solicitor for Junction Milling Co.

Order Admitting Junction Milling Company as Lien Claimant.

(Filed July 21st, 1928.)

It appearing that the Junction Milling Co., a corporation of the State of New Jersey, has filed a Mechanic's Lien on March 9th, 1928, against the mortgaged premises, and the summons and complaint in the said cause has been duly issued on the said date, and by reason of the filing of the Mechanic's Lien aforesaid and bringing of the suit thereon, the said Junction Milling Co., a corporation of the State of New Jersey, has acquired an interest in the premises after the filing of the Mechanic's Lien aforesaid and bringing of the suit thereon, the said Junction Milling Co., a cor-

poration of the State of New Jersey, has acquired an interest in the premises after the filing of the bill of complaint in this cause, and it appearing that the Solicitors for the complainant have consented to the making of this order,

It is thereupon on this 21st day of July, 1928, ORDERED, ADJUDGED and DECREED that the said Junction Milling Co., a corporation of the State of New Jersey, be and the same is hereby admitted as a party defendant to this suit, and that it have 15 days after the date hereof to file its answer or any other plea to the bill of complaint herein.

E. R. WALKER,
C.

We hereby consent to the making of the above order.

GROSS & GROSS,
Solicitors for Complainant.

Answer and Counterclaim of Defendant, Junction Milling Company, as Lien Claimant.

(Duly Served on Complainant.)
(Filed April 28th, 1928.)

The defendant, Junction Milling Co., a corporation of the State of New Jersey, by an order duly made by this court was admitted as a party defendant because it acquired an interest in the mortgaged premises after the filing of the bill of complaint, having its principal offices in the City of Jersey City, County of Hudson and State of

Answer and Counterclaim of Defendant, Junction Milling Company, as Lien Claimant.

New Jersey, answering the bill of complaint heretofore filed herein, says that:

1. It has not sufficient information or knowledge to form a belief as to the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7 and 8.

2. It admits paragraphs 9 and 10.

3. The allegations of paragraph 11 of the bill of complaint are admitted but this defendant denies that at the time of the execution of the mortgage in said paragraph 11 referred to there was due, or there is now due, the principal sum of said mortgage. This defendant further alleges that the said mortgage is subordinate to the lien claim held by this defendant.

4. The allegations of paragraph 12 of the bill of complaint are admitted but this defendant denies that at the time of the execution of the mortgage in said paragraph 12 referred to there was due, or there is now due, the principal sum of said mortgage; this defendant further alleges that the said mortgage is subordinate to the encumbrance held by this defendant.

5. The allegations of paragraph 13 of the bill of complaint are admitted but this defendant denies that at the time of the execution of the mortgage in said paragraph 13 referred to there was due, or there is now due, the principal sum of said mortgage; this defendant further alleges that the said mortgage is subordinate to the encumbrance held by this defendant.

6. The allegations of paragraph 14 of the bill of complaint are admitted but this defendant denies that at the time of the execution of the mort-

gage in said paragraph 14 referred to there was due, or there is now due, the principal sum of said mortgage; this defendant further alleges that the said mortgage is subordinate to the encumbrance held by this defendant.

7. The allegations of paragraph 16 of the bill of complaint are admitted but this defendant denies that at the time of the execution of the mortgage in said paragraph 16 referred to there was due, or there is now due, the principal sum of said mortgage; this defendant further alleges that the said mortgage is subordinate to the encumbrance held by this defendant.

8. The allegations of paragraph 17 of the bill of complaint are admitted but this defendant denies that at the time of the execution of the mortgage in said paragraph 17 referred to there was due, or there is now due, the principal sum of said mortgage; this defendant further alleges that the said mortgage is subordinate to the encumbrance held by this defendant.

9. The allegations of paragraph 18 of the bill of complaint are admitted but this defendant denies that at the time of the execution of the mortgage in said paragraph 18 referred to there was due, or there is now due, the principal sum of said mortgage; this defendant further alleges that the said mortgage is subordinate to the encumbrance held by this defendant.

10. The allegations of paragraph 19 of the bill of complaint are admitted but this defendant denies that at the time of the execution of the mortgage in said paragraph 19 referred to there was due, or there is now due, the principal sum of said

mortgage; this defendant further alleges that the said mortgage is subordinate to the encumbrance held by this defendant.

11. It has not sufficient information or knowledge to form a belief as to the allegations contained in paragraphs 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 of the bill of complaint and neither denies nor admits such allegations, but leaves the complainant or such other parties in this action as may desire to prove such allegations to make such proof thereof as may be lawfully required.

12. The allegations of paragraph 44 of the bill of complaint are admitted but this defendant alleges that the said judgment is subordinate to the encumbrance held by this defendant.

13. The allegations of paragraph 45 of the bill of complaint are admitted but this defendant alleges that the said judgment is subordinate to the encumbrance held by this defendant.

14. The allegations of paragraph 46 of the bill of complaint are admitted but this defendant alleges that the said judgment is subordinate to the encumbrance held by this defendant.

15. It has not sufficient information or knowledge to form a belief as to the allegations contained in paragraphs 47 and 48 of the bill of complaint, and neither denies nor admits such allegations, but leaves the complainant to make such proof thereof as may be lawfully required.

16. The allegations of paragraph 49 of the bill of complaint are admitted.

17. It has not sufficient information or knowledge to form a belief as to the allegations con-

tained in paragraphs 50, 51 and 52 of the bill of complaint, and neither denies nor admits such allegations, but leaves the complainant or such other parties in this action as may desire to prove such allegations to make such proof thereof as may be lawfully required.

18. By way of further answer this defendant says that on the 9th day of March, 1928, it filed in the Office of the Clerk of Union County a mechanic's lien claim against the Capitol Construction Co. Inc. a corporation of New Jersey, owner and builder, Ira H. Crouse and Benjamin Heyman, Receivers, Israel Shilowitz, Jacob Tucker, Louis Schwartz, Trust Company of New Jersey, Edward P. Stout, Trustee, Carteret Company, a corporation, West Bergen Trust Company, a corporation, Mortgagee wherein and whereby this defendant claims a lien upon the said mortgaged premises for the sum of $8625.00.

19. On the said date aforesaid, this defendant Junction Milling Co. a corporation of New Jersey, caused to be instituted in the Union County Circuit Court an action for the enforcement of the said lien claim, the defendants in the said action are the same as set forth in the lien claim mentioned in paragraph 18. The fact of the institution of said suit was at the time of the issuance of the summons and complaint in the aforesaid action, endorsed upon said lien claim pursuant to the statute of the State of New Jersey. This claimant contended and claimed in the said suit aforesaid that the lien claim held by it is prior and paramount to the liens held by the defendants therein named.

By way of counterclaim against the defendants, Capitol Construction Co. Inc., a corporation, Louis

Answer and Counterclaim of Defendant, Junction Milling Company, as Lien Claimant.

Schwartz, West Bergen Trust Company, a corporation, Israel Shilowitz, Jacob Tucker, Carteret Company, a corporation, The Trust Company of New Jersey, Edward P. Stout, Trustee, John P. Grady, Abraham Shilling, Cranford Trust Company, a corporation, and Ira R. Crouse and Benjamin Heyman, Receivers of Capitol Construction Co. Inc., a corporation, this defendant says that:

1. At all times between May 24, 1927, and November 19th, 1927, Capitol Construction Co., Inc., a corporation, was erecting upon the mortgaged premises a brick apartment house.

2. The allegations of paragraphs 18 and 19 of the within answer are repeated.

3. Subsequent to the date of the commencement of the construction of the aforesaid building the said Capitol Construction Co., Inc., a corporation of New Jersey, executed and delivered a mortgage embracing the premises described in paragraph 3 of the bill of complaint to the defendants Israel Shilowitz and Jacob Tucker, the said mortgage being in the principal sum of $20,000 dated July 29th, 1927, acknowledged July 29th, 1927, and recorded on August 2nd, 1927, in the Office of the Register of Union County in Book 878 of mortgages for said County at page 347, which said sum of $20,000 was not advanced to the defendant Capitol Construction Co., Inc., a corporation of New Jersey, and was not used in the erection and construction of the building on the mortgaged premises. This defendant's lien is entitled to priority over said mortgage.

4. Subsequent to the date of the commencement of the construction of the aforesaid build-

ing, the said Capitol Construction Co., Inc., a corporation of New Jersey, executed and delivered a mortgage embracing the premises described in paragraph 3 of the bill of complaint herein, to the defendant Carteret Company, a corporation, the said mortgage being in the principal sum of $35,000, dated October 14th, 1927, acknowledged October 27, 1927, and recorded on October 24, 1927, in the Office of the Register of Union County in Book 892 of mortgages for the said County at page 89, which said sum of $35,000 was not advanced to the defendant Capitol Construction Co., Inc., a corporation of New Jersey, and was not used in the erection and construction of the building aforesaid on the mortgaged premises. This defendant's lien is entitled to priority over said mortgage.

5. Subsequent to the date of the commencement of the construction of the aforesaid building, the said Capitol Construction Co., Inc., a corporation, executed and delivered a mortgage embracing the premises described in paragraph 3 of the bill of complaint herein to the defendant Louis Schwartz, the said mortgage being in the principal sum of $5,150.00 and recorded on August 25th, 1927, in the Office of the Register of Union County in Book 884 of Mortgages for the said County, at page 127, which said sum of $5,150 was not advanced to the defendant Capitol Construction Co., Inc., a corporation of New Jersey, and was not used in the erection and construction of the building aforesaid on the mortgaged premises. This defendant's lien is entitled to priority over said mortgage.

6. Subsequent to the date of the commencement of the construction of the aforesaid building, the

said Capitol Construction Co., Inc., a corporation, executed and delivered a mortgage embracing the premises described in paragraph 3 of the bill of complaint herein to the defendant West Bergen Trust Company, a corporation, the said mortgage being in the principal sum of $6,000.00 and recorded on October 26, 1927, in the Office of the Clerk of Union County in Liber 895 of Mortgages, page 38, which said sum of $6,000 was not advanced to the defendant Capitol Construction Co., Inc., a corporation, and was not used in the erection and construction of the building aforesaid on the mortgaged premises. This defendant's lien is entitled to priority over said mortgage.

7. Subsequent to the date of the commencement of the construction of the aforesaid building, the said Capitol Construction Co., Inc., a corporation, executed and delivered a mortgage embracing the premises described in paragraph 3 of the bill of complaint herein to Edward P. Stout, Trustee, the said mortgage being in the principal sum of $7,500 recorded on November 12th, 1927, in the Office of the Register of Union County in Book 891 of mortgages for said County, page 194, which said sum of $7,500 was not advanced to the defendant Capitol Construction Co., Inc., a corporation, and was not used in the erection and construction of the building erected upon the mortgaged premises. This defendant's lien is entitled to priority over said mortgage.

8. Subsequent to the date of the commencement of the construction of the aforesaid building, the said Capitol Construction Co., Inc., a corporation, executed and delivered a mortgage embracing the premises described in paragraph 3

of the bill of complaint herein to the defendant Trust Company of New Jersey, the said mortgage being in the principal sum of $16,000 and recorded on December 1, 1927, in the Office of the Register of Union County in Book 898 of Mortgages for said County, page 306, which said sum of $16,000 was not advanced to the defendant Capitol Construction Co., a corporation of New Jersey, and was not used in the erection and construction of the building erected upon the mortgaged premises. This defendant's lien is entitled to priority over said mortgage.

9. The allegations of paragraph 44 of the bill of complaint are repeated. This defendant's encumbrance is entitled to priority over said judgment.

10. The allegations of paragraph 45 of the bill of complaint are repeated. This defendant's encumbrance is entitled to priority over said judgment.

11. The allegations of paragraph 46 of the bill of complaint are repeated. This defendant's encumbrance is entitled to priority over said judgment.

12. The allegations of paragraph 49 of the complaint are repeated.

The defendant Junction Milling Co., a corporation of New Jersey, therefore prays:

1. That the defendants Capitol Construction Co., Inc., a corporation of New Jersey, Israel Shilowitz, Jacob Tucker, Louis Schwartz, West Bergen Trust Co., Carteret Company, a corporation, Trust Company of New Jersey, Edward P. Stout, Trustee, John P. Grady, Abraham Shilling,

Answer and Counterclaim of Defendant, Junction Milling Company, as Lien Claimant.

Cranford Trust Company, a corporation, Ira R. Crouse and Benjamin Heyman, Receivers of Capitol Construction Co., Inc., a corporation of New Jersey, may answer the allegations of this counter-claim and each statement therein made, without oath.

2. That the defendants to this counter-claim or one or more of them may be decreed to pay to this defendant Junction Milling Co., a corporation of New Jersey, the amount due to it on its lien claim.

3. That an account may be taken of the amount due to this defendant on its lien claim as aforesaid.

4. That the lien of this defendant by reason of having furnished materials and having filed its lien claim and instituting suit thereon as aforesaid may be decreed to be prior and paramount to the respective liens, and interest of the defendants to this counterclaim out of the sums to be realized of the sale of the mortgaged premises.

5. That this defendant Junction Milling Co., a corporation, may have such further and other relief as may be just and equitable in the premises.

CHAS. RUBENSTEIN,
Solicitor for and of Counsel with
Junction Milling Co., a Corporation of New Jersey.

Answer and Counterclaim of Defendants, Max Platt, McCabe Bros. Co. and Mowre Lager.

(Duly Served on Complainant.)
(Filed April 21st, 1928.)

The defendants, Max Platt, McCabe Bros. Co., a corporation of New Jersey, and Mowre Lager, of the City of Bayonne, County of Hudson and State of New Jersey, answering the bill of complaint herein, say that:

1. They have no sufficient information or knowledge to form a belief as to the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7 and 8.

2. They admit paragraphs 9 and 10.

3. The allegations of paragraph 11 of the bill of complaint are admitted but these defendants deny that at the time of the execution of the mortgage in said paragraph 11 referred to there was due, or there is now due, the principal sum of said mortgage; these defendants further allege that the said mortgage is subordinate to the encumbrances held by these defendants.

4. The allegations of paragraph 12 of the bill of complaint are admitted but these defendants deny that at the time of the execution of the mortgage in said paragraph 12 referred to there was due, or there is now due, the principal sum of said mortgage; these defendants further allege that the said mortgage is subordinate to the encumbrances held by these defendants.

5. The allegations of paragraph 13 of the bill of complaint are admitted but these defendants deny that at the time of the execution of the mortgage in said paragraph 13 referred to there was due, or there is now due, the principal sum of said mortgage; these defendants further allege

that the said mortgage is subordinate to the encumbrances held by these defendants.

6. The allegations of paragraph 14 of the bill of complaint are admitted but these defendants deny that at the time of the execution of the mortgage in said paragraph 14 referred to there was due, or there is now due, the principal sum of said mortgage; these defendants further allege that the said mortgage is subordinate to the encumbrances held by these defendants.

7. The allegations of paragraph 15 of the bill of complaint are admitted but these defendants deny that at the time of the execution of the mortgage in said paragraph 15 referred to there was due, or there is now due, the principal sum of said mortgage; these defendants further allege that the said mortgage is subordinate to the encumbrances held by these defendants.

8. The allegations of paragraph 16 of the bill of complaint are admitted but these defendants deny that at the time of the execution of the mortgage in said paragraph 16 referred to there was due, or there is now due, the principal sum of said mortgage; these defendants further allege that the said mortgage is subordinate to the encumbrances held by these defendants.

9. The allegations of paragraph 17 of the bill of complaint are admitted but these defendants deny that at the time of the execution of the mortgage in said paragraph 17 referred to there was due, or there is now due, the principal sum of said mortgage; these defendants further allege that the said mortgage is subordinate to the encumbrances held by these defendants.

10. The allegations of paragraph 18 of the bill of complaint are admitted but these defendants deny that at the time of the execution of the mortgage in said paragraph 18 referred to there was due, or there is now due, the principal sum of said mortgage; these defendants further allege that the said mortgage is subordinate to the encumbrances held by these defendants.

11. The allegations of paragraph 19 of the bill of complaint are admitted but these defendants deny that at the time of the mortgage in said paragraph 19 referred to there was due, or there is now due, the principal sum of said mortgage; these defendants further allege that the said mortgage is subordinate to the encumbrances held by these defendants.

12. They have not sufficient information or knowledge to form a belief as to the allegations contained in paragraphs 20, 21, 22, 23, 24 and 25, and neither admit such allegations but leave the complainant, or such other parties in this action as may desire to prove such allegations, to make such proof thereof as may be lawfully required.

13. The allegations of paragraphs 26 and 27 of the complaint are admitted.

14. They have not sufficient information or knowledge to form a belief as to the allegations contained in paragraph 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40 and 41 of the bill of complaint, and neither deny or admit such allegations, but leave the complainant or such other parties in this action as may desire to prove such allegations, to make such proof thereof as may be lawfully required.

Answer and Counterclaim of Defendants, Max Platt, McCabe Bros. Co. and Mowre Lager.

15. The allegations of paragraph 42 of the bill of complaint are admitted.

16. They have not sufficient information or knowledge to form a belief as to the allegations contained in paragraph 43 of the bill of complaint and neither deny nor admit such allegations, but leave the complainant or such other parties in this action as may desire to proof such allegations to make such proof thereof as may be lawfully required.

17. The allegations of paragraph 44 of the bill of complaint are admitted but these defendants allege that the said judgment is subordinate to the encumbrances held by these defendants.

18. The allegations of paragraph 45 of the bill of complaint are admitted but these defendants allege that the said judgment is subordinate to the encumbrances held by these defendants.

19. The allegations of paragraph 46 of the bill of complaint are admitted but these defendants allege that the said judgment is subordinate to the encumbrances held by these defendants.

20. They have not sufficient information or knowledge to form a belief as to the allegations contained in paragraphs 47 and 48 of the bill of complaint and neither deny or admit such allegations, but leave the complaint to make such proof thereof as may be lawfully required.

21. The allegations of paragraph 49 of the bill of complaint are admitted.

22. They have not sufficient information or knowledge to form a belief as to the allegations contained in paragraphs 50, 51 and 52 of the bill of complaint and neither deny or admit such al-

legations, but leave the complaint or such other parties in this action as may desire to prove such allegations, to make such proof thereof as may be lawfully required.

By way of counterclaim against the defendants, Capitol Construction Co., Inc., a corporation, Louis Schwartz, Junction Milling Co., a corporation, West Bergen Trust Company, a corporation, Israel Shilowitz, Jacob Tucker, Carteret Company, a corporation, The Trust Company of New Jersey, Edward P. Stout, trustee, John P. Grady, Abraham Shilling, Cranford Trust Company, a corporation, and Ira R. Crouse and Benjamin Heyman, Receivers of Capitol Construction Co., Inc., a corporation, these defendants say that:

1. On January 3rd, 1928, the defendant Max Platt, filed in the Office of the Clerk of Union County a Mechanic's Lien claim against the said Capitol Construction Co., Inc., wherein and whereby the said Max Platt claims a lien upon the said mortgaged lands and the building erected thereon for the sum of $3,950.00.

2. On January 3rd, 1928, the defendant McCabe Bros. Co., a corporation of N. J., filed in the Office of the Clerk of Union County a Mechanic's Lien claim against the said Capitol Construction Co., Inc., wherein and whereby the said McCabe Bros. Co. claims a lien upon the said mortgaged lands and the building erected thereon for the sum of $1,950.00.

3. On February 21st, 1928, the defendant Mowre Lager, filed in the Office of the Clerk of Union County a Mechanic's Lien claim against the said Capitol Construction Co., Inc., wherein and whereby the said Mowre Lager claims a lien

upon the said mortgaged lands and the building erected thereon for the sum of $5,500.00.

4. On February 20th, 1928, the defendants Max Platt, McCabe Bros. Co., a corporation of New Jersey, caused to be instituted in the Union County Circuit Court an action for the enforcement of the said lien claim. The defendants in the said action are Capitol Construction Co., Inc., a corporation, Ira R. Crouse and Benjamin Heyman, Receivers, Louis Schwartz, Israel Shilowitz, Jacob Tucker, Junction Milling Co., a corporation, Trust Company of New Jersey, Edward P. Stout, Trustee, Carteret Company, a corporation, and West Bergen Trust Company, Mortgagees. The fact of the institution of said suits were, at the time of the issuance of the summons and complaint in the aforesaid actions, endorsed upon said lien claim, pursuant to the statutes of the State of New Jersey.

5. On February 21st, 1928, the defendant Mowre Lager, caused to be instituted in the Union County Circuit Court an action for the enforcement of the said lien claim. The defendants in the said action are Capitol Construction Co., Inc., a corporation, Ira R. Crouse and Benjamin Heyman, Receivers, Louis Schwartz, Israel Shilowitz, Jacob Tucker, Junction Milling Co., a corporation, Trust Company of New Jersey, Edward P. Stout, Trustee, Carteret Company, a corporation, and West Bergen Trust Company, Mortgagees. The fact of the institution of said suit was at the time of the issuance of the summons and complaint in the aforesaid action, endorsed upon said lien claim pursuant to the statutes of the State of New Jersey.

6. Subsequent to the date of the commencement of the construction of the aforesaid building, said Capitol Construction Co., Inc., a corporation, executed and delivered a mortgage, embracing the premises described in paragraph 3 of the bill of complaint, to the defendants, Israel Shilowitz and Jacob Tucker, said mortgage being in the principal sum of $20,000.00, dated July 29th, 1927, acknowledged July 29th, 1927, and recorded on August 2, 1927, in the office of the Register of Union County, in Book 878 of Mortgages for said County, at page 347, which said sum of $20,000.00 was not advanced to the defendant Capitol Construction Co., Inc., a corporation of the State of New Jersey. These defendants' liens are entitled to priority of said mortgage.

7. Subsequent to the date of the commencement of the construction of the aforesaid building, said Capitol Construction Co., Inc., a corporation, executed and delivered a mortgage, embracing the premises described in paragraph 3 of the bill of complaint herein, to the defendant, Carteret Company, a corporation, said mortgage being in the principal sum of $35,000.00, dated October 14th, 1927, acknowledged October 22, 1927, and recorded on October 24, 1927, in the Office of the Register of Union County, in Book 892 of Mortgages for said County, at page 89, which said sum of $35,000.00 was not advanced to the defendant Capitol Construction Co., Inc., a corporation of the State of New Jersey. These defendants' liens are entitled to priority of said mortgage.

8. Subsequent to the date of the commencement of the construction of the aforesaid building, the said Capitol Construction Co., Inc., a corpo-

ration, executed and delivered a mortgage embracing the premises described in paragraph 3 of the bill of complaint herein, to the defendant Louis Schwartz, the said mortgage being in the principal sum of $5,150.00, and recorded on August 25th, 1927, in the Office of the Register of Union County in Book 884 of mortgages for the said County, at page 127. These defendants' liens are entitled to priority of said mortgage.

9. Subsequent to the date of the commencement of the construction of the aforesaid building, the said Capitol Construction Co., Inc., a corporation, executed and delivered a mortgage embracing the premises described in paragraph 3 of the bill of complaint herein, to the defendant Junction Milling Co., a corporation, the said mortgage being in the principal sum of $11,619.34, and recorded on October 6th, 1927, in the Office of the Register of Union County in Book 886 of Mortgages, page 390. These defendants' liens are entitled to priority of said mortgage.

10. Subsequent to the date of the commencement of the construction of the aforesaid building, the said Capitol Construction Co., Inc., a corporation, executed and delivered a mortgage embracing the premises described in paragraph 3 of the bill of complaint herein to the defendant West Bergen Trust Company, a corporation, the said mortgage being in the principal sum of $6,000.00, and recorded on October 26, 1927, in the Office of Union County in Book 895 of Mortgages, page 38. These defendants' liens are entitled to priority of said mortgage.

11. Subsequent to the date of the commencement of the construction of the aforesaid build-

ing, the said Capitol Construction Co., Inc., a corporation, executed and delivered a mortgage embracing the premises described in paragraph 3 of the bill of complaint herein, to the defendant Edward P. Stout, Trustee, said mortgage being in the principal sum of $7,500.00, and recorded on November 12th, 1927, in the Office of the Register of Union County in Book 891 of Mortgages, page 194. These defendants' liens are entitled to priority of said mortgage.

12. Subsequent to the date of the commencement of the construction of the aforesaid building, the said Capitol Construction Co., Inc., a corporation, executed and delivered a mortgage embracing the premises described in paragraph 3 of the bill of complaint herein, to the defendant The Trust Company of New Jersey, said mortgage being in the principal sum of $16,000.00, and recorded on December 1, 1927, in the Office of the Register of Union County in Book 898 of Mortgages, page 306. These defendants' liens are entitled to priority of said mortgage.

13. The allegations of paragraph 44 of the bill of complaint are repeated. These defendants' encumbrances are entitled to priority over said judgment.

14. The allegations of paragraph 45 of the complaint are repeated. These defendants' encumbrances are entitled to priority over said judgment.

15. The allegations of paragraph 46 of the complaint are repeated. These defendants' encumbrances are entitled to priority over said judgment.

Answer and Counterclaim of Defendants, Max Platt, McCabe Bros. Co. and Mowre Lager.

16. The allegations of paragraph 49 of the complaint are repeated.

The defendants therefore pray:

1. That the defendants, Capitol Construction Co., Inc., a corporation, Louis Schwartz, Israel Shilowitz, Jacob Tucker, Junction Milling Co., a corporation, West Bergen Trust Co., Carteret Company, a corporation, Trust Company of New Jersey, Edward P. Stout, Trustee, John P. Grady, Abraham Shilling, Cranford Trust Company, a corporation, Ira R. Crouse and Benjamin Heyman, Receivers of Capitol Construction Co., Inc., a corporation of New Jersey, may answer the allegations of this counterclaim and each statement therein made.

2. That the defendants to this counterclaim, or one or more of them, may be decreed to pay to these defendants the amount due to this defendant on their lien claims.

3. That it be decreed that the amount due to these defendants on their lien claims is entitled to priority of payment, over the mortgages and judgments in respect to which priority is claimed, out of the sums to be realized from the sale of the mortgaged premises.

4. That these defendants may have such further and other relief as may be just and equitable in the premises.

CHAS. RUBENSTEIN,
Solicitor for and of counsel with Max Platt, McCabe Bros. Co., a corporation and Mowre Lager, defendants.

Answer and Counterclaim of Defendants, Geo. F. Perry & Sons, Inc.

(Duly Served.)
(Filed April 5th, 1928.)

The defendant, Geo. F. Perry & Sons, Inc., a corporation, having its principal office in the City of Newark, County of Essex and State of New Jersey, answering the bill of complaint herein, says that:

1. The allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the bill of complaint herein are admitted.

2. The allegations of paragraph 11 of the bill of complaint are admitted but this defendant denies that at the time of the execution of the mortgage, in said paragraph 11 referred to, there was due, or there is now due, the principal sum of said mortgage; this defendant further alleges that said mortgage is subordinate to the encumbrances held by this defendant.

3. The allegations of paragraph 12 of the bill of complaint are admitted but this defendant denies that at the time of the execution of the mortgage, in said paragraph 12 referred to, there was due, or there is now due, the principal sum of said mortgage; this defendant further alleges that said mortgage is subordinate to the encumbrances held by this defendant.

4. The allegations of paragraph 13 of the bill of complaint are admitted but this defendant denies that at the time of the execution of the mortgage, in said paragraph 13 referred to, there was due, or there is now due, the principal sum of said mortgage; this defendant further alleges that

said mortgage is subordinate to the encumbrances held by this defendant.

5. The allegations of paragraph 14 of the bill of complaint are admitted.

6. The allegations of paragraph 15 of the bill of complaint are admited but this defendant denies that at the time of the execution of the mortgage, in said paragraph 15 referred to, there was due, or there is now due, the principal sum of said mortgage; this defendant further alleges that said mortgage is subordinate to the encumbrances held by this defendant.

7. The allegations of paragraph 16 of the bill of complaint are admitted but this defendant denies that at the time of the execution of the mortgage, in said paragraph 16 referred to, there was due, or there is now due, the principal sum of said mortgage; this defendant further alleges that said mortgage is subordinate to the encumbrances held by this defendant.

8. The allegations of paragraph 17 of the bill of complaint are admitted but this defendant denies that at the time of the execution of the mortgage, in said paragraph 17 referred to, there was due, or there is now due, the principal sum of said mortgage; this defendant further alleges that said mortgage is subordinate to the encumbrances held by this defendant.

9. The allegations of paragraph 18 of the bill of complaint are admitted but this defendant denies that at the time of the execution of the mortgage, in said paragraph 18 referred to, there was due, or there is now due, the principal sum of said mortgage; this defendant further alleges that

said mortgage is subordinate to the encumbrances held by this defendant.

10. The allegations of paragraph 19 of the bill of complaint are admitted but this defendant denies that at the time of the execution of the mortgage, in said paragraph 19 referred to, there was due, or there is now due, the principal sum of said mortgage; this defendant further alleges that said mortgage is subordinate to the encumbrances held by this defendant.

11. The allegations of paragraph 20 of the bill of complaint are admitted.

12. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraphs 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42 and 43 of the bill of complaint and neither denies nor admits such allegations but leaves the complainant, or such other parties in this action as may desire to prove such allegations, to make such proof thereof as may be lawfully required.

13. The allegations of paragraph 44 of the bill of complaint are admitted, but this defendant alleges that said judgment is subordinate to the encumbrances held by this defendant.

14. The allegations of paragraph 45 of the bill of complaint are admitted, but this defendant alleges that said judgment is subordinate to the encumbrances held by this defendant.

15. The allegations of paragraph 46 of the bill of complaint are admitted, but this defendant alleges that said judgment is subordinate to the encumbrances held by this defendant.

16. The allegations of paragraphs 47, 48, 49, 50, 51 and 52 of the bill of complaint are admitted.

By way of counterclaim against the defendants, Capitol Construction Co., Inc., a corporation, Louis Schwartz, Junction Milling Co., a corporation, West Bergen Trust Company, a corporation, Israel Shilowitz, Jacob Tucker, Carteret Company, a corporation, The Trust Company of New Jersey, a corporation, John P. Grady, Abraham Shilling, Cranford Trust Company, a corporation, and Ira R. Crouse and Benjamin Heyman, Receivers of Capitol Construction Co., Inc., a corporation, this defendant says that:

17. At all times between May 24th, 1927, and July 14th, 1927, Capitol Construction Co., Inc., a corporation, was the owner of the tract of land described in paragraph 3 of the bill of complaint.

18. During said time, said Capitol Construction Co., Inc., a corporation, became indebted to the plaintiff in the sum of $5,792.25 for materials sold and delivered to said Capitol Construction Co., Inc., a corporation, between May 24th, 1927, and July 14th, 1927, both dates inclusive, the said last mentioned date being the date of the last materials furnished by this defendant.

19. Upon the premises referred to in paragraph 17 hereof, said Capitol Construction Co., Inc., a corporation, erected, or caused to be erected, an apartment house, with its appurtenances, the construction of which buildings was commenced prior to May 24th, 1927.

20. The materials, referred to in paragraph 18 hereof, were furnished to and for, and in and about, the erection and construction of the structures referred to in paragraph 19 hereof.

21. On November 12th, 1927, at 8:20 A. M. this defendant caused to be filed, pursuant to the statutes of New Jersey, in the office of the Clerk of Union County, its mechanic's lien claim, referred to in paragraph 20 of the bill of complaint. Said lien claim was recorded in book 8 of Mechanic's Lien claims for Union County, at page 261.

22. On November 12th, 1927, this defendant (as the plaintiff) caused to be instituted in the Union County Circuit Court, an action, for the enforcement of the aforesaid lien claim; the defendants in said action are Capitol Construction Co., Inc., a corporation, builder and owner, Standard Building Block Company, a corporation, Aetna Realty Company, a corporation, Riverside Apartment Corporation, a corporation, Israel Shilowitz and Jacob Tucker, Louis Schwartz, Junction Milling Co., a corporation, Carteret Company, a corporation, West Bergen Trust Company, a corporation, and The Trust Company of New Jersey, a corporation, mortgagees. The fact of the institution of said suit was, at the time of the issuance of the summons and complaint in the aforesaid action, endorsed upon said lien claim, pursuant to the statutes of the State of New Jersey.

23. Such proceedings were thereupon had in said action, referred to in paragraph 22 hereof, so that this defendant on January 13th, 1928, recovered a judgment therein for the sum of $5,965 damages and $63.37 costs of suit, no part of which judgment has been satisfied; in part, said action is still undetermined. A copy of said judgment, marked Exhibit A, is hereunto annexed, and expressly made a part hereof.

24. Subsequent to the date of the commencement of the construction of the aforesaid building, said Capitol Construction Co., Inc., a corporation, executed and delivered a mortgage, embracing the premises described in paragraph 3 of the bill of complaint, to the defendants, Israel Shilowitz and Jacob Tucker, said mortgage being in the principal sum of $20,000, dated July 29, 1927, acknowledged July 29, 1927, and recorded on August 2, 1927, in the office of the Register of Union County, in book 878 of Mortgages for said County, at page 347. Plaintiff's lien is entitled to priority over said mortgage.

25. Subsequent to the date of the commencement of the construction of the aforesaid building, said Capitol Construction Co., Inc., a corporation, executed and delivered a mortgage, embracing the premises described in paragraph 3 of the bill of complaint herein, to the defendant, Carteret Company, a corporation, said mortgage being in the principal sum of $35,000, dated October 14, 1927, acknowledged October 22, 1927, and recorded on October 24, 1927, in the office of the Register of Union County, in book 892 of Mortgages for said County, at page 89. Plaintiff's lien is entitled to priority over said mortgage.

26. Subsequent to the date of the commencement of the construction of the aforesaid building, said Capitol Construction Co., Inc., a corporation, executed and delivered a mortgage, embracing the premises described in paragraph 3 of the bill of complaint herein, to the defendant, The Trust Company of New Jersey, a corporation, said mortgage being in the principal sum of $16,000, dated October 28, 1927, acknowledged October 28,

1927, and recorded on November 9, 1927, in the office of the Register of Union County. Plaintiff's lien is entitled to priority over said mortgage.

27. Subsequent to the filing of the lien claim, referred to in paragraph 21 hereof, the mortgage, referred to in paragraph 18 of the bill of complaint, was recorded. This defendant's encumbrances are entitled to priority over said mortgage.

28. The allegations of paragraph 44 of the bill of complaint are repeated. This defendant's encumbrances are entitled to priority over said judgment.

29. The allegations of paragraph 45 of the bill of complaint are repeated. This defendant's encumbrances are entitled to priority over said judgment.

30. The allegations of paragraph 46 of the bill of complaint are repeated. This defendant's encumbrances are entitled to priority over said judgment.

31. The allegations of paragraph 49 of the bill of complaint are hereby repeated.

This defendant therefore prays:

A. That the defendants, Capitol Construction Co., Inc., a corporation, Louis Schwartz, Junction Milling Co., a corporation, West Bergen Trust Company, a corporation, Israel Shilowitz, Jacob Tucker, Carteret Company, a corporation, The Trust Company of New Jersey, a corporation, John P. Grady, Abraham Shilling, Cranford Trust Company, a corporation, and Ira R. Crouse and

Benjamin Heyman, receivers of Capitol Construction Co., Inc., a corporation, may answer the allegations of this counterclaim and each statement therein made.

B. That the defendants to this counterclaim, or one or more of them, may be decreed to pay to this defendant the amount due to this defendant on its lien claim and judgment.

C. That it be decreed that the amount due to this defendant on its lien claim and judgment is entitled to priority of payment, over the mortgages and judgments in respect to which priority is claimed, out of the sums to be realized from the sale of the mortgaged premises.

D. That this defendant may have such further and other relief as may be just and equitable in the premises.

KANTER & KANTER,
Solicitors for and of counsel with defendant, Geo. F. Perry & Sons, Inc., a corporation.

"Exhibit A".

UNION COUNTY CIRCUIT COURT.

GEO. F. PERRY & SONS, INC., a corporation, Plaintiff, *vs.* CAPITOL CONSTRUCTION CO. INC., a corporation, *et als.*, Defendants.	Action at Law. Final Judgment vs. Capitol Contruction Co., Inc., a corporation, Louis Schwartz, Junction Milling Co., a corporation, and West Bergen Trust Company, a corporation.

The summons and complaint in this cause having been duly served upon the defendants, Capitol Construction Co., Inc., a corporation, Louis Schwartz, Junction Milling Co., a corporation, and West Bergen Trust Company, a corporation, and interlocutory judgment having heretofore been entered in favor of the plaintiff, Geo. F. Perry & Sons, Inc., a corporation, and against the aforesaid defendants, last named, and the Clerk of this Court having assessed the damages of the plaintiff, Geo. F. Perry & Sons, Inc., a corporation, against the defendant, Capitol Construction Co. Inc., a corporation, at the sum of Five Thousand Nine Hundred and Sixty Five Dollars ($5,965);

It is thereupon, on this thirteenth day of January, A. D. 1928, ORDERED and ADJUDGED that judgment final shall be, and hereby is, entered in favor of the plaintiff, Geo. F. Perry & Sons, Inc., a corporation, generally against the defendant, Capitol Construction Co., Inc., a corporation, for the sum of Five Thousand Nine Hundred and Sixty Five Dollars ($5,965), with costs of suit to be taxed,

specially to be made of the land and building (described in the complaint and the lien claim whereon this action is founded) situate lying and being in the Township of Cranford, County of Union and State of New Jersey, which may be described as follows:—

BEGINNING at a point formed by the intersection of the northeasterly side of Riverside Drive with the southeasterly side of Prospect Avenue; thence north forty seven degrees thirty six minutes east along said side of Prospect Avenue three hundred and fifty eight feet and thirty hundredths of a foot to a point; thence south forty two degrees twenty four minutes east two hundred feet to a point; thence north forty seven degrees thirty six minutes east thirteen feet and seventy six hundredths of a foot to a point; thence south forty two degrees twenty four minutes east one hundred and ninety five feet and ninety eight hundredths of a foot to the southwesterly side of Union Avenue; thence south forty nine degrees sixteen minutes west eighty seven feet and ninety seven hundredths of a foot along said side of Union Avenue to a point; thence still along said side of Union Avenue south forty one degrees and fifty one minutes west one hundred and fifty two feet and thirty four hundredths of a foot to said side of Riverside Drive; thence northwesterly along said side of Riverside Drive, its various courses, four hundred and forty three feet, more or less to the point or place of BEGINNING. The foregoing description is according to survey made by J. L. Bauer, Civil Engineer and Surveyor, Elizabeth, N. J., June 1911.

It is further ORDERED and ADJUDGED that the lien claim of said plaintiff, and the lien of this judgment, are prior and paramount to the lien of the

mortgage dated August 22nd, 1927, acknowledged August 22nd, 1927, and recorded on August 25th, 1927, in the office of the Register of Union County in book 884 of Mortgages for said County, at page 127, made or given by said Capitol Construction Co. Inc., a corporation, to the defendant, Louis Schwartz.

It is further ORDERED and ADJUDGED that the lien claim of said plaintiff, and the lien of this judgment, are prior and paramount to the lien of the mortgage dated September 16th, 1927, acknowledged September 26th, 1927, and recorded on October 6th, 1927, in the office of the Register of Union County in book 886 of Mortgages for said County, at page 390, made or given by said Capitol Construction Co. Inc., a corporation, to the defendant, Junction Milling Co., a corporation.

It is further ORDERED and ADJUDGED that the lien claim of said plaintiff, and the lien of this judgment, are prior and paramount to the lien of the mortgage dated October 25th, 1927, acknowledged October 25th, 1927, and recorded on October 26th, 1927, in the office of the Register of Union County in book 895 of Mortgages for said County, at page 38, made or given by said Capitol Construction Co. Inc., a corporation, to the defendant, West Bergen Trust Company, a corporation.

It is further ORDERED and ADJUDGED that the determination of the matters in issue in this action as to the defendants, Standard Building Block Company, a corporation, Aetna Realty Company, a corporation, Riverside Apartment Corporation, a corporation, Israel Shilowitz, Jacob Tucker, Carteret Company, a corporation, and The Trust Company of New Jersey, a corporation, and as to the mortgages held by said defendants respectively, and as to the priority thereof with respect

to the lien of the plaintiff, shall be, and hereby is, reserved for further proceedings herein.

PETER F. DALY

Rule actually entered
January 13th, 1928.

On Motion of

KANTER & KANTER
Attorneys of Plaintiff.

Answer of West Bergen Trust Company to Counterclaim of Geo. F. Perry & Sons, Inc.

(Duly Filed April 24th, 1928.)

The answer of defendant, West Bergen Trust Company, a corporation of the State of New Jersey, to counterclaim of defendant, Geo. F. Perry & Sons, Inc.:

This defendant, West Bergen Trust Company, answering the counterclaim of defendant, Geo. F. Perry & Sons, Inc., says that:

1. It admits paragraph 19.

2. It has no knowledge or information sufficient to form a belief as to the other statements of said counterclaim, except as to the defendant, West Bergen Trust Company; and, as to said defendant, West Bergen Trust Company, it says that its mortgage has priority over the lien claim of said defendant, Geo. F. Perry & Sons, Inc., because the money due or to grow due on this defendant's mortgage was actually advanced and paid by this defendant to defendant, Capitol Construction Co., Inc., and applied by it to the erection of said

building on the mortgaged premises; and this defendant's said mortgage was recorded before the filing of said lien claim; and this defendant's said mortgage has priority over the mortgages of the defendants, Louis Schwartz, Junction Milling Company, and the Trust Company of New Jersey, and over the judgments of John P. Grady, Abraham Shilling, and the Cranford Trust Company, because said mortgages are not advance-money mortgages nor did said mortgages or said judgments encumber said mortgaged premises prior to the commencement of the construction of said building; and, as to the mortgage of defendant, Carteret Company, this defendant claims priority over said mortgage to so much thereof as has not been advanced thereon and paid to said defendant, Capitol Construction Co., Inc.

EDWARD P. STOUT,
Solicitor for Defendant, West
Bergen Trust Company.

Answer of Israel Shilowitz and Jacob Tucker to Counterclaim of Geo. F. Perry & Sons, Inc.

(Duly filed April 11th, 1928.)

The defendants, Israel Shilowitz and Jacob Tucker in reply to the answer of the defendant, Geo. F. Perry & Sons Inc. join issue thereon.

By way of answer to the counterclaim they say that:

1. Paragraphs 17 to 20 both inclusive of the counterclaim are denied.

2. Not having sufficient knowledge as to the allegations of paragraphs 21, 22, 23, 25, 26, 27, 28, 29, 30 and 31 of the counterclaim they leave the defendant Geo. F. Perry & Sons Inc. to its proof.

3. The allegations of paragraph 24 of the counterclaim that the lien of the defendant, Geo. F. Perry Sons Inc. is entitled to priority over the mortgage of these defendants is denied.

4. The mortgage of these defendants, Israel Shilowitz and Jacob Tucker, mentioned in the bill of complaint is prior and paramount to the lien of the defendant, Geo. F. Perry Sons Inc.

Seclow & Nessanbaum,
Solicitors of defendants, Israel
Shilowitz and Jacob Tucker.

Replication of Geo. F. Perry & Sons, Inc. to Answer of Israel Shilowitz and Jacob Tucker to Counterclaim.

(Filed as in time.)

The defendant, Geo. F. Perry & Sons Inc., a corporation, one of the defendants in this cause of action, which has filed a counterclaim herein, affecting (among others) the defendants, Israel Shilowitz and Jacob Tucker, joins issue on the answer of said Israel Shilowitz and Jacob Tucker, to said counterclaim of said Geo. F. Perry & Sons Inc., a corporation.

KANTER & KANTER,
Solicitors for and of counsel with
Geo. F. Perry & Sons Inc.

Answer of Carteret Company to Counterclaim of Geo. F. Perry & Sons, Inc.

(Duly filed April 26th, 1928.)

The defendant Carteret Company, a corporation of New Jersey, having its principal Office in Jersey City, in this State, answering the counterclaim of the defendant Geo. F. Perry & Sons, Inc. says that:

1. This defendant has no knowledge or information sufficient to form a belief as to the allegations of Paragraphs 17, 18, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30 and 31, and therefore leaves the said defendant to proof thereof.

2. This defendant has no knowledge or information sufficient to form a belief as to whether the building was commenced prior to May 24th, 1927,

as alleged in Paragraph 19th of the said counterclaim, and therefore leaves the said defendant to proof thereof, but this defendant denies that said building was erected upon the premises therein referred to.

3. This defendant admits that subsequent to the date of the commencement of the erection of said building, a mortgage was executed and delivered and recorded to this defendant, as set forth in Paragraph 25 of the counterclaim, but this defendant denies that the lien of said defendant Geo. F. Perry & Sons, Inc. is entitled to priority over said mortgage as alleged in said Paragraph 25.

JAS. E. PYLE,
Solicitor of Defendant, Carteret Company.

Replication of Geo. F. Perry & Sons, Inc. to Answer of Carteret Company to Counterclaim.

(Filed as in Time.)

The defendant, Geo. F. Perry & Sons, Inc., a corporation, one of the defendants in this cause of action, which has filed a counterclaim herein, affecting (among others) the defendant Carteret Company, a corporation, joins issue on the answer of said Carteret Company, a corporation, to said counterclaim of said Geo. F. Perry & Sons, Inc., a corporation.

KANTER & KANTER,
Solicitors for and of Counsel with Geo. F. Perry & Sons, Inc.

Answer and Counterclaim of Defendant, Louis Moore.

(Duly Served.)
(Filed April 9th, 1928.)

The defendant, Louis Moore, of the City of Linden, County of Union and State of New Jersey, answering the complaint in this cause, says that:

1. He has not sufficient knowledge or information whereof to form a belief concerning the allegations contained in paragraphs 1, 2, 4, 5, 6, 7, 8 and 10 of said complaint.

2. This defendant admits all the other paragraphs of the said complaint.

COUNTERCLAIM.

By way of counter claim against the complainant, Riverside Apartment Corporation, a corporation, and the defendants, Capitol Construction Co., Inc., a corporation, Israel Shilowitz, Jacob Tucker, Carteret Company, a corporation, Louis Schwartz, Junction Milling Co., a corporation, West Bergen Trust Company, a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, Trustee, John P. Grady, Abraham Shilling and Cranford Trust Company, a corporation, the defendant, Louis Moore, says that:

1. On January 12, 1928, Louis Moore filed in the Office of the Clerk of Union County, a mechanic's lien claim against said Capitol Construction Co., Inc., wherein and whereby said Louis Moore claims a lien upon the said mortgaged lands for the sum of $10,500.00 or some other sum.

2. On July 29th, 1927, said Capitol Construction Co., Inc., a corporation, mortgaged said lands

to Israel Shilowitz and Jacob Tucker for $20,000.00, which mortgage was, on August 2nd, 1927, recorded in the Office of the Register of the County of Union in Book 878 of Mortgages, page 347.

Any interest which the said Israel Shilowitz and Jacob Tucker or either of them may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

3. On October 14th, 1927, said Capitol Construction Co., Inc., a corporation, mortgaged said lands to Carteret Company, a corporation for $35,000.00, which mortgage was on October 24th, 1927, recorded in the Office of the Register of Union County in Book 892 of Mortgages, page 89.

Any interest which the said Carteret Company, a corporation, may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

4. On August 22nd, 1927, said Capitol Construction Co., Inc., mortgaged said lands to Louis Schwartz for $5,150.00 which mortgage was on August 25th, 1927, recorded in the Office of the Register of Union County in Book 884 of Mortgages, page 127.

Any interest which the said Louis Schwartz may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

5. By agreement dated October 20th, 1927, and recorded in the Office of the Register of Union County on October 24th, 1927, in Book 67 of Releases, page 178, said Louis Schwartz did agree with said Carteret Company to subordinate the lien of the mortgage of said Louis Schwartz to the lien of the mortgage of said Carteret Company

and by virtue thereof said Carteret Company claims priority of the lien of the aforesaid mortgage to the lien of the said mortgage of the said Louis Schwartz.

Any interest which the said Louis Schwartz and said Carteret Company may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

6. On September 16th, 1927, said Capitol Construction Co., Inc., mortgaged said lands to Junction Milling Co., a corporation, for $11,619.34, which said mortgage was, on October 6th, 1927, recorded in the Office of the Register of Union County in Book 886 of Mortgages, page 390.

Any interest which the said Junction Milling Co. may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

7. On October 25th, 1927, said Capitol Construction Co., Inc., mortgaged said lands to West Bergen Trust Company, a corporation, for $6,000.00 which mortgage was on October 26th, 1927, recorded in the Office of the Register of Union County in Book 895 of Mortgages, page 38.

Any interest which the said West Bergen Trust Company may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

8. On October 28th, 1927, said Capitol Construction Co., Inc., mortgaged said lands to The Trust Company of New Jersey for $16,000.00 which mortgage was on November 9th, 1927, recorded in the Office of the Register of Union County in Book 894 of Mortgages, page 257.

Any interest which said The Trust Company of New Jersey may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

9. On November 1st, 1927, said Capitol Construction Co., Inc., mortgaged said lands to Edward P. Stout, trustee for $7,500.00 which mortgage was on November 12th, 1927, recorded in the Office of the Register of Union County in Book 891 of Mortgages, page 194.

Any interest which the said Edward P. Stout, Trustee, may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

10. On October 28th, 1927, said Capitol Construction Co., Inc., mortgaged said lands to The Trust Company of New Jersey, a corporation, for $16,000.00, which mortgage was on December 1st, 1927, recorded in the Office of the Register of Union County in Book 898 of Mortgages, page 306.

Any interest which said The Trust Company of New Jersey may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

11. On January 9th, 1928, John P. Grady recovered judgment in the New Jersey Supreme Court against Hyman Silverman, Harry Starr, Jacob Starr and Capitol Construction Co., Inc., in the sum of $1,124.61 against Capitol Construction Co.,, Inc., and Hyman Silverman and $819.52 against said Jacob Starr and $305.09 against said Harry Starr besides $66.02 costs of suit.

Any interest which said John P. Grady may have in said lands is subject, subsequent and subordinate to the claim of this defendant.

12. On November 21st, 1927, Abraham Shilling docketed from the Hudson County Court of Common Pleas in the New Jersey Supreme Court, a judgment recovered by him, said Abraham Shilling against said Hyman Silverman and Jacob Starr in the sum of $2,555.00 damages and $56.12 costs of suit.

Any interest which said Abraham Shilling may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

13. On February 27th, 1928, Cranford Trust Company, a corporation, recovered judgment in the New Jersey Supreme Court against said Hyman Silverman and Jacob Starr and Harry Starr for $1,075.96 damages and $62.02 costs of suit.

Any interest which said Cranford Trust Company may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

This defendant is without adequate remedy in the courts of law, and therefore prays:

1. That Capitol Construction Co., Inc., a corporation, Israel Shilowitz, Jacob Tucker, Carteret Company, a corporation, Louis Schwartz, Junction Milling Co., a corporation, West Bergen Trust Company, a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, Trustee, John P. Grady, Abraham Shilling and Cranford Trust Company, a corporation, who are the defendants in this counter claim, may answer this counter claim, without oath, and each statement therein made.

2. That an account may be taken of the amount due to this defendant on its lien claim, as aforesaid.

3. That the lien of this defendant, by reason of having furnished materials, aforesaid, and having filed his lien claim and instituted suit thereon, as aforesaid, may be decreed to be prior and paramount to the respective liens and interest of the complainant and the other defendants in this cause.

4. That the defendants to this counter claim, or one of them, may be decreed to pay to this defendant the amount so found due, with interest and costs, by a short day, to be appointed by this court, and that in default of such payment, they and each of them be debarred and foreclosed of all equity of redemption in said lands and premises, or

5. That a decree may be made for a sale of the mortgaged premises set forth in the said complaint, to raise and pay, in the first instance, to this defendant, the amount so found due to it on its claim, as aforesaid, with interest and costs, and in the second instance, to the complainant and such other defendants herein, as may be determined by this court.

AARON KAUFMAN,
Solicitor for Defendant,
Louis Moore.

Notice of Motion of Carteret Company to Strike Out Counterclaim of Louis Moore.

(Duly Served.)

(Filed April 17th, 1928.)

To Aaron Kaufman, Solicitor of Defendant, Louis Moore:

PLEASE TAKE NOTICE that on Monday, April 16th, 1928, at ten o'clock in the forenoon or as soon thereafter as the matter can be heard, I shall apply to the Chancellor, at Chancery Chambers in Jersey City, #1 Exchange Place, Jersey City, for an order striking out the counterclaim filed by you in the above entitled cause as to the defendant, Carteret Company, on the following grounds:

1. That the said counterclaim does not disclose any cause of action against the defendant, Carteret Company.

2. That the said counterclaim is sham and frivolous.

3. That the said counterclaim does not exhibit honestly and truthfully the true state of facts, which true state of facts if set forth in the bill would preclude any possibility of success under said counterclaim.

AND PLEASE TAKE FURTHER NOTICE, that the defendant, Louis Moore, will be required to appear for examination at the time of making said motion, and upon failure to do so, I shall apply to the Court for an order requiring said defendant, Louis Moore, to appear for examination.

Dated April 11th, 1928.

JAS. E. PYLE,
Sol'r. for defendant, Carteret Company.

Affidavit On Motion.

(Filed April 17th, 1928.)

JAMES E. PYLE, being duly sworn according to law on his oath says, that he is the solicitor for the defendant, Carteret Company, and as such had full charge of the placing of the mortgage of the Carteret Company mentioned in the bill of complaint in the above entitled cause, and disbursing the moneys thereunder, and procuring releases as to rights to file mechanic's liens upon the premises covered by the said mortgage, against the said mortgagee, and that as an inducement to the said mortgagee to place said mortgage loan, the defendant, Louis Moore, did on or about October 22nd, 1927, execute a release in writing bearing date on that date, whereby he agreed that the said mortgage of the defendant, Carteret Company, should be and remain a prior lien on said premises covered thereby, prior and paramount to any claim or lien which the said Louis Moore might then or thereafter have against said premises, and by virtue of the laws of the State of New Jersey, entitled "An Act to secure to mechanics and others payment for labor and materials in erecting any building".

Subscribed and sworn to before me this 16th day of April, 1928. } JAMES E. PYLE.

WILLIAM T. CAHILL,
Attorney at Law of New Jersey.

Order Striking Out Counterclaim of Louis Moore, as to Carteret Company.

(Filed April 17th, 1928.)

A motion having been made by the defendant Carteret Company, to strike out as to the defendant Carteret Company, the counterclaim of Louis Moore on the ground that the same does not disclose any cause of action and on the further ground that the same was sham and frivolous and does not honestly and truthfully set forth the true state of facts, and it appearing that due notice of this motion has been given to the defendant Louis Moore and the court having heard the arguments of James E. Pyle, Solicitor for the defendant Carteret Company, and Aaron Kaufman, Solicitor for the defendant Louis Moore and being of the opinion that the said counterclaim is defective in that it does not set forth a cause of action:

It is thereupon on this 16th day of April, nineteen hundred and twenty-eight, ORDERED that said counterclaim be and the same is hereby stricken out as to the defendant, Carteret Company, and it is further ORDERED that on the question of permitting said defendant Louis Moore to file an amended counterclaim to take the place of the one so stricken out, that said matter be continued over to Monday, April 30th, 1928, at ten o'clock in the forenoon (daylight saving time) or as soon thereafter as the matter can be heard, at Chancery Chambers, in Jersey City.

E. R. WALKER, C.

Respectfully advised:
JOHN BENTLEY, V. C.

Answer of Israel Shilowitz and Jacob Tucker to Counterclaim of Louis Moore.

(Filed April 11th, 1928.)

The defendants, Israel Shilowitz and Jacob Tucker, in reply to answer of the defendant, Louis Moore, join issue thereon.

By way of answer to the counterclaim, the defendants, Israel Shilowitz and Jacob Tucker, say that:

1. The allegations of paragraphs 1 and 2 of the counterclaim are denied.

2. Not having sufficient knowledge as to the allegations of paragraphs 3 to 13, both inclusive, of the counterclaim, they leave the defendant, Louise Moore, to his proof.

3. The mortgage of these defendants, Israel Shilowitz and Jacob Tucker, mentioned in the bill of complaint, is prior and paramount to the lien claim of the answering defendant, Louis Moore.

SECLOW & NESSANBAUM,
Solicitors of Defendants,
Israel Shilowitz and Jacob Tucker.

Amended Answer and Counterclaim of Defendant, Louis Moore.

(Duly Served.)

(Filed April 23rd, 1928.)

The defendant, Louis Moore, of the City of Linden, County of Union and State of New Jersey, answering the complaint in this cause, says that:

1. He has not sufficient knowledge or information whereof to form a belief concerning the allegations contained in paragraphs 1, 2, 4, 5, 6, 7, 8, 10 of said complaint.

2. As to all the other paragraphs in the said bill of complaint, this defendant admits all the other paragraphs of the said complaint, but disputes the order of priority as set forth in the said bill of complaint.

COUNTERCLAIM.

By way of counterclaim against the defendants, Capitol Construction Co., Inc., a corporation, Israel Shilowitz, Jacob Tucker, Louis Schwartz, Junction Milling Co., a corporation, West Bergen Trust Company, a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, Trustee, John P. Grady, Abraham Shilling and Cranford Trust Company, a corporation, the defendant, Louis Moore, says that:

1. On January 12th, 1928, the said Louis Moore filed in the Office of the Clerk of Union County, a mechanic's lien claim against said Capitol Construction Co., Inc., wherein and whereby said Louis Moore claims a lien upon the said mortgaged lands for the sum of $10,500.00 or some other sum.

Amended Answer and Counterclaim of Defendant, Louis Moore.

2. On January 4th, 1928, this Court declared the defendant, Capitol Construction Co., Inc., a corporation of the State of New Jersey, as an insolvent, and appointed Ira R. Crouse and Benjamin Heyman of Jersey City as receivers of the said defendant corporation.

3. On July 29th, 1927, said Capitol Construction Co., Inc., a corporation, mortgaged said lands to Israel Shilowitz and Jacob Tucker for $20,000.00, which mortgage was, on August 2nd, 1927, recorded in the office of the Register of the County of Union in Book 878 of mortgages, page 347. Said mortgage was recorded after the commencement of the building on the said premises, and part of the funds thereof were not applied to the construction of the said building.

Any portion of the said principal of the said mortgage which was not applied towards the construction of the said building is subsequent and subordinate in lien to the claim of this defendant.

4. On August 22nd, 1927, said Capitol Construction Co., Inc., mortgaged said lands to Louis Schwartz for $5,150.00, which mortgage was on August 25th, 1927, recorded in the Office of the Register of Union County in Book 884 of mortgages, page 127. Said mortgage was placed on record after the commencement of the building and none of the funds thereof were applied towards the construction of the said building.

Any interest which the said Louis Schwartz may have in the said lands by reason of said mortgage is therefore subsequent and subordinate to the claim of this defendant.

5. On September 16th, 1927, said Capitol Construction Co., Inc., mortgaged said lands to Junc-

tion Milling Co., a corporation, for $11,619.34, which said mortgage was, on October 6th, 1927, recorded in the Office of the Register of Union County in Book 886 of mortgages, page 390. Said mortgage was recorded after the commencement of the said building and none of the funds of the said mortgage were applied towards the construction of the said building.

Any interest which the said Junction Milling Co. may have in the said lands is therefore subsequent and subordinate to the claim of this defendant.

6. On October 25th, 1927, said Capitol Construction Co., Inc., mortgaged said lands to West Bergen Trust Company, a corporation, for $6,000.00, which mortgage was on October 26th, 1927, recorded in the Office of the Register of Union County in Book 895 of mortgages, page 38. Said mortgage was recorded after the commencement of the said building, and none of the funds of the said mortgage were applied towards the construction of the said building.

Any interest which the said West Bergen Trust Company may have in the said lands is therefore subsequent and subordinate to the claim of this defendant.

7. On October 28th, 1927, said Capitol Construction Co., Inc., mortgaged said lands to The Trust Company of New Jersey for $16,000.00, which mortgage was on November 9th, 1927, recorded in the Office of the Register of Union County in Book 894 of mortgages, page 257. Said mortgage was recorded after the commencement of the said building, and none of the funds of the said mortgage were applied towards the construction of the said building.

Any interest which the said The Trust Company of New Jersey may have in the said lands is therefore subsequent and subordinate to the claim of this defendant.

8. On November 1st, 1927, said Capitol Construction Co., Inc., mortgaged said lands to Edward P. Stout, trustee, for $7,500.00, which mortgage was on November 12th, 1927, recorded in the Office of the Register of Union County in Book 891 of mortgages, page 194. Said mortgage was recorded after the commencement of the said building, and none of the funds of the said mortgage were applied towards the construction of the said building.

Any interest which the said Edward P. Stout, trustee, may have in the said lands is therefore subsequent and subordinate to the claim of this defendant.

9. On October 28th, 1927, said Capitol Construction Co., Inc., mortgaged said lands to The Trust Company of New Jersey, a corporation, for $16,000.00, which mortgage was on December 1st, 1927, recorded in the Office of the Register of Union County in Book 898 of mortgages, page 306. Said mortgage was recorded after the commencement of the said building, and none of the funds of the said mortgage were applied towards the construction of the said building.

Any interest which the said The Trust Company of New Jersey may have in the said lands is therefore subsequent and subordinate to the claim of this defendant.

10. On January 9th, 1928, John P. Grady recovered judgment in the New Jersey Supreme Court against Hyman Silverman, Jacob Starr,

Harry Starr and Capitol Construction Co., Inc., in the sum of $1,124.61 against Capitol Construction Co., Inc., and Hyman Silverman and $819.52 against said Jacob Starr and $305.09 against said Harry Starr besides $66.02 costs of suit.

By reason of the filing of the mechanic's lien by the said defendant, Louis Moore, for materials furnished and plumbing work performed on the said premises, any interest which the said John P. Grady may have in the said lands, is subsequent and subordinate to the claim of this defendant.

11. On November 21st, 1927, Abraham Shilling docketed from the Hudson County Court of Common Pleas in the New Jersey Supreme Court, a judgment recovered by him, said Abraham Shilling against said Hyman Silverman and Jacob Starr in the sum of $2,555.00 damages and $56.12 costs of suit.

By reason of the filing of the mechanic's lien by the said defendant, Louis Moore, for materials furnished and plumbing work performed on the said premises, any interest which the said Abraham Shilling may have in the said lands, is subsequent and subordinate to the claim of this defendant.

12. On February 27th, 1928, Cranford Trust Company, a corporation, recovered judgment in the New Jersey Supreme Court against said Hyman Silverman and Jacob Starr and Harry Starr for $1,075.96 damages and $62.02 costs of suit.

By reason of the filing of the mechanic's lien by the said defendant, Louis Moore, for materials furnished and plumbing work performed on the said premises, any interest which the said Cran-

ford Trust Company may have in the said lands is subsequent and subordinate to the claim of this defendant.

This defendant is without adequate remedy in the courts of law, and therefore prays:

1. That Capitol Construction Co., Inc., a corporation, Israel Shilowitz, Jacob Tucker, Louis Schwartz, Junction Milling Co., a corporation, West Bergen Trust Company, a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, trustee, John P. Grady, Abraham Shilling and Cranford Trust Company, a corporation, who are the defendants to this counterclaim, may answer this counterclaim, without oath, and each statement therein made.

2. That an account may be taken of the amount due to this defendant on its lien claim, as aforesaid.

3. That the lien of this defendant, by reason of having furnished materials, and plumbing work performed, as aforesaid, and having filed his lien claim as aforesaid, may be decreed to be prior and paramount to the respective liens and interests of the complainant and all other defendants mentioned in this counterclaim except the defendants Israel Shilowitz and Jacob Tucker, and as to them, that it may be decreed that the mechanic's lien of this defendant is prior and paramount to the mortgage of the said Israel Shilowitz and Jacob Tucker to the amount of the moneys not applied in their mortgage towards the construction of the building.

4. That the defendants to this counterclaim or one of them, may be decreed to pay to this defend-

ant the amount so found due, with interest and costs, by a short day, to be appointed by this Court, and that in default of such payment, they and each of them be debarred and foreclosed of all equity of redemption in said lands and premises, or

5. That a decree may be made for a sale of the mortgaged premises set forth in the said complaint, to raise and pay in the first instance to the complainant the amount so found due on its claim as aforesaid with interest and costs, and in the second instance, to the defendant, Louis Moore, and in the third instance to such other defendants herein as may be determined by this Court.

AARON KAUFMAN,
Solicitor for Defendant, Louis Moore.

Answer of West Bergen Trust Company to Counterclaim of Louis Moore.

(Filed Apr. 24th, 1928.)

The answer of defendant, West Bergen Trust Company, a corporation of New Jersey, to counterclaim of defendant, Louis Moore:

This defendant, West Bergen Trust Company, answering the counter-claim of defendant, Louis Moore, says that:

1. It has no knowledge or information sufficient to form a belief as to the statements of said counter-claim, except as to the statements in Paragraph 7 thereof.

2. As to Paragraph 7, this defendant says that its mortgage has priority over the alleged lien

claim of defendant, Louis Moore, mentioned in said counter-claim, because the money due or to grow due on this defendant's mortgage was actually advanced and paid by this defendant to defendant, Capitol Construction Co., Inc., and applied by it to the erection of a certain building on said mortgaged premises, and said mortgage was recorded before the filing of said lien claim; and this defendant's mortgage has priority over the mortgage and judgments mentioned in said counter-claim, except the mortgage mentioned in Paragraph 3 of said counter-claim, because said mortgages are not advance-money mortgages nor did they or said judgments encumber said mortgaged premises prior to the commencement of the construction of said building; and, as to the mortgage mentioned in said Paragraph 3, this defendant claims priority over said mortgage to so much thereof as has not been advanced thereon and paid to defendant, Capitol Construction Co., Inc.

EDWARD P. STOUT,
Solicitor for Defendant,
West Bergen Trust Company.

Order Denying Request to File Amended Counterclaim of Louis Moore, as to Carteret Company.

(Filed Apr. 30th, 1928.)

A motion having been made by defendant Carteret Company to strike out as to said defendant the counter-claim of the defendant Louis Moore, on the ground that the same does not disclose any cause of action and was sham, and the court

Order Denying Request to File Amended Counter-claim of Louis Moore, as to Carteret Company.

having heard the argument of James E. Pyle, Solicitor for the defendant Carteret Company, and Aaron Kaufman, Solicitor for the defendant Louis Moore, and having thereupon granted said motion, and an order striking out said counter-claim as to the defendant Carteret Company having been entered April 17th, 1928, and the defendant Louis Moore having thereupon requested permission to file an amended counter-claim against the defendant Carteret Company, which matter was thereupon adjourned over to this day, for the purpose of permitting the defendant Louis Moore to file and serve an affidavit of proof as to his right to file said amended counter-claim, and no one appearing on behalf of the said Louis Moore:

It is on this thirtieth day of April, nineteen hundred and twenty-eight, ORDERED that the said request of the said defendant Louis Moore to file an amended counter-claim against the said Carteret Company is hereby denied.

And it is further ORDERED that the said defendant Louis Moore pay to the said defendant Carteret Company the costs to be taxed of this motion and of the aforesaid motion to strike out, within ten days of service upon him or his said solicitor of a true but uncertified copy of this order and of said taxed costs, and that in default of such payment execution be issued therefor according to the practice of this Court.

E. R. WALKER,
C.

Respectfully advised.
JOHN BENTLEY,
V.-C.

Answer of Israel Shilowitz and Jacob Tucker to Counterclaim of Louis Moore.

(Filed May 2nd, 1928.)

The defendants, Jacob Tucker and Israel Shilowitz, join issue with the defendant, Louis Moore, upon his amended answer.

ANSWER TO COUNTERCLAIM.

1. The defendants, Jacob Tucker and Israel Shilowitz, answering the counterclaim say that not having sufficient knowledge as to the allegations of paragraph 1 of the counterclaim, they leave the defendant, Louis Moore, to his proof.

2. Paragraph 2 of the counterclaim is admitted.

3. The execution of the mortgage mentioned in paragraph 3 of the counterclaim is admitted, but it is denied that the funds thereof was not applied to the construction of said building. As a matter of fact the $20,000 for which the mortgage was given as security was actually applied towards the construction of the building. It is further denied that the lien claim of the defendant, Louis Moore, is prior to the mortgage of these defendants, Jacob Tucker and Israel Shilowitz, their mortgage being prior and paramount to any lien claim which the said Louis Moore may have.

4. The mortgage of the defendants, Jacob Tucker and Israel Shilowitz, is prior and paramount to any of the liens or mortgages mentioned in the counterclaim of Louis Moore except to complainant's mortgage.

SECLOW & NESSANBAUM,
Solicitors of defendants, Jacob Tucker and Israel Shilowitz.

Order Discontinuing Counterclaim of Louis Moore Against Complainant.

(Filed May 21st, 1928.)

Defendant, Louis Moore, having inadvertently joined the complainant as a party to the counterclaim filed by him herein, and desiring to discontinue the said counterclaim as against the complainant; and upon reading the consent of the solicitor of the said defendant Louis Moore to the making of this order hereunder written;

It is on this 21st day of May, 1928, on motion of Gross & Gross, solicitors of said complainant,

Ordered that the counterclaim filed herein by the said defendant Louis Moore, in so far as the same is against the complainant, be and the same is hereby discontinued without costs to either parties against the other.

E. R. Walker,
C.

I hereby consent to the making of the foregoing order.

Aaron Kaufman,
Solicitor of defendant Louis Moore.

Decree *Pro Confesso* on Counterclaim of Louis Moore.

(Filed July 30th, 1928.)

This cause, being opened to the Court by Aaron Kaufman, of counsel with the defendant, Louis Moore, and it appearing that the said defendant, Louis Moore, filed an amended answer and counterclaim against the defendants hereinafter named on April 23rd, 1928, and that service of copies of said counterclaim were acknowledged by the said defendants or their attorneys on April 27th and April 28th, 1928, and an acknowledgment of service was filed with this court on May 9th, 1928, which counterclaim directs the said defendants to appear and answer the said counterclaim;

And it further appearing that the said defendants, Capitol Construction Co., Inc., a corporation, Louis Schwartz, Junction Milling Co., a corporation, West Bergen Trust Company, a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, Trustee, John P. Grady, Abraham Shilling and Cranford Trust Company, a corporation, have not, nor have any or either of them, filed any reply to the said counterclaim within the time limited by law, or at any other time, but that they have wholly failed and neglected so to do;

It is therefore, on this 30th day of July, in the year of Our Lord One Thousand Nine Hundred and Twenty-eight, Ordered, Adjudged, and Decreed that the said counterclaim be taken as confessed as against the Capitol Construction Co., Inc., a corporation, Louis Schwartz Junction Milling Co., a corporation, West Bergen Trust Company, a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, Trustee,

John P. Grady, Abraham Shilling and Cranford Trust Company, a corporation, to the end that such decree may be made against them as the Chancellor shall think equitable and just.

E. R. WALKER,
C.

Answer and Counterclaim of Defendant, Lipschitz Parquet Floor Co.

(Duly Served.)

(Filed April 9th, 1928.)

The defendants, Morris Portnow and Abraham Lipschitz, partners, trading as Lipschitz Parquet Floor Co., of the City of Jersey City, County of Hudson and State of New Jersey, answering the complaint in this cause, say that:

1. They have not sufficient knowledge or information whereof to form a belief concerning the allegations contained in paragraphs 1, 2, 4, 5, 6, 7, 8 and 10 of said complaint.

2. This defendant admits all the other paragraphs of the said complaint.

COUNTERCLAIM.

By way of counterclaim against the complainant, Riverside Apartment Corporation, a corporation, and the defendants, Capitol Construction Co., Inc., a corporation, Israel Shilowitz, Jacob Tucker, Carteret Company, a corporation, Louis Schwartz, Junction Milling Co., a corporation, West Bergen Trust Company, a corporation, The Trust Company of New Jersey, a corporation,

Edward P. Stout, trustee, John P. Grady, Abraham Shilling and Cranford Trust Company, a corporation, the defendants, Lipschitz Parquet Floor Co., say that:

1. On January 12, 1928, Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co., filed in the office of the Clerk of Union County, a mechanic's lien claim against said Capitol Construction Co., Inc., wherein and whereby said Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co. claims a lien upon the said mortgaged lands for the sum of $3,700.00 or some other sum.

2. On July 29th, 1927, said Capitol Construction Co., Inc., a corporation, mortgaged said lands to Israel Shilowitz and Jacob Tucker for $20,000.00 which mortgage was, on August 2nd, 1927, recorded in the office of the Register of the County of Union in Book 878 of mortgages page 347.

Any interest which the said Israel Shilowitz and Jacob Tucker or either of them may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

3. On October 14th, 1927, said Capitol Construction Co., Inc., a corporation, mortgaged said lands to Carteret Company, a corporation for $35,000.00, which mortgage was on October 24th, 1927, recorded in the Office of the Register of Union County in Book 892 of Mortgages page 89.

Any interest which the said Carteret Company, a corporation, may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

4. On August 22nd, 1927, said Capitol Construction Co., Inc., mortgaged said lands to Louis

Schwartz for $5,150.00 which mortgage was on August 25th, 1927, recorded in the Office of the Register of Union County in Book 884 of mortgages page 127.

Any interest which the said Louis Schwartz may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

5. By agreement dated October 20th, 1927, and recorded in the Office of the Register of Union County on October 24th, 1927, in Book 67 of Releases page 178, said Louis Schwartz did agree with said Carteret Company to subordinate the lien of the mortgage of said Louis Schwartz to the lien of the mortgage of said Carteret Company and by virtue thereof said Carteret Company claims priority of the lien of the aforesaid mortgage to the lien of the said mortgage of the said Louis Schwartz.

Any interest which the said Louis Schwartz and said Carteret Company may have in the said lands is subject subsequent and subordinate to the claim of this defendant.

6. On September 16th, 1927, said Capitol Construction Co., Inc., mortgaged said lands to Junction Milling Co., a corporation, for $11,619.34, which said mortgage was, on October 6th, 1927, recorded in the Office of the Register of Union County in Book 886 of mortgages, page 390.

Any interest which the said Junction Milling Co. may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

7. On October 25th, 1927, said Capitol Construction Co., Inc., mortgaged said lands to West Bergen Trust Company, a corporation for $6,000.00 which mortgage was on October 26th,

1927, recorded in the Office of the Register of Union County in Book 895 of mortgages, page 38.

Any interest which the said West Bergen Trust Company may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

8. On October 28th, 1927, said Capitol Construction Co., Inc., mortgaged said lands to The Trust Company of New Jersey for $16,000.00 which mortgage was on November 9th, 1927, recorded in the Office of the Register of Union County in Book 894 of mortgages, page 257.

Any interest which said The Trust Company of New Jersey may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

9. On November 1st, 1927, said Capitol Construction Co., Inc., mortgaged said lands to Edward P. Stout, Trustee for $7,500.00 which mortgage was on November 12th, 1927, recorded in the Office of the Register of Union County in Book 891 of Mortgages, page 194.

Any interest which said Edward P. Stout, Trustee may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

10. On October 28th, 1927, said Capitol Construction Co., Inc., mortgaged said lands to The Trust Company of New Jersey, a corporation, for $16,000.00, which mortgage was on December 1st, 1927, recorded in the Office of the Register of Union County in Book 898 of mortgages, page 306.

Any interest which said The Trust Company of New Jersey may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

Answer and Counterclaim of Defendant, Lipschitz Parquet Floor Co.

11. On January 9th, 1928, John P. Grady recovered judgment in the New Jersey Supreme Court against Hyman Silverman, Harry Starr, Jacob Starr, and Capitol Construction Co., Inc., in the sum of $1,124.61 against Capitol Construction Co., Inc., and Hyman Silverman and $819.52 against said Jacob Starr and $305.09 against said Harry Starr besides $66.02 costs of suit.

Any interest which said John P. Grady may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

12. On November 21st, 1927, Abraham Shilling docketed from the Hudson County Court of Common Pleas in the New Jersey Supreme Court, a judgment recovered by him, said Abraham Shilling against said Hyman Silverman and Jacob Starr in the sum of $2,555.00 damages and $56.12 costs of suit.

Any interest which said Abraham Shilling may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

13. On February 27th, 1928, Cranford Trust Company, a corporation, recovered judgment in the New Jersey Supreme Court against said Hyman Silverman and Jacob Starr and Harry Starr for $1,075.96 damages and $62.02 costs of suit.

Any interest which said Cranford Trust Company may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

This defendant is without adequate remedy in the courts of law, and therefore prays:

1. That Capitol Construction Co., Inc., a corporation, Israel Shilowitz, Jacob Tucker, Carteret Company, a corporation, Louis Schwartz, Junction Milling Co., a corporation, West Bergen

Trust Company, a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, trustee, John P. Grady, Abraham Shilling and Cranford Trust Company, a corporation, who are the defendants to this counterclaim, may answer this counterclaim, without oath, and each statement therein made.

2. That an account may be taken of the amount due to this defendant on its lien claim, as aforesaid.

3. That the lien of this defendant, by reason of having furnished materials, as aforesaid, and having filed their lien claim and instituted suit thereon, as aforesaid, may be decreed to be prior and paramount to the respective liens and interests of the complainant and the other defendants in this cause.

4. That the defendants to this counterclaim, or one of them, may be decreed to pay to this defendant the amount so found due, with interest and costs, by a short day, to be appointed by this court, and that in default of such payment, they and each of them be debarred and foreclosed of all equity of redemption in said lands and premises, or

5. That a decree may be made for a sale of the mortgaged premises set forth in the said complaint, to raise and pay, in the first instance, to this defendant, the amount so found due to it on its claim, as aforesaid, with interest and costs, and in the second instance, to the complainant and such other defendants herein, as may be determined by this court.

AARON KAUFMAN,
Solicitor for Defendant,
Lipschitz Parquet Floor Co.

Notice of Motion of Carteret Company to Strike Out Counterclaim of Lipschitz Parquet Floor Co.

(Duly Served.)

(Filed April 17th, 1928.)

To Aaron Kaufman,
Solicitor of Defendant, Lipschitz
Parquet Floor Co.

Please take notice that on Monday, April 16th, 1928 at ten o'clock in the forenoon or as soon thereafter as the matter can be heard, I shall apply to the Chancellor, at Chancery Chambers in Jersey City, No. 1 Exchange Place, Jersey City, for an order striking out the Counterclaim filed by you in the above entitled cause as to the defendant Carteret Company, on the following grounds:

1. That the said Counterclaim does not disclose any cause of action against the defendant, Carteret Company.

2. That the said Counterclaim is sham and frivolous.

3. That the said Counterclaim does not exhibit honestly and truthfully the true state of facts, which true state of facts if set forth in the Bill would preclude any possibility of success under said counterclaim.

And please take further notice, that the defendant, Lipschitz Parquet Floor Co., will be required to appear for examination at the time of making said motion, and upon failure to do so, I shall apply to the Court for an Order requiring said defendant, Lipschitz Parquet Floor Co., to appear for examination.

Dated, April 11th, 1928.

Jas. E. Pyle,
Sol'r. for Defendant, Carteret Company.

Affidavit On Motion.

(Filed April 17th, 1928.)

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

JAMES E. PYLE, being duly sworn according to law on his oath says, that he is the Solicitor for the defendant Carteret Company, and as such had full charge of the placing of the mortgage of the Carteret Company mentioned in the Bill of Complaint in the above entitled cause, and disbursing the moneys due thereunder and procuring releases as to rights to file mechanics liens upon the premises covered by said mortgage, against the said mortgagee, and that as an inducement to the said mortgagee to place said mortgage loan, the defendant Lipschitz Parquet Floor Co., did on or about October 13th, 1927 execute a release in writing bearing date on that day, releasing all right to file any mechanics lien against the premises covered by the mortgage of said defendant Carteret Company being the same premises set forth in the Bill of Complaint, so that the said mortgagee might hold its said mortgage fully released and discharged from any such lien, which release is now in possession of the deponent ready to be produced before this court.

Subscribed and sworn to before me this 16th day of April, 1928. } JAMES E. PYLE.

WILLIAM T. CAHILL,
Attorney at Law of New Jersey.

Order Striking Out Counterclaim of Lipschitz Parquet Floor Co., as to Carteret Company.

(Filed April 17th, 1928.)

A motion having been made by the defendant Carteret Company, to strike out as to the defendant Carteret Company, the counterclaim of Lipschitz Parquet Floor Co., on the ground that the same does not disclose any cause of action and on the further ground that the same was sham and frivolous and does not honestly and truthfully set forth the true state of facts, and it appearing that due notice of this motion has been given to the defendant Lipschitz Parquet Floor Co. and the court having heard the arguments of James E. Pyle, Solicitor for the defendant Carteret Company, and Aaron Kaufman, Solicitor for the defendant Lipschitz Parquet Floor Co., and being of the opinion that the said counterclaim is defective in that it does not set forth a cause of action;

It is thereupon on this 16th day of April, nineteen hundred and twenty-eight, ORDERED that said counter claim be and the same is hereby stricken out as to the defendant, Carteret Company, and it is further ORDERED that on the question of permitting said defendant Lipschitz Parquet Floor Co. to file an amended counter claim to take the place of the one so stricken out, that said matter be continued over to Monday, April 30th, 1928, at ten o'clock in the forenoon (daylight saving time) or as soon thereafter as the matter can be heard, at Chancery Chambers, in Jersey City.

E. R. WALKER, C.

Respectfully advised:
JOHN BENTLEY, V. C.

Answer of Israel Shilowitz and Jacob Tucker to Counterclaim of Lipschitz Parquet Floor Co.

(Filed April 11th, 1928.)

The defendants, Israel Shilowitz and Jacob Tucker, in reply to the answer of the defendant, Lipschitz Parquet Floor Co., join issue thereon.

By way of answer to the counter claim, the defendants, Israel Shilowitz and Jacob Tucker, say that:

1. The allegations of paragraphs 1 and 2 of the counter claim are denied.

2. Not having sufficient knowledge as to the allegations of paragraphs 3 to 13, both inclusive, of the counter claim, they leave the defendant, Lipschitz Parquet Floor Co. to its proof.

3. The mortgage of these defendants, Israel Shilowitz and Jacob Tucker, mentioned in the bill of complaint is prior and paramount to the lien claim of the answering defendant, Lipschitz Parquet Floor Co.

Seclow & Nessanbaum,
Solicitors of Defendants,
Israel Shilowitz and Jacob Tucker.

Amended Answer and Counterclaim of Defendant Lipschitz Parquet Floor Co.

(Duly Served.)

(Filed Apr. 23rd, 1928.)

The defendants, Morris Portnow and Abraham Lipschitz, partners, trading as Lipschitz Parquet Floor Co., of the City of Jersey City, County of Union and State of New Jersey, answering the complaint in this cause, say that:

1. They have not sufficient knowledge or information whereof to form a belief concerning the allegations contained in paragraphs 1, 2, 4, 5, 6, 7, 8, 10 of said complaint.

2. As to all the other paragraphs in the said bill of complaint, these defendants admit all the other paragraphs of the said complaint, but dispute the order of priority as set forth in the said bill of complaint.

COUNTERCLAIM.

By way of counterclaim against the defendants, Capitol Construction Co., Inc., a corporation, Israel Shilowitz, Jacob Tucker, Louis Schwartz, Junction Milling Co., a corporation, West Bergen Trust Company, a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, Trustee, John P. Grady, Abraham Shilling and Cranford Trust Company, a corporation, the defendants, Lipschitz Parquet Floor Co., say that:

1. On January 12th, 1928, Morris Portnow and Abraham Lipschitz, partners, trading as Lipschitz Parquet Floor Co., filed in the Office of

the Clerk of Union County a mechanic's lien claim against said Capitol Construction Co., Inc., wherein and whereby said Morris Portnow and Abraham Lipschitz, partners, trading as Lipschitz Parquet Floor Co., claims a lien upon the said mortgaged lands for the sum of $3,700.00 or some other sum.

2. On January 4th, 1928, this court declared the defendant, Capitol Construction Co., Inc., a corporation of the State of New Jersey, as an insolvent, and appointed Ira R. Crouse and Benjamin Heyman of Jersey City as receivers of the said defendant corporation.

3. On July 29th, 1927, said Capitol Construction Co., Inc., a corporation, mortgaged said lands to Israel Shilowitz and Jacob Tucker for $20,000.00, which mortgage was, on August 2nd, 1927, recorded in the Office of the Register of the County of Union in Book 878 of mortgages, page 347. Said mortgage was recorded after the commencement of the building on the said premises, and part of the funds thereof were not applied to the construction of the said building.

Any portion of the said principal of the said mortgage which was not applied towards the construction of the said building is subsequent and subordinate in lien to the claim of this defendant.

4. On August 22nd, 1927, said Capitol Construction Co., Inc., mortgaged said lands to Louis Schwartz for $5,150.00, which mortgage was on August 25th, 1927, recorded in the Office of the Register of Union County in Book 884 of mortgages, page 127. Said mortgage was placed on record after the commencement of the building and none of the funds thereof were applied towards the construction of the said building.

Any interest which the said Louis Schwartz may have in the said lands by reason of said mortgage is therefore subsequent and subordinate to the claim of this defendant.

5. On September 16th, 1927, said Capitol Construction Co., Inc., mortgaged said lands to Junction Milling Co., a corporation, for $11,619.34, which said mortgage was, on October 6th, 1927, recorded in the Office of the Register of Union County in Book 886 of mortgages, page 390. Said mortgage was recorded after the commencement of the said building, and none of the funds of the said mortgage were applied towards the construction of the said building.

Any interest which the said Junction Milling Co. may have in the said lands is therefore subsequent and subordinate to the claim of this defendant.

6. On October 25th, 1927, said Capitol Construction Co., Inc., mortgaged said lands to West Bergen Trust Company, a corporation, for $6,000.00, which mortgage was on October 26th, 1927, recorded in the Office of the Register of Union County in Book 895 of mortgages, page 38. Said mortgage was recorded after the commencement of the said building, and none of the funds of the said mortgage were applied towards the construction of the said building.

Any interest which the said West Bergen Trust Company may have in the said lands is therefore subsequent and subordinate to the claim of this defendant.

7. On October 28th, 1927, said Capitol Construction Co., Inc., mortgaged said lands to The Trust Company of New Jersey for $16,000.00, which mortgage was on November 9th, 1927, re-

corded in the Office of the Register of Union County in Book 894 of mortgages, page 257. Said mortgage was recorded after the commencement of the said building, and none of the funds of the said mortgage were applied towards the construction of the said building.

Any interest which the said The Trust Company of New Jersey may have in the said lands is therefore subsequent and subordinate to the claim of this defendant.

8. On November 1st, 1927, said Capitol Construction Co., Inc., mortgaged said lands to Edward P. Stout, trustee for $7,500.00, which mortgage was on November 12th, 1927, recorded in the Office of the Register of Union County in Book 891 of mortgages, page 194. Said mortgage was recorded after the commencement of the said building, and none of the funds of the said mortgage were applied towards the construction of the said building.

Any interest which the said Edward P. Stout, trustee, may have in the said lands is therefore subsequent and subordinate to the claim of this defendant.

9. On October 28th, 1927, said Capitol Construction Co., Inc., mortgaged said lands to The Trust Company of New Jersey, a corporation, for $16,000.00, which mortgage was on December 1st, 1927, recorded in the Office of the Register of Union County in Book 898 of mortgages, page 306. Said mortgage was recorded after the commencement of the said building, and none of the funds of the said mortgage were applied towards the construction of the said building.

Any interest which the said The Trust Company of New Jersey may have in the said lands

is therefore subsequent and subordinate to the claim of this defendant.

10. On January 9th, 1928, John P. Grady recovered judgment in the New Jersey Supreme Court against Hyman Silverman, Jacob Starr, Harry Starr and Capitol Construction Co., Inc., in the sum of $1,124.61 against Capitol Construction Co., Inc., and Hyman Silverman and $819.52 against said Jacob Starr and $305.09 against said Harry Starr besides $66.02 costs of suit. By reason of the filing of the mechanic's lien by the said defendants Lipschitz Parquet Floor Co. for materials furnished and labor performed on the said premises, any interest which the said John P. Grady may have in the said lands is subsequent and subordinate to the claim of this defendant.

11. On November 21st, 1927, Abraham Shilling docketed from the Hudson County Court of Common Pleas in the New Jersey Supreme Court a judgment recovered by him said Abraham Shilling against said Hyman Silverman and Jacob Starr in the sum of $2,555.00 damages and $56.12 costs of suit.

By reason of the filing of the mechanic's lien by the said defendants Lipschitz Parquet Floor Co. for materials furnished and labor performed on the said premises any interest which the said Abraham Shilling may have in the said lands is subsequent and subordinate to the claim of this defendant.

12. On February 27th, 1928, Cranford Trust Company, a corporation, recovered judgment in the New Jersey Supreme Court against said Hyman Silverman and Jacob Starr and Harry

Starr for $1,075.96 damages and $62.02 costs of suit.

By reason of the filing of the mechanic's lien by the said defendants Lipschitz Parquet Floor Co. for materials furnished and labor performed on the said premises any interest which the said Cranford Trust Company may have in the said lands is subsequent and subordinate to the claim of this defendant.

This defendant is without adequate remedy in the courts of law, and therefore prays:

1. The Capitol Construction Co., Inc., a corporation, Israel Shilowitz, Jacob Tucker, Louis Schwartz, Junction Milling Co., a corporation, West Bergen Trust Company, a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, trustee, John P. Grady, Abraham Shilling and Cranford Trust Company, a corporation, who are the defendants to this counterclaim, may answer this counterclaim, without oath, and each statement therein made.

2. That an account may be taken of the amount due to this defendant on its lien claim, as aforesaid.

3. That the lien of this defendant, by reason of having furnished materials and labor performed, as aforesaid, and having filed their lien claim as aforesaid, may be decreed to be prior and paramount to the respective liens and interests of the complainant and all other defendants mentioned in this counterclaim except the defendants Israel Shilowitz and Jacob Tucker, and as to them that it may be decreed that the mechanic's lien of these defendants are prior and paramount to the mortgage of the said Israel Shilowitz and

Jacob Tucker to the amount of the moneys not applied to their mortgage towards the construction of the building.

4. That the defendants to this counterclaim or one of them may be decreed to pay to these defendants the amount so found due, with interest and costs, by a short day, to be appointed by this court, and that in default of such payment they and each of them be debarred and foreclosed of all equity of redemption in said lands and premises, or

5. That a decree may be made for a sale of the mortgaged premises set forth in the said complaint to raise and pay in the first instance to the complainant the amount so found due on its claim as aforesaid with interest and costs, and in the second instance to the defendants Lipschitz Parquet Floor Co., and in the third instance to such other defendants herein as may be determined by this court.

AARON KAUFMAN,
Solicitor for Defendants,
Lipschitz Parquet Floor Co.

Answer of West Bergen Trust Company to Counterclaim of Lipschitz Parquet Floor Co.

(Filed April 24th, 1928.)

The Answer of Defendant, West Bergen Trust Company, a corporation of New Jersey, to counterclaim of defendants, Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co.:

This defendant, West Bergen Trust Company, answering the counterclaim of defendants, Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Company, says that:

1. It has no knowledge or information sufficient to form a belief as to the statements of said counterclaim, except as to the statements in Paragraph 7 thereof.

2. As to Paragraph 7, this defendant says that its mortgage has priority over the alleged lien claim of defendants, Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co., mentioned in said counterclaim, because the money due or to grow due on this defendant's mortgage was actually advanced and paid by this defendant to defendant, Capitol Construction Co., Inc., and applied by it to the erection of a certain building on said mortgaged premises, and said mortgage was recorded before the filing of said lien claim; and this defendant's mortgage has priority over the mortgages and judgments mentioned in said counterclaim, except the mortgage mentioned in Paragraph 3 of said counterclaim, because said mortgages are not advance money mortgages, nor did they or said judgments encumber said mortgaged premises

prior to the commencement of the construction of said building; and, as to the mortgage mentioned in said Paragraph 3, this defendant claims priority over said mortgage to so much thereof as has not been advanced thereon and paid to defendant, Capitol Construction Co., Inc.

EDWARD P. STOUT,
Solicitor for Defendant,
West Bergen Trust Company.

Order Denying Request to File Amended Counterclaim of Lipschitz Parquet Floor Co., as to Carteret Company.

(Filed April 30th, 1928.)

A motion having been made by the defendant Carteret Company to strike out as to said defendant, the counterclaim of the defendant Lipschitz Parquet Floor Co., on the ground that the same does not disclose any cause of action, and was sham and the Court having heard the argument of James E. Pyle, Solicitor for the defendant Carteret Company, and Aaron Kaufman, Solicitor for the defendant Lipschitz Parquet Floor Co., and having thereupon granted said motion, and an Order striking out said counterclaim as to the defendant Carteret Company having been entered April 17th, 1928, and the defendant Lipschitz Parquet Floor Co. having thereupon requested permission to file an amended counterclaim against the defendant Carteret Company, which matter was thereupon adjourned and set over to this day for the purpose of permitting the

Order Denying Request to File Counterclaim of Lipschitz Parquet Floor Co., as to Carteret Company.

defendant Lipschitz Parquet Floor Co. to file and serve an affidavit of proof as to its right to file said amended counterclaim, and one appearing on behalf of the said Lipschitz Parquet Floor Co.:

It is on this 30th day of April, Nineteen Hundred and twenty-eight, ORDERED, that the said request of the said defendant Lipschitz Parquet Floor Co., to file an amended counterclaim against the said Carteret Company is hereby denied.

And it is further ORDERED, that the said defendant Lipschitz Parquet Floor Co. pay to the said defendant Carteret Company the costs to be taxed of this motion and of the aforesaid motion to strike out, within 10 days after service upon it or its said Solicitor of a true but uncertified copy of this Order and of said taxed costs, and that in default of such payment execution be issued therefor, according to the practice of this Court.

E. R. WALKER,
C.

Respectfully advised,
JOHN BENTLEY,
V. C.

Answer of Israel Shilowitz and Jacob Tucker to Counterclaim of Lipschitz Parquet Floor Co.

(Filed May 2nd, 1928.)

The defendants, Jacob Tucker and Israel Shilowitz, join issue with the defendant, Morris Portnow and Abraham Lipschitz, partners trading as Lispschitz Parquet Floor Co. upon their amended answer.

Answer to Counterclaim.

1. The defendants, Jacob Tucker and Israel Shilowitz, answering the counterclaim say that not having sufficient knowledge as to the allegations of paragraph 1 of the counterclaim, they leave the defendants, Lipschitz Parquet Floor Co. to their proof.

2. Paragraph 2 of the counterclaim is admitted.

3. The execution of the mortgage mentioned in paragraph 3 of the counterclaim is admitted, but it is denied that the funds thereof was not applied to the construction of said building. As a matter of fact, the $20,000 for which the mortgage was given as security was actually applied towards the construction of the building. It is further denied that the lien claim of the defendants, Lipschitz Parquet Floor Co., is prior to the mortgage of these defendants, Jacob Tucker and Israel Shilowitz, their mortgage being prior and paramount to any lien claim which the said Lipschitz Parquet Floor Co. may have.

4. The mortgage of the defendants, Jacob Tucker and Israel Shilowitz, is prior and paramount to any of the liens or mortgages mentioned in the counterclaim of Lipschitz Parquet Floor Co., except to complainant's mortgage.

Seclow & Nessanbaum,
Solicitors of Defendants,
Jacob Tucker and Israel Shilowitz.

Order Discontinuing Counterclaim of Lipschitz Parquet Floor Co. Against Complainant.

(Filed May 21st, 1928.)

Defendants, Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co., having inadvertently joined this complainant as a party to the counterclaim filed by them herein, and desiring to discontinue the said counterclaim as against the complainant; and upon reading the consent of the solicitor of the said defendants Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Floor Co. to the making of this order hereunder written; it is on this 21st day of May, 1928, on motion of Gross & Gross, Solicitors of said complainant,

Ordered, that the counterclaim filed herein by the said defendants Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co. in so far as the same is hereby discontinued without costs to either parties against the other.

E. R. Walker, C.

I hereby consent to the making of the foregoing Order.

Aaron Kaufman,
Solicitor of Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co.

Decree *Pro Confesso* on Counterclaim of Lipschitz Parquet Floor Co.

(Filed July 30th, 1928.)

This cause being opened to the court by Aaron Kaufman, of counsel with the defendants Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co., and it appearing that the said defendants, Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co., filed an amended answer and counterclaim against the defendants hereinafter named on April 23rd, 1928 and that service of copies of the said counterclaim were acknowledgment of service was filed with this court on May 9th, 1928 which counterclaim directs the said defendants to appear and answer the said counterclaim:

And it further appearing that the said defendants Capitol Construction Co., Inc. a corporation, Louis Schwartz, Junction Milling Co., a corporation, West Bergen Trust Company, a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, Trustee, John P. Grady, Abraham Shilling and Cranford Trust Company, a corporation, have not nor have any or either of them, filed any reply to the said counterclaim within the time limited by law, or at any other time, but that they have wholly failed to and neglected so to do.

It is thereupon, on this 30th day of July in the year of Our Lord One Thousand Nine Hundred and Twenty-Eight, Ordered, Adjudged, and Decreed, that the said counterclaim be taken as confessed as against the Capitol Construction Co., Inc., a corporation, Louis Schwartz, Junction Milling Co., a corporation, West Bergen Trust

Company, a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, Trustee, John P. Grady, Abraham Shilling and Cranford Trust Company, a corporation to the end that such decree may be made against them as the Chancellor shall think equitable and just.

E. R. WALKER,
C.

Answer and Counterclaim of Defendant, Ira R. Crouse.

(Duly Served.)

(Filed April 9th, 1928.)

The defendant, Ira R. Crouse, of the City of Perth Amboy, County of Middlesex and State of New Jersey, answering the complaint in this cause, says that:

1. He has not sufficient knowledge or information whereof to form a belief concerning the allegations contained in paragraphs 1, 2, 4, 5, 6, 7, 8, and 10 of said complaint.

2. This defendant admits all the other paragraphs of the said complaint.

COUNTERCLAIM.

By way of counterclaim against the complainant, Riverside Apartment Corporation, a corporation, and the defendants, Capitol Construction Co., Inc., a corporation, Israel Shilowitz, Jacob Tucker, Carteret Company, a corporation, Louis Schwartz, Junction Milling Co., a corporation, West Bergen Trust Company, a corporation, The

Trust Company of New Jersey, a corporation, Edward P. Stout, trustee, John P. Grady, Abraham Shilling and Cranford Trust Company, a corporation, the defendant Ira R. Crouse, says that:

1. On January 12th, 1928, the said Ira R. Crouse filed in the office of the Clerk of Union County a mechanic's lien claim against the said Capitol Construction Co. Inc. wherein and whereby said Ira R. Crouse claims a lien upon the said mortgaged lands for the sum of $19,383.79.

2. On July 29th, 1927 said Capitol Construction Co. Inc. a corporation, mortgaged said lands to Israel Shilowitz and Jacob Tucker for $20,000.00, which mortgage was, on August 2nd, 1927 recorded in the Office of the Register of the County of Union in Book 878 of Mortgages, page 347.

Any interest which the said Israel Shilowitz and Jacob Tucker or either of them may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

3. On October 14th, 1927 said Capitol Construction Co. Inc. a corporation, mortgaged said lands to Carteret Company, a corporation for $35,000.00, which mortgage was on October 24th, 1927 recorded in the Office of the Register of Union County in Book 892 of Mortgages, page 89.

Any interest which the said Carteret Company, a corporation may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

4. On August 22nd, 1927 said Capitol Construction Co. Inc. mortgaged said lands to Louis

Schwartz for $5150.00 which mortgage was on August 25th, 1927 recorded in the Office of the Register of Union County in Book 884 of Mortgages, page 127.

Any interest which the said Louis Schwartz may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

5. By agreement dated October 20th, 1927 and recorded in the office of the Register of Union County on October 24th, 1927 in Book 67 of Releases, page 178, said Louis Schwartz did agree with said Carteret Company to subordinate the lien if the mortgage of said Louis Schwartz to the lien of the mortgage of said Carteret Company and by virtue thereof said Carteret Company claims priority of the lien of the aforesaid mortgage to the lien of the said mortgage of the said Louis Schwartz.

Any interest which the said Louis Schwartz and said Carteret Company may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

6. On September 16th, 1927 said Capitol Construction Co. Inc. mortgaged said lands to Junction Milling Co. a corporation for $11,619.34, which said mortgage was, on October 6th, 1927 recorded in the Office of the Register of Union County in Book 886 of Mortgages, page 390.

Any interest which the said Junction Milling Co. may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

7. On October 25th, 1927 said Capitol Construction Co. Inc. mortgaged said lands to West Bergen Trust Company, a corporation for $6,000.00 which mortgage was on October 26th, 1927 recorded in

the Office of the Register of Union County in Book 895 of Mortgages, page 38.

Any interest which the said West Bergen Trust Company may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

8. On October 28th, 1927 said Capitol Construction Co. Inc. mortgaged said lands to The Trust Company of New Jersey for $16,000.00 which mortgage was on November 9th, 1927 recorded in the Office of the Register of Union County in Book 894 of Mortgages, page 257.

Any interest which said The Trust Company of New Jersey may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

9. On November 1st, 1927 said Capitol Construction Co. Inc. mortgaged said lands to Edward P. Stout, trustee, for $7500.00 which mortgage was on November 12th, 1927 recorded in the Office of the Register of Union County in Book 891 of Mortgages, page 194.

Any interest which said Edward P. Stout, trustee, may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

10. On October 28th, 1927 said Capitol Construction Co. Inc. mortgaged said lands to The Trust Company of New Jersey, a corporation for $16,000.00, which mortgage was on December 1st, 1927 recorded in the Office of the Register of Union County in Book 898 of Mortgages, page 306.

Any interest which said The Trust Company of New Jersey may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

Answer and Counterclaim of Defendant, Ira R. Crouse.

11. On January 9th, 1928 John P. Grady recovered judgment in the New Jersey Supreme Court against Hyman Silverman, Harry Starr, Jacob Starr and Capitol Construction Co. Inc. in the sum of $1124.61 against Capitol Construction Co. Inc. and Hyman Silverman and $819.52 against said Jacob Starr and $305.09 against said Harry Starr besides $66.02 costs of suit.

Any interest which said John P. Grady may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

12. On November 21st, 1927 Abraham Shilling docketed from the Hudson County Court of Common Pleas in the New Jersey Supreme Court, a judgment recovered by him, said Abraham Shilling against said Hyman Silverman and Jacob Starr in the sum of $2550.00 damages and $55.12 costs of suit.

Any interest which said Abraham Shilling may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

13. On February 27th, 1928 Cranford Trust Company, a corporation, recovered judgment in the New Jersey Supreme Court against said Hyman Silverman and Jacob Starr and Harry Starr for $1075.96 damages and $62.02 costs of suit.

Any interest which said Cranford Trust Company may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

This defendant is without adequate remedy in the courts of law, and therefore prays:

1. That Capitol Construction Co. Inc., a corporation, Israel Shilowitz, Jacob Tucker, Carteret Company, a corporation, Louis Schwartz, Junc-

tion Milling Co., a corporation, West Bergen Trust Company, a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, trustee, John P. Grady, Abraham Shilling, and Cranford Trust Company, a corporation, who are the defendants to this counterclaim, may answer this counterclaim, without oath, and each statement therein made.

2. That an account may be taken of the amount due to this defendant on its lien claim, as aforesaid.

3. That the lien of this defendant, by reason of having furnished materials, as aforesaid, and having filed his lien claim and instituted suit thereon, as aforesaid, may be decreed to be prior and paramount to the respective liens and interests of the complainant and the other defendants in this cause.

4. That the defendants to this counterclaim, or one of them, may be decreed to pay to this defendant the amount so found due, with interest and costs, by a short day, to be appointed by this court, and that in default of such payment, they and each of them be debarred and foreclosed of all equity of redemption in said lands and premises, or

5. That a decree may be made for a sale of the mortgaged premises set forth in the said complaint, to raise and pay, in the first instance, to this defendant, the amount so found due to it on its claim, as aforesaid, with interest and costs, and in the second instance, to the complainant and such other defendants herein, as may be determined by this court.

AARON KAUFMAN,
Solicitor for Defendant, Ira R. Crouse.

Notice of Motion of Carteret Company to Strike Out Counterclaim of Ira R. Crouse.

(Duly Served.)

(Filed April 17th, 1928.)

To Aaron Kaufman, Solicitor of Defendant, Ira R. Crouse:

Please take notice that on Monday, April 16th, 1928, at ten o'clock in the forenoon or as soon thereafter as the matter can be heard, I shall apply to the Chancellor, at Chancery Chambers in Jersey City, #1 Exchange Place, Jersey City, for an order striking out the counterclaim filed by you in the above entitled cause as to the defendant Carteret Company, on the following grounds:

1. That the said counterclaim does not disclose any cause of action against the defendant, Carteret Company.

2. That the said counterclaim is sham and frivolous.

3. That the said counterclaim does not exhibit honestly and truthfully the true state of facts, which true state of facts if set forth in the Bill would preclude any possibility of success under said counterclaim.

And please take further notice, that the defendant, Ira R. Crouse, will be required to appear for examination at the time of making said motion, and upon failure to do so, I shall apply to the Court for an Order requiring said defendant, Ira R. Crouse, to appear for examination.

Dated April 11th, 1928.

Jas. E. Pyle,
Sol'r. for Defendant,
Carteret Company.

Affidavit On Motion.

(Filed April 17th, 1928.)

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

James E. Pyle, being duly sworn according to law on his oath, says that he is the Solicitor for the defendant Carteret Company, and as such had full charge of the placing of the mortgage of the Carteret Company mentioned in the Bill of Complaint in the above entitled cause, and disbursing of the moneys due thereunder, and procuring releases as to rights to file mechanic's liens upon the premises covered by said mortgage, against said mortgagee and that as an inducement to the said mortgagee to place said mortgage loan, the defendant, Ira R. Crouse did on or about October 13th, 1927, execute a release in writing bearing date on that day, releasing all right to file any mechanic's lien against the premises covered by the mortgage of the said defendant Carteret Company, being the same premises set forth in the Bill of Complaint, so that the said mortgage might hold its said mortgage fully released and discharged from any such lien, which release is now in possession of the deponent, ready to be produced before this court.

Subscribed and sworn to before me this 16th day of April, 1928. } James E. Pyle.

William T. Cahill,
Attorney at Law of New Jersey.

Order Striking Out Counterclaim of Ira R. Crouse.

(Filed April 17th, 1928.)

A motion having been made by the defendant Carteret Company to strike out as the defendant Carteret Company the counterclaim of Ira R. Crouse, on the ground the same does not disclose any cause of action and on the further ground that the same was sham and frivolous and does not honestly and truthfully set forth the true state of facts and it appearing that due notice of this motion has been given to the said defendant Ira R. Crouse and the Court having heard the arguments of James E. Pyle, Solicitor for the defendant Carteret Company and Aaron Kaufman, Solicitor for the defendant Ira R. Crouse and being of the opinion that the said counterclaim is defective in that it does not set forth a cause of action.

It is thereupon on this 16th day of April, Nineteen Hundred and twenty-eight, ORDERED, that said counterclaim be and the same is hereby stricken out as to the defendant Carteret Company, and it is further ORDERED, that on the question of permitting the said defendant Ira R. Crouse to file an amended counterclaim to take the place of the one so stricken out that said matter be continued over to Monday, April 30th, 1928, at ten o'clock in the forenoon (daylight saving time) or as soon thereafter as the matter can be heard at Chancery Chambers in Jersey City.

E. R. WALKER,
C.

Respectfully Advised,
JOHN BENTLEY,
V. C.

Answer of Israel Shilowitz and Jacob Tucker to Counterclaim of Ira R. Crouse.

(Filed April 11th, 1928.)

The defendants, Israel Shilowitz and Jacob Tucker, in reply to the answer of the defendant, Ira R. Crouse, joins issue thereon.

By way of answer to the counterclaim, the defendants, Israel Shilowitz and Jacob Tucker, say that:

1. The allegations of paragraphs 1 and 2 of the counterclaim are denied.

2. Not having sufficient knowledge as to the allegations of paragraphs 3 to 13, both inclusive of the counterclaim, they leave the defendant, Ira R. Crouse, to his proof.

3. The mortgage of these defendants, Israel Shilowitz and Jacob Tucker, mentioned in the bill of complaint is prior and paramount to the lien claim of the answering defendant, Ira R. Crouse.

SECLOW & NESSANBAUM,
Solicitors of defendants, Israel
Shilowitz and Jacob Tucker.

Amended Answer and Counterclaim of Defendant, Ira R. Crouse.

(Duly Served.)

(Filed April 23rd 1928.)

The defendant, Ira R. Crouse, of the City of Perth Amboy, County of Middlesex and State of New Jersey, answering the complaint in this cause, says that:

1. He has not sufficient knowledge or information whereof to form a belief concerning the allegations contained in paragraphs 1, 2, 4, 5, 6, 7, 8, 10 of said complaint.

2. As to all the other paragraphs in the said bill of complaint, this defendant admits all the other paragraphs of the said complaint, but disputes the order of priority as set forth in the said bill of complaint.

COUNTERCLAIM.

By way of counterclaim against the defendants, Capitol Construction Co., Inc., a corporation, Israel Shilowitz, Jacob Tucker, Louis Schwartz, Junction Milling Co., a corporation, West Bergen Trust Company, a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, Trustee, John P. Grady, Abraham Shilling and Cranford Trust Company, a corporation, the defendant, Ira R. Crouse, says that:

1. On January 12th, 1928, the said Ira R. Crouse filed in the office of the Clerk of Union County a mechanic's lien claim against the said Capitol Construction Co., Inc., wherein and whereby said Ira R. Crouse claims a lien upon

the said mortgaged lands for the sum of $19,383.79, for materials furnished in the construction of a building upon the property described in the bill of complaint.

2. On January 4th, 1928, this court declared the defendant, Capitol Construction Co., Inc., a corporation of the State of New Jersey, as an insolvent, and appointed Ira R. Crouse and Benjamin Heyman of Jersey City as receivers of the said defendant corporation.

3. On July 29th, 1927, said Capitol Construction Co., Inc., a corporation, mortgaged said lands to Israel Shilowitz and Jacob Tucker for $20,000.00, which mortgage was, on August 2nd, 1927 recorded in the office of the Register of the County of Union in Book 878 of mortgages page 347. Said mortgage was recorded after the commencement of the building on the said premises, and part of the funds thereof were not applied to the construction of the said building.

Any portion of the said principal of the said mortgage which was not applied towards the construction of the said building is subsequent and subordinate in lien to the claim of this defendant.

4. On August 22nd, 1927 said capitol Construction Co., Inc., mortgaged said lands to Louis Schwartz for $5,150.00 which mortgage was on August 25th, 1927 recorded in the Office of the Register of Union County in Book 884 of mortgages page 127. Said mortgage was placed on record after the commencement of the building and none of the funds thereof were applied towards the construction of the said building.

Any interest which the said Louis Schwartz may have in the said lands by reason of said

mortgage is therefore subsequent and subordinate to the claim of this defendant.

5. On September 16th, 1927 said Capitol Construction Co., Inc. mortgaged said lands to Junction Milling Co., a corporation, for $11,619.34, which said mortgage was, on October 6th, 1927 recorded in the Office of the Register of Union County in Book 886 of mortgages, page 390. Said mortgage was recorded after the commencement of the said building, and none of the funds of the said mortgage were applied towards the construction of the said building.

Any interest which the said Junction Milling Co. may have in the said lands is therefore subsequent and subordinate to the claim of this defendant.

6. On October 25th, 1927 said Capitol Construction Co., Inc. mortgaged said lands to West Bergen Trust Company, a corporation, for $6,000.00, which mortgage was on October 26th, 1927 recorded in the Office of the Register of Union County in Book 895 of mortgages, page 38. Said mortgage was recorded after the commencement of the said building, and none of the funds of the said mortgage were applied towards the construction of the said building.

Any interest which the said West Bergen Trust Company may have in the said lands is therefore subsequent and subordinate to the claim of this defendant.

7. On October 28th, 1927, said Capitol Construction Co., Inc. mortgaged said lands to The Trust Company of New Jersey for $16,000.00 which mortgage was on November 9th, 1927, recorded in the Office of the Register of Union

County in Book 894 of mortgages, page 257. Said mortgage was recorded after the commencement of the said building, and none of the funds of the said mortgage were applied towards the construction of the said building.

Any interest which the said The Trust Company of New Jersey may have in the said lands is therefore subsequent and subordinate to the claim of this defendant.

8. On November 1st, 1927 said Capitol Construction Co., Inc. mortgaged said lands to Edward P. Stout, trustee for $7,500.00, which mortgage was on November 12th, 1927, recorded in the Office of the Register of Union County in Book 891 of mortgages, page 194. Said mortgage was recorded after the commencement of the said building, and none of the funds of the said mortgage were applied towards the construction of the said building.

Any interest which the said Edward P. Stout, trustee, may have in the said lands is therefore subsequent and subordinate to the claim of this defendant.

9. On October 28th, 1927 said Capital Construction Co., Inc. mortgaged said lands to The Trust Company of New Jersey, a corporation for $16,000.00, which mortgage was on December 1st, 1927 recorded in the Office of the Register of Union County in Book 898 of mortgages page 306. Said mortgage was recorded after the commencement of the said building, and none of the funds of the said mortgage were applied towards the construction of the said building.

Any interest which the said The Trust Company of New Jersey, may have in the said lands is

therefore subsequent and subordinate to the claim of this defendant.

10. On January 9th, 1928 John P. Grady recovered judgment in the New Jersey Supreme Court against Hyman Silverman, Jacob Starr, Harry Starr and Capitol Construction Co., Inc., in the sum of $1,124.61 against Capitol Construction Co., Inc., and Hyman Silverman and $819.52 against said Jacob Starr and $305.09 against said Harry Starr besides $66.02 costs of suit.

By reason of the filing of the mechanic's lien by the said defendant Ira R. Crouse for materials furnished on the said premises any interest which the said John P. Grady may have in the said lands is subsequent and subordinate to the claim of this defendant.

11. On November 21st, 1927, Abraham Shilling docketed from the Hudson County Court of Common Pleas in the New Jersey Supreme Court a judgment recovered by him said Abraham Shilling against said Hyman Silverman and Jacob Starr in the sum of $2,555.00 damages and $56.12 costs of suit.

By reason of the filing of the mechanic's lien by the said defendant Ira R. Crouse for materials furnished on the said premises any interest which the said Abraham Shilling may have in the said lands is subsequent and subordinate to the claim of this defendant.

12. On February 27th, 1928, Cranford Trust Company, a corporation, recovered judgment in the New Jersey Supreme Court against said Hyman Silverman and Jacob Starr and Harry Starr for $1075.96 damages and $62.02 costs of suit.

Amended Answer and Counterclaim of Defendant, Ira R. Crouse.

By reason of the filing of the mechanic's lien by the said defendant, Ira R. Crouse for materials furnished on the said premises, any interest which the said Cranford Trust Company may have in the said lands, is subsequent and subordinate to the claim of this defendant.

This defendant is without adequate remedy in the courts of law, and therefore prays:

1. That Capitol Construction Co., Inc., a corporation, Israel Shilowitz, Jacob Tucker, Louis Schwartz, Junction Milling Co., a corporation, West Bergen Trust Company, a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, Trustee, John P. Grady, Abraham Shilling and Cranford Trust Company, a corporation, who are the defendants to this counterclaim, may answer this counterclaim, without oath, and each statement therein made.

2. That an account may be taken of the amount due to this defendant on its lien claim, as aforesaid.

3. That the lien of this defendant, by reason of having furnished materials, as aforesaid, and having filed his lien claim as aforesaid, may be decreed to be prior and paramount to the respective liens and interests of the complainant and all other defendants mentioned in this counterclaim except the defendants Israel Shilowitz and Jacob Tucker, and as to them, that it may be decreed that the mechanic's lien of this defendant is prior and paramount to the mortgage of the said Israel Shilowitz and Jacob Tucker to the amount of the moneys not applied in their mortgage towards the construction of the building.

Amended Answer and Counterclaim of Defendant, Ira R. Crouse.

4. That the defendants to this counterclaim or one of them, may be decreed to pay to this defendant the amount so found due, with interest and costs, by a short day, to be appointed by this court, and that in default of such payment, they and each of them be debarred and foreclosed of all equity of redemption in said lands and premises, or

5. That a decree may be made for a sale of the mortgaged premises set forth in the said complaint, to raise and pay, in the first instance, to the complainant the amount so found due on its claim as aforesaid with interest and costs, and in the second instance, to the defendant, Ira R. Crouse, and in the third instance, to such other defendants herein as may be determined by this court.

AARON KAUFMAN,
Solicitor for Defendant,
Ira R. Crouse.

Answer of West Bergen Trust Company to Counterclaim of Ira R. Crouse.

(Filed April 24th, 1928.)

The answer of defendant, West Bergen Trust Company, a corporation of New Jersey, to counterclaim of defendant, Ira R. Crouse:

This defendant, West Bergen Trust Company, answering the counterclaim of defendant, Ira R. Crouse, says that:

1. It has no knowledge or information sufficient to form a belief as to the statements of said counterclaim, except as to the statements in Paragraph 7 thereof.

2. As to Paragraph 7, this defendant says that its mortgage has priority over the alleged lien claim of defendant, Ira R. Crouse, mentioned in said counterclaim, because the money due or to grow due on this defendant's mortgage was actually advanced and paid by this defendant to defendant, Capitol Construction Co., Inc., and applied by it to the erection of a certain building on said mortgaged premises, and said mortgage was recorded before the filing of said lien claim; and this defendant's mortgage has priority over the morgages and judgments mentioned in said counterclaim, except the mortgage mentioned in Paragraph 3 of said counterclaim, because said mortgages and judgments did not encumber said mortgaged premises prior to the commencement of the construction of said building, and said mortgages are not advance-money mortgages; and, as to the mortgage mentioned in said Paragraph 3, this defendant claims priority over said mortgages to so much thereof as has not been advanced thereon and paid to defendant, Capitol Construction Co., Inc.

EDWARD P. STOUT,
Solicitor for Defendant,
WEST BERGEN TRUST COMPANY.

Order Denying Request to File Amended Counterclaim of Ira R. Crouse, as to Carteret Company.

(Filed April 30th, 1928.)

A motion having been made by the defendant Carteret Company to strike out as to said defendant, the counter-claim of the defendant Ira R. Crouse on the ground that the same does not disclose any cause of action, and was sham and the Court having heard the argument of James E. Pyle, Solicitor for the defendant Carteret Company, and Aaron Kaufman, Solicitor for the defendant Ira R. Crouse, and having thereupon granted said motion, and an Order striking out said Counter-claim as to the defendant Carteret Company having been entered April 17th, 1928, and the defendant Ira R. Crouse having thereupon requested permission to file an amended Counter-claim against the defendant Carteret Company, which matter was thereupon held over to this day for the purpose of permitting the defendant Ira R. Crouse to file and serve an affidavit of proof as to his right to file said amended Counter-claim, and one appearing on behalf of the said Ira R. Crouse:

It is on this 30th day of April, Nineteen Hundred and Twenty-eight, ORDERED, that the said request of the said defendant Ira R. Crouse to file an amended Counter-claim against the said Carteret Company is hereby denied.

And it is further ORDERED, that the said defendant Ira R. Crouse pay to the said defendant Carteret Company its costs to be taxed of this motion and the said aforesaid motion to strike out, within 10 days after service upon him or his said Solicitor of a true but uncertified copy of this Order and of said taxed costs, and that in default of such payment, execution be issued therefor, according to the practice of this Court.

E. R. WALKER,
C.

Respectfully advised,
JOHN BENTLEY,
V. C.

Answer of Israel Shilowitz and Jacob Tucker to Counterclaim of Ira R. Crouse.

(Filed May 2nd, 1928.)

The defendants, Jacob Tucker and Israel Shilowitz, join issue with the defendant, Ira R. Crouse, upon his amended answer.

ANSWER TO COUNTER-CLAIM.

1. The defendants, Jacob Tucker and Israel Shilowitz, answering the counter-claim say that they not having sufficient knowledge as to the allegations of paragraph 1 of the counter-claim, they leave the defendant, Ira R. Crouse, to his proof.

2. Paragraph 2 of the counter-claim is admitted.

3. The execution of the mortgage mentioned in paragraph 3 of the counter-claim is admitted, but it is denied that the funds thereof was not applied to the construction of said building. As a matter of fact the $20,000 for which the mortgage was given as security was actually applied towards the construction of the building. It is further denied that the lien claim of the defendant, Ira R. Crouse, is prior to the mortgage of these defendants, Jacob Tucker and Israel Shilowitz, their mortgage being prior and paramount to any lien claim which the said Ira R. Crouse may have.

4. The mortgage of the defendants, Jacob Tucker and Israel Shilowitz, is prior and paramount to any of the liens or mortgages mentioned in the counter-claim of Louis Moore, except to the complainant's mortgage.

SECLOW & NESSANBAUM,
Solicitors of Defendant, Jacob Tucker and Israel Shilowitz.

Order Discontinuing Counterclaim of Ira R. Crouse Against Complainant.

(Filed May 21st, 1928.)

Defendant Ira R. Crouse, having inadvertently joined the complainant as a party to the counterclaim filed by him herein, and desiring to discontinue the said counterclaim as against the complainant; and upon reading the consent of the solicitor of the said defendant Ira R. Crouse to the making of this order hereunder written;

It is on this 21st day of May, 1928, on motion of Gross & Gross, solicitors of said complainant

ORDERED that the counterclaim filed herein by the said defendant Ira R. Crouse, in so far as the same is against the complainant, be and the same is hereby discontinued without costs to either parties against the other.

E. R. WALKER,
C.

I hereby consent to the making of the foregoing order.

AARON KAUFMAN,
Solicitor of Defendant Ira R. Crouse.

Decree *Pro Confesso* on Counterclaim of Ira R. Crouse.

(Filed July 30th, 1928.)

This cause, being opened to the Court by Aaron Kaufman, of counsel with the defendant, Ira R. Crouse, and it appearing that the said defendant, Ira R. Crouse, filed an amended answer and counterclaim against the defendants hereinafter named on April 23rd 1928 and that service of copies of said counterclaim were acknowledged by the said defendants or their attorneys on April 27th and April 28th, 1928, and an acknowledgment of service was filed with this court on May 9th 1928, which counterclaim directs the said defendants to appear and answer the said counterclaim;

And it further appearing that the said defendants, Capitol Construction Co., Inc., a corporation, Louis Schwartz, Junction Milling Co., a corporation, West Bergen Trust Company, a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, Trustee, John P. Grady, Abraham Shilling and Cranford Trust Company, a corporation, have not, nor have any or either of them, filed any reply to the said counterclaim within the time limited by law, or at any other time, but that they have wholly failed and neglected so to do;

It is Thereupon, on this 30th day of July, in the year of Our Lord, One Thousand Nine Hundred and Twenty-Eight, ordered, adjudged, and decreed that the said counterclaim be taken as confessed as against the Capitol Construction Co., Inc., a corporation, Louis Schwartz, Junction Milling Co., a corporation, West Bergen Trust Company, a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, Trustee,

John P. Grady, Abraham Shilling and Cranford Trust Company, a corporation, to the end that such decree may be made against them as the Chancellor shall think equitable and just.

E. R. WALKER,
C.

Answer and Counterclaim of Defendant, Meyer and Ruh Company.

(Duly Served.)

(Filed April 9th, 1928.)

The defendant, Meyer and Ruh Company, a corporation of the State of New Jersey, answering the complaint in this cause, says that:

1. It has not sufficient knowledge or information whereof to form a belief concerning the allegations contained in paragraphs 1, 2, 4, 5, 6, 7, 8 and 10 of said complaint.

2. This defendant admits all the other paragraphs of said complaint.

COUNTERCLAIM.

By way of counterclaim against the complainant, Riverside Apartment Corporation, a corporation, and the defendants, Capitol Construction Co., Inc., a corporation, Israel Shilowitz, Jacob Tucker, Carteret Company, a corporation, Louis Schwartz, Junction Milling Co., a corporation, West Bergen Trust Company, a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, Trustee, John P. Grady, Abraham

Shilling and Cranford Trust Company, a corporation, the defendant, Meyer and Ruh Company, says that:

1. On January 21st, 1928, Meyer and Ruh Company, a corporation, filed in the office of the Clerk of Union County, a mechanics' lien claim against said Capitol Construction Co., Inc., wherein and whereby said Meyer and Ruh Company claims a lien upon the said mortgaged lands for the sum of $791.19 or some other sum.

2. On July 29th, 1927, said Capitol Construction Co., Inc., a corporation, mortgaged said lands to Israel Shilowitz and Jacob Tucker for $20,000.00, which mortgage was, on August 2nd, 1927, recorded in the Office of the Register of the County of Union in Book 878 of mortgages, page 347.

Any interest which the said Israel Shilowitz and Jacob Tucker or either of them may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

3. On October 14th, 1927, said Capitol Construction Co., Inc., a corporation, mortgaged said lands to Carteret Company, a corporation, for $35,000.00, which mortgage was on October 24th, 1927, recorded in the Office of the Register of Union County in Book 892 of mortgages, page 89.

Any interest which the said Carteret Company, a corporation, may have in the said lands is subject, subsequent and subordinate to the claim of this defendant.

4. On August 22nd, 1927, said Capitol Construction Co., Inc., mortgaged said lands to Louis Schwartz for $5,150.00, which mortgage was on August 25th, 1927, recorded in the Office of the

Registrar of Union County in Book 884 of mortgages, page 127.

Any interest which the said Louis Schwartz may have in the said lands is subject, subsequent and subordinate, to the claim of this defendant.

5. By agreement dated October 20th, 1927, and recorded in the Office of the Register of Union County on October 24th, 1927, in Book 67 of Releases, page 178, said Louis Schwartz did agree with said Carteret Company to subordinate the lien of the mortgage of said Louis Schwartz to the lien of the mortgage of said Carteret Company and by virtue thereof said Carteret Company claims priority of the lien of the aforesaid mortgage to the lien of the said mortgage of the said Louis Schwartz.

Any interest which the said Louis Schwartz and said Carteret Company may have in the said lands is subject, subsequent and subordinate, to the claim of this defendant.

6. On September 16th, 1927, said Capitol Construction Co., Inc., mortgaged said lands to Junction Milling Co., a corporation, for $11,619.34, which said mortgage was, on October 6th, 1927, recorded in the Office of the Register of Union County in Book 886 of Mortgages, page 380.

Any interest which the said Junction Milling Co. may have in the said lands is subject, subsequent and subordinate, to the claim of this defendant.

7. On October 25th, 1927, said Capitol Construction Co., Inc., mortgaged said lands to West Bergen Trust Company, a corporation, for $6,000.00, which mortgage was, on October 26th, 1927, recorded in the Office of the Register of

Union County in Book 895 of mortgages, page 38.

Any interest which the said West Bergen Trust Company may have in the said lands is subject, subsequent and subordinate, to the claim of this defendant.

8. On October 28th, 1927, said Capitol Construction Co., Inc., mortgaged said lands to The Trust Company of New Jersey for $16,000.00, which mortgage was, on November 9th, 1927, recorded in the Office of the Register of Union County in Book 894 of mortgages, page 257.

Any interest which said The Trust Company of New Jersey may have in the said lands is subject, subsequent and subordinate, to the claim of this defendant.

9. On November 1st, 1927, said Capitol Construction Co., Inc., mortgaged said lands to Edward P. Stout, Trustee, for $7,500.00, which mortgage was, on November 12th, 1927, recorded in the Office of the Register of Union County in Book 891 of Mortgages, page 194.

Any interest which said Edward P. Stout, Trustee, may have in the said lands is subject, subsequent and subordinate, to the claim of this defendant.

10. On October 28th, 1927, said Capitol Construction Co., Inc., mortgaged said lands to The Trust Company of New Jersey, a corporation, for $16,000.00, which mortgage was, on December 1st, 1927, recorded in the Office of the Register of Union County in Book 898 of Mortgages, page 306.

Any interest which said The Trust Company of New Jersey may have in the said lands is subject, subsequent and subordinate, to the claim of this defendant.

Answer and Counterclaim of Defendant, Meyer and Ruh Company.

11. On January 9th, 1928, John P. Grady recovered judgment in the New Jersey Supreme Court against Hyman Silverman, Harry Starr, Jacob Starr and Capitol Construction Co., Inc., in the sum of $1,124.61 against Capitol Construction Co., Inc., and Hyman Silverman and $819.52 against said Jacob Starr and $305.09 against said Harry Starr besides $66.02 costs of suit.

Any interest which said John P. Grady may have in the said lands is subject, subsequent and subordinate, to the claim of this defendant.

12. On November 21st, 1927, Abraham Shilling docketed from the Hudson County Court of Common Pleas in the New Jersey Supreme Court, a judgment recovered by him, said Abraham Shilling against said Hyman Silverman and Jacob Starr in the sum of $2,555.00 damages and $56.12 costs of suit.

Any interest which said Abraham Shilling may have in the said lands is subject, subsequent and subordinate, to the claim of this defendant.

13. On February 27th, 1928, Cranford Trust Company, a corporation, recovered judgment in the New Jersey Supreme Court against said Hyman Silverman and Jacob Starr and Harry Starr for $1,075.96 damages and $62.02 costs of suit.

Any interest which said Cranford Trust Company may have in the said lands is subject, subsequent and subordinate, to the claim of this defendant.

This defendant is without adequate remedy in the courts of law, and therefore prays:

1. That Capitol Construction, Inc., a corporation, Israel Shilowitz, Jacob Tucker, Carteret Company, a corporation, Louis Schwartz, Junction Milling Co., a corporation, West Bergen

Trust Company, a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, Trustee, John P. Grady, Abraham Shilling, and Cranford Trust Company, a corporation, who are the defendants to this counterclaim, may answer this counterclaim, without oath, and each statement therein made.

2. That an account may be taken of the amount due to this defendant on its lien claim, as aforesaid.

3. That the lien of this defendant, by reason of having furnished materials, as aforesaid, and having filed his lien claim and instituted suit thereon, as aforesaid, may be decreed to be prior and paramount to the respective liens and interest of the complainant and the other defendants in this cause.

4. That the defendants to this counterclaim, or one of them, may be decreed to pay to this defendant the amount so found due, with interest and costs, by a short day, to be appointed by this court, and that in default of such payment, they and each of them be debarred and foreclosed of all equity of redemption in said lands and premises, or

5. That a decree may be made for a sale of the mortgaged premises set forth in the said complaint, to raise and pay, in the first instance, to this defendant, the amount so found due to it on its claim, as aforesaid, with interest and costs, and in the second instance, to the complainant and such other defendants herein, as may be determined by this court.

AARON KAUFMAN,
Solicitor for Defendants,
Meyer and Ruh Company.

Notice of Motion of Carteret Company to Strike Out Counterclaim of Meyer and Ruh Company.

(Duly Served.)

(Filed April 17th, 1928.)

To Aaron Kaufman, Solicitor of Defendant, Meyer and Ruh Company:

Please take notice that on Monday, April 16th, 1928, at ten o'clock in the forenoon or as soon thereafter as the matter can be heard, I shall apply to the Chancellor, at Chancery Chambers in Jersey City, No. 1 Exchange Place, Jersey City, for an order striking out the counterclaim filed by you in the above entitled cause as to the defendant Carteret Company, on the following grounds:

1. That the said counterclaim does not disclose any cause of action against the defendant, Carteret Company.

2. That the said counter-claim is sham and frivolous.

3. That the said counterclaim does not exhibit honestly and truthfully the true state of facts, which true state of facts if set forth in the bill would preclude any possibility of success under said counterclaim.

And please take further notice, that the defendant, Meyer and Ruh Company, will be required to appear for examination at the time of making said motion, and upon failure to do so, I shall apply to the Court for an order requiring said defendant, Meyer and Ruh Company, to appear for examination.

Dated April 11th, 1928.

Jas. E. Pyle,
Solicitor for defendant,
Carteret Company.

Order Striking Out Counterclaim of Meyer and Ruh Company.

(Filed April 17th, 1928.)

A motion having been made by the defendant Carteret Company to strike out as to the defendant Carteret Company, the counterclaim of Meyer and Ruh Company, on the ground that the same does not disclose any cause of action and on the further ground that the same was sham and frivolous and does not honestly and truthfully set forth the true state of facts, and it appearing that due notice of this motion has been given to the defendant Meyer and Ruh Company, and the Court having heard the arguments of James E. Pyle, Solicitor for the defendant Carteret Company, and Aaron Kaufman, Solicitor for the defendant Meyer and Ruh Company, and being of the opinion that the said counterclaim is defective in that it does not set forth a cause of action:

It is thereupon on this 16th day of April, nineteen hundred and twenty-eight, ORDERED that said counterclaim be and the same is hereby stricken out as to the defendant Carteret Company, and it is further ORDERED that on the question of permitting said defendant Meyer and Ruh Company to file an amended counterclaim to take the place of the one so stricken out, that said matter be continued over to Monday, April 30th, 1928, at ten o'clock in the forenoon (daylight saving time) or as soon thereafter as the matter can be heard, at Chancery Chambers, in Jersey City.

E. R. WALKER, C.

Respectfully advised,
JOHN BENTLEY,
V. C.

Answer of Israel Shilowitz and Jacob Tucker to Counterclaim of Meyer and Ruh Company.

(Filed April 11th, 1928.)

The defendants, Israel Shilowitz and Jacob Tucker, in reply to the answer of the defendant, Meyer and Ruh Company, join issue thereon.

By way of answer to the counter-claim, the defendants, Israel Shilowitz and Jacob Tucker, say that:

1. The allegations of paragraphs 1 and 2 of the counter-claim are denied.

2. Not having sufficient knowledge as to the allegations of paragraphs 3 to 13, both inclusive of the counter-claim, they leave the defendant, Meyer and Ruh Company to its proof.

3. The mortgage of these defendants, Israel Shilowitz and Jacob Tucker, mentioned in the bill of complaint is prior and paramount to the lien claim of the answering defendant, Meyer and Ruh Company.

SECLOW & NESSANBAUM,
Solicitors of Defendants,
Israel Shilowitz and Jacob Tucker.

Amended Answer and Counterclaim of Defendant Meyer and Ruh Company.

(Duly Served.)

(Filed April 23rd, 1928.)

The defendant, Meyer and Ruh Company, a corporation of the State of New Jersey, answering the complaint in this cause says that:

1. It has not sufficient knowledge or information whereof to form a belief concerning the allegations contained in paragraphs 1, 2, 4, 5, 6, 7, 8, 10 of said complaint.

2. As to all the other paragraphs in the said bill of complaint, this defendant admits all the other paragraphs of the said complaint, but disputes the order of priority as set forth in the said bill of complaint.

COUNTERCLAIM.

By way of counterclaim against the defendants, Capitol Construction Co., Inc., a corporation, Israel Shilowitz, Jacob Tucker, Louis Schwartz, Junction Milling Co., a corporation, West Bergen Trust Company, a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, Trustee, John P. Grady, Abraham Shilling and Cranford Trust Company, a corporation, the defendant, Meyer and Ruh Company, says that:

1. On January 21st, 1928, Meyer and Ruh Company, a corporation, filed in the Office of the Clerk of Union County, a mechanic's lien claim against said Capitol Construction Co., Inc., wherein and whereby said Meyer and Ruh Company claims a lien upon the said mortgaged lands for the sum of $791.19 or some other sum.

Amended Answer and Counterclaim of Defendant, Meyer and Ruh Company.

2. On January 4th, 1928, this court declared the defendant, Capital Construction Co., Inc., a corporation of the State of New Jersey, as an insolvent, and appointed Ira R. Crouse and Benjamin Heyman of Jersey City as receivers of the said defendant corporation.

3. On July 29th, 1927, said Capital Construction Co., Inc., a corporation, mortgaged said lands to Israel Shilowitz and Jacob Tucker for $20,000.00, which mortgage was, on August 2nd, 1927, recorded in the Office of the Register of the County of Union in Book 878 of mortgages page 347. Said mortgage was recorded after the commencement of the buildings on the said premises, and part of the funds thereof were not applied to the construction of the said building.

Any portion of the said principal of the said mortgage which was not applied towards the construction of the said building is subsequent and subordinate in lien to the claim of this defendant.

4. On August 22nd, 1927, said Capital Construction Co., Inc., mortgaged said lands to Louis Schwartz for $5,150.00, which mortgage was on August 25th, 1927, recorded in the Office of the Register of Union County in Book 884 of mortgages page 127. Said mortgage was placed on record after the commencement of the building and none of the funds thereof were applied towards the construction of the said building.

Any interest which the said Louis Schwartz may have in the said lands by reason of said mortgage is therefore subsequent and subordinate to the claim of this defendant.

5. On September 16th, 1927, said Capital Construction Co., Inc., mortgaged said lands to Junc-

tion Milling Co., a corporation for $11,619.34, which said mortgage was, on October 6th, 1927, recorded in the Office of the Register of Union County in Book 886 of mortgages page 390. Said mortgage was recorded after the commencement of the said building, and none of the funds of the said mortgage were applied towards the construction of the said building.

Any interest which the said Junction Milling Co. may have in the said lands is therefore subsequent and subordinate to the claim of this defendant.

6. On October 25th, 1927, said Capital Construction Co., Inc., mortgaged said lands to West Bergen Trust Company, a corporation for $6,000.00, which mortgage was on October 26th, 1927, recorded in the Office of the Register of Union County in Book 95 of mortgages page 38. Said mortgage was recorded after the commencement of the said building, and none of the funds of the said mortgage were applied towards the construction of the said building.

Any interest which the said West Bergen Trust Company may have in the said lands is therefore subsequent and subordinate to the claim of this defendant.

7. On October 28th, 1927, said Capital Construction Co., Inc., mortgaged said lands to The Trust Company of New Jersey for $16,000.00, which mortgage was on November 9th, 1927, recorded in the Office of the Register of Union County in Book 894 of mortgages page 257. Said mortgage was recorded after the commencement of the said building, and none of the funds of the said mortgage were applied towards the construction of the said building.

Any interest which the said The Trust Company of New Jersey may have in the said lands is therefore subsequent and subordinate to the claim of this defendant.

8. On November 1st, 1927, said Capitol Construction Co., Inc., mortgaged said lands to Edward P. Stout, trustee for $7,500.00 which mortgage was on November 12th, 1927, recorded in the Office of the Register of Union County in Book 891 of mortgages, page 194. Said mortgage was recorded after the commencement of the said building, and none of the funds of the said mortgage were applied towards the construction of the said building.

Any interest which the said Edward P. Stout, trustee, may have in the said lands is therefore subsequent and subordinate to the claim of this defendant.

9. On October 28th, 1927, said Capitol Construction Co., Inc., mortgaged said lands to The Trust Company of New Jersey, a corporation for $16,000.00, which mortgage was on December 1st, 1927, recorded in the Office of the Register of Union County in Book 898 of mortgages, page 306. Said mortgage was recorded after the commencement of the said building, and none of the funds of the said mortgage were applied towards the construction of the said building.

Any interest which the said The Trust Company of New Jersey, may have in the said lands is therefore subsequent and subordinate to the claim of this defendant.

10. On January 9th, 1928, John P. Grady recovered judgment in the New Jersey Supreme Court against Hyman Silverman, Jacob Starr, Harry Starr and Capitol Construction Co., Inc.,

in the sum of $1,124.61 against Capitol Construction Co., Inc., and Hyman Silverman and $819.52 against said Jacob Starr and $305.09 against said Harry Starr besides $66.02 costs of suit.

By reason of the filing of the mechanic's lien by the said defendant, Meyer and Ruh Company for materials furnished on the said premises, any interest which the said John P. Grady may have in the said lands, is subsequent and subordinate to the claim of this defendant.

11. On November 21st, 1927, Abraham Shilling docketed from the Hudson County Court of Common Pleas in the New Jersey Supreme Court, a judgment recovered by him, said Abraham Shilling against said Hyman Silverman and Jacob Starr in the sum of $2,555.00 damages and $56.12 costs of suit.

By reason of the filing of the mechanic's lien by the said defendant, Meyer and Ruh Company for materials furnished on the said premises, any interest which the said Abraham Shilling may have in the said lands, is subsequent and subordinate to the claim of this defendant.

12. On February 27th, 1928, Cranford Trust Company, a corporation, recovered judgment in the New Jersey Supreme Court against said Hyman Silverman and Jacob Starr and Harry Starr for $1,075.96 damages and $62.02 costs of suit.

By reason of the filing of the mechanic's lien by the said defendant, Meyer and Ruh Company for materials furnished on the said premises, any interest which the said Cranford Trust Company, may have in the said lands, is subsequent and subordinate to the claim of this defendant.

Amended Answer and Counterclaim of Defendant, Meyer and Ruh Company.

This defendant is without adequate remedy in the Courts of law, and therefore prays:

1. That Capitol Construction Co., Inc., a corporation, Israel Shilowitz, Jacob Tucker, Louis Schwartz, Junction Milling Co., a corporation, West Bergen Trust Company, a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, trustee, John P. Grady, Abraham Shilling and Cranford Trust Company, a corporation, who are the defendants to this counterclaim, may answer this counterclaim, without oath, and each statement therein made.

2. That an account may be taken of the amount due to this defendant on its lien claim, as aforesaid.

3. That the lien of this defendant, by reason of having furnished materials, as aforesaid, and having filed his lien claim as aforesaid, may be decreed to be prior and paramount to the respective liens and interests of the complainant and all other defendants mentioned in this counterclaim except the defendants Israel Shilowitz and Jacob Tucker, and as to them, that it may be decreed that the mechanic's lien of this defendant is prior and paramount to the mortgage of the said Israel Shilowitz and Jacob Tucker to the amount of the moneys not applied in their mortgage towards the construction of the building.

4. That the defendants to this counterclaim or one of them, may be decreed to pay to this defendant the amount so found due, with interest and costs, by a short day, to be appointed by this court, and that in default of such payment, they and each of them be debarred and foreclosed of

all equity of redemption in said lands and premises, or

5. That a decree may be made for a sale of the mortgaged premises set forth in the said complaint, to raise and pay, in the first instance, to the complainant the amount so found due on its claim as aforesaid with interest and costs, and in the second instance, to the defendant, Meyer and Ruh Company, and in the third instance to such other defendants herein as may be determined by this court.

AARON KAUFMAN,
Solicitor for Defendant,
Meyer and Ruh Company.

Answer of West Bergen Trust Company to Counterclaim of Meyer and Ruh Company.

(Filed April 24th, 1928.)

The Answer of Defendant, West Bergen Trust Company, a corporation of New Jersey, to counterclaim of Defendant, Meyer & Ruh Company, a corporation:

This defendant, West Bergen Trust Company, answering the counterclaim of defendant, Meyer & Ruh Company, says that:

1. It has no knowledge or information sufficient to form a belief as to the statements of said counterclaim, except as to the statements in Paragraph 7 thereof.

2. As to Paragraph 7, this defendant says that its mortgage has priority over the alleged lien claim of defendant, Meyer & Ruh Company, mentioned in said counterclaim, because the money

due or to grow due on this defendant's mortgage was actually advanced and paid by this defendant to defendant, Capitol Construction Co., Inc., and applied by it to the erection of a certain building on said mortgaged premises, and said mortgage was recorded before the filing of said lien claim; and this defendant's mortgage has priority over the mortgages and judgments mentioned in said counterclaim, except the mortgage mentioned in Paragraph 3 of said counterclaim, because said mortgages are not advance-money mortgages nor did they or said judgments encumber said mortgaged premises prior to the commencement of the construction of said building; and, as to the mortgage mentioned in said Paragraph 3, this defendant claims priority over said mortgage to so much thereof as has not been advanced thereon and paid to defendant, Capitol Construction Co., Inc.

EDWARD P. STOUT,
Solicitor for Defendant,
West Bergen Trust Company.

Order Denying Request to File Amended Counterclaim of Meyer and Ruh Company, as to Carteret Company.

(Filed April 30th, 1928.)

A motion having been made by the defendant Carteret Company to strike out as to said defendant, the counterclaim of the defendant Meyer and Ruh Company, on the ground that the same does not disclose any cause of action, and was sham and the Court having heard the argument of

Order Denying Request to File Amended Counterclaim of Meyer and Ruh Company, as to Carteret Company.

James E. Pyle, Solicitor for the defendant Carteret Company, and Aaron Kaufman, Solicitor for the defendant Meyer and Ruh Company, and having thereupon granted said motion, and an order striking out said counterclaim as to the defendant Carteret Company having been entered April 17th, 1928, and the defendant Meyer and Ruh Company having thereupon requested permission to file an amended counterclaim against the defendant Carteret Company, which matter was thereupon adjourned over to this day for the purpose of permitting the defendant Meyer and Ruh Company to file and serve an affidavit of proof as to its right to file said amended counterclaim, and one appearing on behalf of the said Meyer and Ruh Company:—

It is on this 30th day of April, nineteen hundred and twenty-eight, ORDERED, that the said request of the said defendant Meyer and Ruh Company to file an amended counterclaim against the said Carteret Company is hereby denied.

And it is further ORDERED that the said defendant Meyer and Ruh Company pay to the said defendant Carteret Company the costs to be taxed of this motion, and of the aforesaid motion to strike out, within 10 days after service upon it or as said Solicitor of a true but uncertified copy of this order and of said taxed costs, and that in default of such payment execution be issued therefor according to the practice of this Court.

E. R. WALKER,
C.

Respectfully advised,
JOHN BENTLEY,
V. C.

Answer of Israel Shilowitz and Jacob Tucker to Counterclaim of Meyer and Ruh Company.

(Filed May 2nd, 1928.)

The defendants, Jacob Tucker and Israel Shilowitz, join issue with the defendant, Meyer and Ruh Company, upon its amended answer.

Answer to Counterclaim.

1. The defendants, Jacob Tucker and Israel Shilowitz, answering the counterclaim say that not having sufficient knowledge as to the allegations of paragraph 1 of the counterclaim, they leave the defendant, Meyer and Ruh Company to its proof.

2. Paragraph 2 of the counterclaim is admitted.

3. The execution of the mortgage mentioned in paragraph 3 of the counterclaim is admitted, but it is denied that the funds thereof was not applied to the construction of said building. As a matter of fact the $20,000 for which the mortgage was given as security was actually applied towards the construction of the building. It is further denied that the lien claim of the defendant, Meyer and Ruh Company, is prior to the mortgage of these defendants, Jacob Tucker and Israel Shilowitz, their mortgage being prior and paramount to any lien claim which the said Meyer and Ruh Company may have.

4. The mortgage of the defendants, Jacob Tucker and Israel Shilowitz, is prior and paramount to any of the liens or mortgages mentioned in the counterclaim of Meyer and Ruh Company except to complainant's mortgage.

Seclow & Nessanbaum,
Solicitors of defendants,
Jacob Tucker and Israel Shilowitz.

Order Discontinuing Counterclaim Against Complainant.

(Filed May 21st, 1928.)

Defendant having inadvertently joined the complainant as a party to the counterclaim filed by it herein, and desiring to discontinue the said counterclaim as against the complainant; and upon reading the consent of the solicitor of the said defendant Meyer and Ruh Company to the making of this order hereunder written;

It is on this 21st day of May, 1928, on motion of Gross & Gross, solicitors of said complainant

ORDERED that the counterclaim filed herein by the said defendant Meyer and Ruh Company, in so far as the same is against the complainant, be and the same is hereby discontinued without costs to either parties against the other.

E. R. Walker,
C.

I hereby consent to the making of the foregoing order.

Aaron Kaufman,
Solicitor of defendant,
Meyer and Ruh Company.

Decree *Pro Confesso* on Counterclaim of Meyer and Ruh Company.

(Filed July 30th, 1928.)

This cause, being opened to the Court by Aaron Kaufman, of counsel with the defendant, Meyer and Ruh Company, a corporation of New Jersey, and it appearing that the said defendant, Meyer and Ruh Company, a corporation of New Jersey, filed an amended answer and counterclaim against the defendants hereinafter named on April 23rd, 1928, and that service of copies of said counterclaim were acknowledged by the said defendants or their attorneys on April 27th and April 28th, 1928, and an acknowledgment of service was filed with this court on May 9th, 1928, which counterclaim directs the said defendants to appear and answer the said counterclaim;

And it further appearing that the said defendants, Capitol Construction Co., Inc., a corporation, Louis Schwartz, Junction Milling Co., a corporation, West Bergen Trust Company, a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, Trustee, John P. Grady, Abraham Shilling and Cranford Trust Company, a corporation, have not, nor have any or either of them, filed any reply to the said counterclaim within the time limited by law, or at any other time, but that they have wholly failed and neglected so to do;

It is thereupon, on this 30th day of July, in the year of Our Lord One Thousand Nine Hundred and Twenty-eight, Ordered, Adjudged, and Decreed that the said counterclaim be taken as confessed as against the Capitol Construction Co., Inc., a corporation, Louis Schwartz, Junction Milling Co., a corporation, West Bergen Trust Company, a corporation, The Trust Company of New Jersey, a corporation, Edward B. Stout, Trustee, John P. Grady, Abraham Shilling and

Cranford Trust Company, a corporation, to the end that such decree may be made against them as the Chancellor shall think equitable and just.

E. R. WALKER,
C.

Replication of Complainant to Answers.

(Filed May 12th, 1928.)

Complainant joins issue on the answers filed herein by defendants Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co., and by Meyer & Ruh Company, a corporation, and by Louis Moore and Ira R. Crouse and Max Platt, McCabe Bros. Co. and Mowre Lager and Alfred W. Booth & Bro., a corporation, and Alpheus S. Van Woeart, and by Joseph Machetto, and M. Tozzi and Joseph Marcasiano, partners trading as M. Tozzi and J. Marcasiano, and by West Bergen Trust Company, a corporation.

GROSS & GROSS,
Solicitors of Complainant.

Decree *Pro Confesso* for Complainant.

(Filed May 14th, 1928.)

This cause being opened to the Court by Gross & Gross, of counsel with the complainant; and it appearing that process of subpoena for the defendants to appear and answer the complainant's bill has been duly issued and returned served upon all of the defendants herein, and that the defendant John P. Grady, A. S. Reid & Company,

Decree Pro Confesso for Complainant.

Hudson Fireproof Block Company, Jacob Tucker and Israel Shilowitz, and the Trust Company of New Jersey and Abraham Shilling and Louis Schwartz and Harry Siegel and Isador Levin, co-partners trading as Siegel & Levin, Winchester & Muhlberg, Inc., a corporation and John Nicaretta and Benjamin Parnis and Royal Marble Works and Carteret Company, a corporation, and Bayonne Supply Company and Junction Milling Company, have served and filed notices to have their encumbrances reported upon, but not denying the right or priority of complainant's mortgages as in the bill of complaint alleged; and defendants George F. Perry & Sons, Inc., a corporation, and Arthur G. Tewels and Edward P. Stout, trustee, have filed answers admitting complainant's right as is alleged in the bill of complaint, and that the defendants, Capitol Construction Co., Inc. and Ira R. Crouse and Benjamin Heyman, receivers of said Capitol Construction Co., Inc. and Roderick M. Crocket & Co., a corporation, and Julius Stenkauskas and Cranford Trust Company, a corporation, have not nor has any or either of them appeared and pleaded, answered or demurred to the said bill within the time limited by law or at any other time, but that they have wholly failed and neglected so to do; it is thereupon, on this 14th day of May, 1928, on motion of Gross & Gross, Solicitors of Coplt.

Ordered and Decreed that the complainants bill be and the same is hereby taken as confessed against said defendants John P. Grady, Jacob Tucker and Israel Shilowitz, A. S. Reid & Company, Hudson Fireproof Block Company, and the Trust Company of New Jersey and Abraham Shilling and Louis Schwartz and Harry Siegel and Isador Levin, co-partners trading as Siegel

& Levin, Winchester & Muhlberg, Inc., a corporation, and John Nicaretta and Benjamin Parnis and Royal Marble Works, Carteret Company, a corporation, Bayonne Supply Company, Junction Milling Company, George F. Perry & Sons, Inc., a corporation, Arthur G. Teweles, Edward P. Stout, trustee, Capitol Construction Co., Inc., Ira R. Crouse and Benjamin Heyman, receivers of said Capitol Construction Co., Inc., Roderick M. Crocket & Co., a corporation, Julius Stenkauskas and Cranford Trust Company, a corporation, to the end that such decree may be made against them as the Chancellor shall think equitable and just.

E. R. WALKER,
C.

(Note)

No notice, answer or plea filed by defendants: Capitol Construction Co., Inc.; Ira R. Crouse and Benjamin Heyman, receivers of said Capitol Construction Co., Inc.; Roderick M. Crocket & Co.; Julius Stenkauskas and/or the Cranford Trust Company; Decree *Pro Confesso* of complainant recites that the bill was taken as confessed against them.

Decree *Pro Confesso* of complainant recites that defendants, Hudson Fireproof Block Co. and John P. Grady each filed notice in lieu of answer, but same is missing from the file of the Clerk in Chancery, and the decree recites that the bill is taken as confessed against them.

Petition for Sale *Pendente Lite.*

(Filed March 27th, 1928.)

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

The petitioner Riverside Apartment Corporation, a corporation of the State of New Jersey, having its principal office in the City of Jersey City, County of Hudson and State of New Jersey, respectfully shows:

1. Your petitioner has recently filed its bill of complaint in this Honorable Court for the foreclosure of a certain mortgage made to it by Jacob Starr and Hyman Silverman, to secure a certain bond or obligation bearing even date with said mortgage, to wit, March 30, 1927, payable March 30, 1928, and which said mortgage was given to secure part of the consideration or purchase price in the lands and premises hereinafter and in the bill of complaint herein more particularly described, and was recorded in the office of the Register of the County of Union on March 31, 1927; all as by reference to the bill of complaint herein, reference to which is here made, will more fully and at large appear.

2. That in and by the terms of said bond and mortgage it was provided that interest on the principal sum thereof to be computed from said March 30, 1927, at and after the rate of 6% per annum, shall be paid semi-annually, and that the whole of said principal sum shall, at the option of the holder of said mortgage, became due after default in the payment of any installment of interest for 30 days.

3. That on September 30, 1927, six months interest became due and payable upon your peti-

tioner's said mortgage, and the same has not been paid, nor has any part thereof, and the same has been in default for thirty days, and your petitioner has elected that the whole amount of the principal sum of said mortgage, with all accrued interest thereon, shall immediately be due and payable.

4. Your petitioner is also the holder and owner of a certain other bond and mortgage made by the said Jacob Starr and Hyman Silverman to secure the payment of the sum of $30,000.00, dated March 30, 1927, and payable on March 30, 1928, with interest thereon, after the rate of 6% per annum, to be paid semi-annually, and upon which six months' interest became due and payable on September 30, 1927, and has not been paid, nor has any part thereof, and said bond and mortgage likewise contain a provision that the whole of the principal sum shall, at the option of the holder of said mortgage, become due after default in the payment of any installment of interest for 30 days, and your petitioner alleges that such default in the payment of said interest has occurred for more than 30 days, and that your petitioner has likewise elected to declare the entire amount of said last mentioned bond and mortgage now due and payable with all accrued interest thereon.

5. That to petitioner's suit for the foreclosure of its said mortgage there are approximately 35 defendants, all of whom have been served with process, and some, or a great number of said defendants, your petitioner is informed and verily believes threaten and intend to litigate amongst themselves their respective rights of priority of liens upon the said mortgaged lands and premises, although the validity and priority of your peti-

tioner's said mortgages are not questioned, and your petitioner believes that considerable time will elapse before the rights of the respective defendants as between themselves will be determind.

6. There has recently been built upon the said mortgaged lands an apartment house, which has been substantially completed, and the same is now in the hands and possession of Benjamin Heyman and Ira R. Crouse, receivers of Capitol Construction Co., Inc., owner of said land and premises, who were duly appointed as such receivers by an order of this court, and that such receivers are unable to complete the said building because they are not in possession of the necessary funds with which to do so, and the said building now remains in an incompleted state, and open and exposed to damage by the elements, and unprotected from the acts of trespassers and miscreants, and is so constituted as to make it liable to deteriorate in value pending this suit, and to make its care or preservation difficult or expensive, and that said lands and premises can now be sold and a better price realized therefor than at a later season, because the said apartment house can now be complete in a very short time, and rented to tenants from on or about May 1, 1928, which your petitioner is informed is a good renting season for apartment property of the character of the mortgaged premises.

7. That the parties to said foreclosure suit of your petitioner are the following:

Capitol Construction Co., Inc., and Benjamin Heyman and Ira R. Crouse, receivers of said Capitol Construction Co., Inc.; Israel Shilowitz and Jacob Tucker, holders of a mortgage for $20,-

000.00; Carteret Company, holder of a mortgage of $35,000.00; Louis Schwartz, holder of a mortgage of $5,150.00; Junction Milling Company, holder of a mortgage of $11,619.34; West Bergen Trust Company, holder of a mortgage of $6,000.00; Trust Company of New Jersey, holder of a mortgage of $16,000.00; Edward P. Stout, trustee, holder of a mortgage of $7,500.00.

The following who are made parties defendant to your petitioner's foreclosure suit are the holders of mechanics liens against said mortgaged lands and premises: Geo. F. Perry & Sons, Inc., a corporation; A. S. Reid & Company, a corporation; Royal Marble Works, Inc., a corporation; Bayonne Supply Co., a corporation; Winchester & Muhlberg, Inc., a corporation; McCabe Bros. Co., a corporation; Max Platt; John Nigaretta; Benj. Parnis; Harry Siegel and Isador Levin, copartners trading as Siegel & Levin; Joseph Machetto; Roderick M. Crocket & Co., a corporation; Arthur G. Teweles; Louis Moore; Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co.; Ira R. Crouse; Hudson Fireproof Block Co.; Julius Stenkauskas; Meyer and Ruh Company, a corporation; Alpheus S. Van Woeart; Michael Tozzi and Joseph Marcasiano, partners trading as M. Tozzi and J. Marcasiano; Mowre Lager, and Alfred W. Booth & Bro., a corporation.

The following are made parties defendant as judgment creditors: John P. Grady, Abraham Shilling and Cranford Trust Company, a corporation.

8. All of the aforementioned mortgagees, lien claimants and judgment creditors are subsequent

in priority of lien to the lien of your petitioner's aforementioned mortgages.

9. The premises hereinabove referred to are described as follows:

ALL that certain tract of land and premises situate in the Township of Cranford, in the County of Union and State of New Jersey:

Beginning at the point formed by the intersection of the northeasterly side of Riverside Drive with the southeasterly side of Prospect Avenue; thence north forty-seven (47) degrees thirty-six (36) minutes, east along said side of Prospect Avenue three hundred fifty-eight and thirty one-hundredths (358.30) feet to a point; thence south forty-two degrees (42) twenty-four (24) minutes east two hundred (200) feet to a point; thence north forty-seven (47) degrees thirty-six (36) minutes east thirteen and seventy-six (18.76) one-hundredths feet to a point; thence south forty-two (42) degrees twenty-four (24) minutes east one hundred ninety-five and ninety-eight one-hundredths (195.98) feet to the northwesterly side of Union Avenue; thence south forty-nine (49) degrees sixteen (16) minutes west eighty-seven and ninety-seven one-hundredths (87.97) feet along said side of Union Avenue to a point; thence still along said side of Union Avenue south forty-one (41) degrees fifty-one (51) minutes west one hundred and fifty-two and thirty-four one-hundredths (152.34) feet to said side of Riverside Drive; thence northwesterly along said side of Riverside Drive its various courses four hundred forty-three (443) feet more or less to the point or place of beginning.

WHEREFORE your petitioner prays that an order may be made herein for the sale of the said mortgaged lands and premises by the Sheriff of the County of Union pending this suit, in the manner

and subject to the provisions of law relating to the sale of lands on writ of *fieri facias* issued out of this court in foreclosure cases; and that the proceeds of such sale be brought into this court, there to remain subject to the same liens and equities of all parties in interest as was the mortgaged lands and premises, and to be disposed of as this court by its decree or order shall direct.

GROSS & GROSS,
Solicitors and of Counsel
with Petitioner.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

PHILIP GERSHONOWITZ being duly sworn, on his oath deposes and says:

I am Treasurer of Riverside Apartment Corporation, the complainant in the above entitled cause and the petitioner in the foregoing petition named, and have read the said petition, and the contents thereof are true.

Sworn and subscribed to before me this 22nd day of March, 1928. } PHILIP GERSHONOWITZ.

WALTER J. MCINTYRE,
Master in Chancery of New Jersey.

Order to Show Cause.

(Filed March 27th, 1928.)

(Duly Served.)

(Filed March 27th, 1928.)

Upon reading and filing the duly verified petition of Riverside Apartment Corporation, the complainant in the above entitled cause, from which sufficient reason appears therefor; it is, on this 27th day of March, 1928, on motion of Gross & Gross,

ORDERED, that Capitol Construction Co., Inc., and Benjamin Heyman and Ira R. Crouse, receivers of said Capitol Construction Co., Inc.; and Israel Shilowitz and Jacob Tucker; and Carteret Company, a corporation; and Louis Schwartz; and Junction Milling Co., a corporation; and West Bergen Trust Company, a corporation; and the Trust Company of New Jersey, a corporation; and Edward P. Stout, trustee; and Geo. F. Perry & Sons, Inc., a corporation; and A. S. Reid & Company, a corporation; and Royal Marble Works, Inc., a corporation; and Bayonne Supply Co., a corporation; and Winchester & Muhlberg, Inc., a corporation; and McCabe Bros. Co., a corporation; and Max Platt; and John Nicaretta; and Benj. Parnis; and Harry Siegel and Isador Levin, copartners, trading as Siegel & Levin; and Joseph Machetto; and Roderick M. Crocket & Co., a corporation; and Arthur G. Teweles; and Louis Morre; and Morris Portnow and Abraham Lipschitz, partners, trading as Lipschitz Parquet Floor Co.; and Ira R. Crouse; and Hudson Fireproof Block Co.; and Julius Stenkauskas; and Meyer and Ruh Company, a corporation; and Alpheus S. Van Woeart; and

Order to Show.

Michael Tozzi and Joseph Marcasiano, partners, trading as M. Tozzi and J. Marcasiano; and Mowre Lager; and Alfred W. Booth & Bro., a corporation; and John P. Grady; and Abraham Shilling and Cranford Trust Company, a corporation, show cause before the Chancellor, at the Chancery Chambers in the City of Jersey City, on the 16th day of April, 1928, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why the prayer of the petition of said Riverside Apartment Corporation should not be granted, and why an order should not be made for a sale of the lands and premises in the bill of complaint herein and in said petition described, being the mortgaged lands and premises, by the Sheriff of the County of Union, at Public Sale, pending this suit, and the proceeds of such sale brought into this court, there to remain subject to the same liens and equities of all parties in interest as was the mortgaged lands and property, and to be disposed of as this court shall hereafter, by its decree or order, direct. And it is further

ORDERED, that service of a copy of this order (which need not be certified) upon all of the aforementioned parties, or upon their respective solicitors or attorneys, within 6 days from the date hereof, by either personal service or by mailing the same within said time, shall be deemed good and sufficient service.

E. R. WALKER,
C.

Respectfully advised,
JOHN BENTLEY,
V. C.

Order for Sale *Pendente Lite*, Made April 5th, 1928.

(Filed April 6th, 1928.)

This matter being opened to the court by Gross & Gross, of counsel with the complainant, and it appearing that the said complainant has filed its petition herein on the 27th day of March, 1928, praying that an order may be made herein for the sale of the mortgaged lands and premises described in said petition and in the bill of complaint herein by the Sheriff of the County of Union, pending this suit in the manner and subject to the provisions of law relating to the sale of lands on writ of *fieri facias* issued out of this court in foreclosure cases, and that the proceeds of such sale be brought into this court there to remain subject to the same liens and equities of all parties in interest as was the mortgaged lands and premises, and to be disposed of as this court by its decree or order shall direct; and it appearing to the court that complainant has filed a bill of complaint in this court for the foreclosure of certain mortgages made to it by Jacob Starr and Hyman Silverman, to secure certain bonds or obligations in the sum of $21,000.00 and $30,000.00 respectfully with interest, and that considerable time will elapse before said foreclosure suit is determined and the mortgaged lands and premises sold under a final decree herein; and it further appearing to the court that there stands erected upon said lands and premises, an apartment house which is not fully completed, and that the same is now in the hands and possession of Benjamin Heyman and Ira R. Crouse, receivers of Capitol Construction Co., Inc., owner of said lands and premises, and that such receiv-

ers are unable to complete the said building because they are not in possession of the necessary funds with which to do so, and that said building now remains in an incomplete state and open and exposed to damage by the elements and unprotected from the acts of trespassers and miscreants, and is so constituted as to make it liable to deteriorate in value pending this suit and to make its care or preservation difficult or expensive, and that said lands and premises can now be sold and a better price realized therefor than at a later season; and it appearing to the court that an order to show cause made upon the said petition of the complainant has been duly served in the manner in said order to show cause provided, upon all parties in interest, and the court having requested all parties in interest to advise it if any objection existed against the granting of the prayer of said petition, and no objection being made to the granting thereof, and although the return day of said order to show cause has not arrived, the court having heretofore heard all of the parties in interest with respect to the matters involved in said petition, and being satisfied of the extreme urgency of granting the prayer of said petition forthwith, the court having heretofore apprized all of the parties in interest of the acceleration of the return day of said order to show cause to this date, and no one appearing or objecting to the granting of the prayer of said petition; it is on this fifth day of April, 1928, on motion of Gross & Gross, of counsel with the said complainant,

ORDERED that the Sheriff of the County of Union be and he is hereby commanded to make

sale in the manner provided by law, of the lands and premises described as follows:

ALL that certain tract of land and premises situate in the Township of Cranford, in the County of Union and State of New Jersey:

BEGINNING at the point formed by the intersection of the northeasterly side of Riverside Drive with the southeasterly side of Prospect Avenue; thence north forty-seven (47) degrees thirty-six (36) minutes, east along said side of Prospect Avenue three hundred fifty-eight and thirty one-hundredths (358.30) feet to a point; thence south forty-two degrees (42) twenty-four (24) minutes east two hundred (200) feet to a point; thence north (47) degrees thirty-six (36) minutes east thirteen and seventy-six (13.76) one-hundreths feet to a point; thence south forty-two (42) degrees twenty-four (24) minutes east one hundred ninety-five and ninety-eight one-hundredths (195.98) feet to the northwesterly side of Union Avenue; thence south forty-nine (49) degrees sixteen (16) minutes west eighty-seven and ninety-seven one-hundredths (87.97) feet along said side of Union Avenue to a point; thence still along said line of Union Avenue south forty-one (41) degrees fifty-one (51) minutes west one hundred and fifty-two and thirty-four one-hundredths (152.34) feet to said side of Riverside Drive; thence northwesterly along said side of Riverside Drive its various courses four hundred forty-three (443) feet more or less to the point or place of beginning.

Together with all and singular the rights, liberties, privileges, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and remainders, rents, issues and profits thereof, and also all the estate,

right, title, interest, use, property, claim and demand of all of the parties hereinafter named in, to and out of the same; and it is further

ORDERED, ADJUDGED AND DECREED, that Aetna Realty Company; Standard Building Block Company; Capitol Construction Co., Inc.; Benjamin Heyman and Ira R. Crouse, receivers of said Capitol Construction Co., Inc.; Israel Shilowitz and Jacob Tucker; Carteret Company; Louis Schwartz; Junction Milling Company; West Bergen Trust Company; Trust Company of New Jersey; Edward P. Stout, Trustee; Geo. F. Perry & Sons, Inc.; A. S. Reid & Company; Royal Marble Works, Inc.; Bayonne Supply Co.; Winchester & Muhlberg, Inc.; McCabe Bros. Co.; Max Platt; John Nicaretta; Benj. Parnis; Harry Siegel and Isador Levin, co-partners trading as Siegel & Levin; Joseph Machetto; Roderick M. Crockett & Co.; Arthur G. Teweles; Louis Moore; Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co.; Ira R. Crouse; Hudson Fireproof Block Co.; Julius Stenkauskas; Meyer & Ruh Company; Alpheus S. Van Woeart; Michael Tozzi and Joseph Marcasiano, partners trading as M. Tozzi and J. Marcasiano; Mowre Lager; Alfred W. Booth & Bro.; John P. Grady; Abraham Shilling, and Cranford Trust Company, and each of them, stand absolutely debarred and foreclosed of and from all equity of redemption of in and to the said mortgaged premises when sold as aforesaid by virtue of this order; and it is further

ORDERED, that the said Sheriff of the County of Union do forthwith, after the making of said sale, report the same to the Chancellor for confirma-

tion, and when so confirmed, shall deliver to the purchaser upon payment of the purchase price of said lands and premises, a deed of conveyance conveying the same to the said purchaser upon the latter's complying with the conditions of sale, and that such deed of conveyance, when so made and delivered, be valid and effectual forever and operate as an effectual bar both at law and in equity against the aforementioned parties, and all persons claiming by, from, through or under them or either of them; and it is further

ORDERED, that said Sheriff pay the proceeds of said sale to the Clerk of this Court to remain in the custody of said Clerk, subject to the same liens and equities of all parties in interest, as were the said mortgaged lands and premises, and be disposed of as this Court shall direct.

All further equities are hereby reserved.

E. R. WALKER,
C.

Respectfully advised:
JOHN BENTLEY,
V. C.

Order Modifying Order for Sale *Pendente Lite.*

(Duly Served.)

(Filed April 30th, 1928.)

This matter coming on to be heard upon application on behalf of said complainant to modify the order heretofore made herein on April 5, 1928, for the sale of the mortgaged lands and premises *pendente lite;* and it appearing to the court that said order provides for the sale of said lands and premises free of the mortgage thereon held by Aetna Realty Company and Standard Building Block Company and that the said Aetna Realty Company and Standard Building Block Company are not parties to this suit, and that the said order was inadvertently made to include the sale of said mortgaged lands free of the mortgage of said Aetna Realty Company and Standard Building Block Company, and the said order should be modified so that the sale of said mortgaged lands and premises shall be subject to the mortgage of said Aetna Realty Company and Standard Building Block Company in the principal sum of $59,000.00 with accrued interest thereon; and it appearing to the court that due notice of motion to amend the said order for sale in the particulars aforesaid and of an application for the making of this order has been duly served on all parties in interest, and it appearing to the court that the said order should be so modified, it is on this 30th day of April, 1928, on motion of Gross and Gross,

Ordered, that the said order for sale of the mortgaged lands and premises described in complainant's bill, *pendente lite,* be and the same is hereby amended and modified so as to provide for

the sale of the said mortgaged lands and premises pursuant to the said order for sale *pendente lite* made on April 5th, 1928, but subject to the said mortgage of said Aetna Realty Company and Standard Building Company in the sum of $59,-000.00 with accrued interest thereon, and it is further

ORDERED, that in all other respects said order of April 5, 1928, shall remain in full force and effect.

E. R. WALKER,
C.

Respectfully advised,
JOHN BENTLEY,
V. C.

Sheriff's Report of Sale.

(Filed May 24th, 1928.)

Elizabeth, N. J., May 23, 1928.

I hereby authorize and empower Frank R. Emmons, Under Sheriff of the County, to make sale of lands or other property as advertised in the matter of Riverside Apartment Corporation, a Corp. New Jersey

Capital Construction Co., Inc., a corp. *et als.* as set for Wednesday the 23rd day of May, 1928, or to make adjournment

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 23rd day of May 1928

SAM H. TOOL
Sheriff

Sheriff's Report of Sale.

IN CHANCERY OF NEW JERSEY.

Between
RIVERSIDE APARTMENT CORPORATION a corp. of New Jersey,
Complainant
and
CAPITOL CONSTRUCTION CO., INC., a corp. et als.
Defendants.

Report of Sale.
On Bill, &c.
Pendente Lite.

To his Honor EDWIN ROBERT WALKER, Chancellor of the State of New Jersey:

I, FRANK R. EMMONS, Under-Sheriff of the County of Union, do respectfully report that I did on the twenty-third day of May, nineteen hundred and twenty-eight sell at Public Vendue, at the SHERIFF'S OFFICE ELIZABETH, N. J. (having first duly advertised the same,) the lands and premises described in the writ of *Pendente Lite* issued to me in the above stated cause, to Randolph Perkins of the Borough of Woodcliff Lake of the County of Bergen and State of New Jersey for the sum of One hundred forty-two thousand five hundred dollars ($142,500) he being the highest bidder therefor.

Respectfully submitted this twenty-third day of May, A. D. nineteen hundred twenty-eight.

FRANK R. EMMONS
Under-Sheriff

Sheriff's Report of Sale.

STATE OF NEW JERSEY }
UNION COUNTY } SS:

FRANK R. EMMONS of full age being, duly sworn according to law, on his oath, says that the premises mentioned and referred to in the foregoing report were duly sold to the highest and best the same would bring in cash at the time of sale.

Sworn and subscribed before me, this Twenty-third day of May A. D. 1928.

FRANK R. EMMONS.

GEORGE W. PEEK JR.
Notary Public for New Jersey
My Commission Expires February 11th, 1932

Order Confirming Sale.

(Filed June 24th, 1928.)

Upon reading and filing a report made by Frank R. Emmons, Under Sheriff of the County of Union, bearing date the 23rd day of May, nineteen hundred and twenty-eight, and the affidavit thereto attached, whereby it appears that on the 23rd day of May, nineteen hundred and twenty-eight, he sold at public Vendue at the Sheriff's Office, Elizabeth, N. J. (having first duly advertised the same), the lands and premises described in the writ of *Pendente Lite* issued to him in the above stated cause, to RANDOLPH PERKINS of the Borough of Woodcliff Lake, County of Bergen, and State of New Jersey, for the sum of ONE HUNDRED AND FORTY-TWO THOUSAND FIVE HUNDRED DOLLARS ($142,500.00) and being the highest bidder therefor, and that the said lands and premises were sold at the highest and best price the sale would bring in cash, and no cause being shown or appearing to the contrary:

It is, on this 4th day of June, nineteen hundred and twenty-eight, ordered that the said sale be, and the same is hereby confirmed as valid and effectual in law. And it is further ordered that the said sheriff do execute a good and sufficient conveyance in the law to the said purchaser or his assigns for the said mortgaged premises so sold.

E. R. WALKER,
C.

Sheriff's Return.

(Filed July 18th, 1928.)

IN CHANCERY OF NEW JERSEY.

Between

RIVERSIDE APARTMENT CORPORATION, a corporation of New Jersey,

Complainant,

vs.

CAPITOL CONSTRUCTION CO., INC., a corporation, *et als.*,

Defendants.

Amount bid May 23		$142,500.00
Interest to June 11, 1928		1,147.68
		$143,647.68
Sheriff's Fees:		
Levy, posting deed, etc.	$ 19.50	
Report	1.50	
1 Adjournment	1.00	
Advertisements, 2 at $21.84	43.68	
Commission on $142,500	2,875.00	2,940.68
		$140,707.00

By virtue of an order for sale *Pendente Lite,* to me directed, I did sell at public vendue, at the Court House, in the City of Elizabeth, Union County, N. J., on the Twenty-Third day of May, 1928 (pursuant to advertisement), all tract

or parcel of land and premises described in said writ, to Randolph Perkins, he being the highest bidder for same.

Sheriff's fees, $2,940.68.

THIS IS TO CERTIFY That the above statement is correct; that I did duly advertise and sell the property described in the above stated Order as required by law, and the proceeds of said sale, after deducting therefrom Sheriff's fees, amount to $140,707.00.

SAMUEL H. TOOL,
Sheriff.

STATE OF NEW JERSEY, }
COUNTY OF UNION, } ss.:

Sheriff of Union County, aforesaid, being duly sworn, on his oath, says the above statement is true.

Subscribed and sworn to before me the 17th day of July, 1928.

GEORGE W. PEEK, JR.

Notary Public for New Jersey.
My commission expires February 11th, 1932.

Order of Reference to Vice Chancellor Bentley.

(Filed June 5th, 1928.)

Upon reading the consent of the solicitors of all parties who have appeared herein, hereunder written; it is on this 5th day of June, 1928, on motion of Gross & Gross, Solicitors of complainant,

ORDERED that the above entitled cause be and the same is hereby referred to Hon. John Bentley, one of the Vice Chancellors, to hear the same for the Chancellor and to advise what order or decree should be made herein.

E. R. WALKER,
C.

We hereby consent to the making and entry of the foregoing Order.

STANLEY M. TUCKER,
Solicitor of defendant Benjamin Parnis;

SECLOW & NESSANBAUM,
Solicitor of defendants Jacob Tucker and Israel Shilowitz;

WALTER C. ALBERTS,
Solicitor of defendants Alfred W. Booth & Bro., Alpheus Van Woeart, Michael Tozzi and Joseph Marcasiano, partners trading as M. Tozzi and J. Marcasiano, and Joseph Machetto;

EDWARD P. STOUT,
Solicitor for defendant West Bergen Trust Company and Edward P. Stout, Trustee;

ISADOR HABER,
Solicitor of defendant Royal Marble Works, Inc.;

A. A. MELNIKER,
Solicitor of defendant Abraham Shilling;

BENNY & CRUDEN,
Solicitors for defendant Louis Schwartz;

VICTOR SAMUEL,
Solicitor of defendants Harry Siegel and Isador Levin, partners trading as Siegel & Levin, and Winchester & Muhlberg, Inc., and John Nicaretta;

KANTER & KANTER,
Solicitors of defendant Geo. F. Perry & Sons, Inc.;

KELSEY & LUDWIG,
Solicitors of defendant John Grady;

AARON KAUFMAN,
Solicitor of defendants Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co., and Meyer & Ruh Company, and Louis Moore and of Ira R. Crouse;

LEAVITT, ULBRICH & TALLEY,
Solicitors of defendant A. S. Reid & Company;

JAS. E. PYLE,
Solicitor of defendant Carteret Company;

CHAS. RUBENSTEIN,
Solicitor of defendants Max Platt, McCabe Bros. Co., a corporation, and Mowre Lager and Junction Milling Co.;

PERKINS & DREWEN,
Solicitors of defendant The Trust Company of New Jersey;

JOHN B. McGEEHAN,
Solicitor of defendant Bayonne Supply Company;

HERSHENSTEIN & FINNERTY,
Solicitors of defendant Arthur G. Teweles;

RICHARD H. THIELE,
Solicitor of defendant Hudson Fireproof Block Company;

CHARLES E. HENDRICKSON,
Solicitor of defendant Junction Milling Co.

Order of Designation.

(Filed June 25th, 1928.)

The above entitled cause having by the Chancellor been referred to me, and upon reading the consents of the solicitors of the respective parties hereunder written, I do hereby fix and designate the 12th day of July 1928, at 10 o'clock in the forenoon of that day (Daylight Saving Time) as the time, and the Chancery Chambers in the City of Jersey City as the place for the hearing of the above entitled cause.

JOHN BENTLEY,
V. C.

Order of Designation.

We hereby consent to the making and entry of the foregoing order.

STANLEY M. TUCKER,
Solicitor of defendant Benjamin Parnis.

SECLOW & NESSANBAUM,
Solicitors of defendants Jacob Tucker and Israel Shilowitz.

EDWARD P. STOUT,
Solicitor of defendant West Bergen Trust Co. and Edward P. Stout, trustee.

WALTER C. ALBERTS,
Solicitor of defendant Alfred W. Booth & Bro., Alpheus Van Woeart, Michael Tozzi and Joseph Marcasiano, partners, trading as M. Tozzi and J. Marcasiano and Joseph Machetto.

ISADOR HABER,
Solicitor of defendant Royal Marble Works, Inc.

AARON A. MELNIKER,
Solicitor of deft. Abraham Shilling.

VICTOR SAMUEL L. B.,
Solicitor of defts. Harry Siegel and Isador Levin, partners, trading as Siegel and Levine, and Winchester & Muhlberg, Inc. and John Nicaratta.

KANTER & KANTER,
Solicitors of deft. Geo. F. Perry & Sons, Inc.

Order of Designation.

BENNY & CRUDEN,
Solicitor of deft. Louis Schwartz.
LEVY, FENSTER & MCCLOSKEY,
Solicitors of deft. John Grady.

AARON KAUFMAN,
Solicitor of defts. Morris Portnow and Abraham Lipschitz, partners, trading as Lipschitz Parquet Floor Co. and Meyer & Ruh Co. and Louis Moore and of Ira R. Crouse.

LEAVITT, ULBRICH & TALLEY,
Solicitors of deft. A. S. Reid & Company.

JAS. E. PYLE,
Solicitor of deft. Carteret Company.

CHAS. RUBENSTEIN,
Solicitor of defts. Max Platt, McCabe Bros. Co., a corporation, and Mowre Lager and Junction Milling Co.

PERKINS & DREWEN,
Solicitors of deft. The Trust Company of New Jersey.

JOHN B. MCGEEHAN,
Solicitor of deft. Bayonne Supply Company.

HERSHENSTEIN & FINNERTY,
Solicitors of Arthur G. Teweles.

RICHARD H. THIELE,
Solicitors of deft. Hudson Fireproof Block Company.

CHARLES HERSHENSTEIN,
Solicitor of defendant Junction Milling Co.

Notice of Hearing.

(Duly Served.)

(Filed July 2nd, 1928.)

Sirs:

Take Notice that Hon. John Bentley, Vice Chancellor, to whom the above entitled cause has been referred by the Chancellor, has fixed and designated the 12th day of July, 1928, at 10 o'clock in the forenoon of that day (daylight saving time) as the time, and the Chancery Chambers in the City of Jersey City as the place for the hearing of the above entitled cause.

And take further notice that we shall move the hearing of the above entitled cause before the said Vice Chancellor at the said time and place.

Respectfully,

Gross & Gross.

To:

Stanley N. Tucker, Esq.,
Solicitor of defendant Benjamin Parnis.

Seclow & Nessanbaum, Esqs.,
Solrs. of defts. Jacob Tucker and Israel Shilowitz.

Edward P. Stout, Esq.,
Solr. of deft. West Bergen Trust Co. and Edward P. Stout, trustee.

William C. Albert, Esq.,
Solr. of deft. Alfred W. Booth & Bro., Alpheus Van Woeart, Michael Tozzi and Joseph Marcasiano, partners trading as M. Tozzi and J. Marcasiano and Joseph Machetto.

ISADOR HABER, Esq.,
Solr. of deft. Royal Marble Works, Inc.

AARON A. MELNIKER, Esq.,
Solr. of deft. Abraham Shilling.

BENNY & CRUDEN, Esqs.,
Solrs. of deft. Louis Schwartz.

VICTOR SAMUELS, Esq.,
Solr. of defts. Harry Siegel and Isador Levin, partners trading as Siegel & Levine, and Winchester & Muhlberg, Inc., and John Nicaretta.

KANTER & KANTER, Esqs.,
Solrs. of deft. Geo. F. Perry & Sons, Inc.

LEVY, FENSTER & MCCLOSKEY, Esqs.,
Solrs. of deft. John Grady.

AARON KAUFMAN, Esq.,
Solr. of Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co., and Meyer & Ruh Co. and Louis Moore and Ira R. Crouse.

LEAVITT, ULBRICH & TALLEY, Esqs.,
Solrs. of deft. A. S. Reid & Company.

JAMES E. PYLE, Esq.,
Solr. of deft. Carteret Company.

CHARLES RUBENSTEIN, Esq.,
Solr. of defts. Max Platt, McCabe Bros. Co., a corporation, and Mowre Lager and Junction Milling Co.

PERKINS & DREWEN, Esqs.,
Solrs. of deft. The Trust Company of New Jersey.

JOHN B. MCGEEHAN, Esq.,
Solr. of deft. Bayonne Supply Company.

HERSHENSTEIN & FINNERTY, Esqs.,
Solrs. of deft. Arthur G. Teweles.

RICHARD H. THIELE, Esq.,
Solr. of deft. Hudson Fireproof Block Company.

CHARLES HENDRICKSON, Esq.,
Solr. of defendant Junction Milling Co.

Order to Clerk to Pay Complainant's Decree, Costs and Counsel Fee.

(Filed July 12th, 1928.)

This cause coming on to be heard in the presence of Gross & Gross, of counsel with the complainant, and of James E. Pyle, solicitor of Carteret Corporation; Alexander Seclow, solicitor of Tucker & Shillowitz; Elias Kanter, solicitor of George F. Perry & Sons; Benjamin Heyman, Receiver; Charles E. Hendrickson, solicitor of Junction Milling Co.; and it appearing to the court that due notice of this hearing has been served on all parties who have appeared in this cause; and the complainant having established by due proof that there is due to it on this day on its bond and mortgage in paragraphs 1, 2, 3 and 4 in the bill of complaint mentioned and described,

Order to Clerk to Pay Complainant's Decree, Costs and Counsel Fee.

the principal sum of $21,000, with interest thereon from March 30, 1927, or in all the sum of $22,-620.50; and that there is further due unto it, the said complainant, on this day, upon its bond and mortgage in paragraphs 5, 6 and 7 of the complainant's bill of complaint mentioned and described, the sum of $30,000, with interest thereon from March 30, 1927, or in all the sum of $32,-315; and that the aggregate amount so due to the said complainant upon its said bonds and mortgages on this day is the sum of $54,935.50, and that said several bonds and mortgages are liens upon the mortgaged lands and premises prior to the liens of any of the defendants, and that the same should be first paid;

And it further appearing to the court that the said lands and premises have heretofore been sold *pendente lite,* under and pursuant to an order of this court made in the above entitled cause, and that the amount so due unto the said complainant should be paid by the Clerk of this court out of the proceeds of said sale deposited with him, and that the balance of the moneys so deposited with the Clerk of this court shall continue to remain on deposit with said Clerk until the rights of the several defendants thereto shall hereafter be determined, and subject to the further order of the court;

It is, on this 12th day of July, 1928, on motion of Gross & Gross, of counsel with the complainant:

ORDERED, ADJUDGED AND DECREED, that the Clerk of this court pay unto the said complainant, or unto its solicitors, out of the moneys deposited with him by the Sheriff of the County of Union, as the proceeds of the sale of the said mortgaged

lands and premises, in satisfaction of its said two mortgages, the said sum of $54,935.50, with lawful interest thereon from the date of this order until the date of such payment, together with the costs of this suit to be taxed. And it is further

ORDERED, that there be allowed and paid to the solicitors of the said complainant the sum of $22.25 for search fees incurred by the said complainant, an abstract of the searches having been filed in this court, as provided by the rules of this court, said sum to be included in the taxed bill of costs and paid with the other items of said bill. And it is further

ORDERED, ADJUDGED AND DECREED, that the sum of $3,000 be allowed and paid to the solicitors of the complainant as and for a counsel fee, and that the same be included in the taxed bill of costs and paid with the other items of the said bill. And it is further

ORDERED, ADJUDGED AND DECREED, that the Clerk of this court retain in his possession the balance of the moneys deposited with him by the Sheriff of the County of Union, as the proceeds of sale of the said mortgaged lands and premises, to abide the determination of the rights of the several defendants thereto, and until the further order of the court in the premises. And it is further ordered that the final hearing of this cause, as between the several defendants, be and the same is hereby continued until October 30, 1928, at 10 A. M., at the Chancery Chambers, Jersey City.

E. R. WALKER,
C.

Respectfully advised,

JOHN BENTLEY,
V. C.

Order of Reference to Special Master, John Milton.

(Filed May 14th, 1929.)

This matter being opened to the court by Seclow & Nessanbaum, solicitors of the defendants, Jacob Tucker and Israel Shilowitz, and it appearing that this cause was brought on before the Chancellor upon an application to determine the priorities of the various parties in surplus moneys arising out of the sale of the mortgaged premises, and the court having heard argument of counsel as to the conflicting claims of the various parties to such surplus moneys, and it appearing that the conflicting claims of the various parties involved can most expeditiously be determined by a reference to a Special Master;

It is thereupon, on this 14th day of May, 1929, Ordered, Adjudged and Decreed that this cause be referred to John Milton, Esq., one of the Special Masters of this court to ascertain and report the amount due to the various parties for principal and interest due upon their mortgages, lien claims, judgments and other demands, and that the said Special Master further report the order of priorities of the various mortgages, lien claims, judgments, demands and other claims, and whether they all embrace the premises mentioned in the bill of complaint, and that the said Special Master report thereon with all convenient speed.

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

E. R. Walker,
C.

Respectfully advised,

John Bentley,
V. C.

Order Substituting Special Master Aloysius McMahon for John Milton.

(Filed June 13th, 1929.)

This matter being opened to the Court by Seclow & Nessanbaum, solicitors of the defendants, Israel Shilowitz and Jacob Tucker, and it having been represented to the Court that John Milton, Esq. to whom the matter had been previously referred, had been employed in a law action by one of the defendants to this suit, which law action arose out of some phase of the building operation upon the lands described in the bill of complaint and the said John Milton, Esq. having requested that another Master be substituted for said reason:

It is thereupon, on this 13th day of June, 1929, Ordered that Aloysius McMahon, Esq., one of the Masters of this Court, be substituted in the place of the said John Milton, Esq. as the designated Master, to ascertain and report the amount due to the various parties for principal and interest due upon their mortgages, lien claims, judgments and other demands, and that the said Special Master further report the order of priorities of the various mortgages, lien claims, judgments, demands and other claims, and whether they all embrace the premises mentioned in the bill of complaint, and that the said Master report thereon with all convenient speed.

And all further equity is reserved until the coming in said report.

E. R. Walker,
C.

Respectfully advised,

John Bentley,
V. C.

Master's Summons.

(Master's Summons in the following form, duly served on the respective defendants:)

To West Bergen Trust Company, a corporation, one of the defendants in the above stated cause:

Sirs:

By virtue of an order of reference, made in the above cause, you are hereby summoned to be and appear before me, at the Chancery Chambers at No. 1 Exchange Place, Jersey City, N. J., on Tuesday, the 25th day of June, next, at ten o'clock in the forenoon, Daylight Saving Time, at which time I shall proceed to ascertain and report the amount due to the various parties for principal and interest due upon their mortgages, lien claims, judgments, and other demands, and I shall also determine the order of priorities of the various mortgages, lien claims, judgments, demands and other claims, and whether they all embrace the premises mentioned in the bill of complaint and proceed to report upon the same, and the other matters referred to me.

Dated, June 13th, 1929.

Aloysius McMahon,
Master in Chancery of New Jersey.

Order to Pay Receivers of Capital Construction Co., Inc., etc.

(Filed November 25th, 1929.)

Application having been made to this Court in the suit now pending wherein Ralph Cianfrone and Ciro Castellano, partners, trading as Venango Stone Company, are complainants and Capital Construction Company is defendant (66-512), for an Order directing the Clerk of this Court, out of the funds now in his hands, in the above entitled cause, to pay to the Receivers certain expenditures, disbursements and counsel fees, and the matter having come on regularly to be heard by this Court, and the Court having allowed the said expenditures, disbursements and counsel fees, and having determined that the Order making such allowance be made the order of this Court in the above entitled cause, now, on motion of Benjamin Heyman, one of the Receivers of the defendant corporation, it is on this 25th day of November, 1929,

ORDERED, ADJUDGED AND DECREED that the Clerk of this Court, out of the funds in his hands in the above entitled cause, pay over to Ira R. Crouse and Benjamin Heyman, the sum of $8,098.08 for the purpose of enabling the said Receivers to pay the said sum to the various creditors who have furnished work, labor, services and materials for the preservation of the defendants' property, as set forth in the Schedule annexed to the Receivers' Final Report as the same was amended, and also the sum of $269.64 for the disbursements incurred by the Receivers, and also the sum of $3,000.00 for their services as such Receivers in said cause; and it is further

Order to Pay Receivers of Capital Construction Co., Inc., etc.

ORDERED that the Clerk of this Court pay unto Milberg & Milberg, Esqs. their taxed costs in the suit above mentioned, wherein Ralph Cianfrone and Ciro Castellano, partners, trading as Vanango Stone Company, are complainants and Capital Construction Company is defendant (66-512), and also the sum of $34.09 for their disbursements, and the sum of $250.00 as counsel fee to be taxed in said costs; and it is further

ORDERED that the Clerk of this Court pay unto Edward P. Stout, solicitor for the defendant in the foregoing suit of Ralph Cianfrone and Ciro Castellano, partners, trading as Venango Stone Company, complainants, and Capital Construction Company, defendant (66-512), the sum of $250.00 for his services as Solicitor for the defendant therein.

E. R. WALKER,
C.

Respectfully Advised,

JOHN BENTLEY,
V. C.

Master's Report.

(Filed October 15th, 1930.)

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey.

In pursuance of an order of this Court made in the above entitled matter on the day of June, 1929, whereby it was referred to me, Aloysius McMahon, one of the Masters of this Court to ascertain and report the amount due to the various parties hereto for principal and interest due upon their mortgages, lien claims, judg-

ments and other demands, and to also ascertain and determine the order of priorities of the various mortgages, lien claims, judgments, demands and other claims, and whether they embrace the premises mentioned in the Bill of Complaint.

I respectfully report that I have been attended by Messrs. Seclow & Nessanbaum, Solicitors of Jacob Tucker and Israel Shilowitz; Elias Kanter, Esq., Solicitor of George F. Perry and Sons; James E. Pyle, Esq., Solicitor of the Carteret Company; Messrs. Leavitt, Ulbrich and Talley, Solicitors for A. S. Reid & Company; Victor Samuels, Esq., Solicitor of John Nicaretta and Seigal and Levine; Charles Rubenstein, Esq., Solicitor of McCabe Brothers Company, Max Platt and Junction Milling Co.; Edward P. Stout, Esq., Solicitor for West Bergen Trust Company and Edward P. Stout, Trustee; Benjamin Heyman, Esq., Receiver of defendant corporation; Walter E. Alberts, Esq., Solicitor of Michael Tozzi and Joseph Marasino; Isadore Haber, Esq., Solicitor for Royal Marble Works; Edward P. Stout, Solicitor for Alfred W. Booth & Brothers; Alpheus Van Woeart & Joseph Machetto; and Victor Samuels, Esq., Solicitor of Winchester & Millberg, Inc.; John F. Ryan, Esq., Solicitor of Julius Stanskuski; Aaron Kaufman, Esq., Solicitor for Lipschitz Parquet Floor Company and Louis Moore; Messrs. Hershenstein and Finnerty, Solicitors for Arthur G. Tewel, Stanley M. Tucker, Esq., Solicitor for Benjamin Parniss, and by Carl H. Warsinski, Solicitor for Roderick M. Crockett & Company, no one appearing for Trust Company of New Jersey, Louis Schwartz, Abraham Shilling, Bayonne Supply Company, John P. Goody, Cranford Trust Company, Hudson Concrete Block Company although duly summoned as appears

by acknowledgments of service duly endorsed on the summonses herewith annexed, and in the presence of the parties attending me I have considered the matters so referred to me by said order.

I certify that I duly issued summonses to the defendants appearing before me as appears by acknowledgments of service duly endorsed on said summons.

I further report that the said Solicitor of the defendants Tucker and Shilowitz produced before me the mortgage mentioned in the Bill of Complaint and also the bond which the said mortgage is given to secure, which mortgage bears date July 29, 1927, and was made by defendant Capitol Construction Company, Inc., and duly recorded as in the said bill of complaint mentioned as appears by endorsements thereon, which bond and mortgage were marked Exhibits 1 and 2 respectively.

I find and report that there is due to the said Israel Shilowitz and Jacob Tucker on the 29th day of July, 1930, for principal and interest, upon the said mortgage held by said Israel Shilowitz and Jacob Tucker upon the premises mentioned and described in the Bill of Complaint, the sum of Twenty-three Thousand Four Hundred Eighty-Two ($23,482.00) Dollars, which amount is a first lien on the premises described in the complaint.

I further report that the said solicitor of the defendant Carteret Company produced before me the mortgage made by the Capitol Construction Company to the said Carteret Company and also the bond which said mortgage was given to secure, which mortgage bears date the 14th day of October, 1927, and was made by the Capitol Construction Company, Inc., a corporation of the State of New Jersey to the Carteret Company, and which

mortgage was duly acknowledged according to law by the Secretary of said corporation and recorded in the Register's office of the County of Union in Book 878 of Mortgages, at page 347, as appears by endorsement thereon, which bond and mortgage were respectively marked by me, Exhibits 36 and 37, and the said solicitor of the Carteret Company also produced before me a release of a part of the mortgaged premises made by the Junction Milling Company to the Capitol Construction Company, dated October 18th, 1928, recorded in the Register's office of Union County in Book 67 of Releases of Mortgages at page 180, releasing from the lien of the mortgage held by the Junction Milling Company on the property described in the bill of complaint, the lot or tract described in said release, which release was marked by me Exhibit 38. The said solicitor also produced before me a subordination agreement made by one Louis Schwartz subordinating a mortgage held by him on the premises described in the bill of complaint to the lien of the mortgage of the Carteret Company, and which agreement was recorded in the office of the Clerk of Union County in 67 of Releases of Mortgage on page 178, and which agreement was marked by me, Exhibit 39.

I find and report that there is due to the said Carteret Company on the 29th day of July, 1930, for principal and interest upon the said mortgage held by it upon the premises mentioned and described in the bill of complaint the sum of Thirty-seven thousand three hundred sixty-five and forty-eight cents ($37,365.48) Dollars, and that said mortgage is second and subordinate to the mortgage of Shilowitz and Tucker.

I further report that the solicitors of the West Bergen Trust Company produced before me the

mortgage made by the defendant Capitol Construction Company to it, which mortgage bears date the 25th day of October, 1927, and also the bond which said mortgage was given to secure bearing the same date, and which mortgage was duly acknowledged according to law by the Secretary of said Capitol Construction Company, and was recorded in the Union County Register's Office in Book 895 of Mortgages for said County on page 38, etc., as appears by endorsements thereon, and which bond and mortgage were marked by me as Exhibits 8 and 9, of July 10, 1929.

I find and report that there is due to the West Bergen Trust Company on the 29th day of July, 1930, Six thousand eight hundred seventy-four ($6,874) Dollars, for principal and interest on said bond and mortgage, and is a lien upon the whole tract and is subsequent to the lien of the Shilowitz and Tucker mortgage and the Carteret Mortgage.

I further certify and report, that I have been attended by the solicitors of the following named lienors who proved before me their respective lien claims, and which lien claims were marked in evidence.

I further certify and report, that there is due to each of the said lienors the amount hereinafter set opposite their respective names, and that said liens are subordinate to the mortgages heretofore reported upon and that said lienors are entitled to share ratably and concurrently in the funds remaining after the payment of the foregoing mortgages.

Master's Report.

Name	*Exhibit*	*Amount Due*	*Interest From*
George F. Perry & Sons	#32	$ 6,028.37	Jan. 13, 1928 to day of this report.
A. S. Reid Company	#85 & #86	3,233.90	July 17, 1928 to day of this report.
Max Platt	#96	3,950.00	Dec. 1, 1927 to day of this report.
Ira R. Crouse	#96	19,383.79	Dec. 19, 1927 to day of this report.
Louis Moore	#97	10,500.00	Jan. 9, 1928 to day of this report.
Joseph Machetto	#100	8,000.00	Dec. 16, 1927 to day of this report.
Venango Stone Co.	#104	2,836.10	Apr. 5, 1928 to day of this report.
A. W. Booth & Bro.	#109	3,714.14	Dec. 9, 1927 to day of this report.
Lipschitz Parquet Floor Company	#113	3,700.00	Oct. 15, 1928 to day of this report.
Alpheus S. Van Woeart	#111	2,718.00	Jan. 4, 1928 to day of this report.
Roderick N. Crocket		2,337.25	Dec. 8, 1927 to day of this report.
John Nicoretta	#114	2,175.00	Nov. 26, 1927 to day of this report.
Meyer & Ruh Co.	#2 of July 10	791.19	Dec. 1, 1927 to day of this report.
M. Tozzi & J. Morcasiano		956.00	Oct. 18, 1927 to day of this report.
Royal Marble Works, Inc.	#7 of July 10	1,122.00	Apr. 7, 1928 to day of this report.
Mowre Lager	#12 of July 10	3,000.00	Dec. 9, 1927 to day of this report.
Arthur Teweles		355.00	Dec. 12, 1927 to day of this report.

I further certify and report, that I was attended by the solicitor of the Junction Milling Company who produced before me bond and mortgage made by the defendant Capitol Construction Company to said Junction Milling Company, which mortgage bears date the 16th day of September, 1927, and was made by the Capitol Construction Company, Inc., a corporation of the State of New Jersey to Junction Milling Company, a corporation of the State of New Jersey, and which mortgage was duly acknowledged according to law by the Secretary of said Capitol Construction Company and was recorded in the Union County Register's office in Book 886 of Mortgages for said County

on pages 390, etc., as appears by endorsements thereon. The bond for which said mortgage was given was not produced. The said mortgage was marked by me as Exhibit #107.

I further find and report that said mortgage was given for the payment of materials supplied in the erecting of the building on lands described in the bill of complaint herein and other property, and is entitled to be paid from whatever fund remains after the payment of the foregoing mechanics' lienors.

I further find and report that there is due to the Junction Milling Company on said mortgage on the 29th day of July, 1930, Seven thousand nine hundred seventy-three ($7,973) Dollars.

I further find and report that Julius Steckauski is not entitled to any lien and is not entitled to share in the fund.

I further find and report that McCabe Brothers are not entitled to any mechanic's lien because they did not file the lien within four months after the work was done and the materials furnished.

All of which is respectfully submitted, this 29th day of July, 1930.

ALOYSIUS MCMAHON,
A Master in Chancery of New Jersey.

MASTER'S FEES.

Making Report	$ 10.00
Drawing Report	7.20
Attendance	19.00
Marking 142 Exhibits	21.30
Swearing 35 Witnesses	8.75
Testimony 1245 Folios	373.50
Issuing 37 Summons	14.80
	$453.55

New Jersey State Library

Notice to Confirm Master's Report.

(Filed December 4th, 1930.)

To: Cranford Trust Company, a corporation; Abraham Shilling; Hudson Fireproof Block Co.; Louis Schwartz; Julius Stenkauskas; John P. Grady; Bayonne Supply Co.; Trust Company of New Jersey; George F. Perry & Sons, Inc.; A. S. Reid & Company; Meyer & Ruh Company, Ira R. Crouse, Lipschitz Parquet Floor Co.; Louis Moore; Joseph Machetto, Alpheus S. Van Woeart; M. Tozzi and J. Marcasiano; Alfred W. Booth & Bro.; Arthur G. Teweles; Edward P. Stout, Trustee; West Bergen Trust Company; Royal Marble Works, Inc.; Benjamin Parnes; Max Platt, Junction Milling Co.; McCabe Bros. Co.; Mowre Lager; Winchester & Muhlberg, Inc.; Harry Siegel and Isadore Levin, copartners trading as Siegel & Levin; John Nicaretta; Ira R. Crouse and Benjamin Heyman, receivers of Capital Construction Co., Inc.; Carteret Company, defendants:

YOU WILL PLEASE TAKE NOTICE that on Monday, October 20th, 1930, at ten o'clock in the forenoon, we shall make application to the Chancellor at the Chancery Chambers, 1 Exchange Place, Jersey City, N. J., for an order confirming the report of Aloysius J. McMahon, the Master to whom this matter was referred. At the said time and place we shall also make application for the fixing of our counsel fees, for the fixing of allowances for the Master, and for the stenographer's fees and for the taxation of costs.

Dated: October 11th, 1930.

Yours, etc.,

SECLOW & NESSANBAUM,
Solicitors of Jacob Tucker &
Israel Shilowitz.

Order *Nisi* to Confirm Master's Report.

(Filed October 20th, 1930.)

This matter being opened to the Court by Seclow & Nessanbaum, solicitors of Israel Shilowitz and Jacob Tucker, and upon reading and filing the report made in this cause by Aloysius McMahon, one of the Masters of this Court, bearing date the 29th day of July, 1930;

It is on this 20th day of October, 1930, on motion of Seclow & Nessanbaum, solicitors of the said Israel Shilowitz and Jacob Tucker,

Ordered, that the said Master's report and all the matters and things therein contained do stand in all things ratified and confirmed according to the true tenor and meaning thereof unless the defendants shall within eight days from the date hereof show good cause to the contrary, and exceptions already filed shall be deemed to have been filed pursuant to this order and within proper time.

E. R. Walker,
C.

Respectfully advised,
J. O. Bigelow,
V. C.

Exceptions of Geo. F. Perry & Sons, Inc., to Master's Report.

(Filed October 15th, 1930.)

The defendant, George F. Perry & Sons, Inc., a corporation, hereby specifies the following as its exceptions to the report of Aloysius McMahon, Esq., which report was dated July 29, 1930, and filed in the office of the Clerk of this Court within four days prior to the date hereof:

1. Said Master has erroneously reported that there is due to the defendant, Israel Shilowitz and Jacob Tucker, as of July 29, 1930, for principal and interest upon their mortgage, the sum of $23,482.00, and that said amount is a first lien on the premises described in the bill of complaint, whereas said Master should have reported:

(a) That said mortgage, and the amount due thereon, is subordinate and inferior to the lien of the encumbrance held by Geo. F. Perry & Sons, Inc., a corporation,

(b) That said mortgage, if any part thereof be paramount to the lien of the encumbrance held by Geo. F. Perry & Sons, Inc., a corporation, is paramount only for so much of the principal thereof as was advanced thereon by the mortgagees and actually paid and used for labor and materials used in the construction of the building (said mortgage having been executed and delivered subsequent to the commencement of the erection of the building upon the mortgaged premises), together with interest thereon at the rate of six per cent (6%) per annum, from the date of each several and respective advancement (so paid and used) to the date when the proceeds of the sale of the mortgaged premises, sold *pendente lite,* were paid into the office of the Clerk in Chancery, said date being July 17, 1928, and together with interest there-

after from July 17, 1928, to the date of the Master's Report, at the rate of two per cent. (2%) per annum, or such other amount as the Clerk of this Court allows or pays on moneys deposited with him, and that only for the aggregate of the amounts herein set forth, are said mortgagees, the defendants, Israel Shilowitz and Jacob Tucker, entitled to payment before payment is made to Geo. F. Perry & Sons, Inc., a corporation,

(c) That the Clerk of this Court, from the moneys deposited with him in this cause, be directed to pay the said Israel Shilowitz and Jacob Tucker, the sum not greater than the aggregate of the sums last stated.

2. Said Master has erroneously reported that there is due to the defendant, Carteret Company, as of July 29, 1930, upon its mortgage, the sum of $37,365.48, and that said amount is a second lien on the premises described in the bill of complaint, whereas said Master should have reported:

(a) That said mortgage, and the amount due thereon, is subordinate and inferior to the lien of the encumbrance held by Geo. F. Perry & Sons, Inc., a corporation,

(b) That said mortgage, if any part thereof be paramount to the lien of the encumbrance held by Geo. F. Perry & Sons, Inc., a corporation, is paramount only for so much of the principal thereof as was advanced thereon by the mortgagee and actually paid and used for labor and materials used in the construction of the building (said mortgage having been executed and delivered subsequent to the commencement of the erection of the building upon the mortgaged premises), together with interest thereon at the rate of six per cent. (6%) per annum, from

the date of each several and respective advancement (so paid and used) to the date when the proceeds of the sale of the mortgaged premises, sold *pendente lite,* were paid into the office of the Clerk in Chancery, said date being July 17, 1928, and together with interest thereafter from July 17, 1928, to the date of the Master's Report, at the rate of two per cent. (2%) per annum, or such other amount as the Clerk of this Court allows or pays on moneys deposited with him, and that only for the aggregate of the amounts herein set forth, is said mortgagee, the defendant, Carteret Company, entitled to payment before payment is made to Geo. F. Perry & Sons, Inc., a corporation,

(c) That the Clerk of this Court, from the moneys deposited with him in this cause be directed to pay the said Carteret Company the sum not greater than the aggregate of the sums last stated.

3. Said Master has erroneously reported that there is due to the defendant, West Bergen Trust Company, as of July 29, 1930, upon its mortgage, the sum of $6,874.00, and that said amount is a lien on the premises described in the bill of complaint, paramount to the encumbrance of Geo. F. Perry & Sons, Inc., a corporation, whereas said Master should have reported:

(a) That said mortgage, and the amount due thereon, if any, is subordinate and inferior to the lien of the encumbrance held by Geo. F. Perry & Sons, Inc., a corporation.

4. Said Master has erroneously reported that the lien of the encumbrance of Geo. F. Perry & Sons, Inc., a corporation, is concurrent with the liens of the defendants, A. S. Reid Company, Max Platt, Ira R. Crouse, Louis Moore, Joseph Ma-

chetto, Venango Stone Co., A. W. Booth & Bro., Lipschitz Parquet Floor Company, Alpheus S. Van Woeart, Roderick N. Crockett, John Nicaretta, Meyer & Ruh Co., M. Tozzi & J. Morcasiano, Royal Marble Works, Inc., Mowre Lager and Arthur Teweles, whereas said Master should have reported:

(a) That the encumbrance of the defendant, Geo. F. Perry & Sons, Inc., a corporation, is prior and paramount to the alleged liens of the aforesaid defendants.

(b) That the Clerk of this Court, from the moneys deposited with him in this cause be directed to pay to Geo. F. Perry & Sons, Inc., a corporation, the sum of $6,028.37 (the amount of the judgment recovered by Geo. F. Perry & Sons, Inc., a corporation, on January 13, 1928, in the Union County Circuit Court, generally against the defendant, Capitol Construction Co., Inc., a corporation, the Builder and Owner, specially against the lands and building described in the bill of complaint in this cause, and with priority over the mortgages held respectively by the defendant, Louis Schwartz, by the defendant, Junction Milling Co., a corporation, and by the defendant, West Bergen Trust Company, a corporation), together with 6% interest on said amount from January 13, 1928 to July 17, 1928, and together with interest thereafter from July 17, 1928, to the date of the Master's Report at the rate of two per cent. (2%) per annum.

5. Said Master has erroneously failed to report:

First.—That the amount due on the encumbrance of Geo. F. Perry & Sons, Inc., a corporation, is the sum of $6,028.37, together with in-

terest on said amount at six per cent. (6%) per annum from January 13, 1928 to July 17, 1928, and also together with interest on said amount at the rate of two per cent. (2%) per annum from July 17, 1928, to the date of the Master's Report.

Second.—That the aggregate of the aforesaid amounts is prior and paramount to each and every of the encumbrances of all other defendants, and is first entitled to be paid from moneys deposited in this cause with the Clerk of this Court.

Third.—That the Clerk of this Court, from the moneys deposited with him in this cause, be directed in the first instance to pay to Geo. F. Perry & Sons, Inc., a corporation, the sum of $6,028.37 (the amount of the judgment recovered by Geo. F. Perry & Sons, Inc., a corporation, on January 13, 1928, in the Union County Circuit Court, generally against the defendant, Capitol Construction Co., Inc., a corporation, the Builder and Owner, specially against the lands and building described in the bill of complaint in this cause, and with priority over the mortgages held respectively by the defendant, Louis Schwartz, by the defendant, Junction Milling Co., a corporation, and by the defendant, West Bergen Trust Company, a corporation) together with interest on said amount at six per cent. (6%) per annum from January 13, 1928 to July 17, 1928, and together with interest thereafter from July 17, 1928 to the date of the Master's Report at the rate of two per cent. (2%) per annum.

6. Said Master has erroneously failed to report that the mortgage of Carteret Company em-

braced only a portion of the lands and premises covered by the encumbrance of Geo. F. Perry & Sons, Inc., a corporation, and that the proceeds of the sale of the mortgaged premises represents the proceeds from a sale of the whole thereof, and not merely that portion thereof covered by the mortgage of Carteret Company.

7. Said Master has erroneously failed to annex to his said report schedules showing the manner, or method of computation, by which he has arrived at the amounts due to the defendants, other than Geo. F. Perry & Sons, Inc., a corporation.

8. Said Master has erroneously, and contrary to Rule 187 of this Court, attempted to postpone the rights and claims of Geo. F. Perry & Sons, Inc., a corporation, to the rights of other parties, when the priority of the rights or claims of such other parties, and the facts upon which they depend, were not distinctly set forth in the bill of complaint, nor in any counterclaim filed by them.

9. Said Master has erroneously failed to report that the defendants, Max Platt, Ira R. Crouse, Louis Moore, Joseph Machetto, Venango Stone Co., A. W. Booth & Bro., Lipschitz Parquet Floor Company, Alpheus S. Van Woeart, Roderick N. Crocket, John Nicaretta, Meyer & Ruh Co., M. Tozzi & J. Morcasiano, Royal Marble Works, Inc., Mowre Lager and Arthur Teweles, had no lien or encumbrance against the mortgaged premises, and are entitled to be paid nothing from the moneys deposited with the Clerk of this Court in this cause.

Exceptions of Geo. F. Perry & Sons, Inc., to Master's Report.

10. Said Master has erroneously allowed interest to the aforesaid defendants, where he has allowed no interest to Geo. F. Perry & Sons, Inc.

11. Said Master's Report is contrary to the evidence, contrary to the adjudications of this Court in this cause, contrary to the admissions of counsel during the course of the trial, and is contrary to equity and good conscience.

In all or some of which particulars the defendant, Geo. F. Perry & Sons, Inc., a corporation, is advised, that the said report is erroneous and insufficient, and humbly prays that the same may be set aside or corrected, as may be agreeable to equity and good conscience.

KANTER & KANTER,
Sol'rs. of Defendant, Geo. F. Perry & Sons, Inc., a corporation.

Newark, N. J.
October 15, 1930.

Exceptions of A. S. Reid & Company to Master's Report.

(Filed October 15th, 1930.)

The defendant, A. S. Reid & Company, a corporation, hereby specifies the following as its exceptions to the report of Aloysius McMahon, Esq., which report was dated July 29th, 1930, and filed in the office of the Clerk of this Court within four days prior to the date hereof:

1. Said Master has erroneously reported that there is due to the defendants, Israel Shilowitz

and Jacob Tucker, as of July 29th, 1930, for principal and interest upon their mortgage, the sum of $23,482.00, and that said amount is a first lien on the premises described in the bill of complaint, whereas said Master should have reported:

(a) That said mortgage, and the amount due thereon, is subordinate and inferior to the lien of the encumbrance held by A. S. Reid & Company, a corporation,

(b) That said mortgage, if any part thereof be paramount to the lien of the encumbrance held by A. S. Reid & Company, a corporation, is paramount only for so much of the principal thereof as was advanced thereon by the mortgagees and actually paid and used for labor and materials used in the construction of the building (said mortgage having been executed and delivered subsequent to the commencement of the erection of the building upon the mortgaged premises), together with interest thereon at the rate of six per cent (6%) per annum, from the date of each several and respective advancement (so paid and used) to the date when the proceeds of the sale of the mortgaged premises, sold *pendente lite,* were paid into the office of the Clerk in Chancery, said date being July 17th, 1928, and together with interest thereafter from July 17th, 1928, to the date of the Master's Report, at the rate of two per cent (2%) per annum, or such other amount as the Clerk of this Court allows or pays on monies deposited with him, and that only for the aggregate of the amounts herein set forth, are said mortgagees, the defendants, Israel Shilowitz and Jacob Tucker, entitled to payment before payment is made to A. S. Reid & Company, a corporation,

(c) That the Clerk of this Court, from the monies deposited with him in this cause, be

directed to pay the said Israel Shilowitz and Jacob Tucker, the sum not greater than the aggregate of the sums last stated.

2. Said Master has erroneously reported that there is due to the defendant, Carteret Company, as of July 29th, 1930, upon its mortgage, the sum of $37,365.48, and that said amount is a second lien on the premises described in the bill of complaint, whereas said Master should have reported:

(a) That said mortgage, and the amount due thereon, is subordinate and inferior to the lien of the encumbrance held by A. S. Reid & Company, a corporation,

(b) That said mortgage, if any part thereof be paramount to the lien of the encumbrance held by A. S. Reid & Company, a corporation, is paramount only for so much of the principal thereof as was advanced thereon by the mortgagee and actually paid and used for labor and materials used in the construction of the building (said mortgage having been executed and delivered subsequent to the commencement of the erection of the building upon the mortgaged premises), together with interest thereon at the rate of six per cent. (6%) per annum, from the date of each several and respective advancement (so paid and used) to the date when the proceeds of the sale of the mortgaged premises, sold *pendente lite,* were paid into the office of the Clerk in Chancery, said date being July 17th, 1928, and together with interest thereafter from July 17th, 1928, to the date of the Master's Report, at the rate of two per cent (2%) per annum, or such other amount as the Clerk of this Court allows or pays on monies deposited with him, and that only for the aggregate of the amounts herein set forth, is said mortgagee, the defendant, Carteret Company, en-

titled to payment before payment is made to A. S. Reid & Company, a corporation,

(c) That the Clerk of this Court, from the monies deposited with him in this cause, be directed to pay the said Carteret Company, the sum not greater than the aggregate of the sums last stated.

3. Said Master has erroneously reported that there is due to the defendant, West Bergen Trust Company, as of July 29th, 1930, upon its mortgage, the sum of $6,874.00, and that said amount is a lien on the premises described in the bill of complaint, paramount to the encumbrance of A. S. Reid & Company, a corporation, whereas said Master should have reported:

(a) That said mortgage, and the amount due thereon, if any, is subordinate and inferior to the lien of the encumbrance held by A. S. Reid & Company, a corporation.

4. Said Master has erroneously reported that the lien of the encumbrance of A. S. Reid & Company, a corporation, is concurrent with the liens of the defendants, Geo. F. Perry & Sons, Inc., Max Platt, Ira R. Crouse, Louis Moore, Joseph Machetto, Venango Stone Co., A. W. Booth & Bro., Lipschitz Parquet Floor Company, Alpheus S. Van Woeart, Roderick N. Crocket, John Nicaretta, Meyer & Ruh Co., M. Tozzi & J. Marcasiano, Royal Marble Works, Inc., Mowre Lager and Arthur Teweles, whereas said Master should have reported:

(a) That the encumbrance of the defendant, A. S. Reid & Company, a corporation, is prior and paramount to the alleged liens of the aforesaid defendants,

Exceptions of A. S. Reid & Company to Master's Report.

(b) That the Clerk of this Court, from the monies deposited with him in this cause, be directed to pay to A. S. Reid & Company, a corporation, the sum of $3,233.90 (the amount of the judgment and costs recovered by A. S. Reid & Company, a corporation, on July 7th, 1928, in the Union County Circuit Court, generally against the defendant, Capitol Construction Co. Inc., a corporation, the builder and owner, specially against the lands and building described in the bill of complaint in this cause, and with priority over the mortgages held respectively by the defendants, Louis Schwartz, by the defendant, Junction Milling Co., a corporation, and by the defendant, Edward P. Stout, Trustee) together with interest on said amount from July 7th, 1928 to July 17th, 1928, at six per cent (6%) per annum, and together with interest thereafter from July 17th, 1928 to the date of the Master's report at the rate of two per cent (2%) per annum.

5. Said Master has erroneously failed to report:

First.—That the amount due on the encumbrance of A. S. Reid & Company, a corporation, is the sum of $3,233.90, together with interest on said amount at six per cent (6%) per annum from July 7th, 1928 to July 17th, 1928, and also together with interest on said amount at the rate of two per cent (2% per annum from July 17th, 1928 to the date of the Master's report,

Second.—That the aggregate of the aforesaid amounts is prior and paramount to each and every of the encumbrances of all other defendants, and is first entitled to be paid from the monies deposited in this cause with the Clerk of this Court,

Third.—That the Clerk of this Court, from the monies deposited with him in this cause, be di-

rected in the first instance to pay to A. S. Reid & Company, a corporation, the sum of $3,233.90 (the amount of the judgment and costs recovered by A. S. Reid & Company, a corporation, on July 7th, 1928, in the Union County Circuit Court, generally against the defendant, Capitol Construction Co. Inc., a corporation, the builder and owner, especially against the lands and building described in the bill of complaint in this cause, and with priority over the mortgages held respectively by the defendant, Louis Schwartz, by the defendant, Junction Milling Co., a corporation, and by the defendant, Edward P. Stout, Trustee) together with interest on said amount at six per cent (6%) per annum from July 7th, 1928 to July 17th, 1928, and together with interest thereafter from July 17th, 1928 to the date of the Master's report at the rate of two per cent (2%) per annum.

6. Said Master has erroneously failed to report that the mortgage of Carteret Company embraced only a portion of the lands and premises, covered by the encumbrance of A. S. Reid & Company, a corporation, and that the proceeds of the sale of the mortgaged premises represents the proceeds from a sale of the whole thereof, and not merely that portion thereof covered by the mortgage of Carteret Company.

7. Said Master has erroneously failed to annex to his said report schedules showing the manner, or method of computation by which he has arrived at the amount due to the defendants, other than A. S. Reid & Company, a corporation.

8. Said Master has erroneously, and contrary to Rule 187 of this Court, attempted to postpone the rights and claims of A. S. Reid & Company,

a corporation, to the rights of other parties when the priority of the rights or claims of such other parties, and the facts upon which they depend, were not distinctly set forth in the bill of complaint, now in any counterclaim filed by them.

9. Said Master has erroneously failed to report that the defendants, Max Platt, Ira R. Crouse, Louis Moore, Joseph Machetto, Venango Stone Co., A. W. Booth & Bro., Lipschitz Parquet Floor Company, Alpheus S. Van Woeart, Roderick N. Crocket, John Nicaretta, Meyer & Ruh Co., M. Tozzi & J. Marcasiano, Royal Marble Works, Inc., Mowre Lager and Arthur Teweles, had no lien or encumbrance against the mortgaged premises, and are entitled to be paid nothing from the monies deposited with the Clerk of this Court in this cause.

10. Said Master has erroneously allowed interest to the aforesaid defendants, where he has allowed no interest to A. S. Reid & Company, a corporation.

11. Said Master's report is contrary to the evidence, contrary to the adjudications of this Court in this cause, contrary to the admissions of counsel during the course of the trial, and is contrary to equity and good conscience.

In all or some of which particulars the defendant, A. S. Reid & Company, a corporation, is advised, that the said report is erroneous and insufficient, and humbly prays that the same may be set aside or corrected, as may be agreeable to equity and good conscience.

LEAVITT, ULBRICH & TALLEY,

Solicitors of Defendant,
A. S. Reid & Company, a corporation.

Elizabeth, N. J.
October 15th, 1930.

Exception of Ira R. Crouse, Louis Moore, Lipschitz Parquet Floor Co. and Meyer & Ruh Company to Master's Report.

(Filed October 15th, 1930.)

The defendants Ira R. Crouse, Louis Moore, Lipschitz Parquet Floor Company and Meyer & Ruh Co. hereby specify the following as their exceptions to the report of Aloysius McMahon, Esq., which report was dated July 29, 1930, and filed in the office of the Clerk of this Court within four (4) days prior to the date hereof:

1. Said Master has erroneously reported that there is due to the defendant West Bergen Trust Company, as of July 29, 1930, upon its mortgage the sum of $6,874.00 and that said amount is a lien on the premises described in the bill of complaint, paramount to the encumbrances of Ira R. Crouse, Louis Moore, Lipschitz Parquet Floor Company and Meyer & Ruh Co., whereas said Master should have reported:

> (a) That said mortgage and the amount due thereon, if any, is subordinate and inferior and to the lien of the encumbrances held by Ira R. Crouse, Louis Moore, Lipschitz Parquet Floor Company and Meyer & Ruh Co.

In all or some of which particulars the defendants, Ira R. Crouse, Louis Moore, Lipschitz Parquet Floor Company and Meyer & Ruh Co. are advised that the said report is erroneous and insufficient, and humbly pray that the same may be set aside or corrected as may be agreeable to equity and good conscience.

AARON KAUFMAN,
Sol'r of Ira R. Crouse, *et als.*

Elizabeth, N. J.,
October 15, 1930.

Exceptions of Mowre Lager and Max Platt to Master's Report.

(Filed October 20th, 1930.)

The defendants, Mowre Lager and Max Platt, hereby except to the report filed in this cause by Aloysius McMahon, one of the Masters of this Court bearing date the 29th day of July, 1930, for the following reasons:

1. The said Master has failed to apportion the fund in the hands of the Clerk of the Court into two separate funds. The premises sold by virtue of the *fieri facias* under the foreclosure of the complainant's mortgage consisted of an apartment house erected in the center of a large tract of land, situate, lying and being in the Township of Cranford, County of Union and State of New Jersey, fronting on the northerly side of Riverside Drive and running from Prospect Avenue to Union Avenue. The said premises had a frontage of approximately four hundred forty-three and four one-hundredths (443.04) feet, and having a frontage on Prospect Avenue of three hundred fifty-eight and thirty one-hundredths (358.30) feet, and a frontage on Union Avenue of two hundred forty and thirty-one one-hundredths (240.31) feet. The curtilage intended to be appropriated for the apartment house had a frontage of about two hundred fifty-four and six one-hundredths (254.06) feet on Riverside Drive and the frontage remaining on Riverside Drive of the said tract, one section fronting on Prospect Avenue and the other section fronting on Union Avenue was intended for other purposes and for other developments. The exact dimensions of the three parcels will be found in the mortgage made by the Capitol Construction Co. to the Carteret Com-

pany recorded in Book 878 of Mortgages of Union County, page 347, which description will more particularly set forth the lands and premises intended for the apartment house, and the two wings adjoining the apartment house are described in the mortgage made by Capitol Construction Co. to the Junction Milling Company, which mortgage was recorded in Liber 886 of Mortgages for Union County, on page 390. The Master should have apportioned the fund on hand into two funds. First, as to the value of the two wings hereto described which was fixed at the sum of $20,000.00 by the uncontradicted testimony given before the Master as the same bore to the amount realized at the Sheriff's sale plus the amount of liens which were assumed by the purchaser at the sale. After determining the ratio of distribution of the two funds the Master should have allowed as the first lien the claim of Israel Shilowitz and Jacob Tucker for the sum of $23,482.00 (which sum is not admitted to be the true amount due) who was to receive a proportionate share out of the fund representing the two wings aforesaid, and the balance out of the center tract upon which the apartment house was erected. Secondly, he should have allowed to the Carteret Company the amount due it out of the fund realized from the center tract upon which the apartment house was erected. Thirdly, he should have allowed to the Junction Milling Company the amount due it out of the fund apportioned to the two wings aforesaid. The Carteret Company mortgage was lien in priority to the Junction Milling Company, only to the extent of the center tract upon which the apartment house was erected. The Junction Milling Company mortgage was a lien only on the

two wings as therein more particularly described. The said Junction Milling Company mortgage was recorded prior to the West Bergen Trust Company mortgage, which latter mortgage contained a recital that the said mortgage was subject to various mortgages including the mortgage of the Junction Milling Company. All other claimants except heretofore mentioned alleging a claim shall thereupon share in the said fund.

2. That the said Master should have reported that the claims of the above defendants based upon mechanic's liens were prior and paramount to the claim of the West Bergen Trust Company which was based upon a mortgage recorded after the commencement of the erection of the building and after the claimants' rights have accrued. The proceeds of which mortgage were not advanced for the payment of labor or materials furnished or performed in the erection and construction of the apartment house.

3. The said Master has failed to report the true amount due to Israel Shilowitz and Jacob Tucker.

4. The said Master has failed to report the true amount due to the Carteret Company.

5. The said Master has failed to report the true amount due to the West Bergen Trust Company.

CHAS. RUBENSTEIN,
Solicitor of the defendant Mowre Lager and Max Platt.

Exceptions of Junction Milling Company to Master's Report.

(Filed October 20th, 1930.)

The defendant Junction Milling Company, a corporation of the State of New Jersey, hereby excepts to the report filed in this cause by Aloysius McMahon, one of the Masters of this Court bearing date the 29th day of July, 1930, for the following reasons:

1. The said Master has failed to apportion the fund in the hands of the Clerk of the Court into two separate funds. The premises sold by virtue of the *fieri facias* under the foreclosure of the complainant's mortgage consisted of an apartment house erected in the center of a large tract of land, situate, lying and being in the Township of Cranford, County of Union and State of New Jersey, fronting on the northerly side of Riverside Drive and running from Prospect Avenue to Union Avenue. The said premises had a frontage of approximately four hundred forty-three and four one-hundredths (443.04) feet, and having a frontage on Prospect Avenue of three hundred fifty-eight and thirty one-hundredths (358.30) feet, and a frontage on Union Avenue of two hundred forty and thirty-one one-hundredths (240.31) feet. The curtilage intended to be appropriated for the apartment house had a frontage of about two hundred fifty-four and six one-hundredths (254.06) feet on Riverside Drive and the frontage remaining on Riverside Drive of the said tract, one section fronting on Prospect Avenue and the other section fronting on Union Avenue was intended for other purposes and for other developments. The exact dimensions of the three parcels will be found in the mortgage

made by the Capitol Construction Co. to the Carteret Company recorded in Book 878 of Mortgages of Union County, page 347, which description will more particularly set forth the lands and premises intended for the apartment house, and the two wings adjoining the apartment house are described in the mortgage made by Capitol Construction Co. to the Junction Milling Company, which mortgage was recorded in Liber 886 of Mortgages for Union County, on page 390. The Master should have apportioned the fund on hand into two funds. First, as to the value of the two wings hereto described which was fixed at the sum of $20,000.00 by the uncontradicted testimony given before the Master as the same bore to the amount realized at the Sheriff's sale plus the amount of liens which were assumed by the purchaser at the sale. After determining the ratio of distribution of the two funds the Master should have allowed as the first lien the claim of Israel Shilowitz and Jacob Tucker for the sum of $23,482.00 (which sum is not admitted to be the true amount due) who was to receive a proportionate share out of the fund representing the two wings aforesaid, and the balance out of the center tract upon which the apartment house was erected. Secondly, he should have allowed to the Carteret Company the amount due it out of the fund realized from the center tract upon which the apartment house was erected. Thirdly, he should have allowed to the Junction Milling Company the amount due it out of the fund apportioned to the two wings aforesaid. The Carteret Company mortgage was lien in priority to the Junction Milling Company, only to the extent of the center tract upon which the apartment house was erected. The Junction Milling Company

mortgage was a lien only on the two wings as therein more particularly described. The said Junction Milling Company mortgage was recorded prior to the West Bergen Trust Company mortgage, which latter mortgage contained a recital that the said mortgage was subject to various mortgages, including the mortgage of the Junction Milling Company. All other claimants except heretofore mentioned alleging a claim shall thereupon share in the said fund.

2. The said Master should have reported that the lien claimants should share in such fund only as should have been apportioned to the center tract upon which the apartment house has been erected and not in the fund apportioned for two wings of the vacant land which were never intended to be included in the curtilage on which the building was erected.

3. The said Master should have reported that the Junction Milling Company mortgage is prior and paramount to the mortgage of the West Bergen Trust Company.

4. The said Master has failed to report the true amount due to Israel Shilowitz and Jacob Tucker.

5. The said Master has failed to report the true amount due to the Carteret Company.

6. The said Master has failed to report the true amount due to the West Bergen Trust Company.

CHAS. RUBENSTEIN,
Solicitor of the Defendant Junction Milling Company.

Amended Exceptions of Junction Milling Company.

(Filed November 6th, 1930.)

The defendant, Junction Milling Company, a corporation of the State of New Jersey, hereby excepts to the report filed in this cause by Aloysius McMahon, one of the Masters of this Court, bearing date July 29, 1930, for the following reasons:

1. This exceptant objects to that part of said Master's report in which the said Master finds that the mortgage of defendant Carteret Company upon the premises described in the bill of complaint is record lien and subordinate to the mortgage of Shilowitz and Tucker, whereas he should have reported that this exceptant is entitled to priority to said lien of Carteret Company under its mortgage dated September 16, 1927, and recorded in the Register's Office of Union County in Book 886 of Mortgages for said County on pages 390, etc., as to the value of the land unconnected with the apartment house erected upon part of the mortgaged premises described in the complainant's and exceptant's mortgages herein, because said exceptant's mortgage was executed and recorded prior to the mortgage held by said defendant Carteret Company.

2. This exceptant objects to that part of said Master's report in which the said Master finds that the mortgage of the West Bergen Trust Company, dated October 25, 1927, and recorded in Book 895 of mortgages for Union County on pages 38, etc., is a lien upon the whole tract and is subsequent to the lien of the Shilowitz and Tucker mortgage and the Carteret Company mortgage,

whereas he should have reported that this exceptant is entitled to priority to said lien of West Bergen Trust Company under its mortgage referred to in paragraph 1 herein, as to the value of the land unconnected with the apartment house erected upon part of the mortgaged premises described in the complainant's and exceptant's mortgages herein, because the said defendant's mortmade, executed and recorded subsequent to said exceptant's mortgage.

3. This exceptant objects to that part of the said Master's report in which the said Master finds that the mortgage of the exceptant was given for the payment of materials supplied in the erection of the building on lands described in the bill of complaint herein and other property, and is entitled to be paid from whatever fund remains after the payment of the defendant lienors, whereas he should have reported that this exceptant is entitled to priority to mortgagee defendant Carteret Company and West Bergen Trust Company, and also is entitled to priority to defendant lienors as to the value of the land unconnected with the apartment house erected upon part of the mortgaged premises described in the complaint's mortgage herein, because said mortgagees defendants Carteret Company and West Bergen Trust Company respective mortgages were executed and recorded subsequent to this exceptant's mortgage, and defendant lienors have no statutory interest whatever to the land unaffected by the apartment house.

4. The said Master erred in finding that the lien claimant-defendants should share in the entire

surplus fund, whereas he should have reported that the lien claimant-defendants were entitled to their respective statutory right of lien claim only upon the fund realized from the sale of the apartment house and the land upon which the same is erected and have no rights prior to the exceptant's mortgage as to the premises unconnected with the apartment house.

5. The said Master erred in considering the surplus monies as a common fund among all the claimants herein, whereas he should have treated the same in three distinct groups, to wit: one group as to claimants only interested in the land unconnected with the apartment house and land upon which the same is erected; another group as to claimants interested in the entire mortgaged premises, and the last group as to claimants only interested in the apartment house and land upon which the same stands erected.

6. The said Master should have reported that the value of the entire parcel, including the building, was $250,000, and that value of the land, independent of and unconnected with apartment house and land upon which the same was erected, was $20,000 at the time of the Sheriff's sale under complainant's mortgage.

7. The Master should have apportioned the fund now on deposit with this Court into two funds, one fund to represent the proportionate share for the lands independent of and unconnected with the apartment house and the curtilage upon which it stands, and the other fund to represent the proportionate share for the apartment house and the curtilage upon which it stands.

Amended Exceptions of Junction Milling Company.

8. The Master should have reported that both proportionately shall be applied towards the payment of the mortgage held by the defendants Israel Shilowitz and Jacob Tucker, and the residue of the fund representing the land independent of and unconnected with the apartment applied towards the payment of the exceptant's mortgage, and any balance then remaining applied to the other claimant or claimants entitled to the same.

9. The Master's findings and conclusions are contrary to equity and the evidence taken before the said Master.

For which particulars the report of the said Master is, as the said Junction Milling Company, exceptant, is advised, erroneous and contrary to law and equity, and the said exceptant appeals therefore to the judgment of this Honorable Court. This amendment of exceptions to Master's report being filed in pursuance to an oral order made by this Honorable Court.

CHAS. RUBENSTEIN,
Solicitor for Exceptant, Junction Milling Company.

Order of Re-Reference to Vice Chancellor Bigelow.

(Filed December 4th, 1930.)

The above stated cause having been duly referred to the Honorable John Bentley, formerly one of the Vice Chancellors of this Court, and the same remaining unheard:

It is thereupon, on this fourth day of December, A. D. nineteen and thirty, ordered that said cause be now referred to the Honorable J. O. Bigelow, one of the Vice Chancellors of this Court, to hear the same for the Chancellor and to report thereon to him and advise what order or decree should be made therein; and such hearing be had at the time and place already designated therefor.

E. R. WALKER,
C.

Notice to Confirm Master's Report.

(Served November 7th, 1930.)
(Filed December 4th, 1930.)

To Roderick N. Crockett:

YOU WILL PLEASE TAKE NOTICE that on Thursday, December 4th, 1930, at ten o'clock in the forenoon, we shall make application to Vice-Chancellor Bigelow, at the Chancery Chambers, 1 Exchange Place, Jersey City, N. J. for an Order confirming the report of Aloysius J. McMahon, the Master to whom this matter was referred. At the said time and place we shall also make application for the fixing of our counsel fees, for the fixing of allowances for the master, and for the stenographers' fees and for the taxation of costs.

Dated: October 11th, 1930.

Yours &c.

SECLOW & NESSANBAUM,
Solicitors of defendants, Jacob Tucker and Israel Shilowitz.

Notice on Exceptions to Master's Report.

To: Cranford Trust Company, a corporation, Abraham Shilling, Hudson Fireproof Block Co., Louis Schwartz, Julius Stenkauskas, John P. Grady, Bayonne Supply Co., Trust Company of New Jersey, George F. Perry & Sons, Inc., A. S. Reid & Company, Meyer & Ruh Company, Ira R. Crouse, Lipschitz Parquet Floor Co., Louis Moore, Joseph Machetto, Alpheus S. Van Woeart, M. Tozzi and J. Marcasiano, Alfred W. Booth & Bro., Arthur G. Teweles, Edward P. Stout, Trustee, West Bergen Trust Company, Royal Marble Works, Inc., Benjamin Parnis, Max Platt, Junction Milling Co., McCabe Bros. Co., Mowre Lager, Winchester & Muhlberg, Inc., Harry Siegel and Isadore Levin, co-partners trading as Siegel & Levine, John Nicaretta, Ira R. Crouse and Benjamin Heyman, Receivers of Capital Construction Co., Inc., and Carteret Company:

TAKE NOTICE that Vice-Chancellor Bigelow has designated Thursday, December 4th, 1930, at ten o'clock in the forenoon as the time and the Chancery Chambers, 1 Exchange Place, Jersey City, as the place for the argument on the exceptions to the master's report which may be properly filed in this cause.

Dated: October 20th, 1930.

Yours, &c.,

SECLOW & NESSANBAUM,
Solicitors of Defendants, Jacob Tucker and Israel Shilowitz.

Order to Pay Master's and Stenographers' Fees and a/c Carteret Company and Shilowitz & Tucker Mortgages.

(Filed December 8th, 1930.)

This matter being opened to the court by Seclow & Nessenbaum, solicitors of the defendants, Jacob Tucker and Israel Shilowitz, and the matter having been argued between the solicitors of the various parties upon the exceptions to the master's report, and it has been conceded by the common consent of the solicitors at such argument that there was no controversy as to the priority of at least $14,500 of the mortgages of the defendants, Jacob Tucker and Israel Shilowitz and $15,000 of the defendant, Carteret Company, and that pending the termination of the matter of the exceptions it would be for the benefit of all the other parties that such amounts be paid so as to lessen the accruing interest charges;

And it further appearing that Aloysious McMahon, the master, has not been paid his fees nor have the stenographer's fees been paid, and it appearing that the services rendered by said master involved a great deal of time;

It is on this 8th day of December, 1930 ORDERED that the clerk of this court pay to the Carteret Company, or James E. Pyle, its solicitors, the sum of $15,000 which shall be credited on account of any further moneys to be received by the said Carteret Company, and that the clerk of this court pay to Seclow & Nessanbaum, solicitors of the defendants, Jacob Tucker and Israel Shilowitz, the sum of $14,500 which shall likewise be credited upon any moneys to which the said Jacob Tucker and Israel Shilowitz shall become entitled.

Order to Pay Master's and Stenographers' Fees and a/c Carteret Company and Shilowitz & Tucker Mortgages.

FURTHER ORDERED that the clerk of this court pay to Harry Schirmer the sum of $329 for stenographer's fees and to Neale Ransom the sum of $179 for stenographer's fees and to Aloysious McMahon, Esq., the master, an allowance of $1,000 in lieu of the other fees to which the master is entitled.

E. R. WALKER,
C.

Respectfully advised,

J. O. BIGELOW,
V. C.

Opinion of Vice Chancellor Bigelow.

(Filed Dec. 26th, 1930.)

1. A Master's finding of a fact in issue is entitled to great weight and should not be disturbed when there is a serious conflict of evidence. But when the Master makes no finding of the fact and his conclusion may be based on an erroneous conception of the law, the Court, on exceptions to the report, must decide the fact for itself in accordance with the evidence.

2. Money advanced by a mortgagee for legal services in connection with the mortgage loan is not applied to the erection of the building within the meaning of Section 15 of the Mechanics' Lien Act, P. L. 1898, page 538.

3. A mortgage was subsequent, to the extent of $1,000, to the liens of materialmen. All the materialmen, except two, agreed with the mort-

gagee to postpone their liens. Held that the materialmen who did not postpone and whose claims exceeded $1,000 should not be awarded the entire $1,000, but only that proportion thereof to which they would be entitled if the other materialmen had not agreed to postpone.

4. On foreclosure, the property was sold *pendente lite* and the proceeds deposited in court. The mortgagees and other lienors are entitled to interest at 6 percent. to the date of the decree distributing the fund, even though the money in court does not bear interest at that rate.

5. A materialman who takes a mortgage to secure his debt waives his right to a statutory mechanic's lien.

6. Such materialman thereafter filed a mechanic's lien claim which he later abandoned. Held that his rights under his mortgage were not thereby affected.

7. One materialman cannot secure priority of lien over other materialmen by taking a mortgage after the commencement of the building.

8. A mortgage given after the commencement of the building, to a materialman to secure payment of the amount due for materials used in the construction of the building, is subordinate to mechanics' liens under the provisions of Sections 15 and 28 of the Mechanics' Lien Act.

9. A mortgage given to a materialman is prior in lien to mortgages executed and recorded after the mortgage of the materialman was recorded, even though the subsequent mortgages secured funds applied to the erection of the building on the mortgaged premises.

10. The first, second, fourth and fifth mortgages covered the entire tract. The third covered part only. The entire tract was sold *pendente lite* as one parcel. Held that the proceeds should be considered as two funds; one fund, the proceeds of the part covered by the third mortgage, and the other, the proceeds of the balance of the tract, the apportionment to be made in accordance with evidence of the comparative values of the two parts.

11. In such case, the funds should be marshaled so that the amount due on the third mortgage may be paid in full, even though the sum remaining available for the fourth and fifth mortgages is thereby reduced.

12. Money advanced by a mortgagee to pay insurance premiums on the mortgaged premises is not applied to the erection of the building within the meaning of Section 15 of the Mechanics' Lien Act.

13. A trust company which lends money to the owner on the owner's general credit and thereafter takes a mortgage to secure the debt, is preferred by Section 15 of the Mechanics' Lien Act over mechanics' lien claimants, provided the money advanced was actually applied to the building.

14. A mortgagee advanced $5,000 to the owner of the mortgaged premises on which a building was being constructed. The owner mingled the loan with other monies by depositing it in his bank account in which there was a balance at the time of $651.53. Thereupon, and before any other deposits were made to the account, $3,000 was paid out and applied to the erection of the building. Held that the mortgagee, despite the mingling of

the funds, was entitled to priority over mechanics' lien claimants to the extent of at least $2,348.47.

15. A materialman filed a mechanic's lien claim and began action thereon in the Circuit Court against the owner and mortgagee, pursuant to the Mechanics' Lien Act. Thereafter, the owner was adjudged insolvent and a receiver appointed by the Court of Chancery. The mortgagee apparently assumed that the action in the Circuit Court would not be pressed since a receiver had been appointed and therefore interposed no defense. Judgment was entered by default, establishing the priority of the lien claim over the mortgage. Held, on foreclosure, that the judgment of the Circuit Court was conclusive. If the mortgagee desired to avoid its effect, application should have been made to the Circuit Court to vacate the judgment.

16. A mortgage was given to secure money applied to the erection of a building on the mortgaged premises and was *prima facie* prior to mechanics' lien claims. But one such claimant had established the priority of his claim by judgment in the Circuit Court. Such claimant is entitled to the full amount of his judgment in preference to the mortgagee and not merely to that proportion of the proceeds which he would receive if all lien claimants were entitled to priority.

17. The owner of a tract of two and one-quarter acres of land erected thereon a large apartment house. Held under the circumstances of this case that Section 21 of the Mechanics' Lien Law does not apply and that the entire tract is the curtilege subject to the lien describing it.

18. Lien claims which describe as the curtilege part only of the lot which might have been liened, are not thereby invalidated.

19. Two lien claims described only part of the tract. The only fund in court available for lien claimants was that carved out of a mortgage covering the balance of the tract not described in the two lien claims. Held that these claimants cannot share in the fund in court.

20. An exception to a Master's report should be so drawn as to direct the attention of the Court to the exact error complained of, so that the Court may readily determine the merits of the exception. An exception which is too general may be disregarded.

21. When a materialman files a mechanic's lien and thereafter, but within four months from the date of the last material furnished by him, the owner corporation is adjudged insolvent and a receiver appointed by the Court of Chancery, the claimant is relieved from necessity of bringing suit on his lien claim in compliance with Section 18 of the Mechanics' Lien Law until the receiver or the Court of Chancery requires suit to be brought.

22. Likewise, if action on the lien claim has been commenced before the appointment of the receiver, the diligent prosecution of the action pursuant to Section 18 becomes unnecessary after the appointment.

23. The Court of Chancery on foreclosure may establish and enforce mechanics' liens which have been neither reduced to judgment in the Circuit Court nor allowed by a receiver in insolvency.

24. Fund in court marshalled among mortgagees and mechanics' lien claimants.

25. When two lien claimants, through their counsel, have been especially vigorous in attacking the claims of mortgagees and have succeeded in carving out a fund in which lien claimants as a class will share, they may be allowed counsel fees out of such fund.

December 22, 1930.

MESSRS. SECLOW & NESSANBAUM, for Israel Shilowitz and Jacob Tucker, Mortgagees.

CHARLES RUBENSTEIN, Esq., for Junction Milling Company, Mortgagee.

JAMES E. PYLE, Esq., for Cartaret Company, Mortgagee.

EDWARD P. STOUT, Esq., for West Bergen Trust Company, Mortgagee.

MESSRS. KANTOR & KANTOR, for George F. Perry & Sons, Inc., Mechanic's lien claimant.

MESSRS. LEAVITT, ULLBRICH & TALLEY, for A. S. Reid & Company, Mechanic's lien claimant.

AARON KAUFMAN, Esq., for Ira Crouse and others, Mechanic's lien claimants.

Opinion.

BIGELOW, V. C.

This is a suit to foreclose a mortgage on a large apartment house and the tract of land on which it is built in Cranford, Union County. The premises were sold *pendente lite* for $142,500 and the proceeds paid into court. Subsequently, by order made in this cause, the complainant was paid and there now remains a surplus to be disposed of, amounting to $70,347.21, besides interest accrued. There was a reference to a Master, who reported encumbrances in the following order of priority:

Mortgage of Shilowitz and Tucker	$23,482.00
Mortgage of Cartaret Company	37,365.48
Mortgage of West Bergen Trust Co.	6,874.00
Mechanics liens of 17 defendants	74,810.74
Mortgage of Junction Milling Co.	7,973.00

Exceptions have been filed by Junction Milling Company and eight claimants. The case is before the Court for final hearing on these exceptions.

I will take up the mortgages in the order of priority of record:

(1) *Mortgage of Shilowitz and Tucker, dated July 29, 1927, recorded August 2, 1927.* This mortgage, like all the others, was made and recorded after the construction of the building on the premises had been commenced but before any lien claims had been filed. The mortgagees claim priority over the mechanics' lienors on the ground that the mortgage money was actually applied to the erection of the building and because the lienors or some of them by agreement

postponed their liens to this mortgage. The Master made no express findings on these issues of fact. He merely reported that the total sum of principal and interest which he found due is a first lien on the premises described in the complaint. A Master's finding of a fact in issue is entitled to great weight and should not be disturbed when there is a serious conflict of evidence. *Bagley, etc., Co.* v. *Traders, etc., Co.,* 86 A. 1029. But when, as here, the Master makes no finding of the fact and his conclusion may be based on an erroneous conception of the law, the Court, on exceptions to the report, must decide the fact for itself in accordance with the evidence.

The principal sum advanced on the Shilowitz and Tucker mortgage was $20,000. Exceptants admit that $13,800 was applied to the construction of the building. The mortgagees admit that $1,000 was paid for legal services in connection with the loan. However necessary and proper this disbursement was, it is not money that entered into the building within the meaning of Section 15 of the Mechanics' Lien Act of 1898. *Fischgrund* v. *Eriksen, etc., Co.,* 105 N. J. Eq. 345, 145 A. 811. See also *Pinsky* v. *Wike,* 101 N. J. Eq. 45, 136 A. 920; *Lincoln Materials Co.* v. *Goodwin Const. Co.,* 150 A. 769. The remaining $5,200 is in dispute. The owner of the land constructing the building was the Capitol Construction Company, of which the president was Hyman Silverman, the Secretary Jacob Starr, and the Treasurer Harry Starr. These three men were the principal stockholders of the company. As I recall, the only other stockholders were their wives. The same three men were also co-partners, carrying on the business of carpenter con-

tractors under the firm name of Starr & Silverman. A contract for the carpenter work was executed May 25, 1927, between the Capitol Construction Company and Starr & Silverman. The entire $5,200 was paid to Starr & Silverman pursuant to this contract. Furthermore, it appears, though not clearly, that this sum, besides other moneys, was used by Starr & Silverman to pay the wages of journeymen carpenters on the job. The exceptants contend that this contract was a mere device to permit the diversion of mortgage money to purposes other than the erection of the building and that Starr & Silverman did not actually do the carpentry work. As no other contractor appears to have done it, exceptants take the position that this work was done by day labor employed directly by the owner.

The burden of establishing the fraud was on the exceptants; they have not sustained their position. I find that out of the principal sum of $20,000 advanced on this mortgage, $19,000 was applied to the erection of the building and is prior to the mechanics' lien claims, and $1,000 was not so applied and is inferior except as affected by subordination agreements.

The Master reported that all the mechanics' lienors—seventeen in number—are subordinate to the entire amount due on this mortgage. Of these, none but George F. Perry & Sons, Inc., and A. S. Reid & Co. claim priority. The sum of these two claims is $9,262. Their counsel contend that they should receive the entire sum of $1,000 as to which they have established priority and not merely their pro rata share which they would receive if all the other lienors had established priority. I do not think this contention can prevail. These exceptants have not proved any facts peculiar to

their own claims which entitle them to advancement. They have merely established a situation in which *prima facie* all mechanics' lien claims are advanced and should share equally. The lienors, who do not claim priority over any part of the Shilowitz and Tucker mortgages, entered into agreements with the mortgagees whereby they postponed their claims. These agreements were made with and for the benefit of the mortgagees in order to induce them to advance money on the mortgage; they were not intended for the benefit of Perry or Reid. The only purpose was to protect the mortgagee in the exact situation which has arisen, namely, to secure the priority of the mortgage with respect to the money loaned but not applied to the building. If the exceptants' contention prevails, these instruments would be entirely nullified and the mortgagees in no better position than if they had not taken the precaution of securing postponement agreements. They would be nullified, that is, so far as the mortgagees are concerned, but kept alive for the purpose of diverting the fund to the exceptants.

The execution of postponement agreements by the other lienors neither injures nor aids Perry and Reid. They will be allowed out of the sum of $1,000 that proportion of their claim which $1,000 bears to the amount due on the claims of all the lienors.

Perry and Reid both reduced their claims to judgment. Perry's judgment was entered January 13, 1928, for $6,028.37; that of Reid was entered July 7, 1928, for $3,233.90. The Master reported that there was due July 29, 1930, to Perry and to Reid the face amounts of the judgments. For some reason, he did not allow interest; this was error.

Opinion.

The Master reported interest at 6 per cent on all the mortgages, to the date of his report. Several of the exceptants urge that interest should be allowed at 6 per cent only to the time of the sale *pendente lite,* and since then only at the rate paid by the Clerk on the funds in his hands. There may be cases in which the circumstances are such that equity requires interest to be allowed only to the time of sale, but the general rule is the other way. A creditor should have interest until he is paid or until funds are made available to him, as by a decree directing the Clerk to make the distribution. In the absence of special circumstances, there is no more reason why a creditor holding a prior security should be compelled to forego interest for the benefit of subordinate creditors than there is reason that he should yield up a part of his principal for their benefit. All the defendants will be allowed interest on their several debts to the date of the decree. At the oral argument, it developed that there was no dispute over the mortgage of Shilowitz and Tucker to the extent of $14,500 and Carteret Realty Company to the extent of $15,000. Thereupon, an order was made directing the payment forthwith of these sums. Of course, when the final decree is drawn, credit should be given for these amounts, and interest from the time the payments were made should be calculated on the balance only.

(2) *Mortgage of Junction Milling Company, dated September 16, 1927, recorded October 6, 1927.* At the time this mortgage was given, the firm of Starr & Silverman was indebted to the Milling Company for $2,919.34 for material sold them, and used in construction work not connected

with the present suit. The Milling Company on that date also had a contract with Capitol Construction Company to furnish trim on the Cranford job for the contract price of $8,800 and had already delivered the greater part of the material. The mortgage was given by the Capitol Construction Company to secure payment of its own debt as well as the debt of Starr & Silverman. On October 27, 1927, the mortgagee received $2,000 on account of the $8,800 item. The Master had reported that there is due on this mortgage for principal and interest, $7,973. The evidence seems to indicate a larger amount due, but as no exception has been taken on this ground, I accept $7,973 as correct.

The taking of this mortgage waived the right to a mechanic's lien. *Weaver* v. *Demoth,* 40 N. J. L. 238. Nevertheless, the Milling Company on March 9, 1928 filed a lien claim for $8,625, part of the amount due on the mortgage. At the hearing before the Master, it abandoned its lien claim. In my opinion, the filing and abandonment of the lien claim do not affect, in any respect, the rights of the Milling Company under its mortgage.

This mortgage, so far as it secures the debt of Starr & Silverman is, of course, deferred to mechanics' lien claims. I think the balance due on the mortgage is likewise deferred by Section 28 of the Mechanics' lien law. The only basis for a contrary view is the provision in Section 15, giving a mortgage preference "to the extent of the money actually advanced and paid by the mortgagee and applied to the erection of any new building upon the mortgaged lands". The act divides into two classes those who lend credit to aid in the erection of a building, namely, those who advance funds and those who perform labor

or furnish material. In the statutory scheme, the first class are secured by mortgage and the latter by lien claims. In my opinion, the phrase "money actually advanced and paid" does not include building materials furnished. One materialman cannot secure priority over others, after the commencement of the building, by taking a mortgage. This conclusion is in harmony with the decision of Vice Chancellor Berry in *Meister* v. *Meister,* 142 A. 312.

The Master has reported that this mortgage is subordinate to the mortgages of the Cartaret Company and West Bergen Trust Company which were executed after the Milling Company's mortgage was recorded. No reason for this postponement is stated in the report or has been suggested by counsel. I therefore sustain the exceptions of the Milling Company in this respect.

The Milling Company mortgage covers only a part of the tract described in all the other mortgages, both prior and subsequent. The premises were sold in this cause as a whole and not in parcels. But the undisputed evidence of experts is that the part of the entire tract covered by the Milling Company mortgage is in value 8 per cent of the whole. If, from the fund still in court, $70,347.21, there be deducted the amount due on the Shilowitz and Tucker mortgage, $23,482 and costs, there will remain about $43,750, of which 8 per cent is $3,500, or only half the sum due on the Junction Milling Company mortgage. But the whole amount received by the Sheriff, $142,500, may be considered as two funds—8 per cent of it, $11,400, as the proceeds of the tract covered by the Milling Company mortgage, and $131,100, the proceeds of the balance of the tract. These two funds should be marshaled, and the prior mort-

gages and costs which are a lien on both funds should be charged against the greater one so as to leave enough in the smaller fund on which alone the Milling Company mortgage is a lien, to permit the payment of the amount due on that mortgage in full. This, of course, will reduce the amount available for the payment of subordinate mortgages. But these mortgagees cannot complain, since they took their mortgages with notice of the mortgage of the Junction Milling Company.

(3) *Mortgage of Carteret Company, dated October 14, 1927, recorded October 24, 1927.* The some questions arise in respect to this mortgage as have already been considered with regard to the mortgage of Shilowitz and Tucker. The principal sum secured is $35,000. $29,955.70 undeniably went into the building. $2,744.30 was used to pay lawyers' fees and insurance premiums and is subordinate to mechanics' lienors. $2,300 is in dispute and was paid to Starr & Silverman. I find that it, too, was applied to the erection of the building. So that $32,255.70 is prior to the mechanics' lien claimants. Here, too, all of the claimants, except Perry, but including Reid, postponed their claims to this mortgage or failed to except to so much of the Master's report as gives it priority. Perry will be allowed his proportionate part of $2,744.30 and interest out of the fund which would otherwise go to the Carteret Company.

(4) *Mortgage of West Bergen Trust Company, dated October 25, 1927, recorded October 26, 1927.* Besides Perry and Reid, six other mechanics' lien claimants by exceptions assert priority over the whole amount due on this mortgage. Since prior

payments out of the fund in court will leave less than $2,000 to be applied on this mortgage, it is necessary to consider only so much of the amount due thereon.

The Capitol Construction Company had a checking account with the Trust Company. On Saturday, September 10, 1927, the balance in this account was $651.53, but there was outstanding a check which was presented that day, for $2,000 for plaster work on the apartment house. At about noon, the Starrs and Silverman called on one of the officers of the bank and obtained credit for the Construction Company for $5,000 and drew its note in that amount, payable in one month. The check was thereupon paid by the bank. The fact that the note was not credited to the account until the following Monday is immaterial, since the granting of the credit and the delivery of the note preceded the payment of the check. On September 13 and before any other deposits were made to this account, $1,000 was checked out to McCabe Brothers for excavating at this job. On October 25 the mortgage in question was executed to secure payments of the amount due the Trust Company.

The exceptants say that the loan was made on the general credit of the Construction Company and no money was actually advanced on the faith of the mortgage and therefore the mortgage is not preferred. The contrary rule is established by *Young* v. *Haight,* 69 N. J. L. 453, 55 A. 100. A mortgagee who lends money to the owner on the owner's general credit and thereafter takes a mortgage to secure the debt, is preferred by Section 15 of the Mechanics' Lien Act over mechanics' lien claimants, provided the money advanced was actually applied to the building.

Exceptants also point out that the $5,000 loaned was mingled with other funds of the Construction Company and therefore, they say, the Court cannot know with certainty that the money loaned was applied to the building. This is not accurate. In order to obviate the difficulty created by the mingling of funds, I will assume that $651.53 out of $3,000 applied to the building consumed the balance on hand September 10. Then necessarily the remaining $2,348.47 applied to the building, was made out of the money loaned by the Trust Company.

To this extent, the Trust Company is preferred to all the lien claimants except Perry.

As noted above, Perry took Judgment in the Circuit Court establishing his lien. The West Bergen Trust Company was a party to this action; the judgment established that the lien claim was paramount to the mortgage. This judgment cannot be controverted in the present suit unless there are special circumstances. *Peoples B. & L.* v. *Vaniewsky,* 85 N. J. Eq. 551, 96 A. 1074. The judgment was entered by default. Prior to the entry of the judgment, the Capitol Construction Company had been adjudged insolvent. The Trust Company apparently assumed that the action in the Circuit Court would not be pressed since a receiver had been appointed and therefore interposed no defense. I do not think it inequitable to give to this judgment its ordinary effect. If the Trust Company desired to avoid it, it should have applied to the Circuit Court to vacate the judgment. I therefore find that Perry's lien claim is preferred to the mortgage of the West Bergen Trust Company, and must be paid out of the funds that would otherwise go to that company. The situation is different from that already discussed

in respect to the mortgages of Shilowitz and Tucker and the Carteret Company. Perry takes only his proportion of the fund allocated to those mortgages which he would get if all the other lien claimants shared pro rata; those mortgages (in part) are subordinate to lien claimants as a class. But the mortgage of the West Bergen Trust Company is preferred to lien claimants as a class and is subordinate to Perry only because of Perry's judgment. Perry will therefore receive, to the extent that the fund is available, the full amount of his judgment.

The exceptions of Junction Milling Company, Max Platt and Mowre Lager question the curtilage which may properly be covered by the lien claimants. The tract of land on which the apartment house was erected fronts on Riverside Drive and is bounded on one side by Prospect Avenue and on the other by Union Avenue. The distance between these two streets is about 400 feet. The average depth of the lot is 300 feet, so that it contains two and three-quarters acres more or less. The apartment house is a large structure with an extreme frontage of 195 feet and a depth of 100 feet. It is 40 feet from Riverside Drive and midway between the side streets. On September 8, 1927, surveyors ran lines that divided the tract into three parts. One lot, fronting on Prospect Avenue, is 358 by 94 feet; another on Union Avenue, 240 feet by 110 feet; and the third, the central lot on which the apartment house stands, with an average depth of 300 feet and a width of 200 feet. The line of one side lot was drawn within 7.25 feet of the building and the line of the other side lot, 10 feet from the building. The mortgage of the Junction Milling Company covers the two side lots and not the central part of the tract on

which is the apartment house. The survey was probably made for the purpose of this mortgage. The same description was used in subsequent mortgages, namely, those of the Carteret Company and West Bergen Trust Company. In each of these, however, all three lots are described. In the prior mortgages (and there were several of them besides those already mentioned) the entire premises are described as one parcel. All of the mechanics' lien claims, except those of Platt and Lager, likewise contain a description of the entire tract. The Lager and Platt claims describe only the centre lot. The three exceptants urge that all the other lien claimants are excluded from any share in the fund because the curtilage described in their claims is incorrect and excessive. The pertinent sections of the statute follow:

"1. Every building hereafter erected or built within this state shall be liable for the payment of any debt contracted and owing to any person for labor performed or materials furnished for the erection and construction thereof, which debt shall be a lien on such building, and on the land whereon it stands, including the lot or curtilage whereon the same is erected.

"21. When the curtilage or lot on which the building is erected shall not be surrounded by an enclosure separating it from adjoining lands of the same owner, then the lot on which the building lien shall extend, shall be such tract as in the place of its location is usually known and designated as a building lot, and bounded by the lines laid down for its boundaries on any map made for the sale of it or on file in any public office, to lay out in lots the tract including it, and in cases where no such map exists, such lot may be designated by the claimant in the lien claim, but in no

case shall the same exceed half an acre, or include any building not used and occupied with, or intended to be used and occupied with, the building for the cost of which the lien is claimed." P. L. 1898, p. 538.

Exceptants rely on the clause "but in no case shall the same exceed half an acre". The building in question, without any surrounding land at all, has an area of one-quarter acre. If there be included with it a lot extending from the street to the rear line of the building and with a width equal to the frontage of the building, over half an acre is included. The curtailage described in the claims of Platt and Lager contain an acre and a quarter of ground. They certainly are in no position to press this particular objection. Exceptants also point to the provision that "the lot on which the building lien shall extend shall be such tract as in the place of its location is usually known and designated as a building lot and bounded by the lines laid down for its boundaries on any map made for the sale of it or on file in any public office, to lay out in lots the tract including it." The map made from the survey of September 8, 1927, is said to have been filed with the Building Department of Cranford. At what time and for what purpose, does not appear. None of the three plots shown on the map has been proved to be such a tract as in Cranford is usually known as a building lot.

In *Gerard* v. *Burch,* 28 N. J. Eq. 317, Chancellor Runyon held that a lot 500 feet front by 450 feet deep was a proper curtilage. The owner apparently held adjoining property as well and had caused a map to be made on which this plot was designated as lot No. 21. The Chancellor found that the one-half acre limitation applied

only "to the case where there has been no description of the curtilage by the owner and where the means of designation by map do not exist. In such case, the lien claimant is to designate the curtilage and the limitation applies." *James* v. *Van Horn,* 39 N. J. L. 353, was an appeal from the Circuit Court. Judgment establishing the lien on a tract of 50 acres was affirmed. Mr. Justice Reed said, "Where there is no separation of the lot upon which the building stands from adjoining lands of the same owner, then if the land is mapped for building lots, the curtilage shall include the building lot so mapped upon which the building is erected, and if not mapped, the curtilage shall not exceed half an acre."

Vice Chancellor Howell considered this section in *Federal Trust Co.* v. *Guigues,* 76 N. J. Eq. 495, 74 A. 652. The owner had erected a mansion house on a large plot, bounded by streets on three sides. The size of this plot is not stated in the opinion, but it must have been well over half an acre. A one-half acre plot is only 147 feet square. Mr. Guigues also owned another lot opposite the one on which his house was built. The Court held that Section 21 of the Mechanics' Lien Act did not apply and that the curtilage subject to the liens "should be so much land as might be necessary for the convenient and beneficial enjoyment of the buildings on which the claimant's work was done." He limited the lien claims to the mansion house lot.

Section 21 applies only when the same owner has other lands adjoining the curtilage on which the building is erected. Whether the entire lot between Prospect Avenue and Union Avenue is the curtilage or whether part of it constitutes the curtilage and the balance is adjoining land of the

same owner, is a question for this Court to determine. The whole tract was treated by the owner as one parcel until the Junction Milling Company demanded a mortgage on the side pieces. This was several months after the erection of the building had commenced. Up to the time of the sale of the property in this suit, there were no fences or other physical signs of a division of the tract. During construction work, it was all used indiscriminately for the handling of material. The whole adds to the convenient and beneficial use of the apartment house and doubtless enables higher rentals to be had than could otherwise be obtained. I find that the entire tract is the curtailage subject to the liens describing it.

The lien claims of Max Platt and Mowre Lager describe only the central part of the lot. This does not, however, invalidate them. No bad faith is shown and no reason appears why these claimants should not be allowed their lien on the curtilages described in their claims. The only fund, however, available for the lien claimants (other than Perry and Reid) is that carved out of the mortgage of the Junction Milling Company. Platt and Lager do not claim a lien on any land covered by that mortgage. These claimants, therefore, cannot share in the monies distributed in this cause.

Perry and Reid each filed an exception reading as follows: "Said Master has erroneously failed to report that the defendants, Max Platt (and others named in the exception), had no lien or encumbrance against the mortgaged premises and are entitled to be paid nothing from the moneys deposited with the Clerk of the Court in this cause." An exception should be so drawn as to direct the attention of the Court to the exact

error complained of, so that the Court may readily determine the merits of the exception. The exception quoted above is too general and might properly be disregarded. However, I have considered the reasons stated in the briefs in support of the exceptions. As to some of the lienors, exceptions contend the evidence was insufficient to show that the claims were filed within four months after the last work was done or material furnished by the lienors or was insufficient to establish the exact amounts due the claimants. I think the evidence sufficiently supports the Master's findings. It is also objected that a number of these claimants did not bring suit in the Circuit Court within four months or failed to prosecute the same diligently within one year as required by Section 19 of the statute. But it also appears that the Capitol Construction Company, the owner of the premises, was adjudged insolvent by this Court and receivers appointed before the expiration of the four-month period or the one-year period. The appointment of the receivers relieved the claimants from the necessity of bringing suit on their lien claims until the receivers or the Court of Chancery should require suit to be brought. Likewise, if action had been started before the appointment of the receivers, the diligent prosecution of that action became unnecessary after the appointment. All controversies concerning the indebtedness of the insolvent company and the liens upon its property may be disposed of by the court in the insolvency proceeding. *Ennis* v. *Eden Paper Co.*, 65 N. J. L. 577, 48 A. 610. *Doty* v. *Auditorium Pier Co.*, 56 A. 720; affd. 65 N. J. Eq. 768, 56 A. 1132. *Meister* v. *Meister, Inc.*, 142 A. 312.

It is similarly objected that the validity of the lien and the amount due thereon, if not established

by judgment of the Circuit Court, must be adjudicated by the receiver in the insolvency proceeding and that this Court should not, in a foreclosure suit, attempt to decide these questions. This contention requires but little attention. It is every-day practice for this Court in foreclosure to establish and enforce mechanics' liens which have been neither reduced to judgment nor allowed by a receiver.

The Master reported that there was due on the mechanics' liens $74,810.74, including interest to the date of his report, July 29, 1930. To that sum should be added interest on the Reid and Perry judgments, making the total $76,133.

In respect to costs and counsel fee, I have considered that the defendants, Shilowitz and Tucker and Carteret Company, have been substantially successful and should have their costs, including counsel fees such as are usually allowed in contested foreclosure cases. The Junction Milling Company and the West Bergen Trust Company receive nothing in this suit and cannot be allowed costs out of the fund. Counsel for Perry and Reid have borne the brunt of the battle for the lien claimants and have succeeded in securing a part of the fund for these claimants. They will, therefore, be allowed counsel fees out of that part of the fund which is distributed to the lien claimants. The lien claimants will not be allowed costs since the monies available are insufficient to pay their claims in full.

The marshalling of the entire fund in Court is determined by *Hoag* v. *Sayre,* 33 N. E. Eq. 552; *Albert & Kernahan* v. *Franklin Arms,* 146 A. 213; *Thirteenth Ward B. & L.* v. *Kanter,* 147 A. 809. The fund should be distributed as set forth in the table below. In that table, interest is calculated

only to the date of the Master's report. It should, however, be calculated to the date of the decree; counsel, in drafting the decree, will change the figures accordingly.

DISTRIBUTION OF FUND.

To Shilowitz and Tucker costs including a counsel fee of $300.

To Shilowitz and Tucker	$22,307.90
To Perry 6950/76133rds of $1,174.10	107.19
To Reid 3632/76133rds of $1,174.10	56.00
To Shilowitz and Tucker, balance of $1,174.10	1,010.91
	$23,482.00
To Perry, a counsel fee of	$200.00
To Reid, a counsel fee of	200.00
To each lien claimant except Platt and Lager, his pro rata share of	7,773.00
	$7,973.00

To Carteret Company, costs including counsel fee of $300.

To Carteret Company	$34,435.66
To Perry 6950/76133rds of $2,929.82	267.49
To Carteret Co., balance of $2,929.82	2,662.33
	$37,365.48

To Perry, the balance in the Clerk's hands.

Order Continuing Settlement of Final Decree.

(Filed January 12th, 1931.)

This matter being opened to the Court by Aaron Kaufman, solicitor of the defendants, Ira Crouse *et als.*, and the following solicitors in the above cause: Seclow & Nessanbaum, Walter C. Alberts, Edward P. Stout, Isidor Haber, Victor Samuel, Kanter & Kanter, Leavitt, Ulbrich & Talley, James E. Pyle, Charles Rubenstein, John B. McGeehan, Hershenstein & Finnerty, Richard H. Thiele, Charles E. Hendrickson, Milberg & Milberg and Carl N. Warsinski having been duly served with a notice to have the final decree approved in accordance with an opinion given by Hon. John O. Bigelow, one of the Vice-Chancellors of this Court, and

It appearing that Edward P. Stout, solicitor for the West Bergen Trust Company, has been given leave to be heard on January 19, 1931, it is on this twelfth day of January, Nineteen Hundred Thirty-one,

Ordered, that this matter be continued until January 19, 1931, at the same time and place or as soon thereafter as counsel may be heard.

E. R. Walker,
C.

Respectfully advised,
J. O. Bigelow,
V. C.

Final Decree.

(Filed January 23rd, 1931.)

This matter having been referred to Aloysius McMahon, Esq., one of the Masters of this Court, by order of June 13th, 1929; and said Master having made his report, dated July 29th, 1930, filed on October 15th, 1930; and exceptions to such report having been filed by Messrs. Kanter & Kanter, solicitors of the defendant, Geo. F. Perry & Sons, Inc., a corporation, by Messrs. Leavitt, Ulbrich & Talley, solicitors of the defendant, A. S. Reid & Company, a corporation, by Aaron Kaufman, Esq., solicitor of the defendants, Ira R. Crouse, Louis Moore, Meyer & Ruh Company, and Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Company, and by Charles Rubenstein, Esq., solicitor of the defendant, Junction Milling Company, a corporation; and this Court by its order of October 30th, 1930, having directed that said Master's report stand ratified and confirmed unless the defendants within eight days from the date thereof show cause to the contrary, and having further directed that the exceptions theretofore filed should be deemed to have been filed pursuant to said order and within time; and said last mentioned order having been duly served; and notice of argument on the aforesaid exceptions having also been duly served; and said matter having been heard and considered on December 4th, 1930, in the presence of the solicitors aforesaid, and also in the presence of Messrs. Seclow & Nessenbaum, solicitors of the defendants, Israel Shilowitz and Jacob Tucker and James E. Pyle, Esq., solicitor of the defendant, The Carteret Company, a corporation, and Edward P. Stout, Esq., solicitor of the defend-

ant, West Bergen Trust Company, a corporation; and the Court being of opinion that this order should now be made and that the payments of the fund in the hands of the Clerk of this Court should be made as hereinafter set forth; and notice of the entry of this decree having been given,

It is thereupon, on this 23rd day of January, A. D. 1931, ORDERED, ADJUDGED AND DECREED THAT, from the funds now in the hands of the Clerk of this Court in this cause, said Clerk shall pay, in the order below designated, and to the persons hereinbelow designated, the following sums to-wit:

First.—To Messrs. Seclow & Nessenbaum, solicitors of the defendants, Israel Shilowitz and Jacob Tucker, the taxed costs herein of said defendants, including a counsel fee of Three hundred Dollars ($300).

Second.—To Israel Shilowitz and Jacob Tucker, or their solicitors herein, Messrs. Seclow & Nessenbaum, the sum of Eighty-four hundred and twenty-three Dollars and eighty cents ($8,423.80).

Third.—To Geo. F. Perry & Sons, Inc., a corporation, or its solicitors herein, Messrs. Kanter & Kanter, the sum of One hundred and seven Dollars and nineteen cents ($107.19).

Fourth.—To A. S. Reid & Company, a corporation, or its solicitors herein, Messrs. Leavitt, Ulbrich & Talley, the sum of Fifty-three Dollars ($53).

Fifth.—To Israel Shilowitz and Jacob Tucker, or these solicitors herein, Messrs. Seclow & Nessenbaum, the sum of Ten hundred and forty-seven Dollars and thirty-one cents ($1,047.31).

Sixth.—To Messrs. Kanter & Kanter, solicitors of the defendant, Geo. F. Perry & Sons, Inc., a corporation, the sum of Two hundred Dollars ($200) as a counsel fee herein.

Seventh.—To Messrs. Leavitt, Ulbrich & Talley, solicitors of the defendant, A. S. Reid & Company, a corporation, the sum of Two hundred Dollars ($200) as a counsel fee herein.

Eighth.—To Geo. F. Perry & Sons Inc., a corporation, or its solicitors, Messrs. Kanter & Kanter, the sum of Six hundred and ninety-two Dollars and ninety-six cents ($692.96).

Ninth.—To A. S. Reid & Company, a corporation, or its solicitors, Messrs. Leavitt, Ulbrich & Talley, the sum of Three hundred and sixty-one Dollars and eighty cents ($361.80).

Tenth.—To Ira R. Crouse, or his solicitor, Aaron Kaufman, Esq., the sum of Twenty-two hundred and thirty-four Dollars and thirty cents ($2,234.30).

Eleventh.—To Louis Moore, or his solicitor, Aaron Kaufman, Esq., the sum of Twelve hundred and six Dollars and ninety cents ($1,206.90).

Twelfth.—To Joseph Machetto, or his solicitor, Walter C. Alberts, Esq., the sum of Nine hundred and twenty-one Dollars and twenty-six cents ($921.26).

Thirteenth.—To Ralph Cianfrone and Ciro Castellano, partners trading as Venango Stone Company, or their solicitors, Messrs. Milberg & Milberg, the sum of Three hundred and twenty-two Dollars and six cents ($322.06).

Fourteenth.—To A. W. Booth & Bro., or its solicitor, Walter C. Alberts, Esq., the sum of Four hundred and twenty-eight Dollars and sixty-two cents ($428.62).

Fifteenth.—To Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Company, or their solicitor, Aaron Kaufman, Esq., the sum of Four hundred and eleven Dollars and fifty-seven cents ($411.57).

Sixteenth.—To Alpheus S. VanWoert, or his solicitor, Walter C. Albert, Esq., the sum of Three hundred and two Dollars and eight-seven cents ($302.87).

Seventeenth.—To Roderick H. Crockett, the sum of Two hundred and sixty-nine Dollars and forty-six cents ($269.46).

Eighteenth.—To John Nicaretta, or his solicitor, Victor Samuel, Esq., the sum of Two hundred and fifty-one Dollars and seventy-four cents ($251.74).

Nineteenth.—To Meyer & Ruh Company, or its solicitor, Aaron Kaufman, Esq., the sum of Ninety-one Dollars and fifty-one cents ($91.51).

Twentieth.—To Michael Tozzi and Joseph Marcasiano, or their solicitor, Walter C. Alberts, Esq., the sum of One hundred and ten Dollars and forty-one cents ($110.41).

Twenty-first.—To Royal Marble Works Inc., a corporation, or its solicitor herein, Isadore Haber, Esq., the sum of One hundred and twenty-six Dollars and forty-eight cents ($126.48).

Twenty-second.—To Arthur G. Teweles, or his solicitors, Messrs. Hershenstein & Finnerty, the sum of forty-one Dollars and sixteen cents ($41.16).

Twenty-third.—To James E. Pyle, Esq., solicitor of the defendant, The Carteret Company, a corporation, the taxed costs of said defendant, and a counsel fee of Three hundred Dollars ($300.00).

Twenty-fourth.—To The Carteret Company, a corporation, or its solicitor herein, James E. Pyle, Esq., the sum of Nineteen thousand eight hundred and eighty-three Dollars and seventy-eight cents ($19,883.78).

Twenty-fifth.—To Geo. F. Perry & Sons Inc., a corporation, or its solicitors, Messrs. Kanter & Kanter, the sum of Two hundred and sixty-seven Dollars and forty-nine cents ($267.49).

Twenty-sixth.—To The Carteret Company, a corporation, or its solicitors herein, James E. Pyle, Esq., the sum of Three thousand and ten Dollars and ninety-two cents ($3,010.92).

Lastly.—To Geo. F. Perry & Sons Inc., a corporation, or its solicitors herein, Messrs. Kanter & Kanter, the balance of all monies in Court in this cause, and all accumulations thereon.

The Clerk will not distribute any part of the fund by virtue of this order, within ten days from the date hereof.

E. R. Walker,
C.

Respectfully advised,
J. O. Bigelow,
V. C.

Consent to Substitution of Aaron A. Melniker, as Solicitor for Mowre Lager and Max Platt.

(Filed January 29th, 1931.)

Charles Rubenstein does hereby agree and consent to the substitution of Aaron A. Melniker, of Labor Bank Building, Jersey City, New Jersey, as Solicitor for and of Counsel with the defendants Mowre Lager and Max Platt, in the above entitled matter.

CHAS. RUBENSTEIN,
Solicitor of Defendants,
Mowre Lager and Max Platt.

Order Substituting Aaron A. Melniker, as Solicitor for Mowre Lager and Max Platt.

(Filed January 29th, 1931.)

It appearing to the Court that Chas. Rubenstein, the solicitor for the defendants in the above-stated cause, filed a consent that Aaron A. Melniker be substituted in his place and stead, and no cause appearing to the contrary.

It is, thereupon, on this 29th day of January, in the year of our Lord one thousand nine hundred and thirty-one, ordered that Aaron A. Melniker be substituted as solicitor for the defendant, in the place and stead of the said Chas. Rubenstein.

E. R. WALKER,
C.

Bill of Complaint.

(Filed December 21st, 1927.)

IN CHANCERY OF NEW JERSEY.

Between
RALPH CIANFRONE and CIRO CASTELLANO, partners trading as VENANGO STONE COMPANY,
Complainant,
and
CAPITAL CONSTRUCTION CO., INC., a Corporation of the State of New Jersey,
Defendant.

On Bill for Receiver.

To His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey:

The Complainants, RALPH CIANFRONE and CIRO CASTELLANO, partners trading as VENANGO STONE COMPANY, having a place of business in Jersey City, New Jersey, respectfully shows:

1. Complainant is a creditor of the Capital Construction Co., Inc., in the sum of Two Thousand Eight Hundred Thirty-six Dollars and Ten Cents ($2,836.10), which said indebtedness is founded upon a claim due to the Complainant for supplies and materials furnished by the Complainant to the defendant, pursuant to a written agreement dated April 19th. 1927, which agreement provided for the payment of Four Thousand Seven Hundred ($4,700.00) Dollars, and also for the additional sum for extra materials

supplied in addition to the written contract, making a total of Five Thousand One Hundred Thirty-six Dollars and Ten Cents ($5,136.10), upon which the Complainant received the sum of Two Thousand Three Hundred ($2,300.00) Dollars, leaving a balance due of Two Thousand Eight Hundred Thirty-six Dollars and Ten Cents ($2,836.10), and all of which materials were furnished to the said defendant for the construction and erection of a three-story apartment house at Cranford, New Jersey, and that the defendant did give to the Complainant, certain promissory notes and checks totaling the sum of Three Thousand Ten Dollars ($3,010) all of which checks and notes were returned on account of insufficient funds.

2. That the said Capital Construction Co., Inc., is a corporation created and existing under and by virtue of the laws of the State of New Jersey, pursuant to the terms and provisions of an Act of the Legislature of the State of New Jersey, entitled "An Act concerning Corporations (Revision of 1896) and several acts amendatory thereof and supplemental thereto."

3. That the objects for which said corporation was formed was for the construction and erection of certain buildings, and particularly the construction and erection of dwelling apartments, and that the assets of the company consist of the three-story apartment dwelling at Cranford, New Jersey, of which the value is very doubtful, on account of the fact that the said building is not completed and cannot be completed owing to the lack of funds of the defendant corporation necessary to pay for materials and labor in order to finish the construction of the said building.

4. That the said defendant company is indebted in large sums of money upon outstanding promissory notes, and also for work, labor and materials furnished towards the erection and construction of the said apartment house at Cranford, New Jersey, in addition to the amount due complainant and other obligations, the total of which your complainant is unable to estimate, and all of which indebtedness said company has no funds to meet and satisfy. That the said apartment dwelling located at Cranford, New Jersey, is encumbered by mortgages and construction loans in the sum of approximately One Hundred Thousand ($100,000.00) Dollars, and in addition thereto, there is due large sums of money to lien claimants for work, labor and materials in an amount which your complainant is unable to state in addition to the amount due complainant for the supplying of materials and for which the complainant is entitled to file a lien, the preference of which is not waived by filing this Bill.

5. That there are other claims and liens upon the said building, such as taxes and assessments, the amounts of which your complainant does not know.

6. That the Company has admitted its inability to pay its debts as they mature, and that the said defendant did on the Thirteenth day of December, 1927, by its attorney, cause notice to be sent to the complainant and other creditors, calling a meeting for the purposes of ascertaining ways and means to complete the building.

7. That all of the notes and checks held by the complainant have all been protested and remain unpaid, and demand having been made, the defendant admitted its inability to pay the notes and

checks or obligations of the said defendant company.

8. That the said corporation has become insolvent and has suspended its ordinary business for the want of funds to carry on same, and its business has been and is being conducted at a great loss and greatly detrimental to its creditors and stockholders and unless the assets of the said corporation are properly marshaled by a Receiver to be appointed for said corporation, it will be subject to vexatious and costly litigation, and in the event of a forced sale without the completion of the building the said property will bring much less than it is fairly and reasonably worth, with detriment to stockholders and creditors; and that the said Corporation is unable to meet its due and maturing obligations, and complainant verily believes that the intervention of this Court is necessary to protect said stockholders and creditors to the end that its property may not be dissipated by multiplicity of suits, filing of lien claims, foreclosing of mortgages, or to the detriment of said creditors and stockholders.

9. Said defendant company has no cash on hand at present, and no means of raising any cash with which to meet its maturing obligations.

In consideration whereof and for as much as your complainant is without adequate remedy without the assistance of this Honorable Court, where matters of this nature are particularly cognizable and relievable, and therefore prays:

1. That the company may answer this bill of complaint and that it may set forth and discover the goods and chattels, rights and claims, moneys and effects and real estate of every kind and description belonging to the said corporation.

2. That your complainant and the other creditors and stockholders of the said company may be paid what is justly due them, and that the said company may be enjoined from exercising any of its franchises and from receiving any debts due to it, and from continuing business; and

3. That the company may be decreed to be insolvent.

4. That a Receiver may be appointed, according to the form of the statute in such case made and provided, and with the usual powers to continue the business.

5. That the said assets of the said corporation and the rights of your complainant and all other stockholders and creditors of the said company may be ascertained, and that the Court will fully administer the funds in which your complainant is interested, being the entire assets of the said corporation, and will, for that purpose, marshal all the assets and ascertain all of the respective liens and priorities existing on any and all parts thereof, and enforce the liens and rights of all the creditors of the said company as the same may be finally ascertained.

6. That a Receiver may be appointed with the powers and duties imposed upon receivers by the provisions of the New Jersey Corporation Act entitled "An Act concerning corporation, Revision of 1896, and its supplements and amendments."

7. That your Complainant may have such further or other relief in the premises as the nature of the case may require, and as may be agreeable to equity and good conscience.

10. That a Writ of Injunction may issue directed to Capital Construction Co., Inc., its officers, agents and servants, enjoining and restraining them and each of them from exercising any of the privileges or franchises granted to or by the company, or from collecting or receiving any debts due to said corporation, or selling, assigning or transferring any of the estate, funds, moneys, lands, tenements or effects of the said corporation.

11. That a Writ of Subpoena may issue directed to the said Capital Construction Co., Inc., to answer this bill of complaint and to abide by such decree or order as the Court may make in the premises.

MILBERG & MILBERG,
Solicitors of Complainant.
SAMUEL MILBERG,
Of Counsel.

Affidavit of Ralph Cianfrone.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

RALPH CIANFRONE, being duly sworn, according to law, upon his oath, deposes and says:

I am a member of the firm of Venango Stone Company, the Complainant herein.

1. I have had many conversations with the officers of the defendant corporation, and particularly with Hyman Silverman, the President, as well as Harry Starr, the Treasurer, respecting the conditions and affairs of the said corporation.

2. At the present time there is due to me the sum of Two Thousand Eight Hundred Thirty-six

Dollars and Ten Cents ($2,836.10), besides interest charges for actual materials supplied by me to the defendant corporation pursuant to a written agreement dated April 19th, 1927, by and between the defendant corporation and myself, which agreement was for the sum of Four Thousand Seven Hundred $(4700.00) Dollars; that in addition thereto, the sum of Four hundred thirty-six Dollars and Ten Cents ($436.10) for extra materials supplied and furnished to the defendant corporation, upon its special instance and request.

3. That I have personally received several notes and checks in the sum of approximately Three thousand ($3000.00) Dollars, for the sum due me for materials supplied to the three-story apartment house at Cranford, New Jersey, under construction by the defendant corporation, and that all of the said notes and checks have been returned unpaid and protested on account of lack of funds, and I have been told by the officers of the defendant corporation that they have no money with which to pay the sum due me or to pay any of the other creditors.

4. I have been informed that there is a construction mortgage upon the said apartment house in the sum of approximately One Hundred Thousand ($100,000.00) Dollars, and that in addition thereto, there is considerable sums due to other lien creditors besides myself, as well as taxes and other paramount liens.

5. I have also been informed that it would require approximately Fifteen thousand ($15,000.00) Dollars in cash in order to complete the said apartment house, and that unless the money would be available it would be impossible to finish the said apartment house, and until the same is finished no

rents can be collected, and all creditors and stockholders would be greatly harmed thereby. I have been told that the said Capital Construction Co., Inc., is a Corporation created and existing under and by virtue of the Laws of the State of New Jersey, pursuant to the terms and provisions of and Act of the Legislature of the State of New Jersey, entitled "An Act concerning Corporations (Revision of 1896), and the several acts amendatory thereof and supplements thereto."

6. The said corporation has become insolvent and has suspended its ordinary business for the want of funds to carry on the same, and its business has been and is being conducted at a great loss owing to the accrual of interest, taxes and other liens, with no income on the said real estate and that unless the assets of the said corporation are properly marshaled by a Receiver to be appointed for said corporation, it will be subject to vexacious and costly litigation, and in the event of a forced sale, the said real estate will bring very much less than it is fairly and reasonably worth, and unless the same is completed at once, it will be a detriment to stockholders and creditors; and that the said corporation is unable to meet the due and maturing obligations and deponent verily believes that the intervention of this Court is necessary to protect the said stockholders and creditors to the end that its property may not be dissipated by multiplicity of suits, foreclosures, lien claims, etc., to the detriment of said creditors and stockholders.

Sworn to and subscribed before me this 20th day of December, 1927.

RALPH CIANFRONE.

IRVING SOLOMON,
Attorney at Law of New Jersey.

Order to Show Cause Why Receiver Should Not Be Appointed with Restraint.

(Filed December 21st, 1927.)

This matter being opened to the Court by Samuel Milberg, Esquire, of Counsel with Complainant, whereupon and upon reading and filing and considering the Bill of Complaint and Affidavit annexed thereto; and the Court being satisfied of the sufficiency of the application made in this cause, and of the truth of the facts and allegations contained in said Bill of Complaint, and sufficient cause having been shown for the making of this order, it is, on this 21st day of December, 1927,

Ordered, that the defendant, Capital Construction Co. Inc., a corporation of the State of New Jersey, show cause before the Chancellor at the Chancery Chambers, No. 1 Exchange Place, Jersey City, New Jersey, on the 27th day of December, 1927, at 10 o'clock in the forenoon, why

A. An injunction should not issue pursuant to the prayer of said bill.

B. A Receiver should not be appointed to take charge of all the property and estate, books and papers of said defendant corporation, pursuant to the Statute in such case made and provided.

C. The Complainant should not be permitted to inspect all the property and estate, books and papers of the defendant corporation.

D. A Master of this Court should not be appointed as Master to take testimony and report, with full power to investigate the affairs and transactions, debts, obligations, contracts and liabilities of defendant company and claims against it and also the acts and conduct of any of the company's officers, agents, creditors or stockholders and the obligations and liabilities of any

officer, agent, creditor, alleged debtor or stockholder of any nature and kind whatsoever, and with all the powers provided under Chapter 207 of the Laws of 1919 of the State of New Jersey, known as a Supplement to an Act entitled "An Act Concerning Corporations Revision of 1896, approved April 21, 1896," and it is further

ORDERED, that until this Order should be made absolute or be discharged, the said defendant, their officers, servants, and agents, absolutely desist, and refrain from contracting any debt or debts; and also from collecting or receiving any money owing to said defendant, and also from paying out any money or selling, assigning, transferring or mortgaging any of their property, estate, or effects of any kind, except in the usual course of business, of which a true and accurate account shall be kept, ready to account to this Court, and it is further

ORDERED, that true copies of any answering affidavits to be filed or read by defendant at the hearing to be held on the return day of this order, shall be served upon the solicitor for complainant at least two days prior to said hearing; and it is further

ORDERED, that a copy of this order, together with a copy of said Bill of Complaint and affidavit thereto annexed (which copies may be certified by the Solicitor for complainant) be served within one day from the date hereof, upon the said defendant corporation; and it is further

ORDERED, that application to modify or dismiss this matter may be made on two days' notice.

E. R. WALKER,
C.

Respectfully advised,
JOHN BENTLEY,
V. C.

Order Appointing Receiver with Restraint.

(Filed January 4th, 1928.)

This matter being opened to the Court by Samuel Milberg, Esq., of counsel with the complainant, in the above entitled cause, and in the presence of Edward P. Stout, solicitor of the defendant, and upon reading and filing the bill of complaint and the affidavits filed herein; and it appearing to the Court that the said defendant is unable to meet its current obligations or to continue its business with safety to the public or advantage to its stockholders and is insolvent, and that Receivers for defendant company should be appointed by this Court to take charge of and administer all of its assets and property:

It is thereupon, on this Fourth day of January, 1928, ORDERED, ADJUDGED and DECREED, as follows:

1. That Ira R. Crouse, of Perth Amboy, and Benjamin Heyman, of Jersey City, both of the State of New Jersey, be and they hereby are appointed Receivers of the said defendant company, and of all its assets and property of every character and description, wheresoever situate, excepting, however, the particular property and premises of the defendant corporation known as No. 185-195, 197 First Street, in the City of Jersey City, County of Hudson and State of New Jersey, and upon which plot of ground there is now being erected a one-story garage building, and adjoining office building; with full power and authority to demand, sue for, collect and receive, and take into their possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of any and every description

belonging to the said defendant, Capital Construction Co., Inc., or to which it may be entitled, and to sell, convey and assign any or all of the real and personal estate of the said corporation, and to do and perform all the duties imposed upon them and required by law and especially by an act entitled "An Act concerning corporations (Revision of 1896)", and the acts supplementary thereto and amendatory thereof.

2. And it is FURTHER ORDERED, that James Bowen, of the City of Jersey City, State of New Jersey, be and he hereby is appointed Receiver, specially and only for premises known as No. 185-195, 197 First Street, in the City of Jersey City, County of Hudson and State of New Jersey, upon which plot of ground there is now being erected a one-story garage building, and adjoining office building, and that the said James Bowen is appointed herein, specially for and only for the said premises, and not for any other property, assets or effects of the defendant corporation, with full power and authority to demand, sue for, collect and receive, and take into his possession said premises, and sell and convey said premises, as such Receiver; and to do and perform all the duties imposed upon him as such Receiver as required by law and the Act aforesaid.

3. And it is FURTHER ORDERED that the said Receivers, Ira R. Crouse and Benjamin Heyman, before entering upon the discharge of their duties, shall take the oath of office described by law, and shall also enter into bond to the Chancellor of the State of New Jersey, with one or more surety or sureties, in such sum as may hereafter ordered, conditioned for the faithful performance of their duties, which said bond shall be approved as to

the form and security thereof by any one of the Special Masters of this Court.

4. And it is FURTHER ORDERED that the said Receiver, James Bowen, before entering upon the discharge of his duties, shall take the oath of office described by law, and shall also enter into bond to the Chancellor of the State of New Jersey, with one or more surety or sureties, in the penal sum of $5000. conditioned for the faithful performance of his duties, which said bond shall be approved as to the form and security thereof by any one of the Special Masters of this Court.

5. And it is FURTHER ORDERED that the said Receivers shall take possession of all the respective property and assets of the defendant corporation and as particularly hereinabove referred to, and account for the same as this court shall hereafter direct, and that the said defendant corporation, its officers, directors and agents, shall forthwith assign, transfer, convey and deliver to the said receivers all of the respective property and assets of the said corporation, both real and personal, wheresoever situated and of whatsoever it may consist.

6. And it is FURTHER ORDERED, that the said defendant corporation, its officers and agents, and all persons claiming under it, shall be, and they hereby are, restrained from interfering with the said receivers taking possession of and managing the said respective property and that all persons whosoever, and especially the creditors of the said defendant corporation, shall be and they hereby are, restrained from bringing any action or proceeding at law or otherwise against the said corporation and from taking any further proceed-

ings in any action or proceeding heretofore commenced.

7. And it is FURTHER ORDERED that the said receivers be, and they hereby are, authorized and empowered, until the further order of this court, to conduct, and to continue to conduct, the business of the said defendant corporation without interruption, and fulfill the contracts (other than indebtedness of the said defendant) made by the said defendant until further order in the premises, and to purchase and pay out of the income and profits of money, assets and effects, from time to time, coming into their hands as such receivers for the necessary supplies for the purposes aforesaid, and to collect and pay all needful agents and servants, and generally to do all acts and things proper or necessary to be done to protect the property and rights of which they are hereby appointed receivers for the benefit of the creditors and stockholders of the said company, with leave to apply, from time to time, whenever necessary, and as they may be advised for instructions touching all and singular their rights, duties and liabilities in the premises.

8. And it is FURTHER ORDERED, that the creditors and stockholders of the said company shall show cause before the Chancellor, at the Chancery Chambers, in the City of Jersey City, on the 9th day of January, 1928, at 10 o'clock in the forenoon, why the appointment of the said receivers should not be continued.

9. And it is FURTHER ORDERED, that the said Receiver shall, within one day from the date hereof, mail to each of the creditors and stockholders that

may be known to the Receivers of the said defendant corporation, a copy of this order.

E. R. WALKER,
C.

Respectfully Advised,

JOHN BENTLEY,
V. C.

MILBERG & MILBERG,
Solicitors of Complainant,
1 Exchange Place,
Jersey City, N. J.

Proof of Service of Order Appointing Receivers with Restraint.

(Filed January 9th, 1928.)

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

ETTA M. LANE, being duly sworn according to law upon her oath says that she is employed in the office of Milberg & Milberg, solicitors for the above named complainant and that on the fifth day of January, 1928, she caused a copy of the attached order appointing Receiver, to be sent to the creditors of the above named defendant corporation by placing the said order appointing Receiver in an envelope properly addressed with postage prepaid thereon, and deposited same in the United States Mail Box No. 1, Exchange Place, Jersey City, N. J.

Sworn to and subscribed before me this 9th day of January, 1928.

ELLA M. LANE.

IRVING SOLOMON,
Attorney at Law,
New Jersey.

Order Continuing Receivers.

(Filed January 9th, 1928.)

This matter being opened to the Court by Milberg & Milberg of Counsel with complainant and it appearing to the Court that on the Fourth day of January, 1928, an order was made in this cause wherein amongst other things, the creditors and stockholders of the defendant corporation were ordered to show cause before this Court on the ninth day of January, 1928, at ten o'clock in the forenoon of that day or as soon thereafter as this matter can be heard at Chancery Chambers No. 1 Exchange Place, Jersey City, New Jersey, why the Receivers heretofore appointed in this cause, shall not be continued or why some other persons should not be appointed Receivers in their place or with them, as co-Receivers and proof of mailing of a notice of a copy of the said order to the creditors and stockholders of the defendant corporation being presented to this Court and being duly filed and no cause being shown to the contrary it is on this 9th day of January, 1928,

Ordered, that Ira R. Crouse of Perth Amboy and Benjamin Heyman of Jersey City, both of the State of New Jersey, be and they hereby are continued as Receivers of the above named defendant corporation, of all its assets and property of every character and description wheresoever situate excepting, however the particular property and premises of the defendant corporation known as No. 185-195-197 First Street in the City of Jersey City, County of Hudson, and State of New Jersey, and for this particular property, it is ordered that James Bowen, of the City of Jersey City, Court of Hudson, and State of New Jersey, and for this particular property, it is

ordered that James Bowen of the City of Jersey City, County of Hudson, and State of New Jersey, who was appointed as Receiver for this particular piece of property, known as No. 185-195-197 First Street, Jersey City, and as appears by an order of even date.

FURTHER ORDERED, that all the Receivers have all the rights, powers and authority as set forth in the order, dated January 4, 1928, and it is

FURTHER ORDERED, that Ira R. Crouse and Benjamin Heyman file a bond in the sum of $10,000 in this Court for the faithful performance of their duties, and that James Bowen's bond filed in the sum of $5,000 in this Court for the faithful performance of his duties be continued.

E. R. WALKER.
C.

Respectfully advised,
JOHN BENTLEY,
V. C.

Testimony.

IN CHANCERY OF NEW JERSEY.

Between:
RIVERSIDE APARTMENT CORPORATION, a corporation of New Jersey,
Complainant,
and
CAPITOL CONSTRUCTION COMPANY, *et al.*,
Defendants.

On Bill, etc.
Depositions.

Depositions in the above entitled cause, taken before me, Aloysius H. McMahon, a Master in Chancery of New Jersey, at the Chancery Chambers, Jersey City, New Jersey, this twenty-fifth day of June, 1929, at ten o'clock in the forenoon, pursuant to notice.

Appearances:

MESSRS. SECLOW & NESSENBAUM, Solicitors of Jacob Tucker and Israel Shilowitz;

ELIAS A. KANTER, Esquire, Solicitor of George F. Perry & Sons;

JAMES E. PYLE, Esquire, Solicitor of Carteret Company;

MESSRS. LEAVITT, ULBRICH & TALLEY, Solicitors for A. S. Reid & Company;

LESTER LASKER, Esquire, Solicitor of Arthur G. Teweles;

VICTOR SAMUELS, Esquire, Solicitor of John Nicaretta; and Siegal & Levin;

CHARLES RUBENSTEIN, Esquire, Solicitor of McCabe Brothers Company; Max Platt; and Junction Milling Co.;

EDWARD P. STOUT, Esquire, Solicitor for West Bergen Trust Company; and Edward P. Stout, Trustee;

BENJAMIN HEYMAN, Esquire, Receiver of defendant corporation;

WALTER C. ALBERTS, Esquire, Solicitor of Michael Tozzi and Joseph Marcasino;

ISADORE HABER, Esquire, Solicitor for Royal Marble Works;

EDWARD P. STOUT, Esquire, Solicitor of Alfred W. Booth & Brothers; Alpheus Van Woeart; Joseph Machetto;

VICTOR SAMUELS, Esquire, Solicitor of Winchester & Millberg, Inc.

Mr. Seclow: Apparently some of the defendants are not participating in this proceeding. Trust Company of New Jersey, by Perkins & Drewen no one appearing. Louis Schwartz, by Benny & Cruden, no one appearing; Abraham Schilling, by A. A. Melniker, no one appearing; Bayonne Supply Company, by John A. McGeehan, no one appearing; Benjamin Parnis, by Tucker & Tucker, no one appearing; John Grady, by Kelsey & Ludwig, no one appearing; Julius Stenkauskas, by John F. Ryan, no one appearing; Hudson Fireproof Block Co., by Richard H. Thiele, no appearance; Cranford Trust Co., by Carl H. Warsinski, no appearance; Roderick N. Crockett & Company, by Carl H. Warsinski, no appearance.

Mr. Heyman: May I make a statement for the record before you start your proof?

The Master: Yes.

Mr. Heyman: Before anybody is to receive anything out of the funds in the hands of the clerk it is the contention of the receivers of the defendant corporation that the expenses of the receivership incurred by the receivers in the preservation of the estate, together with the receivers' fees, allowances and costs, are to be a first lien and to be paid first out of these proceeds. There is now pending before Vice-Chancellor Bentley an application for the payment of those costs, charges and allowances, and upon his decision will depend the question of whether the funds in the hands of the Clerk today is subject to the payment of those costs. I now move this court to make a record of my application at this time, in order that when Vice-Chancellor Bentley does decide our application it may be the order of the court in this proceeding.

The Master: All right.

Mr. Kanter: By our silence here we do not acquiesce in the statement of Mr. Heyman.

Mr. Seclow: I first desire to prove the mortgage held by Israel Shilowitz and Jacob Tucker, which I contend is a first lien on the proceeds now in the hands of the Clerk of this Court. I offer the bond dated July 29, 1927, made by Capitol Construction Company, Inc., to Israel Shilowitz and Jacob Tucker, to secure the principal sum of $20,000 due November 29, 1927, with interest at six per cent. from its date.

Marked Exhibit 1.

Mr. Seclow: I now offer the mortgage, dated July 29, 1927, between the same parties, to se-

cure the same amount, covering the premises described in the bill of complaint, which mortgage is duly acknowledged and recorded in the office of the Register of Union County on August 2, 1927, in Book 878 of Mortgages for Union County, on page 347.

Marked Exhibit 2.

Mr. Seclow: I next offer postponement of mortgage, dated July 26, 1927, whereby certain persons and corporations have postponed their lien claims or rights of lien claims to the mortgage held by Shilowitz & Tucker.

Marked Exhibit 3.

Mr. Kanter: I offer an objection in behalf of George F. Perry & Sons, on the ground that Exhibit 3 is not binding upon them, because it was not signed by them. Is that admitted?

Mr. Seclow: Why, of course, we are not pretending that anybody whose name does not appear on that is bound by it.

Mr. Talley: I offer the same objection on behalf of A. S. Reid.

Mr. Seclow: It is only offered for the purpose of affecting those who have signed.

Mr. Haber: I offer an objection on behalf of Royal Marble Works, as they do not appear to have signed this postponement.

The Master: It will be received subject to the proof of the signatures.

Mr. Pyle: It is not in evidence then, as I under stand it.

The Master: No; not yet.

Harry Starr, on Behalf of Shilowitz and Tucker Mortgage—Direct—Cross.

HARRY STARR, sworn.

Direct examination by Mr. Seclow:

Q. You were an officer of Capitol Construction Company? A. Yes, sir.

Q. What office did you hold? A. Treasurer.

Q. I note that you signed this postponement as a subscribing witness. A. Yes, sir.

Q. Did you see the people sign whose names are on here? A. Yes, sir.

Q. You asked them to sign? A. Yes, sir.

Mr. Seclow: It is now offered, Your Honor.

Mr. Stout: I don't see that that is the proper way to prove the thing, by the subscribing witness.

Mr. Seclow: You don't have to. The statute has done away with that.

Cross-examination by Mr. Stout:

Q. You are familiar with the signatures of all the persons who signed this instrument? A. Yes.

Q. And they are in the handwriting of those who purport to have signed it? A. Yes.

By the Master:

Q. Did you see those names signed, the names here? A. Everyone on the paper signed, because I was the man that was over to get all the signatures.

Q. Every one of them signed in your presence? A. Yes.

By Mr. Kanter:

Q. You are what officer of this company? A. Treasurer.

Q. The property was conveyed to you in March, of 1927? A. I couldn't remember.

Q. Is that approximately correct? A. I suppose so.

Q. You started the erection of a building on that property? A. Exactly.

Q. And you went to Messrs. Shilowitz and Tucker for a construction loan of $20,000? A. Yes, sir.

Q. What stage was the building in at that time?

Mr. Stout: If the Court please, that doesn't seem to be proper cross-examination. The witness has been called just to prove the signatures to this instrument.

Mr. Kanter: And as to the circumstances under which it was signed.

The Master: I don't think his recollection of the financial arrangements with the mortgagee would help us with that.

Mr. Kanter: I think it will. I want to fix the time with reference to the state of the building.

The Master: What difference will that make as to the postponement?

Mr. Stout: Did your client sign this paper?

Mr. Kanter: No.

Mr. Stout: Then I don't think you are interested in this paper.

Mr. Kanter: I am interested, when Mr. Seclow comes to make his argument.

The Master: This merely postpones or subordinates the liens of these people who are signatories to the paper to the lien of Shilowitz and Tucker, doesn't it?

Mr. Seclow: That is correct.

Mr. Kanter: Your Honor will find that when we come to make proof of the lien claim of George F. Perry, he will argue that, notwithstanding we have not postponed, he is entitled to priority of his mortgage over our lien.

Mr. Stout: But not by this instrument.

Mr. Kanter: Not by this instrument. I want to get from him the date when this instrument was signed, with reference to the stage of the building.

Mr. Seclow: I will say right now that this mortgage was not recorded before the building was commenced.

Mr. Kanter: That is all I want to get from him.

Direct examination by Mr. Seclow:

Q. I show you check dated August 5, 1927, for $1,650 endorsed Starr & Silverman and then Capitol Construction Co. Did the Capitol Construction Company and Starr & Silverman get this? A. Well, that was for the payroll we have to pay out.

Q. Did they get the money? A. Certainly.

Q. What was the money used for? A. For the payroll; to pay out to the men there.

Q. To pay out to the men? A. Yes.

Q. For work done on the building? A. For work done on the building.

Q. In Cranford? A. Exactly.

Q. And that is the property that was foreclosed? A. Exactly.

Q. What kind of property was that, Mr. Starr; what kind of building? A. An apartment house.

Q. What kind of an apartment house? A. Well, it is a three-story brick building.

Q. How large was the building? A. Well, it was 36 families there.

Q. Check No. 5508, dated August 5, 1927, for $1,650, made payable to the order of Capitol Construction Co. and Starr & Silverman, endorsed by Capitol Construction Company, Hyman Silverman, President; Harry Starr, Treasurer; now, Starr & Silverman, what were they doing on that building? A. They done the carpenter work.

Q. Did they have a contract for it? A. Yes; then had a contract for $16,000.

Q. This check went to them for the carpenter work? A. Yes, sir.

Check marked Exhibit 4.

Q. I show you check dated August 12, 1927, made by I. Shilowitz, No. 338, payable to Seclow & Nessenbaum, endorsed to Elizabeth Lighting Fixture Co., Inc., for $500 and endorsed by Capitol Construction Co., Harry Starr, Treasurer; do you know what that check was for? A. That was for the lighting fixtures man, what they put in the electric wiring there.

Q. And that work went into the building? A. Yes.

Check marked Exhibit 5.

Q. I show you a check dated August 13, 1927, made by Seclow & Nassenbaum, No. 5562, to the order of Starr & Silverman, for $650, and apparently cashed. A. That was for carpenter labor.

Q. For carpenter labor? A. Yes, sir.

Q. Which went to Starr & Silverman under their contract? A. Exactly; under our contract.

Check marked Exhibit 6.

Q. I show you check dated August 20, 1927, to Capitol Construction Co., No. 5591, made by Seclow & Nessenbaum, for $350, endorsed by Capitol Construction Co., Hyman Silverman, President, and Harry Starr, Treasurer, and then Starr & Silverman; do you know whom that money went to? A. That was also in the building; this was for the labor.

Q. Starr & Silverman; was that for carpenter work? A. Yes, sir.

Check marked Exhibit 7.

Q. I show you check dated August 26, 1927, No. 5622, made by Seclow & Nessenbaum, to Starr & Silverman, for $300, endorsed by Capitol Construction Co., by Harry Starr, and Starr & Silverman and Hyman Silverman; was that for carpenter work? A. Carpenter work.

Q. Went to Starr & Silverman? A. Exactly.

Check marked Exhibit 8.

Q. I show you check dated August 12, 1927, No. 27, made by I. Shilowitz, to Starr & Silverman, for $550, endorsed Capitol Construction Co., Harry Starr, and endorsed by Starr & Silverman; that check was deposited by Seclow & Nessenbaum; do you know what that check was given for?

Mr. Kanter: I object to that on the ground that the best evidence of what that check was given for and what they did with it should come from the accounts of Seclow & Nessenbaum.

The Master: Unless this man would know of his own knowledge.

A. As far as I know it was given for the carpenter labor.

Q. Do you know? A. Yes, sir.

Q. Given to Starr & Silverman? A. Yes, sir.

Q. Did you give it to them? A. Yes, sir.

Q. Starr & Silverman got this money for carpenter labor? A. Exactly.

Check marked Exhibit 9.

By Mr. Seclow:

Q. I show you check dated August 12, 1927, No. 18, made by I. Shilowitz, to Allen Moore, and endorsed Capitol Construction Co. by Harry Starr, Treasurer. A. That was for the plumbing man what put in the plumbing down there.

Q. Was Allen Moore the man who did the plumbing down there? A. Yes, sir.

By Mr. Kanter:

Q. Did he have a contract to do the plumbing work? A. Yes.

Q. What was the amount of that contract? A. That was for the amount, I guess, $12,000; I couldn't remember exactly, but it was over $12,000.

Check marked Exhibit 10.

By Mr. Seclow:

Q. I show you check dated August 12, 1927, No. 246, made by I. Shilowitz, to Seclow & Nessenbaum, and endorsed pay to M. Tozzi or order, Seclow & Nessenbaum; Michael Tozzi; and Capitol Construction Co. by Harry Starr; do you know what Michael Tozzi did on that building? A. He delivered the cinders on the job.

Q. Was this check in payment of cinders used on that job? A. Yes, sir.

Q. And you gave this check to Tozzi? A. Exactly.

Check marked Exhibit 11.

Q. I show you check dated September 9, 1927, No. 5711, made by Seclow & Nessenbaum, to Max Platt, endorsed by Max Platt, Capitol Construction Co. by Harry Starr. A. That was for the lathing; to put all the laths on the walls.

Check marked Exhibit 12.

Q. I show you check dated September 2, 1927, No. 5668, made by Seclow & Nessenbaum to John Nicaretta, and endorsed by Capitol Construction Co. and John Nicaretta, for $400; do you know what work that was for? A. He done the concrete work.

Q. He did the concrete work? A. Yes.

Q. This check was in part payment of his work? A. Yes, sir.

Check marked Exhibit 13.

Q. I show you check dated September 2, 1927, No. 5666, made by Seclow & Nessenbaum to Siegel & Levine, for $11,000 endorsed by H. Siegel and I. Levine, Capitol Construction Co., by Harry Starr; that money went to Siegel & Levine? A. Yes, sir; they done the plaster work.

Q. They were the plasterers on the building? A. Yes, sir.

Q. They have a contract? A. Yes, sir.

Q. Was this in part payment of their work? A. Exactly; yes, sir.

Check marked Exhibit 14.

Q. I show you check dated August 26, 1927, No. 5623, made by Seclow & Nessenbaum to John Nicaretta, endorsed by Capitol Construction Co., by Harry Starr, treasurer, and H. Silverman, and John Nicaretta; you have already testified that John Nicaretta did the concrete work there? A. Yes, sir.

Q. And this check for $250, was that in payment to him on account of his work? A. Yes, sir.

Check marked Exhibit 15.

Q. I show you check dated August 25, 1927, No. 5615, for $1,000, payable to the order of Max Platt, which check is endorsed Capitol Construction Co., by H. Silverman, President, Harry Starr, Treasurer, and Max Platt; you have already testified that Max Platt did the lathing work on that job; did he do it under a contract? A. Yes, sir.

Q. And was this check of $1,000 in part payment for his work on contract? A. Right.

Check marked Exhibit 16.

Q. I show you check dated August 26, 1927, No. 5620, made by Seclow & Nessenbaum to Max Platt, for $500 which is endorsed Capitol Construction Co. by Harry Starr, Treasurer, and Max Platt; you have already testified that Max Platt held a contract for the lathing work on the premises in question; was this check in part payment of his contract? A. Yes, sir.

Check marked Exhibit 17.

Q. I show you check dated August 20, 1927, No. 5590, made by Seclow & Nessenbaum, to John

Nicaretta for $200; endorsed Capitol Construction Co., by Hyman Silverman and John Nicaretta; you have already testified that John Nicaretta did the concrete work on the building on the premises described in the bill of complaint? A. Yes, sir.

Q. Was this check on account of his work? A. Right.

Marked Exhibit 18.

Q. I show you check dated August 20, 1927, No. 5588, made by Seclow & Nessenbaum, to New Jersey Roofing & Sheet Metal Works in the amount of $250; endorsed Capitol Construction Co. by Harry Starr, and N. J. Roofing & S. M. Works; what work, if any, did this payee, New Jersey Roofing & Sheet Metal Works do on this property? A. They put on the roof and all the metal work and metal doors.

Q. Was this check given by you in part payment of their work? A. Yes, sir.

Check Marked Exhibit 19.

Q. I show you check dated August 5, 1927, No. 5510, made by Seclow & Nessenbaum, to the order of Ira R. Crouse, for $4,000, endorsed Capitol Construction Co. by Harry Starr, and Ira R. Crouse; what work did Mr. Crouse do on the premises in question? A. That was the mason material and lumber.

Q. They furnished the rough lumber and mason materials? A. Yes, sir.

Q. Was this check given in part payment of the moneys due for those materials furnished to this building? A. Yes, sir.

Check marked Exhibit 20.

Harry Starr, on Behalf of Shilowitz and Tucker
Mortgage—Direct.

Q. I show you check dated August 5, 1927, No. 5509, payable to the order of Alpheus Van Woeart, for $500 endorsed by Alpheus Van Woeart, Capital Construction Co. by Harry Starr; was this check given for any work done on that building? A. He put in the steam fitting there.

Q. Alpheus Van Woeart had the job under contract? A. Yes, sir.

Q. Was this $500 in payment of moneys due for work done on that building? A. Yes, sir.

Check marked Exhibit 21.

Q. I show you check dated August 5, 1927, No. 5507, for $450 payable to the order of John Nicaretta, endorsed Capitol Construction Co. by Harry Starr, and John Nicaretta; you have already testified that John Nicaretta was the contractor who did the concrete work on that property? A. Yes, sir.

Q. And was this check for $450 in payment on account of his work on that job? A. Yes, sir.

Check Marked Exhibit 22.

Q. I show you check dated August 5, 1927, No. 5506, payable to the order of New Jersey Roofing & Sheet Metal Works, in the amount of $400 endorsed Capitol Construction Co. by J. Starr and N. J. Roofing & S. M. Works; you have already testified that the payee of this check, New Jersey Roofing & Sheet Metal Works did the roofing and some metal work on this Cranford job; was this check of $400 in part payment of work done by them on that building A. Yes, sir.

Check marked Exhibit 23.

Q. I show you check dated August 2, 1927, No. 5478k, made by Seclow & Nessenbaum to the order of Joseph Machetto; endorsed by Joseph Machetto and Capitol Construction Co. by Harry Starr; the amount of this check is $500; you have already testified that Marchetto did the concrete work on this building. A. No; this is the bricklayer.

Q. Joseph Machetto was the bricklayer? A. The bricklayer; he did the brickwork.

Q. Under a contract? A. Yes, sir.

Q. Is this check of $500 in part payment of moneys due him for work done on that building? A. Yes, sir.

Check marked Exhibit 24.

Q. I show you check dated July 29, 1927, No. 5477, made by Seclow & Nessenbaum, to John Nicaretta for $600. A. Yes. That is the concrete work.

Q. Endorsed Capitol Construction Co. by Hyman Silverman, President, and Jacob Starr, Secretary, and Harry Starr, Treasurer, and John Nicaretta; you have already testified that John Nicaretta did the concrete work on this job? A. Yes, sir.

Q. Was this check of $600 in part payment for work done by him on this job? A. Yes, sir.

Check marked Exhibit 25.

Q. I show you check dated July 29, 1927, No. 5476, made by Seclow & Nessenbaum, to the order of Capitol Construction Co. and Lafayette Iron Works, in the amount of $1,000: endorsed Capitol Construction Co., Hyman Silverman, President, Jacob Starr, Secretary, and Harry Starr, Treas-

urer; and Lafayette Iron Works, Inc. was this check given to the Lafayette Iron Works for work done on this job? A. They done the steel work.

Q. They did the steel work on this job? A. On this job; yes, sir.

Q. Was this check given in part payment of moneys due them for work done by them on this job? A. Yes, sir.

Check marked Exhibit 26.

Q. I show you check dated September 2, 1927, for $600, No. 5669, made by Seclow & Nessenbaum, to Starr & Silverman, endorsed Capitol Construction Co., by Harry Starr, and Starr & Silverman, Jacob Tucker & Sons; was this check given to Starr & Silverman? A. Yes, sir.

Q. Do you know what it was given to them for? A. Carpenter work.

Q. On this job? A. Yes, sir.

Check marked Exhibit 27.

Q. I show you check dated July 29, 1927, made by Seclow & Nessenbaum, to Capitol Construction Co. and Starr & Silverman, for $1,400 the check is endorsed Capitol Construction Co., Hyman Silverman, President, Jacob Starr, Secretary, and Harry Starr, treasurer; and Starr & Silverman; do you know what this check was given to Starr & Silverman for? A. Also for carpenter work.

Q. For carpenter work on this Cranford job? A. Yes, sir.

Check marked Exhibit 28.

Q. I show you check dated July 29, 1927, No. 5474, made by Seclow & Nessenbaum, to Tucker

& Shilowitz, and endorsed by Jacob Tucker and I. Shilowitz, then Jacob Starr, Capitol Construction Co. by Harry Starr, and Starr & Silverman; was this check given to Starr & Silverman? A. Yes.

Q. Was this on account of carpenter work done on that job? A. Yes, sir.

Check marked Exhibit 29.

Q. Now, Mr. Starr, all the checks which I have shown you, were those moneys used to pay for labor or materials that went into the building of that apartment house on the property described in the bill of complaint? A. Yes, sir.

Mr. Kanter: You stand on these checks, don't you Mr. Seclow?

Mr. Seclow: I have another check here, but I think that check was simply endorsed by them and deposited; I know there was $19,900 paid out. That is in the bill of particulars.

Cross-examination by Mr. Kanter:

Q. You and your brother were engaged in the construction of this building, were you not? A. Yes, sir.

Q. You acquired the property in March, 1927, didn't you? A. Yes, sir.

Q. And you started to work on this building, didn't you? A. Yes, sir.

Q. You and your brother were doing the carpentry work? A. No, not me and my brother; only Starr & Silverman; that was my other brother.

Q. Your brother and who? A. And the other fellow; Hyman Silverman.

Q. Who is the other fellow? A. Silverman.

Q. Hyman Silverman? A. Yes, sir.

Q. They did the carpentry work? A. Yes, sir.

Q. You were working for them; is that right? A. I didn't work for them.

Q. What were you doing? A. I supervised the building.

Q. You supervised the construction for them. Were you to get a certain salary for that? A. If I should get a certain salary?

Q. You understand my question; don't spar. How much salary were you to get for that? A. I am supposed to get $2,500; each of us.

Q. You were supposed to get $2,500? A. $2,500.

Q. $2,500? A. Yes; when the building is done.

Q. From whom? A. From the corporation; the Capitol Construction Company.

Q. Before the corporation was formed, you started your supervision, didn't you? A. Before the corporation was formed?

Q. Yes. A. No, sir.

Q. Well, when the building was started, you started to supervise the construction? A. Yes, sir.

Q. You started the supervision of this construction for your brother Jacob Starr, and for his partner Hyman Silverman? A. Nothing at all.

Q. Only for your brother, Jacob Starr? A. Nothing at all.

Q. Then you supervised this building only with your brother? A. What I supervised? I didn't supervise the building exactly; I supervised, I took care of the mortgages and loans and running around for the building.

Q. And for that you were supposed to get $2,500? A. Yes.

Q. Who agreed to pay you that sum of money? A. The Capitol Construction Company.

Q. That was when the building was started; is that right? A. Yes, sir.

Q. Who specifically of the Capitol Construction Company agreed to pay you that money? A. Hyman Silverman, Jacob Starr and Harry Starr.

Q. You three men agreed with you, Harry Starr, to pay you $2,500? A. Yes, sir.

Q. You were an officer of the Capitol Construction Company? A. Yes, sir.

Q. You were a director of Capitol Construction Company? A. Yes, sir.

Q. You didn't make any minute of this in the records of your company, did you? A. We did.

Q. Those minutes are in your possession, are they now? A. Yes, sir; they ought to be with Mr. Seclow.

Q. You delivered those minutes to Mr. Seclow, did you? A. Yes, sir.

Mr. Kanter: Will you kindly produce those, Mr. Seclow?

Mr. Seclow: I was under a misapprehension today; I thought the receiver had the minute books, and I was surprised to learn that he didn't; so they are probably in my office; I will bring them the next time we come.

Q. When was this meeting held at which this resolution was passed? A. I can't remember.

Q. What year was it held in? A. Well, it was two years before, when we started the building.

Q. Was it in the Summer, the Winter, the Fall, or Spring? A. Well, it was in the Spring.

Q. The Spring of what year? A. In 1927.

Q. When you say the Spring, what months do you mean to indicate? A. I couldn't tell you what days.

Q. You can't tell us whether it was in February, March, April or May? A. I can't remember when we started.

Q. Was it as late as June? A. Perhaps it was; I couldn't say that, because I don't remember.

Q. But you do remember that these 25 checks went out to these various people, do you? A. Yes, sir.

Q. Tell me how much money did you get on account of this contract. A. On account of my contract?

Q. Yes. A. Nothing.

Q. Well, I thought you said that you got certain checks from Seclow & Nessenbaum on account of your contract? A. Well, this was Jacob Starr and Hyman Silverman; my name is Harry Starr.

Q. You didn't have any contract with the corporation? A. No.

Q. The only arrangement you had was for supervision? A. Yes, sir.

Q. You were to get $2,500 for that? A. When the building will be completed.

Q. When the building was completed you were to get $2,500? A. Yes, sir.

Mr. Seclow: May I interrupt counsel? I want to offer the contract in evidence.

Q. The paper that Mr. Seclow now hands to the Judge is the paper that you say is the contract that you made with the corporation?

Mr. Seclow: No; that is for the carpenter work.

Contract marked Exhibit 30.

Q. Who are the partners that compose the firm of Starr & Silverman? A. Well, Jacob Starr and Hyman Silverman.

Q. You had nothing to do with that? A. No, sir.

Q. You were merely an officer of the Capitol Construction Company? A. Yes, sir.

Q. So that whatever contract was made with the partnership you had nothing to do with that? A. No, sir.

Q. You were not present when this contract, or purported contract, of May 25th, 1927, was signed; were you? A. I was present.

Q. You were present? A. Yes.

Q. What interest did you have in the execution of that contract? A. Well, I am treasurer of the Capitol Construction Company.

Q. Well, you didn't sign this contract, did you? A. Well, I don't remember if I did or not.

Q. You don't remember whether you signed this contract? A. No, sir.

Q. What was the contract price? A. $16,000.

Q. Exactly $16,000; did you make a record of it? A. That is a matter of two years; I can't remember what it is exactly.

Q. You were treasurer of the Capitol Construction Company? A. Yes, sir.

Q. You kept the records of the company? A. I kept the records; yes, sir.

Q. You knew that the Capitol Construction Company had to give two of its directors, Starr and Silverman, certain money under a carpentry contract, didn't you? A. Yes, sir.

Q. You entered that in the books of the company, didn't you? A. Yes, sir.

Q. The payments that were received you entered in the books? A. Yes, sir.

Q. The moneys they received on account? A. Yes, sir.

Q. You were not a member of the partnership of Starr & Silverman? A. No, sir.

Q. Sure about that? A. Yes, sir.

Q. You said in answer to one of Mr. Seclow's first questions that the money was used to pay out to the men; those are the exact words that you used. A. Yes, sir.

Q. When you got a check, we will say for the sum of $200. what was your procedure; did you go to the bank and cash the check and take the money over to the job and give it to the men? A. No, I didn't go to the bank.

Q. Who did that? A. Jacob Starr and Hyman Silverman.

Q. So the money from these checks that went to pay for the workingmen is something that Jacob Starr and Hyman Silverman would know about, is that so? A. No; I received the check and I kept a record of how many men got paid out, so many men.

Q. Have you got the records of your company? A. They are not here; no, sir.

Q. Who has got them? A. Maybe they are in the house; maybe not; it is a matter that happened a few years ago.

Q. You don't remember of your own recollection what men were paid by your firm or the men that were paid on the job on the date of August 5th, 1927, do you? A. No, sir.

Q. You don't remember what men were paid on August 12, 1927? A. No.

Q. Now, do you remember the men that were paid on August 13, 1927? A. No.

Q. Nor on August 20, 1927; do you? A. No.

Q. Nor on August 26th? A. No.

Q. But you got records to show just where those checks that were made to the order of Starr & Silverman went out to and what men were paid? A. Yes.

Q. And the method of payment was that Starr & Silverman was given these checks and it was paid out to the men on the job? A. Yes, sir.

Q. That is the way it was done? A. Yes, sir.

Q. You were always there and you saw the men being paid? A. Yes.

Q. Can you tell us the names of some of the men that were paid? A. No, sir.

Q. That is in your records? A. Yes, sir.

Q. You were interested in knowing how much money you got from Seclow & Nessenbaum, or rather from Shilowitz & Tucker? A. Certainly.

Q. Under the executed mortgage for $20,000? A. Yes.

Q. You wanted to see that you got the $20,000 didn't you? A. Yes.

Q. You kept a record of the moneys you got from Shilowitz & Tucker? A. Yes, sir.

Q. You got those records? A. No.

Q. Where are they? A. Home.

Q. At your home? A. At my home.

Q. Where do you live? A. In 333 Fulton Avenue.

Q. Jersey City? A. Jersey City, yes.

Q. How far is that from here? I am not familiar with the city. A. It is about seventy blocks.

Q. Four miles? A. Yes, sir.

Q. Have you got a car? A. Yes, sir.

Q. Then you kept the record of your company showing when you got these moneys from Shilowitz & Tucker? A. Yes, sir.

Q. And you kept a record of all the moneys you got from other mortgages? A. Yes, sir.

Q. You received money from Mr. Crouse's mortgage? A. Yes.

Q. The Riverside Apartment Corporation; during the same time? A. Yes, sir.

Q. You had to keep a record of the moneys you got from them? A. That wasn't at the same time; the Riverside Drive was before that.

Q. You had executed a mortgage to the Riverside Apartment Corporation for $21,000 and $30,000? A. Yes, sir.

Q. You got money from them? A. That was before I got from this.

Q. But in the same book you got a record of the moneys that you got from the Riverside Apartment Corporation? A. Yes.

Q. Later on you executed a mortgage to a man by the name of Louis Schwartz? A. Yes.

Q. What other mortgages did you execute; do you remember? A. I couldn't remember.

Q. Isn't it a fact that you don't remember a single thing about this transaction unless the answer is put in your mouth? A. What do you mean?

Q. What other mortgages did your company execute besides those that are here? A. We executed to James C. Pyle.

Q. Now, Mr. Starr, do you remember on July 29, 1927, you got two checks for $1,000 each from Messrs. Shilowitz & Tucker; didn't you? A. Yes.

Q. On July 29th, 1927, you received two checks; were you in partnership with a man by the name of Jacob Tucker? A. Jacob Tucker? I wish I could be a partnership with him.

Q. On July 29th you received two checks for $1,000 from Mr. Nessenbaum; I show you these

checks, Exhibits 28 and 29, respectively, for $1,000 and $1,400. Why did you take this payment on one date, July 29th, in two checks? A. I can't remember; I don't remember what; it was two years ago.

Q. You can't remember? A. No.

Q. Were you a depositor in the South Hudson Bank? A. The South Hudson Bank?

Q. Yes. A. No.

Q. You went with somebody to the South Hudson Bank that day, didn't you? A. Yes.

Q. And you cashed that check? A. Perhaps it was we owed money for a couple of weeks ahead.

Q. Did you know any of the tellers at the South Hudson Bank? A. The tellers?

Q. Yes. A. No.

Q. Who went with you to identify you when you went to cash that check? A. Well, I got plenty of friends.

Q. Well, who went with you? A. I don't remember.

Q. Do you know Mr. Shilowitz? A. Maybe.

Q. Do you know Mr. Tucker? A. Yes, sir.

Q. How much of that $1,000 check did you give him back? A. What do you mean, how much?

Q. You heard me. A. None.

Q. Then they weren't with you when you cashed it? A. No.

Q. You don't know the tellers there, do you?

The Master: Were they with you when you cashed it?

A. I can't remember; it was a matter over two years. How could I remember?

Q. You don't deny they were with you? A. Maybe they were; maybe, yes.

Q. How much bonus did you agree to give them? A. Nothing.

Q. You didn't give them a thing? A. No.

Q. Nothing? A. No.

Q. Now, this $1,000 check was cashed on July 29th? A. Yes, sir.

Q. By you? A. Yes, sir.

Q. What did you do with the money? A. I put it in the building; I don't remember what it was for.

Q. You don't remember to whom you paid it? A. It ought to be on the records.

Q. Let us look at this; this check, the first endorsement on there is Jacob Tucker; do you see that? Can you read that signature? A. Yes.

Q. Does that refresh your recollection as to whether Mr. Jacob Tucker was with you when you cashed this $1,000 check, Exhibit 28? A. I don't think that he was with me.

Q. You notice it also bears the endorsement of Israel Shilowitz; I. Shilowitz; does that refresh your recollection as to whether either one of them were with you when you cashed this check? A. I couldn't remember.

Q. You don't remember? A. No.

Q. You notice the endorsement on the check is Capitol Construction Company, by Harry Starr? A. Yes, sir.

Q. You cashed the check? A. Yes.

Q. And your brother is a partner of Silverman? A. I cashed the check.

Q. What did you do with that money? A. I don't remember what I done with the money.

Q. Then you don't know of any materialmen that you gave it to, do you? A. No.

Q. You can't name any materialmen you gave it to? A. No.

Q. And you can't name any workmen you gave it to? A. Well——

Q. Can you? A. Well, as far as I know——

Q. I asked you now, can you name any workmen that you gave any of that money to?

Mr. Seclow: I object to that.

The Master: What is your objection to that question?

Mr. Seclow: He commences to answer the question "As far as I know", and Mr. Kanter doesn't want him to tell what he knows.

The Master: Let him answer the question.

A. As far as I know, we put it into the building.

Q. Now answer the question, please. A. Yes.

Q. Tell me the name of any man that you gave any of this $1,000 to. A. I can't remember absolutely, but those records will show.

Q. You kept a record every time you made a payment and a record of the payroll, indicating the names of the men to whom the money went, didn't you? A. Yes.

Q. And if any of this $1,000 went to any of the men, it would be indicated in your record? A. Yes.

Q. It didn't go to any contractor, did it? A. Maybe it did; I don't know.

Q. Well, what contractor did it go to, if any? A. If I know, I can't remember.

Q. You can't remember that? A. No.

Q. Your books would show that, of course? A. Yes.

Q. The Capitol Construction Company's books would show that? A. Positively.

Q. And you got the Capitol Construction Company's books? A. Yes, sir. They are all there.

Q. Now, this $1400 check, you say you didn't agree to give Shilowitz and Tucker any bonus at all, any premium or commission or discount? A. What we agreed is to give him the insurance premiums on the building.

Q. And the insurance premiums came out of this money, didn't it? A. I suppose so.

Q. You know it did, as a fact, don't you ? A. Yes.

Q. What else did you agree to give Shilowitz and Tucker? A. That is all.

Q. How much did you pay them out of this $1000? A. I don't remember.

Q. The only rake-off that Shilowitz and Tucker were to get out of it was the premiums on the fire insurance policy? A. Yes, sir.

Q. No other bonus, discount or rake-off? A. That is all.

Q. You are sure about that? A. Sure about that.

Q. You didn't deposit that $1000 in any bank account that you had? A. No.

Q. You didn't use the money? A. Why?

Q. I don't care why; I asked you, did you use the money? A. Yes.

Q. What did you use it for? A. I don't remember.

Q. You personally? A. Me personally, I don't remember.

Q. You personally didn't keep the money, I mean, to use that? A. No.

Q. You personally didn't keep any part of this money, did you? A. No.

Q. You personally didn't keep any part of this money in payment of that $2500 supervision fee that you were to get? A. No.

Q. Sure about that? A. Yes, sir.

Q. And the same day Starr & Silverman got a check for $1400 on July 29th? A. Yes.

Q. So part of the $1400 check, you said, they took the money and gave it out to workmen on that day? A. Yes, sir.

Q. You were present when that was done? A. Yes, sir.

Q. So, therefore, no part of the $1000 check went to pay workmen of Starr & Silverman, did it? A. Why, we had two kinds of mortgages; we also had a labor contract; labor, and iron, what they were working on steel down there, so we have also workmen down there what they put in all the wiring down there; maybe this $1000 went into this.

Q. Where did Starr & Silverman have their bank account at that time? A. I believe they had the West Bergen Trust Company.

Q. Yes. A. Whether it was at that time or not, I don't remember; I think they have one in the Trust Company of New Jersey; so I don't remember which it was.

Q. Now, did you ever cash any other check except this $1000 check, Exhibit 29, at the South Hudson Bank in Bayonne? A. In the South Hudson Bank?

Q. Yes. A. Yes, we cashed one in the South Hudson, then we cashed in the Union Trust also some checks.

Q. No; I asked you did you ever cash any other checks except this $1000 check at the South Hudson Bank? A. Well, I was down there a depositor for years, at the South Hudson Bank.

Q. Did you ever cash any other check that you got from Seclow & Nessenbaum, or Shilowitz &

Tucker, or from anybody in their behalf, on account of this mortgage, at the South Hudson Bank? A. Maybe I did; I don't remember; I will have to look through these checks.

Q. You don't recall any? A. No.

Q. You notice the other check of the same date, July 29th, $1400 was also endorsed by you, was it not? A. Yes.

Q. And that money you said went to pay off workmen? A. Yes, sir.

Q. Why did you tell Mr. Seclow that the $1000 check, Exhibit 29, went to pay off workmen, when you didn't know that as a fact? A. Well, as far as I know, it was paid off workmen, but this went to the carpenters, to Starr & Silverman, and this check perhaps went to the different workmen.

Q. You can't name them? A. No.

Q. You are sure it didn't go to material men; that is certain? A. No.

Q. You are sure the records of the Capitol Construction Company will show what workmen were paid out of the $1000 check, and out of the $1400; is that correct? A. Yes, sir.

Q. I show you Exhibit 4; you testified before that this $1650 check was also used to pay off workmen. A. Yes, sir.

Q. And it was done in the manner that I have already indicated; that is, the check was cashed and the money taken out to Cranford, and you were present and you saw the men being paid off? A. Yes, sir.

Q. Do you say, with reference to this Exhibit 4, that the records of your company will show what men, if any, were paid from this check? A. Yes.

Q. And by the records of the company I mean the records of the Capitol Construction Company; you understand that? A. Yes.

Q. And that book is at your home now, isn't it, on Fulton Street? A. I think so.

Q. Is there any doubt about that? A. Yes; because I kept the books and Mr. Silverman kept the books, and Jacob Starr had books.

Q. What makes you doubt it now, when you were sure you had the books there a few minutes ago?

Mr. Seclow: He said he wasn't sure.

A. Either with me, or either with Silverman, I don't remember where they are, it is a fact; it is two years ago; I didn't take care even on those books.

Q. The workmen that were paid were the workmen that worked for the Capitol Construction Company? A. They were paid; certainly.

Q. They were all workmen of the Capitol Construction Company, weren't they? A. Yes.

Q. All those checks that you testified to, the proceeds went to men that worked for the Capitol Construction Company? A. Certainly.

Q. I show you another check, Exhibit 6, whose writing is that, Starr & Silverman? A. That is my writing.

Q. Your writing? A. Yes, sir.

Q. You cashed that check? A. I don't remember.

Q. Look at the check and tell us where you cashed it, and what you did with the money? A. I couldn't tell you.

Q. Do you notice that the check bears no stamp, no bank endorsement on it? A. No, sir.

Q. What did you do with the money? A. I don't know; I don't remember what should I do with that money.

Q. You don't remember what you did with the money? A. I don't remember; but as far as I know it went in in the building, because every dollar what we got there, it went in the building.

Q. You don't know whom you paid it to? A. No.

Q. And the records of your company would show, if it went into the building, to whom it was paid? A. That was Starr & Silverman.

Q. The records of your company would show to whom it was paid if it went to any workmen on the building? A. Yes, sir.

Q. Here is another check, Exhibit 7, that bears your endorsement, does it not? A. Yes, sir; that is Silverman's endorsement.

Q. No, it says Capitol Construction Company, Hyman Silverman, President, Harry Starr, Treasurer; does it not? A. Yes, sir.

Q. You know that the check Exhibit 7, for $350 was cashed? A. Yes, sir.

Q. You were present when it was cashed? A. Yes, sir.

Q. You saw the money taken over to Cranford? A. Certainly.

Q. And paid out to workmen? A. Yes, sir.

Q. You say so? A. Yes, sir.

Q. And the records would show what workmen were paid? A. Yes, sir.

Q. If any? A. Yes, sir.

Q. Of course you wouldn't try to say that you remember what day August 20th, 1927, was? A. No, sir; I couldn't say that.

Q. So your recollection of what happened to that check is just the general statement that the money was taken over to Cranford? A. So far as I know every dollar was taken to Cranford.

Q. And check No. 8, for $300, your endorsement is on that check? A. Yes, sir.

Q. You cashed it? A. Yes, sir.

Q. What did you do with that money? A. It went in the building.

Q. How do you know? A. Well, that is on the account; how do I know.

Q. Did you take that over there personally? A. Yes, sir.

Q. You gave it to the men? A. Yes, sir; not to the men; I gave it to be taken over.

Q. Did you get a receipt from them? A. No, sir.

Q. You saw the money paid out? A. Yes, sir.

Q. The records of your company, the Capitol Construction Company, would show to whom the money went? A. Yes, sir.

Q. And the same thing is true, is it not, of Exhibit 9; Exhibit 9 is a check for $550, you also cashed this check? A. I don't remember; maybe I did; maybe I didn't.

Q. Well, the endorsement of Capitol Construction Company is not on there, is it? A. What is this; isn't this the Capitol Construction Company?

Q. I beg your pardon; it is. Capitol Construction Company, by Harry Starr? A. Starr & Silverman; yes.

Q. Was that money also used to pay off the men? A. Yes, sir.

Q. Look and see where that check was deposited. A. Well, I don't have to see it; it is there; you can read it better than I could.

Q. You don't have to see where this check went to to tell me where the money went to; is that right? A. I know I paid off the men.

Q. You don't have to look at Exhibit 9 in order to find out where the money went? A. I know where I put in the money; why should I bother my head about the checks?

Q. You don't have to look at Exhibit 9 in order to refresh your recollection as to where the money went? A. I can't remember where it was two years ago, where I put that $5,550.

Q. After looking at that check— A. I can't remember.

Q. I will let you see it; it says, "For deposit only, Seclow & Nessenbaum"? A. Yes, sir.

Q. Do you see that? A. Yes.

Q. Can you read that? A. Yes.

Q. Am I reading it correctly? A. Yes, sir.

Q. Did that money go to Seclow & Nessenbaum? A. No.

Q. It didn't go to Seclow & Nessenbaum? A. No, sir.

Q. You are sure about that? A. I am sure: because many times I jumped in to Seclow & Nessenbaum when it comes Saturday near twelve o'clock, I jumped in and get it cashed, my bank didn't have the money there and many times I got to get the check cashed.

Q. You cashed this check at Seclow & Nessenbaum's did you? A. I suppose so.

Q. Is that a guess on your part? A. It is a guess.

Q. What did you do with that money? A. It was put in the building.

Q. The same thing? A. The same thing.

Q. Wasn't there a definite day of the week when you had to pay the payroll? A. It was on Saturday.

Q. All of these checks were given to you on Saturday, weren't they? A. Yes, sir; Friday or Saturday.

Q. That is when you would pay your workmen? A. Yes, on Friday or Saturday; I paid on Saturday, I paid the payroll.

Q. The checks with reference to the workmen— A. Yes, sir.

Q. Why did you get these checks and give them back to Seclow & Nessenbaum; did you cash them or somebody else cash them? A. I don't remember; I cashed that myself maybe, and somebody went down with me in Seclow & Nessenbaum's bank.

Q. Who drew this contract for you? A. Seclow & Nessenbaum.

Q. When? A. I don't remember.

Q. You were directors of the company, weren't you? A. Yes, sir.

Q. And the contract price was $16,000? A. About; something like that; it was around $16,000.

Q. In addition to the records of the Capitol Construction Company, the partnership of Starr & Silverman kept records of money received, did they not? A. Yes, sir.

Q. Your company didn't receive its full $16,000 did they?

Mr. Seclow: I object to that.

The Master: I think it is immaterial.

Q. Do you know how the payments were to be made to that company by your company? A. As the work is progressing.

Q. Yes; what? A. As the work is going along.

Q. Well, how much as the work is going along? A. I don't remember.

Mr. Seclow: Here is the contract; this man didn't even sign the contract.

Q. Who is Hyman Silverman? A. There is the fellow that is sitting down there (indicating).

Q. He was your associate in this business, wasn't he? A. Well, he is the president of this firm, of the Capitol Construction.

Q. You three men were the whole shoot, the whole works? A. What do you mean, the whole shoot?

Q. You and Hyman Silverman and Mr. Jacob Starr were the Capitol Construction Company? A. Yes.

Q. You said you were present when this contract was signed?

Mr. Seclow: He said he didn't know whether he was or not.

The Master: Do you know whether you were present when it was signed?

A. No, I don't remember.

Q. Were you interested in the terms of that contract? A. Yes.

Q. You knew what the terms were at the time, didn't you? A. It was $16,000.

Q. You knew how you were to pay it? A. As the work is progressing.

Q. That is as well as you can tell it to us; is that right? A. Yes.

Q. You didn't care whether your brother got a big profit, on this job, whether he got a high price or a low price, did you? A. What do you mean, I didn't care? Don't I know how much the work should be and how much he should get.

Harry Starr, on Behalf of Shilowitz and Tucker Mortgage—Re-direct.

Q. You weren't interested in the contract price that the corporation made with two of its directors? A. Sure I was interested.

Q. How many shares of stock did you have? A. I will look it up in the minutes.

Q. How many shares did your brother have? A. I will look it up in the minutes.

Q. How many shares did Silverman have? A. The same way.

Q. Did you put one dollar in this corporation?

Mr. Seclow: That is objected to.

The Master: Sustained.

Q. You didn't put one dollar in this corporation, did you? A. How do you know?

Mr. Seclow: I object to that.

The Master: I will sustain the objection.

Mr. Kanter: I will withdraw the question.

Re-direct examination by Mr. Seclow:

Q. I note that this large payment of $1400 and $1000, Exhibits 28 and 29, were made on a Friday of the week that the mortgage was signed; now does that recall to you the circumstances whether the building had been stopped at that time, or not? A. There was a lot of money due to workmen.

Mr. Kanter: Don't refresh his recollection by leading him.

The Master: If he knows, he can testify to it. Do you know anything about that?

A. I know when the building was, before we went ahead and we placed the mortgage, we were stuck for two weeks, we were stopped for two weeks, we

wasn't able to pay, we didn't pay in two weeks; that is as far as I remember; there is a man sitting right down there that I borrowed off him $500 to pay them off; right there, there is this man that I borrowed from, it was for two weeks, two or three weeks, I don't remember exactly.

Q. Did you have laborers and carpenters? A. Certainly; I can't remember all that; it is a matter of two years.

Q. But you do remember now that they were not paid for two weeks on that building? A. Exactly.

Q. Was that the reason that you needed so much on July 29th, to pay the back pay on there? A. Yes, sir.

Re-cross examination by Mr. Kanter:

Q. You got the records to show to whom you paid the back pay, haven't you? A. I think so; I will look it up to see.

Q. You know these men were employees of the Capitol Construction Company? A. Always.

Q. Always? A. Yes, sir.

Q. No question about that? A. No question about that.

Re-direct examination by Mr. Seclow:

Q. The carpenters were working for Mr. Silverman, weren't they?

Mr. Kanter: I object to that; that is leading.

Q. You testified on direct examination and cross-examination that the carpenter work was being done by Mr. Silverman? A. Yes, sir.

Q. For an amount of approximately $16,000? A. Yes.

Q. Mr. Kanter asked you about workmen and said they were working for the Capitol Construction Company; when you made your answer did you have reference to carpenters, or other classes of workmen? A. It was iron men that done the steel work, it was plain laborers, you know, plain, common laborers; those fellows were separate.

Q. They weren't working for Silverman? A. No, sir.

Q. They were working for the Capitol Construction Company? A. Yes, sir.

Re-cross examination by Mr. Kanter:

Q. You carried employer's compensation insurance? A. Yes, sir.

Q. Did you take out a policy for those men? A. Yes, sir.

Q. And the employer's liability insurance was carried in the name of the Capitol Construction Company? A. The Capitol Construction Company. We had two policies; we had for Starr & Silverman and we had Capitol Construction.

Q. As the workmen of the company were paid off, their liability was entered under a policy issued to the Capitol Construction Company?

Mr. Seclow: He said both ways.

Q. Have you got those policies? A. Maybe I got them; maybe not.

Q. You kept those policies, didn't you? A. We did keep them.

Q. Who wrote the policies? A. I think Julius Rose wrote some policies.

Q. Where is he from? A. A Bayonne fellow.

Q. Who wrote the others? A. I don't remember.

Q. What policy did Julius Rose write? A. The compensation policy.

Q. Workmen's compensation policy? A. Workmen's compensation policy.

Q. In whose name was the workmen's compensation policy made out? A. I think that is Starr & Silverman.

Q. Who wrote the other policy? A. I don't remember.

Q. There was another policy, wasn't there? A. That was the other policy.

Q. You don't remember the name of the broker? A. I think it was, what do you call that, the fellow that was in Tucker's.

Q. Tucker wrote the policy? A. I can't remember exactly, but I know he made some policy.

Q. You were working on other buildings at the same time, weren't you? A. At the same time, no.

Q. Didn't you have a building erected in Jersey City? A. That was later, after this building.

Q .When did you start the Jersey City building? A. That was about a year later or something, I don't remember.

Q. Was the Jersey City building started in June, 1928? A. Maybe; I don't remember now.

Q. To refresh your recollection, your company went into the hands of a receiver in January, 1928, didn't it? A. Well, I don't know.

Q. When your company went into the hands of a receiver, in January, 1928, you had two buildings under way; one in Jersey City? A. Yes.

Q. One in Cranford? A. Yes.

Q. The Jersey City building needed money, too, didn't it? A. The Jersey City building, yes.

Q. You took all this money that you got from the mortgages and put it in one bank account, didn't you?

Mr. Seclow: There is no testimony that any of this money went into any bank account.

Q. How did you separate the money that came from the mortgagees in the Jersey City building, from the mortgagees——

Mr. Seclow: I object to that; we are simply tracing the proceeds of this mortgage.

Q. —From the mortgagees on the Cranford job? A. I don't remember.

Mr. Seclow: I object to that.

The Master: Confine yourself to where the moneys from these particular checks went to.

By Mr. Stout:

Q. Mr. Starr, were any of the moneys advanced under the mortgage of Shilowitz and Tucker here under consideration used to pay your brother, Jacob Starr, and Hyman Silverman, under this contract dated May 25, 1927, between Capitol Construction Company and Jacob Starr and Hyman Silverman? A. Well, it was used to pay for the carpenters there.

Q. They were carpenters of Jacob Starr and Hyman Silverman, were they, the carpenters on this job? A. They were the contractors to do the carpenter work.

Q. Was there any money advanced to them or paid to them out of the money advanced on the Shilowitz and Tucker mortgage? A. For this?

Q. Yes. A. No, sir.

Q. It went direct to the men employed by them? A. Yes, sir.

Q. The carpenters employed by them? A. Yes, sir.

Q. How long was this agreement marked Exhibit 30, between Capitol Construction Company and Jacob Starr and Hyman Silverman in effect; did it continue in operation up until the day the building went into the hands of the receiver? A. No; it was, I think, from the beginning we made the contract.

Q. How long did it continue in effect; did you always operate under this contract so long as this building was being built? A. Always.

Q. On this job you were the so-called outside man? A. The outside man.

Q. Jacob Starr was the general carpenter contractor? A. Jacob Starr was the contractor, and Hyman Silverman took care of all the laborers.

Q. He was sort of supervisor then of construction? A. Supervising how the building should go along.

Q. Was any money advanced under the Shilowitz and Tucker mortgage paid to either you, Jacob Starr, or Hyman Silverman, under this agreement whereby you were to receive $2,500 each? A. No, sir.

Q. Did you, or the corporation, Capitol Construction Company, make any agreement with the firm of Seclow & Nessenbaum to pay them any fees for procuring this mortgage, or for searching the title and placing the loan? A. Well, I don't remember.

Q. You mean to say that you don't remember whether you made any agreement with him? A. I don't remember how we paid.

Q. Did you pay them anything for their services, or rather the Capitol Construction Company, on this Shilowitz mortgage of $20,000; were they paid anything for their services? A. I don't remember; they were paid, but I don't remember how much or what.

Q. Well, to your best recollection, none of these checks which have been offered in evidence under the Shilowitz and Tucker mortgage went to pay the firm of Seclow & Nessenbaum anything for their services or fees in the matter of this loan? A. No.

By Mr. Kanter:

Q. You said you did make some agreement with Seclow & Nessenbaum; you did pay them something. A. I don't remember how it was; I can't remember.

By the Master:

Q. Out of these checks which have been marked in evidence here from 4 to 29, Seclow & Nessenbaum got nothing out of those checks? A. No, sir.

By Mr. Lasker:

Q. You say that Starr & Silverman consisted of your brother, Jacob Starr, and Hyman Silverman; is that right? A. Yes, sir.

Q. Didn't you have a partnership, Starr Brothers & Silverman? A. No, sir; it wasn't partners; it was a partnership but it was under no record, it was just going like that; it was no corporation or anything like that.

Q. But you did do business under that name, though? A. Yes, sir.

By Mr. Haber:

Q. You got no part of the moneys represented by these checks that are marked in evidence? A. If I got?

Q. You yourself got no part of the moneys represented by these checks in evidence? A. No, sir.

Q. You say you kept your personal bank account in what bank? A. We kept in the West Bergen Trust Company.

Q. I am speaking of your personal account. A. Me personally?

Q. Yes. A. I don't have no personal account.

Q. Didn't you tell us before that you personally had a bank account in one of these banks in Bayonne, in the same bank? A. Not personally; we had partners, our Capitol Construction and our Starr Brothers & Silverman was used to do it, we were all together.

Q. In other words, you mean now that Starr & Silverman had their bank account in the same bank as the Capitol Construction Company? A. Yes, sir.

Q. Did Starr Brothers & Silverman have a separate bank account? A. No, sir.

Q. What banks did the Capitol Construction Company have an account with? A. West Bergen Trust Company, and we had in the Trust Company of New Jersey.

Q. Did it have any account in Bayonne, in the South Hudson? A. No, sir.

Q. You personally had no bank account with any bank in Bayonne or Jersey City? A. I had five years ago, or twelve years ago.

Q. I am speaking of the time when these checks were issued. A. No.

Mr. Seclow: Shilowitz and Tucker rest.

ARTHUR G. TEWELES, sworn:

Direct examination by Mr. Lasker:

Q. Mr. Teweles, what business are you in? A. Supplying material, kitchen equipment and bath room equipment to builders.

Q. Did you furnish any equipment to the Capitol Construction Company in question in this action? A. I did.

Q. What did you furnish? A. Medicine chests.

Q. I call your attention to the account that you furnished. A. Yes; 34 medicine chests.

Q. What is the total of your claim? A. Total value of $355.

Q. Has any part of this sum been paid to you? A. No, sir.

Q. Have you filed a mechanic's lien? A. Yes, sir.

Q. On what date was the mechanic's lien filed? A. September 12, 1927.

Mr. Pyle: I think the proper proof of that is the lien itself.

Mr. Stout: I don't see why counsel should not consent to the date of the filing of the lien claim, which appears in the bill of complaint and has not been questioned.

The Master: I will receive it for what it is worth.

Mr. Kanter: You admit, do you not, that no suit was brought on your claim at any time?

Mr. Lasker: There was no judgment.

Mr. Kanter: No suit was instituted on your lien claim; that is what we are talking about.

The Master: Has any summons and complaint been issued in that case?

Mr. Lasker: No. I will produce a certified copy of the lien claim, if you wish.

Q. Did you at any time sign an agreement of document by which you agreed to postpone your lien to any other lien or any mortgage? A. No, I did not.

Q. I show you a stipulation for the postponement of lien claims to the mortgage of Israel Shilowitz and Jacob Tucker; did you sign this postponement, Exhibit 3? A. No.

Q. You say the work was completed on September 12, 1927? A. Yes.

Q. And no part of the amount due has been paid? A. No part has been paid.

Mr. Kanter: For the purpose of the record I move that all testimony concerning the lien claim be dismissed on the ground that no lien has been filed within four months after the last work was done or materials furnished.

Mr. Seclow: I will be sworn.

Mr. Stout: Is the witness being produced to show that the money turned over to the Capitol Construction Company was received from Shilowitz and Tucker?

Mr. Seclow: Yes.

Mr. Stout: I don't think there is any question about it. I think it is very pertinent to your claim to show that the moneys

coming into the hands of the Capitol Construction Company actually went to pay certain people. In many instances checks were cashed and the money was turned over by some representative of the Capitol Construction Company to laborers or material men. Mr. Harry Starr has not testified in certain instances that the laborer or material man or contractor actually got the money.

Mr. Kanter: I want it on the record, as far as I am concerned, I do not question that fact, because when Mr. Seclow applies for costs and counsel fees. I now put on the record here a statement of admission, that we admit for George F. Perry & Sons, that whatever money Seclow & Nessenbaum paid out was paid out on behalf of his clients, Shilowitz and Tucker.

Mr. Seclow: Do you admit that these checks that were produced in evidence, 4 to 29, were paid?

Mr. Kanter: Yes.

The Master: You don't admit they went into the building?

Mr. Kanter: No.

JACOB STARR, sworn:

Direct examination by Mr. Seclow:

Q. You were an officer of the Capitol Construction Company; you were secretary, were you not? A. Yes, sir.

Q. You were also a member of the firm of Starr & Silverman? A. Yes, sir.

Jacob Starr, on Behalf of Shilowitz and Tucker Mortgage—Cross.

Q. I show you a paper marked Exhibit 30, purporting to be a contract for the carpenter work for the building on the mortgaged premises, to do the carpenter work for $15,650. Were you and Hyman Silverman the two men who had that job to do the carpenter work? A. Yes, sir.

Q. You heard the testimony here by Harry Starr as to the number of checks that were endorsed by Starr & Silverman? A. Yes.

Q. On these various checks testified to by Mr. Starr, do you know what Starr & Silverman did with those moneys? A. Personally I didn't handle the money, because Harry Starr used to bring it every Saturday or Friday or in the middle of the week cash and the checks and he used to pay out the men.

Q. Did that money come from cashing these checks? A. Yes, sir.

Q. All that money was paid out under that contract, Exhibit 30? A. Yes, sir.

Q. And all these checks were given on the mortgage held by Tucker and Shilowitz? A. Yes, sir.

Cross-examination by Mr. Kanter:

Q. What is your name, sir? A. Jacob Starr.

Q. You are a brother of Harry Starr? A. Yes, sir.

Q. You are the follow that is a partner in Starr & Silverman? A. Yes, sir.

Q. You are the fellow that is supposed to get fifteen thousand and some odd dollars? A. Yes.

Q. But your brother Jacob didn't let you get any of the money, did he? A. Not my brother Jacob; you mean my brother Harry.

Q. Your brother Harry went and paid the money directly? A. He brought the money on

the job that was used to pay out the men on the job.

Q. You said you were not there all the time when he brought the money? A. Yes, sir.

Q. All the time? A. Yes.

Q. How many checks were brought to you? A. He brought the cash on the job.

Q. How many times? A. Every week.

Q. How many weeks? A. Every week I was on the job.

Q. How many weeks were you on the job?

The Master: If you know; if you don't know, say so.

A. Well, from the time we started the job until the end I was every week on the job.

Q. How many times did he bring you money from Shilowitz and Tucker? A. Every Friday or every Saturday.

Q. How many times? A. Well, I couldn't remember.

Q. You were a partner with Mr. Silverman, weren't you? A. Yes.

Q. You kept partnership books? A. Yes, sir.

Q. You kept a record of what moneys were paid out on this contract? A. I did.

Q. Have you got those books? A. I had the books.

Q. What did you do with them? A. I don't know what I did with them.

Q. When did you have them last? A. I had them when the job was going on, I had them on the job.

Q. When did you destroy them, as far as know? A. When the job went in the receiver's hands.

Q. Then you destroyed the partnership books? A. Yes, sir.

Q. You and Mr. Silverman had other jobs, didn't you? A. If we had other jobs?

Q. Yes. A. I was all the time on that job.

Q. You and Mr. Silverman had other transactions besides the Cranford building, didn't you? A. We don't have all jobs; we had one job, that was in Jersey City.

Q. That was also for the Capitol Construction Company? A. Yes, sir.

Q. Wasn't it important for you and Mr. Silverman to keep books? A. I kept books when I was on the job.

Q. Where are the books that you kept? A. I destroyed them.

Q. What did the books contain? A. Well, I had all the payments that I made to anybody and paid out on payrolls, I had them in the book marked.

Q. Did Silverman do that for different payments that he made? A. I don't know what Silverman did.

Q. Where are the books that you kept? A. I destroyed them.

Q. You destroyed them? A. The books that I kept personally.

Q. You had a contract with the Capitol Construction Company whereby you were to get the sum of $16,000 for your work on this job? A. Yes, sir.

Q. You were interested when the job was over in knowing how much money you had received from the Capitol Construction Company, were you not? A. I was interested at the time when I was on the job; at the time the job was going on.

Q. You had $16,000 coming to you, didn't you? A. Yes.

Q. Wasn't it important for you to know how much money you received on account of the $16,000? A. When the job was going on, then it was important for me.

Q. When the job quit didn't you want to know how much money you had received on account? A. No.

Q. You didn't care? A. No.

Q. Weren't you interested one bit? A. Not at all.

Q. Therefore you destroyed the contract? A. Not the contract, but the time book that I had.

Q. You destroyed the time book that you had? A. Yes, sir.

Q. The only book you had was a time book? A. That is right.

Q. That had the names of the men to whom you paid money? A. Right.

Q. Did you keep any other books? A. No, sir.

Q. Didn't you keep a book to show how much money you received from the Capitol Construction Company? A. I had it in a day book.

Q. What did you do with the day book? A. I destroyed it.

Q. What other books did you have? A. That is all, the day book and time book.

Q. Who had the day book? A. I don't know.

Q. You talked about a day book. A. I didn't.

Q. Didn't you just say you had a day book? A. I had one book, that was the day book and time book, it was in one book, not different books.

Q. How long have you been in business? A. Twelve years.

Q. You ran books before, didn't you? A. I did.

Q. With other partners? A. No, sir.

Q. Always for your own business? A. Yes, sir.

Q. Did you have a bank account? A. Yes, sir.

Q. And did you destroy the books? A. Some of them I got; some I haven't got.

Q. What books did you keep? A. Oh, certain books, time books and stuff like that.

Q. You can't tell us how many weeks Mr. Harry Silverman came there with money? A. No, sir.

Q. Or how much money he came there with? A. Well, not exactly.

Q. Then within five thousand dollars, can you tell us? A. No, sir.

Q. You can't tell us within ten thousand dollars how much he came there with, can you? A. I couldn't tell you nothing.

HENRY J. RUCK, sworn.

Direct examination by Mr. Kanter:

Q. You are secretary of George F. Perry & Sons? A. Yes, sir.

Q. Have you an account against Capitol Construction Company for materials furnished to this building at Cranford, New Jersey? A. We have.

Q. What is the date of the first delivery? A. May 24, 1927.

Q. What is the date of the last delivery? A. July 14, 1927.

Q. What is the total amount of your charges? A. For the ledger account?

Q. Yes. A. $5,792.25.

Q. Was any part of that paid? A. No; none.

Mr. Kanter: I offer the account in evidence.

Cross-examination by Mr. Seclow:

Q. What is that, a loose-leaf account? A. Yes; a loose-leaf ledger.

Q. Were you there when any of these materials were supposed to have been delivered? A. Where; on the job?

Q. Yes. A. No.

Q. How do you know they were delivered, of your own knowledge? A. From my own knowledge?

Q. Yes. A. From our salesman; I seen the salesman.

Q. Of your own knowledge? A. From my own knowledge?

Q. You don't know, do you, of your own knowledge; you don't know whether any goods were delivered there? A. I am here to prove the account that materials were delivered on this job; we have the orders and contracts to prove it.

Q. You are now producing some loose-leaf which is your account? A. Yes.

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

Q. Were those materials sold for that account? A. Yes, sir.

Q. For that job? A. Yes, sir.

Mr. Seclow: I object to the witness testifying from that.

The Master:

Q. You didn't keep this account, did you? A. I have supervision of the accounts.

By Mr. Seclow:

Q. Were those materials delivered on this job? Did you ever go up on the job? A. No; I never did.

JACOB STARR, recalled:

Direct examination by Mr. Kanter:

Q. Did you buy materials from George F. Perry & Sons? A. Yes, sir.

Q. You were sued on that account? A. Yes, sir.

Q. And the materials indicated in that account were materials that went into that building from Perry? A. Yes, sir.

Mr. Seclow: I object to any reference to any account.

Q. Look through these delivery slips. A. One slip is signed by me, one Silverman, Silverman, Silverman——

Q. Do you know his signature? A. Yes, sir; Silverman; H. Starr; H. Silverman.

Q. There is another one; do you know who that is (indicating)? A. No.

Mr. Kanter: I offer in evidence a copy of the lien claim and I will produce a certified copy; filed November 12, 1927, in Book 8 of Mechanics Liens for Union County, on page 261; and the endorsement there shows the issuance of summons and complaint on November 12, 1927.

Marked Exhibit 31.

Mr. Kanter: I also offer in evidence copy of the final judgment entered in this case in the Union County Circuit Court on January 13, 1928, for the sum of $5,965 damages and $63.37 costs.

Mr. Stout: I object to the receipt of that judgment in evidence. That judgment was entered after the Capitol Construction Company was in the hands of the receiver. Furthermore, I don't see the advantage of the judgment. As I understand the mechanics lien law, all mechanics liens are on the same basis; they have no priority.

Mr. Kanter: The judgment is general against the defendant, Capitol Construction Company, for the amount of damages and costs as indicated; and special against the lands and buildings described in the lien claim, which are identical with those described in the bill of complaint in this case; further as this judgment is adjudicated, it is prior to the lien of the mortgage made by the Capitol Construction Company to the defendnat, Louis Schwartz, recorded in Book 884 of Mortgages for Union County, on page 127; that it is prior to the mortgage made by the National Construction Company to the Junction Milling Company, recorded in Book 886 of Mortgages for Union County, on page 390, and that it is prior to the lien of the mortgage made to the West Bergen Trust Company by the Capitol Construction Company, recorded in Book 895, page 38; it reserves adjudication as to priorities over the mortgages of Standard Building Block Company, Aetna

Realty Company, Riverside Apartment Corporation, Israel Shilowitz and Jacob Tucker, Carteret Company and the Trust Company of New Jersey; the ruling as to priorities was reserved for future proceedings. In this case, that is the case now at bar, we have an interlocutory decree that was filed in June 14, 1928 against the defendants, with the counterclaim being taken as confessed as against the Capitol Construction Company, Inc., Louis Schwartz, Junction Milling Company, West Bergen Trust Company, Trust Company of New Jersey, John P. Grady, Abraham Shilowitz, Ira Crouse, Benjamin Heyman, receivers of Capitol Construction Company.

Mr. Stout: I still urge my objection that one lien claimant cannot by his judgment take advantage of another lien claimant; therefore, if the Perry lien claim is ahead of any of these mortgages, then to maintain the same status of other lien claimants, he would have to necessarily bring all lien claims ahead of those mortgages. That certainly is not the law, so that I cannot see the advantage of the judgment or what beneficial effect it has so far as Perry is concerned; it maintains its status equal with all other mechanics liens filed in time according to the statute.

Marked Exhibit 32.

Harry Starr, on Behalf of George F. Perry & Sons—Direct.
Jacob Starr, on Behalf of George F. Perry & Sons—Direct.

AARON KAUFMAN, Esquire, Appearing on behalf of Ira Crouse; Meyer & Ruh Company; Lipschitz Parquet Floor Co. and Louis Moore.

HARRY STARR, recalled:

By Mr. Kanter:

Q. You have been recalled now by me to produce those books of account to which you referred on your testimony prior to the noon recess; have you got them? A. No.

JACOB STARR, recalled:

Direct examination by Mr. Kanter:

Q. Mr. Starr, you have examined these delivery slips of George F. Perry & Sons? A. I did.

Q. Upon all the slips I asked you to identify the signatures made by yourself on deliveries; whose signatures are on those slips? A. This is my signature——

Q. Whose signatures are on the slips? A. Certain slips is mine, certain slips is Silverman's; there is 65 signed not by Starr and not by Silverman.

Q. You say there are 65 that are not signed either by you or Mr. Silverman? A. That is right.

Q. Do you know a man by the name of Joe McCutcheon employed by you? A. McCutcheon?

Q. Yes. A. No.

Q. Or McKetcham? A. No.

Q. Is the signature on the slip of November 3, H. Silverman, the signature of Hyman Silverman?

Mr. Stout: I object to that as not proper proof of delivery.

Mr. Kanter: I will withdraw this witness. I think I have proved my case with the evidence in.

Q. You bought these materials from George F. Perry & Sons? A. Yes, sir.

Mr. Stout: Which materials, if the Court please?

Q. The concrete blocks for which you were sued in the Union County Circuit Court.

Mr. Stout: There is no testimony about that.

Q. Did you buy any materials from George F. Perry & Sons on the Cranford job? A. On the Cranford job.

Q. That is all the material you bought? A. Yes.

Q. All the materials you bought from Perry were for the Cranford job? A. That is all.

Q. You ordered for the Cranford job? A. Yes, sir.

Q. And then the deliveries to you were for the Cranford job?

Mr. Stout: I object to that.

A. No.

Q. For what other job did he deliver materials? A. For no other job I received.

Q. That is what I asked you; whatever materials were delivered to you were delivered for the Cranford job? A. Whatever I received was delivered.

Mr. Stout: You mean as shown by these slips?

A. That is right; whatever I received.

Q. Whatever slips of paper bear your signature there which you identified, you got that material and incorporated in this job, did you? A. Yes, sir.

Q. Perry did not deliver material to you for any other job, did he? A. No.

Mr. Stout: I object to that as irrelevant to these issues.

The Master: Well, he has answered it.

Cross-examination by Mr. Stout:

Q. All you know of your own knowledge about the materials being delivered on this job by the Perry company is indicated by these delivery slips which you signed? A. That is right; that is what I said before.

Q. And that is all you know about it? A. That is all that I know.

HYMAN SILVERMAN, sworn.

Direct examination by Mr. Kanter:

Q. I show you a bunch of delivery slips and ask you to examine the signatures purporting to

be the signatures of H. Silverman and ask you whose they are? A. (Witness examines and identifies his signature on slips 37095; 37057; 37018; 37020; 37144; 40674; 41063; 41633; 41679; 42060; 42715; 42746; 42718; 43735; 43730.)

Mr. Stout: It seems to me, if it please the Court, the amounts as evidenced by the delivery slips signed by Jacob Starr and by Hyman Silverman should be ascertained as the amount; if the lien claim is filed for an amount far in excess of that which is proven, it invalidates the claim; and also it seems to me that this judgment which was received here in evidence should not have been received for another reason, that the proof which gives substance to that judgment is not before this court; and further, as I stated before, that judgment was entered after the receiver had been appointed for the Capitol Construction Company; and I have seen no order offered in evidence giving the Perry Company the right to enter this judgment.

The Master: What was the date of the receivership?

Mr. Millberg: I think in conformity with what Mr. Stout has stated, I shall put on the record the affidavit of mailing a copy of the order appointing the receiver, wherein the usual restraint against creditors appears, which was sent by Miss Lane of my office; the original of this affidavit is on file in the Clerk's office and it shows that a copy of the order was sent to all creditors on the 5th day of January, 1928.

Mr. Kanter: What was the order?

Mr. Millberg: An order appointing receivers.

The Master: What was the date of the judgment?

Mr. Heyman: January 13th. It is an unusual restraint; not the usual restraint.

Mr. Millberg: The order provides, among other things, that—I am referring to paragraph 6——

Mr. Kanter: Will you please offer the order in evidence, if you are going to read from it?

Mr. Millberg: I offer in evidence a copy of the order appointing receiver, dated the 4th day of January, 1928.

Mr. Kanter: I object to its reception at this time, because Mr. Millberg is not representing any party before the court.

The Master: He may have an interest in suppressing your account entirely, or defeating it; he would have a right to object; or to limit your accounting, to what you have actually proved. If you have no right to have a judgment under the order I think he would have a right to show it.

Mr. Stout: May I say this, that the original will be produced if necessary, and your Honor can hold open the motion to strike out the testimony as to this judgment. The original order is dated the 4th day of January, 1928.

The Master: We will hold the reception of that judgment in evidence until that order is produced. Does that finish your case of Perry's ?

Mr. Kanter: I would like to have permission to submit a certified copy of the judgment and the lien claim.

(Exhibit numbers 33 and 34 reserved for that purpose.)

Mr. Kanter: I offer in evidence the account of George F. Perry & Sons.

Mr. Seclow: It is objected to for two reasons: The first reason is that the books have not been properly proved showing the system of books; and secondly, on the ground that they are loose leaf slips; and thirdly, they are not the original entries in the account at all; and fourth, that they do not tend to prove delivery on the job.

The Master: I think I will have to refuse to accept them, Mr. Kanter, on the ground that they are not properly proven.

Mr. Kanter: I pray an exception.

HARRY STARR, recalled.

Direct examination by Mr. Stout:

Mr. Seclow: Will it appear on the record that Mr. Stout is examining on the claim of Shilowitz and Tucker?

Q. Mr. Starr, you testified this morning in the matter of the mortgage held by Shilowitz and Tucker, and you were interrogated as to whether you had made any arrangements, or the Capitol Construction Company had made any arrangements or promise to the firm of Seclow & Nessenbaum to pay them for services in negotiating this

loan, searching the title to the property, etc. You were so interrogated? A. Yes.

Q. Have you, since you left the stand, talked to Hyman Silverman, one of the officers of the Capitol Construction Company? A. Yes, sir.

Q. Has your recollection been refreshed as to whether there was any such arrangement or agreement to pay anything for those services in connection with this mortgage loan?

Mr. Seclow: I object to that as immaterial, what his agreement was. The question is, Was it paid? This is not a criminal case, where the intent can be proved. He might have made an agreement to pay $1000 but if that is not carried out, it does not affect us in any way.

Mr. Stout: I appreciate that; but if you had an agreement to pay a certain sum of money for those services and then if I can show a check carrying out that agreement, a check for that amount, it might change his testimony which he gave this morning that no part of these checks was used for the payment of a fee; although if you want me to, I will put the bold question to him, if there was anything paid.

Q. Since talking to Hyman Silverman about this Shilowitz and Tucker mortgage, has your recollection been refreshed as to whether any moneys were paid to Seclow & Nessenbaum for fees in connection with this loan? A. Why Mr. Silverman——

The Master: The question is, Was your memory refreshed? Was it, or was it not?

A. Yes.

Q. What is your recollection now in respect to that?

Mr. Seclow: I object to what his recollection is. I think he ought to testify as to his knowledge.

Mr. Stout: If he doesn't have any recollection he wouldn't have much knowledge.

The Master: I think I will allow it.

A. We spoke, or we talked it over with Mr. Silverman, who is the president of this corporation, so he did tell me it was allowed $1000 to Mr. Shilowitz and Tucker.

Q. Was that amount paid? A. That was the amount paid, yes.

Q. Paid to whom? A. To Tucker and Shilowitz, or Mr. Seclow. I don't know how that was worked out.

Q. If these checks that were offered and received in evidence this morning were presented to you, could you indicate the check which was given in payment of those services? A. I couldn't remember.

Q. I recall that there were two checks, one for $1000 and one for $1400 that were given on the same date; and the $1000 check was cashed by you; is that right? A. Yes.

Q. Do you now recall to whom that $1000 was given? A. I couldn't remember, but the way we could recollect was we did give him $1000 to Shilowitz and Tucker; that is what I think.

By Mr. Pyle:

Q. Where did you get the $1000 from; from the cashing of that $1000 check; is that where it came from? A. Well, we did cash $1000.

Q. That is where you got this $1000 fee from, wasn't it? A. Well, but I don't remember exactly what we did with it; we paid out the full $1000 to them or we paid out the rest on the building, I don't remember exactly.

Q. It was paid in cash, was it? A. No, it was paid in check; they gave us a check.

Q. Then you cashed the check and the cash you turned back and paid it in that way; isn't that your recollection of it? A. Yes.

Cross-examination by Mr. Seclow:

Q. Are you sure about that, Mr. Starr? A. That is two years ago; I can't be sure.

Q. Do you remember that that was done? A. Why, I couldn't remember so much, but Mr. Silverman told me.

Q. You mean you are telling us what someone else told you, is that right? A. Here is the way Mr. Silverman explained to me.

Q. Of your own knowledge you don't know? A. I don't remember.

By Mr. Kanter:

Q. That first $1000 check you know was cashed, wasn't it, the check we were talking about this morning, Exhibit 29? A. Yes, we did get the cash, yes.

Q. Wait a minute. On July 29, 1927, there was a check for $1000; and on the same day you got a check for $1400; now the $1000 check of July 29th was cashed; you said this morning that you went with Mr. Shilowitz or Mr. Tucker to the bank, the Bank of South Hudson, you cashed that $1000 check in that bank? A. Yes.

Q. That is correct, is it? A. Yes.

Q. What is your recollection now as to what you did with that $1,000? A. When we made the agreement we made with them——

Mr. Kanter: That is objected to as not responsive.

The Master: What did you do with the $1,000 that he gave you on July 29th?

A. I can't remember.

Q. What is your present recollection?

Mr. Seclow: That is objected to; if he can't remember, his recollection is immaterial.

The Master: He has already said that his best recollection is that he turned it back.

Q. When you say you turned it back to Shilowitz and Tucker in payment of a bill—isn't that what you said? A. I didn't say that.

Mr. Seclow: He said that Mr. Silverman told him that.

Q. What did you do with the money itself; that is what I want to get at; you got the money from the bank, didn't you? A. Yes, sir.

Q. You cashed the check? A. Yes, sir.

Q. And the paying teller gave you the money? A. Yes.

Q. Shilowitz or Tucker were there? A. Shilowitz and Tucker was there?

Q. Was there with you? A. I don't remember about that.

Q. That is what you testified to this morning; is that correct? A. I didn't testify they were there; they gave the signatures.

Q. You said this morning that they were there; now, is that correct, or is it not correct? A. I don't remember if they were there or they weren't.

Q. You don't remember which way it was; is that right? A. I don't remember if they were there or they weren't there.

Q. In any event, you got the money, though, didn't you? A. Yes, we got the $1,000.

Q. To whom did you turn over the money; to what man did you turn it over? Did you turn it over to me? A. I don't remember. I know I didn't.

Q. You don't remember that either? A. No.

Q. Did you turn it over to Mr. Seclow? A. No.

Q. You mean by "no", you don't remember if you turned it over to him? A. No, I don't remember if I did.

Q. You don't know to whom you gave the money, do you? A. No.

By the Master:

Q. Who identified you in the bank to get the check cashed? A. Mr. Shilowitz and Tucker.

Q. They were both there at the time? A. Yes; they signed in the back of the check and I should get the cash.

Q. This check is payable to Jacob Tucker; that is check Exhibit 29; Jacob Tucker and Israel Shilowitz; they endorsed their names on it, did they? A. Yes, sir.

Q. And gave it to you? A. Yes.

Q. Mr. Starr and Starr and Silverman endorsed their names on it? A. Yes.

Q. Then the Capitol Construction Company and you endorsed it? A. Yes, sir.

Q. Well, when you took this to the bank, who identified you to the paying teller? A. That was

one of Shilowitz and Tucker; I don't remember which one was there.

Q. One of them was with you at the bank? A. Yes, sir.

By Mr. Pyle:

Q. Who walked out with the $1,000; you, or Tucker, or Shilowitz? A. I walked out with the $1,000.

Q. You went out with the $1,000? A. Yes, sir.

Q. Then what did you do; did you give it to Shilowitz and Tucker, or one of them? A. No; I don't remember how that was.

Q. You don't remember what you did with the $1,000 afterwards? A. No.

Q. Well, you didn't carry it home with you and spend it on yourself, did you? A. No, sir.

Q. You know you didn't get it? A. No.

By the Master:

Q. Don't you know any of the financial arrangements that were made for getting this loan of $20,000? A. It was arranged to pay $1,000 for a fee, and like policies and things like this, it was arranged for $1,000.

Q. Was that amount paid? A. Yes, it was paid.

Q. Where did the money come from that paid that? A. It was from this amount.

Q. From the $20,000 you received? A. Yes.

By Mr. Kanter:

Q. Mr. Starr, why did you deny this morning anything about an arrangement for a bonus or premium? A. Because Mr. Silverman explained how that thing was.

Q. You mean he refreshed your recollection on the subject? A. No; he explained me; he is the president of this corporation.

Q. And you know it is correct? A. I suppose it is.

Mr. Seclow: I ask that that be stricken out.

By the Master:

Q. Do you know whether it is correct or not? A. Yes.

James E. Pyle, sworn:

Mr. Pyle: I want to offer in evidence bond of the Capitol Construction Company to the Carteret Company, dated October 14, 1927, for $35,000.

Marked Exhibit 36.

Mr. Pyle: I also offer in evidence mortgage dated the same date, between the same parties, recorded in Book 892 of Mortgages for Union County on page 89.

Marked Exhibit 37.

Mr. Pyle: Also release of part of mortgaged premises, made by Junction Milling Company to the Capitol Construction Company, dated October 18, 1928, recorded in Book 67 of Releases of Mortgages for Union County, on page 180.

Marked Exhibit 38.

A. I was the attorney for the mortgagee in that bond and mortgage, the Carteret Company, and

represented them in putting through this mortgage loan, at the suggestion and at the request of Mr. Harry Starr and Mr. Hyman Silverman, on behalf of the Capitol Construction Company, I agreed to procure this mortgage loan for them; and at that time the building was in course of construction, but the work had been stopped and was then practically at a standstill; they wanted to get this loan so that they might proceed with the construction of the building. It was represented to me if this loan was obtained they could complete the building with this money. They agreed to pay me as a fee for that loan $2,100. in addition to which fees there were disbursements incurred for procuring a corrective deed and putting it on record and putting this release of mortgaged premises which has been offered in evidence and the subordination agreement the sum of $30.80.

Mr. Pyle: If I may go back to offer some other papers, one I forgot, this subordination agreement from Louis Schwartz, subordinating his mortgage to the Carteret Company's mortgage, dated October 20, 1927, recorded in Book 67 of Releases of Mortgages for Union County, on page 178.

Marked Exhibit 39.

A. As a part of the agreement to procure this mortgage, it was agreed that everybody who had furnished any material or labor on this job, or was going to, to complete the building, would have to sign an agreement allowing the mortgage of the Carteret Company to be prior to any right they had to a lien in accordance with that arrangement this subordination agreement was

signed the parties called at my office and signed before me this subordination, so called; this was signed by the different parties by whom it is purported to be signed and the signatures are genuine.

Subordination agreement marked Exhibit 40.

Q. This was also signed, which is also a subordination agreement of similar form, signed by Louis Moore, in my presence, but the other two signatures on it were not made in my presence; they were obtained by Mr. Moore; they were material men and he had them sign it.

Subordination agreement marked Exhibit 41.

A. The other two signatories have not filed liens. These checks that I am now about to offer, they were made from time to time as advances of money on this bond and mortgage of the Carteret Company. The first check is dated October 22, 1927, No. A-1261, which was for $2,130.80; in payment of the fees and disbursements which I have just testified to.

Check marked Exhibit 42.

A. There was also a check given for $7,000, dated October 22, 1927, No. A-1269, to the order of Capitol Construction Company, and endorsed over by them as follows: Pay to the order of Louis Moore, account of plumbing on the Cranford Apartment; Capitol Construction Company; Louis Moore; this was paid by my bank.

Check marked Exhibit 43.

A. Also my check dated October 22, 1927, No. A-1263, for $2,000 payable to the order of Capitol Construction Company and by said company endorsed as follows: Pay to the order of Junction Milling Company, account of material on Cranford Apartment; also endorsed by the Junction Milling Company and paid by my bank.

Check marked Exhibit 44.

A. Also my check dated October 22, 1927, No. A-1264, to the Capitol Construction Company, for $500, endorsed by said company as follows: Pay to the order of N. J. Roofing & Sheet Metal Company, on account of roofing, etc., Cranford Aparment, Capitol Construction Company, N. J. Roofing & Sheet Metal Works; and paid by my bank.

Check marked Exhibit 45.

A. Also check dated October 22, 1927, No. A-1266, for $1,000, to the order of the Capitol Construction Company, and endorsed as follows: Pay to the order of A. W. Booth & Brother, account of material on Cranford Apartment; Capitol Construction Company; A. W. Booth & Brother; and paid by my bank.

Check marked Exhibit 46.

A. Also check dated October 27, 1927, No. A-1267, to the order of the Capitol Construction Company, for $500. and by them endorsed to the order of John Nicaretta, on account of concrete for Cranford apartment; endorsed by John Nicaretta and paid by my bank.

Check marked Exhibit 47.

A. Also check dated October 22, 1927, to the order of the National Construction Company, for $2500. endorsed by them Pay to the order of Lipschitz Parquet Floor Company, on account of flooring in Cranford apartment; endorsed by Lipschitz Parquet Floor Company; and paid by my bank.

Check marked Exhibit 48.

A. Also check dated October 22, 1927, No. A-1262, to the order of Capitol Construction Company, for $400. and endorsed Pay to the order of Harry Grossman; endorsed by Harry Grossman and paid by my bank.

Check marked Exhibit 49.

The Master: Was he a material man?

A. No, he wasn't. At the time I placed my mortgage on the property, or the Carteret Company mortgage upon the property, I found on record a mortgage to Harry Grossman for $21,750. dated October 8, 1927; on inquiry I found that that had been placed on there by the Capitol Construction Company for practically the same purpose that mine had been placed on it, or about to be placed on it, namely, for advances to be made to complete the building; but there was some hitch in the matter and the mortgage transaction did not go through; and Mr. Grossman demanded as compensation for his services in the matter which he performed $400. in order to cancel the mortgage; I think the $400. was paid for that purpose. Mr. Grossman is an attorney at law with an office in Elizabeth. I might say that it was not only in payment of rescue money, as Mr. Stout says, but Mr. Grossman claimed that he was the attorney for Mr. Moore, I think, the

plumber on the job, and had been representing him, and that he had done various services in connection with trying to finance the building and seeing that it was completed; at any rate, he demanded $400. for his services in connection with the mortgage transaction, everything considered, he demanded that amount; he demanded more, but finally he agreed to cancel the mortgage on payment of that amount.

The Master: And the mortgage was canceled?

A. And the mortgage was canceled; and I have it here and offer it in evidence. The mortgage canceled is one dated October 8, 1927, made by the Capitol Construction Company to Harry Grossman, registered October 8, 1927, in Book 888 of Mortgages for Union County, on page 386; and appearing to be canceled of Record October 24, 1927.

Mortgage marked Exhibit 50.

A. On the same date, October 22, 1927, I also gave my check No. A-1268, for $2000. to the Capitol Construction Company, and by it endorsed Pay to the order of J. Starr, account of carpenter work on Cranford apartment; endorsed by J. Starr and paid by my check.

Check marked Exhibit 51.

A. That was given in payment of carpenter labor on the job, as represented to me at that time, that the carpenters had not been paid for some time, and that was one of the reasons why the work had stopped; there was considerable wages in arrears due them, and that Mr. Starr, or Jacob

Starr, was the carpenter contractor, doing the work, and that it was practically impossible for me to go around and dig up the different carpenter laborers who were working, some of them being paid by the day and some by the week the check that was offered in evidence was made to him and he was to take the money put and pay the carpenter laborers and also himself; he also worked as carpenter on the job, and that I presume he did.

Mr. Kanter: You didn't get from him any list of people to whom claim for labor were due?

A. I checked up a list with him at the time, orally, to see how much was due, and it totaled up something over $2000. I have forgotten just what the figures were.

A. Also check dated October 29, 1927, No. A-1274, for $500. to the Capitol Construction Company and Siegel & Levine, and by both of the payees endorsed on the back; it says on account of plastering in Crawford apartment.

Check marked Exhibit 52.

A. Also another check dated October 29, 1927, No. A-1275, for $1000. to the order of Capitol Construction Company and McCabe Brothers Co. and on the back endorsed on account of excavating on Cranford apartment; endorsed by both payees.

Check marked Exhibit 53.

A. Also check dated October 29, 1927, No. A-1273, for $1000. to the order of Capitol Construction

Company and Century Marble & Tile Company, and on the back endorsed on account of tile work on Cranford apartment; endorsed by each of the payees.

Check marked Exhibit 54.

A. Also check dated October 29, 1927, No. A-1271, for $165. to the order of Capitol Construction Company and Mowre Lager, and in the back endorsed on account of painting in Cranford apartment; endorsed by both payees.

Check marked Exhibit 55.

A. Also check dated October 29, 1927, No. A-1276, to the order of Capitol Construction Company and Joseph T. Ryerson & Son for $434.16, and on the back endorsed for account of reinforcement for concrete in Cranford apartment; endorsed by both payees.

Check marked Exhibit 56.

A. Also check dated October 29, 1927, No. A-1277, to the order of Capitol Construction Company and Jacob Starr, for $600. endorsed on the back on account of carpenter work on Cranford apartment; endorsed by both payees.

Check marked Exhibit 57.

A. Also check dated November 3, 1927, No. A-1282, for $400. to the order of Capitol Construction Company and M. Lager, and endorsed on the back on account of painting work on Cranford apartment; signed by both payees.

Check marked Exhibit 58.

A. Also check dated November 5, 1928, No. A-1283, for $550. to the order of Capitol Construction Company and Jacob Starr, endorsed on the back on account of carpenter work on Cranford apartment; endorsed by both payees.

Check marked Exhibit 59.

A. Also check dated November 5, 1927, No. A-1284, for $400. to the order of Capitol Construction Company and Century Marble & Tile Company, endorsed on the back on account of marble and tile work on Cranford apartment; endorsed by both payees.

Check marked Exhibit 60.

A. Also check dated November 5, 1927, No. A-1285, for $500. to the order of Capitol Construction Company and Siegal & Levine, endorsed on the back on account of plaster work on Cranford apartment; endorsed by both payees.

Check marked Exhibit 61.

A. Also check dated November 5, 1927, No. A-1286, for $200. to the order of Capitol Construction Company and John Nicaretta, endorsed on the back for concrete work on Cranford apartment; endorsed by both payees.

Check marked Exhibit 62.

A. Also check dated November 5, 1927, No. A-1287, for $1000. to the order of Capitol Construction Company and Elizabeth Light & Fixture Company, endorsed on the back on account of electric wiring etc. on Cranford apartment; endorsed by both payees.

Check marked Exhibit 63.

A. Also check dated November 5, 1927, No. A-1288, for $2000. to the order of Capitol Construction Company and Wellworth Company, endorsed plumbing supplied in Cranford Apartment; endorsed by both payees and paid by my bank.

Check marked Exhibit 64.

A. Also check dated November 10, 1927, No. A-1480, for $24. to the order of Capitol Construction Company and M. Lager, endorsed on the back on account of painting work on Cranford apartment; signed by both payees.

Check marked Exhibit 65.

A. Also check dated November 10, 1927, No. A-1295, for $500. to the order of Capitol Construction Company and N. J. Roofing & Sheet Metal Works; endorsed on the back for roofing tile, etc. on Cranford apartment; endorsed by both payees.

Checked marked Exhibit 67.

Q. Also check dated November 12, 1927, No. A-1301, for $1,000. to the order of Capitol Construction Company and Arthur S. Van Woeart, endorsed on the back for steam heating in Cranford apartment; endorsed by both payees.

Check marked Exhibit 68.

A. Also check dated November 14, 1927, No. A-1300, for $200. to the order of Capitol Construction Company and Siegel & Levine, and endorsed on the back for plastering in Cranford apartment; endorsed by both payees.

Check marked Exhibit 69x.

A. Also check dated November 18, 1927, No. A-1311, for $420. to the order of Capitol Construction Company and M. Lager, endorsed on the back for painting on Cranford apartment; endorsed by both payees.

Check marked Exhibit 70.

A. Also check dated November 18, 1927, No. A-1312, for $125. to the order of Capitol Construction Company and Lipschitz Parquet Floor Company, endorsed on the back for hardwood floors in Cranford apartment; endorsed by both payees.

Check marked Exhibit 71.

A. Also check dated November 18, 1927, No. A-1313, for $600. to the order of Capitol Construction Company and Jacob Starr and endorsed on the back for carpenter labor on Cranford apartment; endorsed by both payees.

Check marked Exhibit 72.

A. Also check dated November 25, 1927, No. A-1332, for $275. to the order of Capitol Construction Company and M. Lager, endorsed on the back for painting in Cranford apartment; endorsed by both payees.

Check marked Exhibit 73.

A. Also check dated November 25, 1927, No. A-1334, for $200. to the order of Capitol Construction Company and Siegel & Levine, endorsed on the back for plaster work in Cranford apartment; endorsed by both payees.

Check marked Exhibit 74.

James E. Pyle, on Behalf of Carteret Company
Mortgage—Direct.

A. Also check dated November 25, 1927, No. A-1333 for $200. to the order of Capitol Construction Company and Jacob Starr and endorsed on the back for carpenter work in Cranford apartment; endorsed by both payees.

Check marked Exhibit 75.

A. Also check dated November 29, 1927, No. A-1341, for $500. to the order of Capitol Construction Company and N. J. Roofing & Sheet Metal Works; endorsed on the back for roofing and sheet metal work in Cranford apartment; endorsed by both payees.

Check marked Exhibit 76.

A. Also check dated December 3, 1927, No. A-1346, for $200. to the order of Capitol Construction Company and Jacob Starr, endorsed on the back for carpenter work on Cranford apartment; endorsed by both payees.

Check marked Exhibit 77.

A. Also check dated December 3, 1927, No. A-1347, for $200. to the order of Capitol Construction Company and Siegel & Levine, endorsed on the back for plaster work on Cranford apartment; endorsed by both payees.

Check marked Exhibit 78.

A. Also check dated December 10, 1927, No. A-1365, for $150. to the order of Capitol Construction Company and Jacob Starr and endorsed on the back for carpenter work and labor on Cranford apartment; endorsed by both payees.

Check marked Exhibit 79.

A. Also check dated December 10, 1927, No. A-1366 for $200. to the order of Capitol Construction Company and Siegel & Levine, endorsed on the back for plastering on Cranford apartment; endorsed by both payees.

Check marked Exhibit 80.

A. Also check dated April 23, 1928, to F. E. Older——

Mr. Kanter: I object to the reception of that check in evidence on the ground that that was subsequent to the filing of the bill of complaint in this cause and subsequent to the institution of the insolvency proceedings.

A. That check was given in payment of fire insurance premiums. At the time that this mortgage was placed there was some insurance on the building, but as the money was advanced, of course, the amount that we had in there kept growing larger and larger, and there wasn't sufficient fire insurance on the property; and on October 29, 1927, I, with the consent of the Capitol Construction Company, placed upon the property a policy of $35,000, which was the amount needed for the fire protection of the building at that time, and the premium for that policy was $213.50; that premium was not paid at once, but I obligated myself, on behalf of the mortgagee, to pay this, and the payment was delayed until April 23rd, when it was actually made. I might add that I requested to the Capitol Construction Company and others interested in the building to put the insurance on, and nobody did, and I was

compelled to do it on behalf of the mortgagee; also after it was placed on I asked them repeatedly to pay it but they had no funds with which to pay it; I also repeatedly asked the receivers to pay for this insurance after the receivers were appointed and they refused to pay it.

By the Master:

Q. All of these checks that you have offered in evidence were paid by your bank? A. All of these checks were paid by my bank, and also these checks were given for the purpose and used for the purposes as stated in the endorsements on the back.

By Mr. Kanter:

Q. What is the total amount of all these checks? A. These checks total $32,003.46.

Mr. Kauffman: For the purpose of the record we admit the signature on Exhibit 41 as that of Louis Moore.

A. These checks which were given to Jacob Starr and on which he was the payee were given for the purpose of paying carpenter labor on the job; they were turned over to Mr. Jacob Starr, who was represented to be the carpenter contractor on the job, usually on Friday or Saturday, at end of each week, to take care of the payroll for that week, or perhaps for the previous two or three weeks, whatever the case may have been. My recollection is that most of them were made, especially toward the latter end, each week to take care of each weekly payroll. During the first part of the loan I think they were allowed

to run, sometimes for perhaps a couple of weeks or three weeks at a time, and they allowed other claims too, as they got to the end of the job they seemed to be more willing to let them run for more than one week; these checks were turned over to Jacob Starr, who was to take the money for the payroll and to pay himself, he having worked also as a carpenter on the job, and I myself personally inspected the job and found out that this work had been done from week to week by these carpenters and by Mr. Starr and that the money was due them in accordance with the checks paid.

Cross-examination by Mr. Kanter:

Q. The Master already asked you about the check for $2130.80; that wasn't paid to any materialmen, workmen or contractors or laborers in connection with the erection of the building, was it? A. Well, it was paid to me as commission on the job.

Q. That is, for legal services and commissions for the transaction of the loan? A. It was for financing the building to completion, or in attempting to.

Q. And for no other purpose? A. For the purposes I have stated already in my testimony and for no other purpose.

Q. And the fee of Harry Grossman of $400. by check No. 50 was rescue money, as you have termed it? A. I didn't term it; Mr. Stout said it was rescue money; it was for the purpose of procuring a cancellation of this mortgage; really Mr. Grossman was unwilling to cancel it, claiming he had a lien on it for fees and for services which

New Jersey State Library

he had performed in attempting to finance this building, which was unsuccessful.

Q. Of the $2000. check, Exhibit 51, check No. A-1268, how much of that— A. That is the first check to Jacob Starr, isn't it?

Q. Yes; that was paid over to him for the purpose of paying workmen on the job and to pay himself; you testified to. A. That was for the purpose of paying for the—Mr. Starr represented that he was the contractor for carpenter labor on this job, and I went up there and investigated and found out that he was actually working there; we couldn't question each carpenter working on the job.

Q. And he was personally working on the job? A. He was personally working on the job, his gang.

Q. Of the $2000. what did you understand Mr. Starr was to receive? A. Well, the representation was made to me at that time that there was some—I forget just how much—some two or three or four weeks in arrears on carpenter salaries and that they had refused to work any longer because of those arrears, and that if they were paid up, or paid up partially, they would then go on and work; now, Mr. Starr asked for it as the carpenter contractor; as a matter of precaution, however, I told him I wanted him to see that that money was actually paid to the carpenter laborers on the job, and that he agreed to do, and I understood he did do it, with the exception of whatever was due him for weekly salary as a workman on the job himself; of course he said he had to live and that of course he would have to take something for his own weekly salary.

Q. Mr. Starr told you he was a workman on the job? A. Yes.

Q. On a weekly salary? A. No; he didn't say he was on a weekly salary; he told me, as I have already stated, that he was the carpenter contractor on the job, but the job reached the point where he wasn't getting his money out of it in accordance with the contract; however, he had to live, he was working there as a carpenter, and because of that he had to draw something from week to week or he wouldn't be able to go on and work himself, which I agreed with him was reasonable.

Q. How much was he to get out of the $2000? A. Well, I forget just what it was; it was some very small part of it.

Q. $500? A. Although we figured it out together, he was to get, I think, the various carpenter's wages were, I couldn't remember all the details, we will say fifty or sixty or seventy dollars, and he was to draw it out as sort of a drawing account, a similar amount, I have forgotten just what it was, sixty dollars, or perhaps something in that neighborhood.

Q. For how many weeks? A. Well, out of the first week, perhaps the second week; I know he was trying, he wanted to have me advance more than that, and I refused to advance any more; I told him I would let him draw more money later.

Q. The same thing is true of subsequent checks made to Starr? A. Subsequent checks given to Starr were in payment of current wages due; of course this first check had been an accumulation of payments due, I don't know, for several weeks; but afterwards, as you see, the checks got less and less, the first few checks; after that I think I told him I didn't want him coming in every week and having me pay the payroll for him, because it would become a nuisance, so he allowed it to run

for two weeks, or perhaps three weeks in some instances.

Q. You didn't actually see to the application of the money yourself, personally, did you? A. I went out there to see that the men were working on the job, yes, and found they were working; he told me how many men were working, how many carpenters were working with him out there, and we figured out their salary list on that basis and we gave him a check accordingly; I would go out there to see whether the men were working and found that they were.

Q. I didn't ask you that; I asked you whether you actually saw to the application of the particular funds which you gave him in payment of a salary? A. I thought I was answering your question.

Q. No; that isn't so. A. That is what I started to tell you.

Q. I will ask you more specifically; did you actually go out there with Mr. Starr and see him hand over the money which you gave him to certain specified workmen? A. No, every time I gave him a check I didn't go out with Mr. Starr; I usually gave it to him, because very often I gave him the check on Saturday morning and by the time he was through in the office and on his way it would be about twelve o'clock.

Q. Then your answer is that you didn't go out with him to see him pay the workmen? A. No, I didn't go out with him to see him pay the workmen.

Q. According to your figures there, how much do you find due on your mortgage? A. Well, as I stated, I would have to reserve the right to check this total, the amount that I have here is $32,003.46.

Q. There wasn't any postponement signed by George F. Perry in favor of your client's mortgage, was there? A. The postponement agreements are in evidence; I don't find that name; the record speaks for itself.

Q. Have you? A. I don't find anything with George F. Perry in the shape of a subordination agreement.

JACOB STARR, recalled:

Direct examination by Mr. Pyle:

Q. Mr. Starr, you were the man who had charge of the carpenter work on this job? A. Yes, sir.

Q. You have heard these checks that I have testified to and that were offered in evidence, made to your order, and on which you were the endorser? A. Yes, sir.

Q. What did you do with the moneys received from those checks? A. Paid it to carpenters on the job and laborers.

Q. Did you actually take the check, get the cash for it, and then take the cash and pay the carpenters who had worked on that job? A. Most of them I used to cash the checks and get the cash; some of them I deposited and then drew the check.

Q. Then you drew the cash out of the bank? A. I drew the cash out of the bank.

Q. But all the moneys were used by you to pay this carpenter labor, with the exception of the small weekly charge which was paid to yourself as a carpenter? A. Yes, sir.

Q. You were actually working on this job as a carpenter? A. Yes, sir.

Q. You had taken over, as I understand it, the contract which you had in partnership with Mr. Silverman; Hyman Silverman? A. That is right.

Q. But you were not, at the time that my mortgage was made, and subsequently, you were not drawing payments under that contract to which you were entitled? A. No.

Q. You simply drew your weekly wage as a carpenter, as a payment on account? A. Yes.

No cross-examination.

HARRY STARR, recalled:

Direct examination by Mr. Pyle:

Q. Mr. Starr, had you had this survey or blueprint of a survey made of the property of the Capitol Construction Company? A. Yes, sir.

Q. Why was it divided up into three pieces?

Mr. Kanter: I object to that on the ground that this survey is not binding on anybody except in his own mind; there is no evidence that it was ever filed in any public office and therefore an arbitrary division would not be binding upon any of the parties to this suit, and especially George F. Perry & Sons.

Mr. Rubenstein: I want to say to your Honor that in the deeds you will find three descriptions which are set up in this survey.

Mr. Pyle: Aside from that, I want to say that it is a matter of record in the deed, this center piece where my mortgage went on, that is an indication that there is some division of the curtilage.

The Master: We will receive it for what it is worth.

Blueprint marked Exhibit 82.

Q. Was it actually divided? A. It was actually divided on the plot, because we figured to build on the two corners, on this corner and this corner (indicating) we figured to build a separate apartment house; so this is what we did figure.

Q. The new apartment that has now been built is this one shown on the center tract? A. Exactly.

Q. The three-story brick apartment? A. Exactly.

Q. You, as a matter of fact, never got to the point where you did build a separate apartment on each of the two outside tracts; you never did start any apartment on it? A. No, sir.

Q. The company failed before you got to that point? A. Yes, sir.

Q. But it was your intention and the intention of the company to develop the property in that way? A. Exactly.

Q. The way it is divided on this survey?

Mr. Pyle: I offer the survey in evidence.

Mr. Kanter: I object to the survey.

Mr. Talley: I make the same objection as far A. S. Ried & Company is concerned.

Mr. Kauffman: I make the same objection.

By the Master:

Q. Was this survey filed in any public office? A. It was in Cranford.

By Mr. Kanter:

Q. What office? A. In the Building Department.

By the Master:

Q. When you applied for permission to build did you give a description of the building; did you file this survey? A. In the Building Department; yes, sir.

By Mr. Rubenstein:

Q. Did you have a plot plan attached to the plans and specifications that you filed in the Township of Cranford? A. A plot plan, yes.

Q. Have you got your plan here? A. No; we haven't got them.

By Mr. Kanter:

Q. Mr. Starr, do you mean to tell us that you filed a copy of this plan which has been marked Exhibit 82, with the Building Department of Cranford, before you started the building? A. Yes, sir.

Q. You notice the plan is dated September 8, 1927? A. Yes.

Q. When did you start the building? A. I don't remember now.

Q. Do you know when the mortgages were given to your various mortgagees? Do you know when you gave the mortgage to Mr. Pyle's client?

The Master: That apparently shows by the record.

Q. Mr. Pyle calls attention to the fact that your statement is apparently incorrect, that this

plan was made up after you had your building up; is that correct?

Mr. Pyle: No, I didn't call his attention to that.

Mr. Kanter: I will ask counsel please not to interrupt.

Q. Now I show you the date on this plan again, September 8, 1927. A. Yes.

Q. I ask you when you started your building.

Mr. Pyle: You started in May, 1927, didn't you?

A. We started in May, 1927, yes.

Q. Then the building was practically up to the roof or beyond the roof in September, 1927, wasn't it? A. Why, besides this we had a couple of blue prints like that then we had them made again.

Q. I don't care; you said you filed this plan. A. Not exactly this one; but this is filed in the Building Department of Cranford.

Q. You notice the surveyors were Downey & McLaughlin engineers, 201 Broad Street, Elizabeth, and they made this plan for you on September 8th, 1927; when did you file it in the building department? A. Oh, we had different plot plans like this made.

Q. Show me any plan; have you that plan in your possession? A. No, sir; when we had the building on, then this was located according to the building.

Q. When you started this building did you put up any fence on this plot, or any part of it? A. No.

Q. You had building material and lumber and everything strewn all over the land, didn't you? A. Yes.

Q. There was nothing to show that you intended to reserve any part of it for future operations? A. There was to show.

Q. What? A. We had made by the surveyor before, when the engineer was down there they drove stakes down there.

Q. Was there anything; if you came up on the land and looked at the building while it was in course of construction looked at the building or at the land, was there anything to show that you did not intend to use the entire plot for that building? A. Yes; we had our lines down there; we had laid out the building; that was for the building, and then the two corners were separated.

Q. Was there any fence on the plot? A. No, sir.

Q. Was there any physical separation between one plot and the other? A. Yes.

Q. What was it? A. It was made out stakes the way we are laying it out, it was stakes like driven in the ground, then there was a plot like, it is three or four inches around, then you could see the difference.

Q. You saw that, did you? A. Well, I followed this.

Q. Did you call that to the attention of any of the material men? A. No.

Q. When you bought this property did you buy it as three plots or one plot? A. When I bought this?

Q. Yes. A. We bought this as one plot, the way it is.

Q. When you sold it to the Capitol Construction Company did you sell it as one or three plots? A. Three plots.

Q. You sold it as three plots? A. Yes.

Q. You are sure about that? A. Just the way I have this.

Q. Do you remember the date of the deed by which you sold the plot from you and your partner Silverman to the Capitol Construction Company? A. No, sir.

Q. You still insist on saying and are willing to swear to it that you sold it as three plots to the Capitol Construction Company? A. Yes, sir.

Q. You still insist upon it? A. Yes, sir.

Q. Do you remember what date you sold the plot to the Capitol Construction Company? A. No, sir.

Q. But you remember it was by three plots, and the survey was made before the deed was drawn, wasn't it? A. Yes, sir.

Q. And therefore you drew the deed by three plots? A. Yes, sir.

Q. When you mortgaged this property Israel Shilowitz and Jacob Tucker for $20,000. did you mortgage it by one or three plots? A. I don't remember.

Q. That was after you had drawn the deed? A. Yes, sir.

Q. When you mortgaged it to Louis Schwartz did you mortgage it by one plot or three plots? A. I don't remember this.

Q. You drew this plot in anticipation of giving a mortgage to the Junction Milling Company, didn't you? A. Yes.

Q. And it was for the first time then, when you were about to give a mortgage to the Junction Milling Company, that you drew up this map Exhibit 82; isn't that true? A. No, that was before.

Harry Starr, on Behalf of Carteret Company
Mortgage—Direct.

Q. Do you know the date when you gave the mortgage to the Junction Milling Company? A. No, sir.

Q. When you mortgaged this property to the Carteret Company, did you give the mortgage by one or three plots? A. Three plots.

Q. Sure about that? A. Yes, sir.

Q. Look at the description and find the three plots in there. A. (No answer.)

Q. You can read, can't you? A. No.

Q. You can't read? A. No.

Q. When you gave the mortgage to the West Bergen Trust Company, did you mortgage it by one or three plots? A. Three plots.

Q. When you mortgaged it to the Trust Company of New Jersey did you mortgage it by one or by three plots? A. Three plots.

Q. When you mortgaged it to Edward P. Stout, did you mortgage it by one plot or three plots? A. Three plots.

Q. When you mortgaged it to the Trust Company for $16,000, did you mortgage it by one plot or three plots? A. Three plots.

Q. When you mortgaged it to the Riverside Apartment Corporation, did you mortgage it by three plots? A. I don't remember.

Q. Where is the driveway; is the driveway for the garage from Riverside Drive? A. We got a drive right from here (indicating).

Q. There is no driveway from Riverside Drive, is there? A. It is right over here (indicating).

Q. Is the driveway to the garage from Riverside Drive as you constructed the building? A. When I constructed the building I arranged here for a drive of ten feet to this building.

Q. As a matter of fact, you left no driveway; but the driveway runs from Prospect Avenue, doesn't it? A. No, sir.

Mr. Rubenstein: This man didn't finish the building. This building was finished by somebody else.

A. I didn't build no garages there at all, but we did arrange to have this driveway.

By the Master:

Q. Whatever arrangements are there not for the entrance and exit of automobiles, you didn't build? A. No, sir; I don't know.

By Mr. Pyle:

Q. Mr. Starr, when your company, the Capitol Construction Company, purchased this property, you purchased it from Starr & Silverman, didn't you? A. Yes, sir.

Q. Do you know whether in that deed from Starr & Silverman this property was described by one or three plots? A. In three plots.

Q. Do you know what date you purchased it? A. No.

Q. Your company purchased it, I mean? A. No, I don't know.

Q. Do you recall ever having had a survey made of this plot at about the time the purchase was made? A. I went down myself to make the surveys which is here; we laid out the plot for three plots that is, we went down to the survey for these three plots and it was arranged.

Q. Who was the surveyor? A. It is down there, he is in Cranford, really I don't remember his name.

Q. Was it Jacob Bauer? A. I don't remember his name.

Q. Did you go to a surveyor in Elizabeth, with an office in Elizabeth, for the survey of this plot? A. No, sir.

Q. Do you know as a matter of fact that the deed from Starr & Silverman to the Capitol Construction Company recites a survey made by Jacob E. Bauer, on June 11, 1927, and that that survey refers to one description, of one plot only? A. No, sir; I don't know.

Q. Do you know this, that the deed from Starr & Silverman to the Capitol Construction Company was dated May 25, 1927, and was not recorded until October 24th, of the same year; do you recall that there was a long time before it was recorded? A. No, I don't recall this.

Q. Do you recall that after the deed was dated, but before it was recorded, you had a survey made by Jacob L. Bauer, of Elizabeth, New Jersey? A. No, sir.

Q. Would you say that that was not done? A. Perhaps it was, maybe, but as far as I know this was always the work on this building, as soon as we bought this plot we worked according to this survey.

Q. You have no recollection or knowledge whether the deed to the Capitol Construction Company recites a survey by Jacob L. Bauer, dated June 11, 1927? A. No, sir.

Q. You don't know, do you? A. No.

By Mr. Kanter:

Q. Didn't you borrow $30,000. from the Riverside Apartment Corporation as a construction loan for this building? A. Yes, sir.

Q. Do you know what premises you described as security for that construction loan? A. As a security?

Q. Yes. A. Those two plots, I suppose; these two plots.

Q. Are you guessing now, when you say "I suppose"? A. Nothing else; we didn't have any different property.

The Master: Won't the deeds speak for themselves?

Mr. Kanter: I want to discredit this gentleman if I can absolutely.

Q. Mr. Starr, what we are trying to find out from you is, what property did you mortgage, and how did you mortgage it, by one, two or three descriptions, when you mortgaged it to the Riverside Apartment Corporation for $30,000. and secured a construction loan? A. That was on three plots.

Q. You are sure about that, are you? A. I am sure it is three plots.

By the Master:

Q. Do you know how to draw a description in a deed? A. No, sir.

Q. Do you know anything about it? A. I don't know a thing about it.

Q. Then why did you answer questions if you don't know anything about it?

By Mr. Pyle:

Q. You never got to the point of building any driveway to garages on this property as you originally intended; that is the Capitol Construction Company didn't? A. No, sir.

Q. They failed before they got that far? A. Yes, sir.

Q. When you came to me to get this mortgage loan upon the property, your first application was for a mortgage on this central piece only, wasn't it?

Mr. Kanter: I object to that question. The issue in this case is not as to the private agreement between him and Mr. Pyle. The issue is as to the priority of the liens and nothing else. I object to any conversation between Mr. Pyle and anybody else.

The Master: Well, I think this witness is a lay witness; you have asked him did you sell this by three tracts and did you make this as three tracts; you asked him a number of things along that line. I am going to assume that he doesn't know anything about that.

Q. When you came to me you applied for a mortgage on this central tract and showed it on the survey of the whole thing?

Mr. Kanter: I object to that as leading.

A. Yes, sir.

Q. And you applied for a mortgage on the central portion of the whole tract? A. Yes, sir.

Q. And at that time we found there was a mortgage——

Mr. Kanter: I object to that question, if the Court please. Mr. Pyle wants to ask him a question, he can say, What did you tell me, or what did I say to you; that will bring out the answer he wants.

The Master: Don't lead him, Mr. Pyle. That is what he is objecting to.

Q. When you came in there was a mortgage on the property to the Junction Milling Company; and what did I say in regard to how that mortgage would have to be taken care of; what would have to be done to that mortgage before I would make any loan to you? A. We shall release that mortgage of the Junction Milling Company, and then you will place your mortgage.

Q. Did you take the matter up with the Junction Milling Company then? A. Yes.

Q. Did they release the whole tract, or what did they release; what did they say when you went to them and asked them to do that? Do you recall going to them? A. He released the tract, that is what he done.

By Mr. Kanter:

Q. Did they release the whole tract, or part of the tract; or was his mortgage canceled, do you know? A. His mortgage was canceled.

Q. The whole mortgage? A. The whole mortgage.

Mr. Rubenstein: I object to that; I think the proper question is, did he get a release?

Q. Did you get a release from the Junction Milling Company? A. Yes.

Mr. Rubenstein: Well, offer the release in evidence; that speaks for itself.

Q. Before the company failed you attempted to procure a permanent mortgage upon this improvement, didn't you? A. Yes.

James E. Pyle, on Behalf of Carteret Company Mortgage—Direct.

Q. What property did you apply for a mortgage on in that application? A. On that building.

Q. On that building, on what ground; on the central tract, or the whole thing, or the two wings? A. No, not the whole thing; only the building alone.

Q. Then the central tract? A. Yes, sir.

Q. Did you try in one place or several places for a permanent loan? A. We applied in several places.

Q. In each place you applied for a loan on the central tract? A. On the central tract.

Q. This survey that we offered in evidence here, that is a copy of the survey which you had made before the building was erected, and that divided it up in these same three tracts? A. Yes.

Q. But showing no building on it? A. Yes, sir.

Q. After the building was erected you had the surveyors locate the building on this central tract for the purpose of getting a mortgage and handling the title? A. Yes, sir; exactly.

JAMES E. PYLE, recalled:

A. When the Capitol Construction Company came to me for this mortgage loan of the Carteret Company, they first wanted to put this mortgage only upon the central tract; and I first tried to get Mr. Lenkowsky to cancel his mortgage entirely on the whole tract.

The Master: Who is Lenkowsky?

A. The Junction Milling Company, I should say. He didn't want to do that. He insisted that he would release the property that was being developed, but he would not release the undeveloped tracts, because, as he claimed, they would probably want to sell those separately, and then he would be in a position to get his money; he agreed to release only the central tract; and I then insisted that—for the Carteret Company—if they had some other property there, that it should also be included in the mortgage; while I did not think the security behind somebody else was worth very much, it ought to be included for whatever it was worth; in other words, that they ought to give whatever they had; that was the reason the mortgage was placed in that way on the central tract ahead of the Junction Milling Company mortgage, and as to the wings, so-called, behind the Junction Milling Company mortgage.

Cross-examination by Mr. Kanter:

Q. Mr. Pyle, the mortgage given by the Capitol Construction Company to the Junction Milling Company in the sum of $11,619 recorded in Book 886 of Mortgages for Union County on page 390, did not cover the central tract at all, did it? A. My recollection of it is that the descriptions were in such shape that they each overlapped on the central tract, or you couldn't tell whether they did or not, and they were drawn in such a way that there were questions as to whether they would not lap over it. I tried to get them to wipe the whole thing out, but they wouldn't do it; they insisted on retaining it, so we got that release.

Q. But his mortgage didn't cover the central tract at all; there were no three descriptions in

his mortgage at all; the Junction Milling Company? A. I couldn't tell you that; but my recollection is that there were discrepancies in his description, where they lapped over onto the central tract.

HARRY STARR, recalled:

Direct examination by Mr. Tally:

Q. Mr. Starr, you were treasurer of the Capitol Construction Company? A. Yes, sir.

Q. Did you enter this order with A. S. Reid & Company for bricks for the apartment house to be constructed in Cranford owned by your company? A. Yes, sir.

Q. Is this in your handwriting (indicating)? A. Yes, sir.

Q. By the terms of this order you requested the shipment of 15,000 factory 53-10 bricks and 45,000 factory 6-b full range red bricks; is that correct? A. Yes, sir.

Order marked Exhibit 83.

Q. You were the man who was in charge of the carpenter work on the building, weren't you? A. No, sir.

Q. What part did you have to do with the construction of the building? A. Well, I took care of making contracts with everybody.

Q. Weren't you in charge of the supervision? A. Yes; we took care, but I didn't care for the carpenters.

Q. Well, you were in charge all the time, weren't you? A. I was in charge of the workmen who went up.

Harry Starr, on Behalf of A. S. Reid & Company—Cross.
Jacob Starr, on Behalf of A. S. Reid & Company—Direct.

Q. Do you know whether the bricks which you were ordered from A. S. Reid & Company were delivered to that job and used there? A. Yes, sir.

Q. They were, weren't they? A. Yes, sir.

Q. Do you know of your personal knowledge? A. I know of my own personal knowledge they were delivered there?

Cross-examination by Mr. Stout:

Q. How do you know that, Mr. Starr? A. Well as far as Jake told me; my brother told me.

Q. Jake told you? A. Yes, sir.

JACOB STARR, recalled.

Direct examination by Mr. Tally:

Q. Mr. Starr, you were president, weren't you? A. No, sir.

Q. Or Treasurer; was that it? A. Secretary.

Q. Secretary of the Capitol Construction Company? A. Yes, sir.

Q. Did you have charge of the work that was being done on the apartment house in Cranford? A. Yes, sir.

Q. Are you familiar with the order which was placed with A. S. Reid & Company for the bricks for that building? A. Yes, sir.

Q. Are you able to state of your own personal knowledge whether those bricks were delivered and used on that job, by A. S. Reid & Company? A. Yes, sir.

Q. At the time this order was placed, it was changed, was it not, so that you and Mr. Silverman could endorse the notes which were to be given; do you recall that, or not? A. No, I don't know anything about changing contracts.

Q. Do you know whether all the bricks which you ordered were actually delivered there? A. If the bricks what I ordered was delivered there?

Q. Yes; all of them. A. I didn't select no bricks at all.

Q. Who did select them? A. Mr. Harry Starr and Hyman Silverman, they select the price there; I was always on the job and I received anything that came.

Q. Was there any shortage of bricks there? A. Yes, sir.

Q. How many? A. I remember we ordered and they told me that they ordered about 15,000 front brick, and then they were short about 4000 more, so it was delivered.

Q. By A. S. Reid & Company? A. Yes, sir.

Q. It was delivered? A. That is right.

Q. So you got your whole 15,000 front brick? A. Yes.

Q. Did you get your whole 45,000 factory brick 6-b?

Mr. Kanter: In addition to the 15,000?

Mr. Tally: Yes.

A. I don't think it was so many; 19,000 I think.

Q. Do you know when you found there was a shortage whether that was because the original order had not been filled, or whether the order which you placed was not sufficient? A. That I couldn't tell you; I know one thing we were short on the job and I think we took it up with the mason at that time, there was 15,000 bricks and

he said it wouldn't be enough, but if it was more or not, that I don't know.

Cross-examination by Mr. Stout:

Q. Did you actually supervise the receipt of the bricks on the job? A. The actual bricks, no, I took most of the time care of the carpenter work.

Q. When these bricks were delivered on the job, were you there; did you keep tally of the bricks delivered, or did someone else do that? A. I gave it; I received the bricks there; I signed the ticket.

Q. Did you sign the ticket for these deliveries? A. I think I did.

Q. You think you did? A. Yes, sir.

HYMAN SILVERMAN, recalled.

Direct examination by Mr. Tally:

Q. You were president of the Capitol Construction Company? A. That is right.

Q. I show you order dated April 26, 1927, requesting shipment by A. S. Reid & Company of approximately 15,000 factory No. 53 tan bricks at $38. per thousand, and approximately 45,000 factory 6-b full range bricks at $36. a thousand; was that order signed by you? A. Yes, sir.

Q. Is that your signature on there (indicating)? A. Yes, sir.

The Master: Is that in addition to this Exhibit 86?

Mr. Tally: Yes.

Q. Do you know of your own knowledge whether or not those bricks were delivered? A. I know they was on the job.

Q. But you don't know the exact number? A. No, I don't remember.

Cross-examination by Mr. Stout:

Q. You don't know how many bricks were delivered there? A. No.

Order marked Exhibit 87.

CARL G. MARQUARDT, sworn:

Direct examination by Mr. Tally:

Mr. Tally: If the Court please, I offer in evidence certified copy of a lien claim filed by A. S. Reid & Company against Capitol Construction Company and others, in the Union County Clerk's office, on November 18, 1927, on which there is the endorsement that summons was issued on November 18, 1927.

Marked Exhibit 85.

Mr. Tally I also offer in evidence at this time a certified copy of the final judgment in a suit in the Union County Circuit Court of A. S. Reid & Company against Capitol Construction Company and others, dated July 7, 1928, for the sum of $3,163.63 damages and costs of $70.27, which judgment adjudicates that the judgment shall be

prior to the mortgages of the defendants, Louis Schwartz and Junction Milling Company and Edward P. Stout, Trustees.

Mr. Stout: I object to the receipt of that certified copy of judgment in evidence on the ground heretofore stated that all mechanics lien claims are on the same footing; and secondly, which I think is more serious, that this judgment was entered after the receiver had been appointed for the Capitol Construction Company, and under the order appointing the receiver there was an injunction not only against the claimants bringing suit, but against those that had already brought suit from further prosecuting it.

Mr. Rubenstein: I make the same objection.

Mr. Kanter: May I suggest to you that the decisions point out that it doesn't make a particle of difference whether a corporation goes into the hands of a receiver or not, and if suit is once instituted on a mechanics' lien claim that we have a right to proceed regardless of the status of the insolvency of the company, that it may be prosecuted to final judgment but no *fi fa.* may issue on the judgment so obtained.

Q. Mr. Marquardt, what position do you hold with A. S. Reid & Company? A. Secretary.

Q. Are you in charge of the books of account of that company? A. Yes, sir.

Q. Are the records which you have produced in court the original books or records of account of A. S. Reid & Company? A. Yes, sir.

Q. Were those accounts made up under your supervision? A. Yes, sir.

Q. Have you an account in the name of Capitol Construction Company? A. Yes, sir.

Q. Will you turn to it? A. Right here (indicating).

Q. What is the amount due on that account?

Mr. Rubenstein: I object to that.

Mr. Seclow: I object to that. In a lien claim suit the general rule is that a book account is not proper proof of delivery and therefore I object to it.

No cross-examination.

JACOB STARR, recalled.

Direct examination by Mr. Tally:

Q. I show you delivery ticket 10904 bearing the name A. S. Reid & Company, dated June 9, 1927; was that signed by you? A. Yes, sir.

Q. Were the materials for which you signed delivered? A. Yes.

Delivery ticket marked Exhibit 86.

Q. I show you delivery ticket 14783, bearing the name A. S. Reid & Company, dated May 11, 1927, is that your signature? A. Yes, sir.

Q. Were those materials delivered for which you signed?

Delivery ticket marked Exhibit 88.

Q. I show you delivery ticket 14869 bearing the name A. S. Reid & Company, dated May 10, 1927; is that your signature? A. Yes, sir.

Q. Were those materials described in this delivery ticket delivered to the apartment house? A. Yes, sir.

Delivery ticket marked Exhibit 89.

Q. Can you tell me who Nat Starr is? A. Yes; he was a man on the job working.

Q. Is he here in court today? A. No.

Q. Is he related to the other Starr here? A. Yes, sir.

Q. How? A. A son.

Q. Where does he live? A. 333 Fulton Avenue.

Q. Jersey City? A. Right.

Mr. Stout: If the witness will state that that is the signature of N. Starr, I am willing to let it go in evidence.

Mr. Rubenstein: I take it that he was working on the job.

Q. Do you know Nat Starr's signature? A. No.

Q. Was he working on the job? A. Yes, sir.

No cross-examination.

HARRY STARR, recalled.

Direct examination by Mr. Tally:

Q. Are you familiar with your son's signature? A. Yes, sir.

Q. Is that his signature (indicating)? A. Yes, sir.

Mr. Tally: I offer in evidence delivery ticket 10954, dated June 29, 1927, which is admitted by counsel.

Marked Exhibit 90.

Mr. Tally: I offer in evidence delivery ticket 10962, dated July 1, 1927, by consent of counsel.

Marked Exhibit 91.

Mr. Tally: I offer in evidence delivery ticket 10961, dated July 1, 1927, by consent of counsel.

Marked Exhibit 92.

Mr. Tally: I offer in evidence delivery ticket 10997, dated July 20, 1927, by consent counsel.

Marked Exhibit 93.

Q. Do you know whose signature that is (indicating)? A. No, sir.

Q. Who was L. Roberts, Mr. Starr? A. I don't know if we got anybody on the job by that name.

HYMAN SILVERMAN, recalled:

Direct examination by Mr. Tally:

Q. Is this your signature (indicating)? A. Yes, sir.

Q. Were those materials delivered while you were there? A. Yes, sir.

Mr. Tally: I offer in evidence delivery slip 10950, dated June 27, 1927.

Marked Exhibit 94.

Mr. Tally: I would like permission of the Court to reserve my right to produce

these other two men; I don't know myself just now who they are, but I think I can ascertain. I will proceed with the proof of the book account.

The Master: I don't think you need to prove the book account, now that you have proved the deliveries, only as to the value of the materials.

Cross-examination by Mr. Stout:

Q. Who on behalf of the Capitol Construction Company had authority to sign receipts for the delivery of goods? A. The three of us.

Q. Well, the three of you; here is evidently Nathan Starr also; did he have authority? A. He did not.

By the Master:

Q. Who was Nathan Starr; your nephew? A. That is right.

Q. What was he doing on the job? A. He did carpenter work.

Q. Did he ever sign for the delivery of goods? A. Not as far as I know.

Q. His only job was to do carpenter work? A. Yes, sir.

By Mr. Tally:

Q. He was your son? A. Nephew.

Mr. Tally: I will call Harry Starr.

Mr. Rubenstein: As far as my client is concerned; I will admit that that was proper delivery with that signature on; I think the materials went to the job; why waste all this time?

Mr. Tally: I am not trying to prove a forgery here. I will subpoena these men if counsel is not satisfied.

Mr. Rubenstein: I am ready to admit that that is proper proof.

The Master: I can't see personally whether the man had authority or not makes any difference.

Mr. Stout: If you are relying on the delivery slips then it seems to me that you must show that it went into the building.

Mr. Tally: I understood counsel to mean when they consented that they could go into evidence, that they admitted the authority. I am willing to stand on that.

Mr. Stout: What I was trying to bring out was whether somebody else had authority to sign; I am not going to question that now.

CARL G. MARQUARDT, recalled:

Direct examination by Mr. Tally:

Q. Did you ever visit the premises in Cranford on which the Capitol Construction Company was erecting this apartment house? A. Yes, sir.

Q. How many time, if you recall? A. Oh, no less than six; probably eight times; eight or ten; no less than six.

Q. Are you able to testify from your own knowledge whether all the bricks which were ordered by the Capitol Construction Company were delivered to that job in Cranford? A. Yes, sir.

Q. They were, or were not? A. They were.

Q. Did you see them in use there? A. Yes, sir.

Q. How were the deliveries made, if you know? A. In most cases in carload lots; fifteen to sixteen thousand brick.

Q. Will your records show how many bricks in all were actually delivered to the job? A. Yes.

Q. Will you refer to your records and state about how many——

Mr. Stout: I object to the books as not proper proof of delivery.

Q. Can you tell from your books how many were shipped? A. Yes, sir.

Q. You can refresh your recollection by reference to your books, can you? A. Yes, sir.

Mr. Seclow: May I ask the witness a question at this point?

By Mr. Seclow:

Q. Mr. Marquardt, did you ship these bricks in carloads? A. Did I personally ship them?

Q. Yes? A. No, sir.

Q. Where were they shipped from? A. They were shipped from two points of origin in carload quantities; the first point of origin is a little station near Meredith; the bills of lading would be dated at Reynoldsville, Pennsylvania.

Q. Where is your office? A. Our office was in Newark.

Q. They weren't shipped from where you were stationed here at all? A. No, sir.

Q. The only knowledge that you have of this is from these tickets? A. And visiting the job.

Q. Did you see the cars come in? A. Some of them I saw the brick piled on the job.

Q. Did you see the cars come in? A. Yes, sir.

Q. How many? A. Well, on two occasions I was there when they were delivering the bricks.

Q. How many cars were delivered then? A. How many cars?

Q. How many cars have you seen delivered at the railroad station? A. Well, I saw two cars.

Q. How do you know it was your brick? A. How do I know that this is my suit?

Q. You are wearing it; you didn't wear the brick that was in the carload; there are lots of brick in cars, aren't there, at the railroad station? A. Well, we were only shipping one lot of brick to one customer in Cranford.

Q. How do you know that the brick in any particular car belonged to you? A. From the colors of the brick, from the texture, from the quantity of the brick, from the nature of the brick. Is that sufficient?

Q. So you saw two carloads, 30,000 brick? A. Yes, sir.

By Mr. Tally:

Q. Can you tell us as to how many, the total number of brick, that were shipped?

Mr. Seclow: I object to that, because it is not shown where he bases his knowledge; he knows because he saw two carloads of brick at Cranford and from the kind of brick in there. Of course, I think it is a fair inference that this brick was shipped by his concern, but now he is going to tell about all the brick, when he only

knows about two cars shipped by his concern and that is 30,000 brick.

The Master: It seems to me the proof should be what was the unit price for the bricks delivered as shown by these delivery slips received in evidence.

Q. What was the price to be paid for the bricks shipped? There were two classes of brick received. A. For the tan brick it was $38 and the red brick, that is the red range, we call it, was $36 per thousand.

Q. Do the delivery slips show the kind and character of brick delivered? A. Yes, sir.

Q. According to the books, how many bricks of class 53 were shipped? A. 20,000.

Mr. Seclow: I object to that as immaterial.

The Master: I think that objection is proper. You can't show delivery by your books of account.

Mr. Tally: The only reason I am doing this is because I have reserved and your Honor granted me the right to produce the other two witnesses who signed delivery slips. My purpose is to dispense with this witness today, if it is possible, by showing the amount due on the book account. If I can't prove delivery my efforts will be futile.

Q. Will you refer to your ledger; is that the book which shows the charges? A. Yes.

Q. Referring to the delivery on July 1, 1927, 500 bricks class No. 6. A. That is contained in the item of 1900; that was taken by small lots,

500, 600 or 700; we grouped it in one item, 1900 brick; you will find others there that brings that total.

Q. There are two tickets of that date; what was the price of those 1900? A. Those were a higher price; they were taken from stock in Jersey City; they were taken in stock by their own man; Nat Starr probably drove that truck; on the ticket it is marked stock, Lester Fellows, Jersey City; Nat Starr probably drove the truck in and he signed for them.

Q. What was the price of that brick? A. $68.40 for 1900.

Q. Now refer to July 20, 1927. A. That is 3000.

Q. No. 6? A. Number six.

Q. How much were they? A. $40 a thousand; $120.

Q. Refer to May 10, 1927; that is No. 14869. A. That was for 15,000 red brick $36. $540.

Q. May 11, 1927; that is ticket 14873. A. That is for 20,000.

Q. Right. A. Of tan brick, No. 53, at $38. $760.

Q. Refer to June 9, 1927, ticket 10904. A. That is for 15,000; that also is $540.

Q. There are two 15,000. A. The same amount, two cars.

Q. How much was that? A. Each car 15,000 brick; each invoice $540.

Q. That is a total of $1,080 for that ticket; is that right? A. Yes, sir.

Q. June 29, 1927, ticket 10954; how many bricks were there? A. 700 from stock, Lester Fellows.

Q. How much were they? A. $25.20.

Q. Altogether? A. Yes, sir.

Q. June 27, ticket 10950. A. 3,000 brick.

Q. Yes. A. $120.

Q. Refer to ticket of July 5, 1927, 10963. A. 12,000 brick, $432.

Q. And ticket of July 8, 1927, 10974. A. That is 13,000, $468.

No cross-examination.

JOSEPH MACHETTO, sworn.

Direct examination by Mr. Tally:

Q. You were the mason contractor on this job in Cranford, were you not? A. Yes, sir.

Q. Did you have charge of the bricklaying there? A. No; I had the foreman in charge of the bricklaying.

Q. What did you have to do there? A. Well, I used to go there on the job a couple of times a week, two or three times a wek, and so on, and go there with the payroll.

Q. Do you know L. Roberts? A. No; I don't know this fellow.

Q. Are you familiar with his signature (indicating)? A. No.

Q. You don't know who that is? A. No.

Q. Do you know of your own knowledge how many bricks from A. S. Reid & Company were laid on that building? A. I can't tell you just how many.

Q. Have you any records? A. I might have a record, but I wouldn't promise.

Q. You don't know? A. No.

No cross-examination.

MAX PLATT, sworn.

Direct examination by Mr. Rubenstein:

Q. Where do you live? A. 34 West 29th Street, Bayonne.

Q. What work did you do on the job? A. Lathing.

Q. Did you have a contract? A. Verbal, yes.

Q. How much? A. $5500, and $400 extras.

Q. For what? A. For the closets.

Q. You received $1,950 on account? A. Yes, sir.

Q. So there is a balance of $3,950 due you? A. Yes, sir.

Q. Do you know the last day you did work on that job? A. Well, I got my book here; December 1st.

Q. Was it December 1st or 2nd? A. December 1st.

Q. 1928? A. 1927.

Mr. Rubenstein: I offer in evidence a certified copy of the lien claim in which Max Platt is claimant, against Capitol Construction Company and others, filed on January 3, 1928, in the Clerk's office of Union County. A certified copy of the record shows that summons was signed, sealed and issued on the 20th day of February, 1928.

(Marked Exhibit 95.)

By the Master:

Q. You were a contractor on the job? A. Yes, sir.

Cross-examination by Mr. Kanter:

Q. This sheet from which you testified is not your original entry, is it? A. What do you mean, original entry?

Q. Wasn't this sheet inserted in that book? A. I took that with me the last time I went to court.

Q. I show you the prior sheet, called account No. 7; this sheet has no account number; and the sheet thereafter is account No. 8; and you notice that the Capitol Construction Company was put after Starr Brothers in the index under the letter "S"; is that correct? A. I suppose so.

Mr. Seclow: I object to that as being improper cross-examination.

The Master: I think he has testified from this book as to the last day he did any work.

Q. You didn't make that entry? A. No.

Q. Weren't the entries on this sheet headed "Capitol Construction Company" made at one and the same time? Look at the writing and see. A. What do you mean, at the same time; there was every week in that, every week separate.

Q. And this account is called Capitol Construction Company? A. Yes, sir.

Q. It was not put in the place in your ledger where the Capitol Construction Company would ordinarily occur, under the letter "C"? A. Well, I have to enter the name that represented the Capitol, that is where I put it, after Starr & Silverman to know where I was to look.

Q. Do you mean to tell the Master that these were not written at one and the same time? A. Why would they?

Q. You got a charge here; you charged here for lath, and metal lath? A. We supplied that to the job.

Q. The metal lath was a separate claim? A. Not wood lath; I didn't supply any wood lath.

Q. Your lien claim included work and materials? A. Part for materials; not all the materials.

Q. Wasn't your claim for labor alone? A. For labor alone.

Q. You start off this sheet with a balance of $5400., don't you? A. $5500. that was the contract.

Q. You don't say on this sheet Capitol Construction Company, do you? A. Right here it is Capitol Construction Company (indicating).

It is stipulated that the lien claim of Max Platt is postponed to the mortgage of the Carteret Company.

It is stipulated that the lien claim of A. S. Reid & Company is subsequent to the lien of the mortgage of the Carteret Company.

Continuation of depositions in the above entitled cause, taken before me, Aloysius H. McMahon, a Master in Chancery of New Jersey, at the Chancery Chambers in Jersey City, New Jersey, this twenty-fifth day of June, 1929, at eleven o'clock in the forenoon.

JOSEPH GREINER, sworn:

Direct examination by Mr. Kauffman:

Q. Mr. Greiner, what is your business? A. I am working for Ira R. Crouse.

Q. What is your position? A. Manager of Crouse's lumber yard.

Q. I show you a certified copy of lien claim and ask you how much money is due Ira R. Crouse for materials furnished to the Capitol Construction Company on their job in Cranford? A. $19,383.79.

Q. When was the date of the last delivery of goods on this job? A. December 19, 1927.

Q. How much is due Ira R. Crouse on account of the lien claims? A. $19,383.79.

Q. Were all these goods actually delivered? A. They were.

Mr. Kauffman: I would like to introduce a certified copy of the record of the lien claim.

The Master: When was the lien filed?

Mr. Kauffman: It was filed January 12, 1928; no suit was started on this lien claim; the insolvency petition was filed within the four month period and we didn't start suit, because under the law we are not required to do so.

Marked Exhibit 96.

Mr. Kauffman: We agree that the Tucker and Shilowitz mortgage and the Carteret Company mortgage are prior to our lien claim, he having signed subordination agreements.

HYMAN SILVERMAN, sworn:

Direct examination by Mr. Kauffman:

Q. What is your position with the Capitol Construction Company? A. President.

Q. On January 4th, 1928, before the lien claim was filed, did you go over the accounts of Ira R. Crouse? A. Well, we had the bills.

Q. Do you remember signing this stipulation as to the amount that was due Crouse? A. Yes.

Q. How much is the amount due? A. 19,383.79.

Q. Were those goods all shipped to the Cranford job? A. Yes, sir.

LOUIS MOORE, sworn:

Direct examination by Mr. Kauffman:

Q. What is your business, Mr. Moore? A. Plumber.

Q. Did you do any work for the Capitol Construction Company? A. Yes, sir.

Q. On what job? A. On the River View Apartments.

Q. Did you sign an agreement agreeing that the mortgage of the Carteret Company shall be prior in lien to your lien claim? A. I did.

Q. Did you also sign a stipulation making the mortgage of Tucker and Shilowitz prior to your lien claim? A. Yes, sir.

The Master: Is this your signature on Exhibit 41?

A. Yes, sir.

Q. How much is the amount of the contract that you had with the Capitol Construction Company? A. $23,000.

Q. How much has been paid you? A. The first check was $1,500; I got a check from Mr. Pyle for $7,000. and $2,000; $10,500.

Q. When was the last work done on this job, Mr. Moore? A. That was practically everything finished except a few items.

Q. What date? A. I couldn't remember when it was.

Q. About when? A. About a year and a half or two years ago.

Q. How much work had to be done at the time that the job was stopped? A. I figured about $2,000.

Q. How much had you done? A. I finished the job for the other party, you know.

Q. How much is the amount that was due you at the time that the lien claim was filed? A. $10,500.

Q. That is made up of $23,000. the amount of the contract, and you received $10,500. and $2,000. was the value of the unfinished work? A. Yes.

Q. Leaving a balance due of $10,500; is that right? A. Yes, sir.

Mr. Kauffman: I would like at this time to introduce a certified copy of the record of the lien claim filed in the Union County Clerk's office; and there was no suit started on this lien claim.

Marked Exhibit 97.

Cross examination by Mr. Kanter:

Q. Did you have a written contract for your work? A. No.

Q. All this was an oral contract? A. Yes, sir.

Q. Did you have an agreement as to what payments were to be made you during the course of construction? A. Yes.

Q. What was the agreement for payments? A. He made an agreement to give me $1500. on the roughing; he didn't have any more, and the fixtures would be $9000.

Q. You installed the fixtures? A. I had the fixtures installed, yes.

Q. Your contract price was how much? A. $23,000.

Q. How was that to be paid? A. In payments.

Q. How? A. Well, they had to give me $9000. on the fixtures and $1,500 on the roughing and the balance when the job is all finished and he got a regular mortgage.

Q. The roughing was finished? A. I got $1500. on the roughing; yes, sir.

Q. And the $9000. payment had been made? A. Yes; Mr. Pyle made that payment.

Q. There was nothing further due you until you had completed your work? A. Well, the job was pretty near finished.

Q. But the agreement was that you were not to get paid until they got a permanent mortgage and until the work was completed? A. Yes.

Q. Have you a record of the work done between the time of your $9000. payment and the time you quit work; a record of the labor and materials you put in? A. Yes; it was practically all finished.

Q. Have you a record of that? A. There was no record there.

Q. You didn't keep any record? A. No, I haven't.

Q. Did you keep any record? A. No.

Q. And the only reason that you make up your claim for $10,500. is based upon the fact that you say the oral contract was $23,500. A. $23,000.

Q. And you estimated it could cost $2,000 for completion? A. Yes.

Q. That is the only way you make up your lien claim? A. In fact, I did finish the job.

Q. Is that the only way you make up the amount of your lien claim? A. Yes, sir.

Louis Moore, on Behalf of Louis Moore—
Re-direct.

Re-direct examination by Mr. Kauffman:

Q. You were up on the job and figured out the amount that it would cost to complete the job? A. Yes, sir.

Q. What did you figure it to be? A. About $2000.

Q. Did you speak to Mr. Starr or Silverman about the amount that was due you before you filed your lien claim? A. Yes, sure.

By the Master:

Q. At the time you got this $9000. payment from Mr. Pyle, did it pay you for the work that you had done? A. No; just a part of it.

Q. How much was due you at that time? A. There was due me $9000.—$12,500.; I only got $1500. before I got the money from Mr. Pyle.

Q. What I am trying to get at, when you got the $9000. how much was your bill? A. $12,500.

Q. There was $3000. due you that was unpaid? A. There was all the money, the balance of the contract.

Q. You had received $1500. A. They didn't give me a check.

Q. You got $1500. from somebody? A. Yes, sir.

Q. On account of the contract? A. Yes.

Q. Then you got another payment? A. $7000. from Mr. Pyle, and he gave me a check of $2000. from the Wellworth Company; that made $9000.

Q. Now, at the time that you gave credit for this $9000, what was the balance then due you for the work then done? A. The balance of the contract?

Q. Due for work completed on your contract? A. Pretty near; but there was $2000 to finish the contract.

By the Master:

Q. At the time that you got your $9000 payment, when you got it, at that time, how much was the value of the work that was done there; was it $9000, $2000 or $500. A. No; I had all the fixtures installed; it was about $21,000.

Q. Did you have all the fixtures installed when you got your $9000 payment? A. No; I had it all delivered.

Q. Then how much was the value of the work that was done at the time you got your $9000? A. I had to install the fixtures after that.

Q. What was the approximate value of the work at that time? A. It was $21,000.

Q. You are not trying to listen. When you got the $9000 credit from Mr. Pyle, there was a certain amount due you at that time, wasn't there? A. Oh, there was more money due me then.

Q. How much more than $9000? A. Well, the roughing was worth about seven or eight thousand dollars.

Q. Did you keep any books? A. Yes, I keep books.

Q. Have you got them here? A. No; I can get them.

Mr. Kauffman: This account had been gone over with Mr. Silverman and Mr. Starr before the lien claim was filed to ascertain the true amount, and I have an agreement signed by them before the lien claim was filed.

By Mr. Kanter:

Q. Were you working on that building there pretty steadily, Mr. Moore? A. Yes; I finished the whole job complete.

Q. You saw the job from the time Starr and Silverman got through until the time the job was entirely completed, didn't you? A. Yes, sir.

Q. Was there any such thing as a division of the property physically into three sections, for three apartments; was there anything like that? A. I don't know anything about that.

Q. Was there anything on the ground to show that the builders were going to put up other properties? A. They told me about putting up the two corners on the other side as soon as they finished this building.

Q. Was there anything on the ground to show that? A. No.

Q. Where was the material kept, the bricks and lumber and stuff like that? A. Right in the front of the building.

Q. Generally over the entire tract? A. No; right in front of the building.

Q. There was nothing to show two tracts, was there? A. No.

Q. You filed your lien on the whole business, from corner to corner, didn't you? A. Yes.

Q. Is that what you thought the building lot was; that was the building lot? A. Yes.

By the Master:

Q. You say he told you that there was going to be a building on the other two corners? A. Yes.

Q. Where was he going to build them? A. I don't know; I couldn't say.

Q. On that same property? A. He didn't say anything to me; he told me he is going to have more jobs for me.

By Mr. Kauffman:

Q. Did he or anybody else say he was going to build on the outer sides of that building? A. No.

Q. Did he ever speak to you about garages? A. I heard him say something about garages, but I had nothing to do with it.

Q. Then, as far as you know, this piece of ground was to be used for how many buildings? A. For one building.

Q. You are sure of that? A. Well, that is all I know.

Q. How often were you up on that job? A. Pretty near every day.

HYMAN SILVERMAN, recalled:

Direct examination by Mr. Kauffman:

Q. Do you remember signing this paper (indicating)? A. Yes.

Q. What is this paper? A. It is a contract for the job that Mr. Moore done.

Q. What is it; can you read English? A. $10,500. I can't read very much.

Q. I will read it to you: We, the Capitol Construction Company, agree the amount due Louis Moore after going over the statement is the sum of $10,500 for plumbing work in the construction of the three-story apartment house situated in Cranford, New Jersey. Dated January 9, 1928. Did you sign that? A. Yes.

Q. How much is due Mr. Moore?

Mr. Kanter: I object to that.

The Master: I will sustain the objection. This contract was ended. It seems

to me there were two contracts; a contract for the finishing after the receiver took charge and the contract that was entered into with the Capitol Construction Company. You might ask him what was due on the Capitol Construction Company contract.

Q. At the time that this job stopped, how much was due Mr. Moore from the Capitol Construction Company for the plumbing work that he had done? A. Well, as far as I know, he nearly had finished his job; there was a very little bit to finish.

Q. How much was due him? A. It was due, well, he has got to finish it up and get the balance.

Q. How much is it that you agreed was due him? A. We didn't agree anything, but we give him payments $10,500 and then is due to him the balance of the contract.

Q. Why did you sign this paper that there was $10,500 due Mr. Moore at that time? A. That was due on the workmanship that had been done.

Q. That was due? A. Yes, sir.

Cross-examination by Mr. Kanter:

Q. You signed this paper after the insolvency bill was filed against your corporation, didn't you? A. No.

Q. Did you sign this paper on January 4th, 1928? A. Well, there is the date here.

Mr. Kauffman: That was before the insolvency bill was filed.

The Master: When was the receiver appointed?

Mr. Millberg: January 4th.

Q. When was this paper written up, Mr. Silverman? A. This paper was written up when we give him the payment then the payment what has been due.

Q. When you gave whom the payment? A. Mr. Moore.

Q. You gave Mr. Moore a payment on the date you signed this paper? A. Not on that day exactly.

Q. A day or two before? A. Some little time.

Q. Who wrote this paper? A. Who wrote it?

Q. Yes. A. I don't remember who wrote it.

Q. Where was it signed? A. It was signed on the job.

Q. On the job? A. On the Cranford job.

Q. Who brought it to you? A. Mr. Moore.

Q. You can't read, can you? A. I could read a little bit, but I can't read as a lawyer.

Q. Can you read this paper at all? A. They read it for me.

Q. Who read it for you? A. Mr. Moore.

Q. Who else besides Mr. Moore read it? A. Mr. Moore and his partner.

Q. Who else? A. Mr. Moore and his partner; Mr. Moore has got a partner to the job.

Q. You were working on the job that day? A. Yes.

Q. On January 4th, 1928? A. Yes.

Q. What other contractors were working there? A. I don't remember exactly, but it was some of the working men.

Q. How much did you agree to pay Mr. Moore for his entire job? A. I think it was $23,000.

Q. How much had you paid him up to that date? A. There was a payment of $1,500. and $7,000. and $2,000.

Q. That you just heard here this morning; you didn't remember that yourself, did you? A. Why shouldn't I?

Q. Who paid the $2,000? A. In Mr. Pyle's office.

Q. Who paid the $7,000? A. $7,000. also in Mr. Pyle's office, I guess.

Q. Who paid the $1,500? A. Ourselves.

Q. How did you pay him the $1,500? A. I don't remember from which mortgage it was, but we gave him a check.

Q. What were the terms of the contract; how were you to pay him the $23,000? A. The terms, accordingly.

Q. What were the terms? A. Accordingly; we don't have no exactly payments how.

Q. You didn't have any; this was all by word of mouth? A. That is it.

Q. You had word of mouth to do a $23,000. plumbing contract? A. Yes.

Q. Without specifications, without plans, without terms of payment? A. Without plans; no, sir.

Q. You didn't have any written contract whatsoever to evidence how you were to pay the $23,000. and they were to get the $23,000. from you, did you? A. We are doing work more than $20,000.

Q. You are a man of great financial responsibility; I understand you. You didn't have any written contract to cover this $23,000. job that Mr. Moore did; is that correct? A. We didn't have any contract.

Q. You had your understanding by word of mouth? A. That is right.

Q. Now, what did you and Moore agree to as to how you were to pay the $23,000? A. Accordingly the workmanship is being done.

Q. Those were the words? A. Yes.

Q. You were not to pay him in any definite time, were you? A. No.

Q. And he was not to get any money from you at any definite time? A. No.

Q. You never agreed to pay him $1,500. when the rough plumbing was in, did you? A. When we was——

Q. No; I say, before you started, you never agreed to pay him $1500 when the rough plumbing was in? A. It is a fact we agreed to pay him more, but we don't have any more.

Q. You just said you had no agreement with him? A. No written contract; but a verbal agreement.

Q. What was the verbal agreement? A. When the rough plumbing would be done we would pay him so much.

Q. How much? A. I don't remember exactly how much, but I gave him $1500.

Q. What was your agreement to pay him? A. I don't remember.

Q. What else did you agree verbally, as you say? A. Then when he will set his fixtures we will give him so much.

Q. How much? A. I don't remember how much, but we gave him $7000.

Q. You didn't agree on any amount? A. We agreed, but I don't remember how much we shall give him.

Q. And when he got finished you were to pay the balance; is that right? A. Yes.

Q. There is no question about the fact that you were to give him a certain payment when the roughing was done; and another payment when the fixtures were installed; and the balance when the entire job was completed? A. It was men-

tioned how much we shall pay to Mr. Moore, so much we had to pay, and so much we were to give it to him.

Q. You agreed verbally, by word of mouth? A. Yes.

Q. That you were to pay Moore $1500 when the roughing was in, didn't you? A. Let it be $1500; I don't know how much we were to give; we give him so much.

Q. You agreed to pay him a certain amount when the roughing was in? A. Yes.

Q. And you agreed to pay him another amount when the fixtures were in? A. Right.

Q. And you agreed to pay the balance on the entire completion of the contract? A. Yes.

Q. You kept your promise as far as paying the amount when the roughing was in, didn't you? A. Right.

Q. And you kept your promise as to paying him the amount when the fixtures were delivered, didn't you? A. Right.

Q. And the balance wasn't due until the entire contract was completed? A. Right.

Q. Mr. Moore came to you on January 4th, didn't he? A. Yes.

Q. At that time hadn't the job entirely stopped? A. At that time Mr. Moore—

Q. Listen to me; hadn't the job entirely stopped? A. No.

Q. Isn't it a fact that an insolvency bill to throw your corporation into the hands of a receiver had been filed against your corporation? A. It is a fact, but we didn't know we are in receivership.

Q. You didn't know that? A. No; I will tell you how it happened. I was served with the papers and I didn't understand, I didn't look on

the papers, and then when I got the papers to look over, I guess to Mr. Stout, then he said, "Why did you hold that? Don't you know you are in receivership?"

Q. Some papers were brought to you before? A. That is what it was. They started to bring papers, different claims, and I didn't bother to look at them.

Q. You were served with papers, weren't you, before that receivership? A. I was served with papers but I didn't look at them; I overlooked it.

Q. After you got these papers Mr. Moore came to you and asked you to sign this paper, didn't he? A. When I got served with the paper?

Q. Yes. A. That is what I say; I hadn't signed the papers.

By Mr. Kauffman:

Q. Was your signature on this paper before or after you were served with the papers that you hadn't looked at? A. I don't remember.

Q. Can you read any part of this paper? Read me any part of this paper. A. I can't read it.

Q. You can't read any part of it, can you? A. I will try.

By Mr. Kanter:

Q. Try it. A. I can't read it.

Q. I have given you a chance to read it now and you say you can't read a single word on this paper, can you? A. No.

Paper marked Exhibit 98.

Q. You can't read a single word on this paper, can you? A. I can't.

Q. On Exhibit 98; can you; answer yes or no, please. A. What is it?

Q. Can you read a single word on this paper? A. I can't.

Q. Yet you were willing to sign this paper? A. Well, when he——

Q. That Mr. Moore brought to you, simply because of what Mr. Moore told you was in it, without knowing anything about it; isn't that right? A. Yes, sir; we had so much confidence with him.

Q. You had so much confidence in Mr. Moore? A. Yes, sir.

Mr. Kauffman: I was present when that paper was signed. I would like to be given an opportunity to clear it up for you.

Mr. Kanter: I object to counsel interrupting.

The Master: I will give you an opportunity.

By the Master:

Q. Now, this Exhibit 98 was handed to you to sign when you were on the job? A. Yes, sir.

Q. How did you arrive at the figure $10,500. due to Mr. Moore when you were on the job? A. It was so much was due on the finishing of the work.

Q. How did you reach the sum of $10,500? A. Well, it is accordingly.

Q. Accordingly what? A. According to finsh the job.

Q. Did you have any figures before you; did you write down any figures to find out? A. We know what has been done on the job and how much is left to finish.

Q. What was done at that time? A. Oh, it was to set all the fixtures, probably a few little things like to connect gas ranges and some little things, pipe connected.

By Mr. Kanter:

Q. Now, you said before, Mr. Silverman, I will remind you, I asked you, who came up with this paper, and you said Mr. Moore; do you remember telling me that? A. Mr. Moore?

Q. Do you remember telling me Mr. Moore came up? A. Mr. Moore and his partner, I told you that.

Q. You didn't say a word about Mr. Kauffman coming up there, did you? A. Mr. Kauffman?

Q. Aaron Kauffman. A. All right; Mr. Kauffman was there; I don't remember.

Q. Wait a minute, Mr. Silverman; I am going to put an end to this kind of work with you. You told me you, you didn't mention Mr. Kauffman to me, did you? A. I didn't.

Q. You heard Mr. Kauffman mention the fact that he came up with Mr. Moore, didn't you? A. I didn't hear that.

Q. Was Mr. Kauffman up with Mr. Moore? A. I think maybe he was, I can't remember exactly; it is two years ago.

Q. How do you know— A. I know Mr. Moore and his paper was there, I was positive.

Q. You don't know Mr. Kauffman, do you? A. I know Mr. Kauffman, yes.

Q. You had never seen him before, did you? A. Mr. Kauffman?

Q. Yes? A. I seen him when the receivership was on.

Q. You had never seen him before he came up with this paper, did you? A. No.

Q. Mr. Kauffman you met for the first time when he came up with Exhibit 98? A. Probably that time I never seen him before.

Q. You now know he was there on the job with Moore when you signed Exhibit 98? A. I don't remember exactly.

Q. Why didn't you tell us about it? A. Because I don't remember; I really don't.

By the Master:

Q. This Exhibit 98, were these figures filled in when it was brought to you on the job, the $10,500? A. I think it was.

Q. Did you go over any figures, or did you accept the figures given you by Mr. Moore? A. It was talked before.

Q. Before this paper was drawn? A. Yes.

Q. You had a talk with him then? A. Yes; with Mr. Moore's partner.

Q. Where was that? A. On the job.

Q. Did you agree at that time how much was due Mr. Moore? A. Yes.

Q. How long before this paper was signed was that conversation? A. I think it was about a couple of days; a few days before, it was during the same week.

By Mr. Kanter:

Q. You told the Master that the figures were filled in on the job, didn't you? A. No, we had talked before, then when we got here the paper was written already.

Q. Then the statement that you made, that you told the Master, that the figures were filled in on

the job, is not correct; the paper was brought to you already made out? A. Yes; because we agreed before.

Mr. Kauffman: I just like to reserve the right to recall this witness, and I want his partner on the stand; I think I can refresh this man's memory without any of this confusion.

JACOB STARR, recalled:

Direct examination by Mr. Kauffman:

Q. I show you this paper; is this your signature on Exhibit 98? A. Yes, sir.

Q. How did this paper come to be signed? A. This paper, Mr. Moore was on the job and he asked us he would like to get a paper for the balance that was due to him on this job, so we told him we are satisfied to give him a paper, and he took us down in Elizabeth to Mr. Kauffman's office, I was there and Mr. Silverman was there and my brother was there, Harry Starr, and we figured up how much was due to him, how much money he got payments, how much payments, how many payments that Mr. Moore had on the job, we gave him about how much was due to him, and we figured up with that whole paper and I signed it.

Q. Was that done in one day; a whole day? A. Well, we was a couple of times in your office.

Q. Do you remember my coming to Jersey City to meet you in connection with this job? A. Yes, sir.

Q. About when was that? A. Well, that was, I know it was the Winter time, there was snow lay-

ing on the ground, that is the way I remember; the month and the week I couldn't remember.

Q. Do you remember when this paper was signed whether or not there had been an insolvency proceeding started or any paper served on you in connection with this insolvency proceeding? A. Well, I didn't receive no papers at all.

Q. You didn't receive the papers on that date? A. No.

Q. When was the first time that you knew of the insolvency proceeding; how long after the time that you were served with the papers? A. I think it was a couple of weeks; I couldn't remember exactly.

Q. Do you remember going to Mr. Stout's office with the paper and Mr. Stout telling you what the paper was? A. I remember that, but I don't remember how long after this paper.

Q. I don't care about this paper; I mean do you remember? A. Yes, I remember.

Q. How long after the time that you were served with the paper did that happen? A. I was in Mr. Stout's office, but I couldn't say when.

Q. Was that the next day? A. When I got the papers, no, it was a couple of days.

Q. It was a couple of days? A. It was a couple of days, or about a week.

Q. Where did Mr. Silverman sign this paper? A. In the office.

Q. Did anybody read this paper to you and Mr. Silverman before you signed it? A. You read the paper.

Q. Do you remember signing any other papers like that? A. If we did sign any papers; not for Mr. Moore.

Q. For anybody else on the job? A. Maybe; I think it was Crouse.

Q. Was that paper read to you before you signed it? A. Yes.

Q. Did you go over the account of Ira Crouse before you signed that paper? A. We did.

Q. Did you go down to Perth Amboy? A. We went down to Perth Amboy.

Q. How long were you down there? A. Oh, we spent there about half a day.

Q. Do you recall whether or not you signed these papers on one day, or did it take you a few days before you signed these papers? A. I think this one was signed before, if I am not mistaken.

The Master: Before the Crouse paper?

A. That is right.

Cross-examination by Mr. Kanter:

Q. The signing of these papers wasn't doing you one bit of good, was it?

Mr. Kauffman: I object to that; I don't see anything material in that.

Q. Why did you sign these papers? A. Because it was owing him so much and so much money.

Q. It didn't make any difference to you how much the Capitol Construction Company owed Mr. Moore, did it? A. Yes; it bothered me.

Q. It bothered you? A. Yes.

Q. Why; because you wanted to pay? A. Because I wanted to pay, because if the man did the work on the job he is entitled to it.

Q. You didn't know how much money was coming to him? A. I did know.

Q. You were going around to these various people giving them papers and telling them how much you owed them so there wouldn't be any

question as to how much? A. You ask me a question?

Q. I am asking you. A. You ask me if that was so?

Q. Yes. A. No, sir; it wasn't so.

Q. But you went to Mr. Moore? A. I didn't went to Mr. Moore.

Q. Moore went to you? A. We were on the job and we talked with Moore.

Q. Moore brought you down to Kauffman's office to sign this paper? A. Before he brought us down to Kauffman's office he said he wanted to get a paper that that was the balance due.

Q. Before he brought you down he said he wanted a paper to show that that was the balance due? A. Yes.

Q. He came to you, you say then, a day or two prior to the time this paper was signed? A. I couldn't say exactly how many days.

Q. You can't tell us the months or weeks or days? A. No days.

Q. Within what period of time prior to the signing of this paper had Moore been working on the job? A. Mr. Moore personally didn't work on the job; his men was working on the job every day.

Q. Every day? A. That is right.

Q. Up to the time this paper was signed? A. That is right.

Q. That is true, is it? A. Yes, sir.

Q. Absolutely true? A. Absolutely.

Q. But it isn't true that Moore came up to the job with this paper and that you signed this paper on the job in Cranford? A. Never did.

Q. That isn't true? A. Never; never signed any papers on the job for anybody.

Q. Do you remember Kauffman chasing after you in Elizabeth? A. I beg your pardon, Mr.

Kauffman didn't chase me; he was working on the job, he said.

Q. Mr. Kauffman came after you in Jersey City? A. Not in Jersey City; Mr. Moore came and met me on the job.

Q. In Cranford? A. In Cranford, yes; we worked together on the job; I have been personally working there; he was there with his men; he was in charge of his men on the job, you see, and I was on the job and Mr. Silverman was on the job and Harry Starr was; he said, "Boys, you owe me so much money, I would like to get a paper"; I said, "Mr. Moore, we are satisfied to give you a paper for the balance."

Q. Now you say that was a matter of days prior to January 4th, 1928, that he had been working on the job; he hadn't quit until a matter of a few days before? A. I don't get you right.

Q. Mr. Moore hadn't quit—when I say Mr. Moore, I mean his workmen.

Q. Mr. Moore hadn't quit his job until a matter of a few days prior to January 4th, 1928? A. We went down to Mr. Kauffman's office to sign, and Mr. Moore's men was working on the job.

Q. The men were working on January 4th, 1928? A. On January 4th.

Q. No question about that? A. No question about that.

Q. Were there any other people for whom you signed these papers except the clients of Mr. Kauffman's? A. What?

Q. Did you sign any papers admitting liability or admitting the account due except for clients of Mr. Kauffman; that is Mr. Crouse and Mr. Moore? A. I don't remember.

Q. You don't remember any? A. If I seen the signatures then I will tell you.

Q. You don't know, do you? A. I couldn't say nothing until I see my signature.

JULIUS STENKAUSKAS, sworn.

Direct examination by Mr. Reuter:

Q. Where do you live? A. Cranford, New Jersey.

Q. Whom did you work for? A. I worked for these people, you know, I worked for five bosses. I worked for the brick contractor first, started on the job working for the mason.

Q. Is there some money due you on this job? A. Yes.

Q. How much? A. I got coming on the job sixteen weeks' wages at $35. a week.

Q. Did you work on the three-story apartment house in Cranford? A. Yes, sir; I worked about, I guess, eighteen months or over, I don't know.

Q. On December 17, 1927, you were to get wages, weren't you? A. Yes, sir.

Q. How much were you to get? A. He paid me $35. a week.

Q. What did you do there? A. You know I worked, you know, cleaning, cleaning floors, scraping, and everything.

Q. You were a laborer? A. Labor job.

Q. Did he pay you on that date? A. No; after the thing stopped.

Q. On the 24th did you get paid? A. You know he came out, Mr. Crouse and Mr. Starr he said he would settle for anything; after I worked for Mr. Crouse I waited, I don't know, sixteen weeks, and Mr. Crouse give me $170. on a payment, and the rest he owed me.

Q. How many weeks did you work? A. Sixteen weeks I ain't got paid.

Q. At $35. a week? A. $35. a week.

Q. Starting December 17th? A. Yes.

Q. Julius, did your boss ever come to you and ask you to lend him any money? A. Yes, sir; the three men asked me.

Q. What did he say he wanted that money for? A. He paid laborers on the job, he didn't pay the laborers you know, he owed them money and he said, "You know, Julius, you got a little money, please", and I go to the Union Bank and I take $1000. and I pull it out.

Q. Did he give you a note for that? A. Yes, I got a note; the three men signed.

Q. Have you filed a lien claim? A. Yes.

Q. The money was given to pay laborers and you claim a lien for the money advanced? A. Yes, sir.

By Mr. Reuter:

Q. Is that the note he gave you (indicating)? A. Sure, that is.

Note marked Exhibit 99.

Q. You were a carpenter in Cranford before that? A. Yes, a carpenter.

Q. You know all these different lumber companies in Cranford? A. That is Mr. Mooney.

Q. You know Mooney? A. Yes.

Q. And the Standard Lumber Company? A. Yes, sir.

Q. Did your boss ask you to use your name to get lumber for the work? A. He told me that he will pay just next week, to go security.

Q. Did you pay for this broom? A. Yes, sir.

Q. Did he ask you to buy it? A. Yes, sure; that is Mr. Silverman.

The Master: How much was the broom?
Mr. Reuter: 69 cents.

Q. Did you buy a barrel of plaster on December 8th for $5? A. Yes, sir.

Q. On November 14th did you buy two barrels of plaster at $10? A. Yes, sir.

Q. On November 5th did you buy a gallon of tar for 90 cents and 1000 mason laths at $9.60. A. Yes, sir.

Q. Did you advance $25. for a laborer by the name of John? A. Yes, sir.

Q. And 16 weeks is due at $35. a week? A. $35. a week.

By the Master:

Q. This note for $1000. marked Exhibit 99, did you give him the money for this? A. Yes, sir; from the Union County Bank in Elizabeth; he paid it for the laborers.

Q. He used it to man men on the job? A. To pay on the job.

Q. Did you ever ask him for the money back, for the $1000? A. I asked him and he just say wait, wait, wait.

Q. He promised to pay you the money when? A. He told me just wait six months and I get six per cent. he told me like that.

Q. He told you he would give you the money? A. Yes; this Mr. Silverman and Mr. Starr, he took the money I had in the bank.

Q. He took you to the bank where you got the money? A. Yes, sir.

Mr. Kanter: So the Master can understand the purpose on the record, your lien claim states this lien is for carpenter labor?

Mr. Reuter: Yes.

Mr. Kanter: That is what the lien claim states it is for carpenter labor due $1172.24.

Mr. Reuter: Yes.

Cross-examination by Mr. Kanter:

Q. Your whole lien claim is $1172.24; you filed a paper in court? A. Mr. Lawyer, you listen to me a little bit——

Q. Julius, listen; you filed a paper in the court making claim against the building for $1172.24. A. I put that in the Court House.

Q. If anybody came to pay you the money now, if I wanted to pay you the money, how much money would I have to pay you; $1172.24? A. At sixteen weeks wages, and for the materials, for the plaster and for the laths; here is the two fellows, Mr. Silverman and Mr. Starr, he knows it is right.

Q. They didn't give you this note the first time, did they? A. They no give me right.

Q. They gave you this note after you went to your lawyer, didn't they? A. That is all.

JOSEPH MACHETTO, recalled:

Direct examination by Mr. Stout:

Mr. Stout: It is stipulated that the Tucker and Shilowitz mortgage is prior to the lien claim of Joseph Machetto, by reason of a postponement agreement which Joseph Machetto signed, which is in evidence as Exhibit 3.

It is also stipulated that the lien claim of Joseph Machetto is subordinate to the lien of the mortgage of the Carteret Company to the sum advanced $32,003.46.

Mr. Stout: I offer in evidence a true copy of the lien claim in this matter, filed in the Union County Clerk's office on January 3, 1928.

Marked Exhibit 100.

The Master: When was the last material delivered?

Mr. Stout: According to the lien claim it is stated to be December 16, 1927. I also desire to state that suit was brought on this lien claim on March 3, 1928, and the issuing of the summons, etc., is endorsed on the lien claim pursuant to the statute.

Q. Mr. Machetto, you were the person who filed a mechanic's lien claim against the Capitol Construction Company on this Cranford job? A. Yes, sir.

Q. The claim arose out of two contracts; is that right? A. Yes, sir.

Q. Are these the contracts (indicating)? A. Yes.

Q. What work did you have to do on this Cranford job? A. All the labor work on the brick work; brick work and stucco.

Contracts marked Exhibits 101 and 102.

Q. One contract is for $17,000 and the other is $2500? A. $2500.

Q. You employed the laborers to do the work under these contracts? A. Yes, sir.

Q. That is the brick laying and mason work? A. And laying.

Q. When did you complete the work under your contract? A. I think the last work I done over there was December 16th.

Q. December 16th, what year? A. 1927.

Q. You received certain payments on account of your work as it progressed, did you not? A. Yes, sir.

Q. Are the credits as stated in the lien claim correct? A. Yes, sir.

Q. And the total payments to you on this job were $11,500? A. $11,500.

Q. And the balance due you is $8000? A. $8000 right.

HYMAN SILVERMAN, recalled:

Direct examination by Mr. Reuter:

Q. Mr. Silverman, did you request Mr. Stankauskas to give you $1000 in order to pay the labor on this job? A. Yes, sir.

Q. What did you do with the money? A. I paid the laborers and carpenters; paid them on Saturday.

Q. You got the money from him on Saturday? A. Yes.

Q. And you paid the laborers the same day with that money? A. Yes.

Q. And he knew that the money was being paid to the carpenters in the building? A. Yes, he was present; he went with me to the bank in Elizabeth, I don't remember the name of the bank.

Q. National State Bank? A. And he immediately withdraw the money and he gave it to me and I went back to the job.

Q. Every cent of that money was used to pay the workmen on that job? A. Yes, sir.

Q. The same day that you borrowed the money? A. Yes, sir.

Cross-examination by Mr. Seclow:

Q. Who were the workmen working for? A. The workmen was working for the Capitol Construction Company.

Q. They weren't working for him? A. No; he was on the job as a laborer.

Q. And that was a loan, this $1000? A. A loan, yes.

Q. You gave him a note for it? A. Yes, sir.

Q. Payable in six months? A. Yes, sir.

By Mr. Reuter:

Q. When was the note given; it wasn't given the same day, was it? A. No, it was the next week; it was Saturday, it was near twelve o'clock.

Q. You intended to pay the $1000. from money that you got out of that building? A. That is right.

Q. It wasn't a personal loan; it was the Capitol Construction Company that signed the note? A. Yes, sir.

By Mr. Seclow:

Q. You are sure that you intended to pay the money from the Capitol Construction Company? A. Yes, sir.

Ralph Cianfrone, on Behalf of Venango Stone Company—Direct.

RALPH CIANFRONE, sworn:

Direct examination by Mr. Millberg:

Q. You were a partner in the Venango Stone Company? A. Yes, sir.

Q. Did you have a contract with the Capitol Construction Company? A. Yes, sir.

Q. I show you a contract and ask you if that is the original contract that you received? A. Yes, sir.

Contract marked Exhibit 103.

Q. In pursuance of that contract, did you do any of the work? A. Yes, sir.

Q. Did you complete it? A. Yes, sir.

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

Q. When did you do your final work for the completion of that contract? A. The last work was done there about December 15, 1927.

Q. Did you have to do anything in addition to sir.

Q. And that finished the contract? A. Yes, the contract? A. Well, there were some extras.

Q. What did those extras amount to? A. The extras were other cut stone work on the outside elevation, such as sills, coping, etc.

Q. That shows on that statement which you have brought here? A. Yes.

Q. The contract was $4700; is that correct? A. Yes, sir.

Q. And the extras were $436? A. Yes, sir.

Q. A total of $5136? A. Yes, sir.

Q. Now, you have received some money on account of your contract? A. Yes, sir.

Ralph Cianfrone, on Behalf of Venango Stone Company—Direct.

Q. You have received, according to this statement made by you payments of $2300? A. Yes, sir.

Q. Leaving a balance of $2836.10 on the contract and the extras; is that correct? A. Yes, sir.

Mr. Millberg: I have here a copy, which is not certified, of the mechanics lien claim filed with the County Clerk of Union County and dated April 5, 1928, with the time endorsed by William P. Martin, Clerk. This copy shows that summons was issued on the 5th day of April, 1928.

Copy of lien claim marked Exhibit 104.

Mr. Kanter: The lien claim is defective in not having a proper bill of particulars, and in claiming that this work was done at the request of Capitol Construction Company, Ira R. Crouse, Benjamin Heyman, receiver of Capitol Construction; the affidavit states that those were the names of the people at whose request the work was done and therefore no lien claim can be claimed in this case.

It is stipulated that the lien claim of this claimant is subsequent to the lien of the mortgage of the Carteret Company in the sum of $32,003.46, and also to the mortgage of Tucker and Shilowitz in the sum of $20,000.

Mr. Lasker: I wish to present a certified copy of the mechanics lien claim of Arthur G. Tewels against Capitol Construction Company, and I wish to state that although the lien claim is filed on January 12th, it is exactly four months after the date of the last work having been

done. The last date for such filing is the date of the fourth month corresponding with the date of the last item. I also wish to make a statement upon the record that no suit was started on this lien claim, and I wish to state that there was no necessity for a suit, in view of the fact that a receiver was appointed.

JAMES MCCABE, sworn.

Direct examination by Mr. Rubenstein:

Mr. Rubenstein: I want to enter this on the record, if your Honor please: It seems that McCabe Brothers Company performed the excavating work on two jobs from the Capitol Construction Company, the Cranford job and the First Street job here in Jersey City; and we received from the Capitol Construction Company $1500. on account of both jobs, but according to the books of Mr. McCabe it was, by error, credited to the First Street job, leaving this job without any payments at all, and we filed our lien claim accordingly. We have discovered since that the money we received and that we credited to the First Street job should have been credited to the Cranford job, and I spoke to Mr. Stout, who is counsel for the Receiver in that matter, and we have agreed to have our claim increased to the extent of $1000. on the First Street job and reduce our claim here to the extent of $1000. on this job.

It is stipulated that the claim of McCabe Brothers Company is subordinate to the lien of the Carteret Company mortgage to the extent of $32,003.46 and interest.

Q. What work did you do on the Cranford job? A. Excavating the cellar.

Q. What was your contract there, Mr. McCabe? A. $1950.

Q. And you received $1000. on account of that? A. Yes, sir.

Q. When was the first day you started to work, and the last day you did any work? A. I think we started around April 11th; the 10th or 11th.

Q. When did you finish? A. Late in October.

Q. Late in October? A. Yes.

The Master: 1927?

A. Yes, sir.

Q. And there is a balance due you of $950? A. Yes.

Q. You had a lien claim filed? A. Yes, sir.

Mr. Rubenstein: I offer in evidence a lien claim filed by McCabe Brothers Company, a corporation, against Capitol Construction Company, filed in the Clerk's office of Union County on January 3, 1928; that suit was started by the issuance of summons on February 20, 1928.

Marked Exhibit 105.

By the Master:

Q. You did all your excavating? A. Yes, sir.

Q. You are all done? A. Yes, sir.

James McCabe, on Behalf of McCabe Brothers Company—Cross.

Cross-examination by Mr. Seclow:

Q. Your claim is for excavating and grading? A. Not grading.

Q. Just excavating? A. Only back filling around the walks.

Q. Well, weren't you finished with your work when they started in building the foundation? A. No.

Q. When were you finished? A. Late in October.

Q. Why was it that your work stretched along for such a long period when it is really the first work that is to be done on the job; isn't it? A. Yes; but they had to get the building up before we went back again and back filled around the walls.

Q. Well, that building was up in May, wasn't it, or June? A. I don't think so.

Q. You ought to know; you claim you did the work. A. We only dug it out in April.

Q. All right; but their foundations were up; they were concrete foundations, weren't they? A. Was it in May?

Q. Yes; or June. A. I don't think so.

Q. It was positively up in July, wasn't it? A. I don't think so.

Q. You didn't go near that building after July, did you? A. We had men over there, I am telling you, back filling around the foundations.

Q. How much back filling did they do? A. I suppose that is about six inches or a foot all around in back, not the front of it.

Q. How many days, actual time, did your men work on there? A. What do you mean?

Q. How many days, actual time, did your men put on that job with the back filling? A. About three days.

Q. When did you finish the excavating for the foundation? A. That was finished around May.

Q. When did you go back to do the back filling? A. In the fall; late in the fall, October.

Q. Why did you wait from May until October to send men around there to do three days' work? A. They weren't ready; we dug the cellar by machine.

Q. Yes. A. After they got the cellar up this building laid there for three or four weeks before anybody went in it.

Q. That building had a roof on in July, didn't it, and they were working inside? A. I don't know; but I know I went out in October and graded around the back of it.

Q. Now, Mr. McCabe, isn't it true that you simply say that to come within your four months' lien claim time? A. No; I can bring you the men that worked there.

Q. Were you there yourself when the men were there? A. I seen the men out there.

Q. Were you there in October? A. In October, certainly I was there.

Q. Were the men there— A. They were there, yes.

Q. Or did you come to the job with your men? A. I didn't come out; I sent the men there and went after them.

Q. You didn't go there with the men? A. I went out after the men; I sent them out with the foreman.

Q. Were you there when these men were working? A. I seen them working.

Q. You saw them working? A. Yes.

Q. When? A. In October.

Q. When in October, the first week? A. Oh, no, I guess it was late in October.

Q. Later than that? A. The last part of October, around the 27th or 28th.

Q. You just testified after looking in a book; what is that book that you testified from? A. That book is a time book.

Q. Is that your time book? A. This book hasn't anything to do with it; it is just this year.

Q. You keep a time book, don't you, for your Workmen's Compensation Insurance? A. Yes, sir.

Q. Where is that time book? A. Up in the office.

Q. Can you bring it? A. Why not?

Q. Will that show where the men were working? A. Certainly.

Q. Will you bring it this afternoon? A. I can't come this afternoon; I lost all morning now.

By Mr. Kanter:

Q. Won't you let me look at the memoranda that you looked at before you answered Mr. Seclow last as to October? A. This is just a figure that I took down; this is the way it reads: April 11th we started the job; October 28th we finished the job.

Q. When did you write that memorandum in this book? A. I wrote that this morning.

Q. You took that from some other book, didn't you? A. Yes.

By Mr. Stout:

Q. When you made the agreement with the Capitol Construction Company to do the excavating work on the Cranford job you were then operating as a partnership, weren't you? A. No, I think we were operating as a company.

Q. As a corporation? A. Yes.

Q. Do you recall when you were incorporated? A. Why, in 1911, I think.

Q. Is that so? A. Why, I think so.

Q. In the dealings that you had with me in respect to the First Street job of the Capitol Construction Company you signed the papers there as a partnership. A. Well, we were working both ways.

Q. You work both ways? A. Yes; the company will have one job and we will have another job.

Q. You say that you had a contract only for the excavating work on the Cranford job and you also had to do with the grading there? A. Yes, sir.

Q. Are you sure about that? A. Back filling around the wall, that is all; not the entire grading.

Q. Was this grading in connection, then, with your excavating? A. Yes, sir.

Q. That is the reason why you say that you had grading to do on that job? A. Yes, sir.

Q. Was there a separate contract or agreement for the excavating work and one for the grading work? A. No; it is all the same.

Q. All hooked together for $1950? A. Yes, sir.

By the Master:

Q. Is that contract in writing? A. No, sir.

Hyman Silverman, on Behalf of McCabe Brothers—Direct.

HYMAN SILVERMAN, recalled:

Direct examination by Mr. Seclow:

Q. Mr. Silverman, did Mr. McCabe's company have any contract there to do any grading? A. No.

Q. When did he finish his work? A. I think he finished the beginning of May, I guess.

Mr. Rubenstein: I object to that; he said "I think."

A. I don't remember exactly; in June or the beginning of May.

Mr. Seclow: I will withdraw the question.

Q. Mr. Silverman, when did you have your house raised up? A. We had the house raised up in, I think in July, we had the roof on.

Mr. Rubenstein: I object to that.

Q. When was the roof on your building? A. I think in July the roof was on the building.

Q. Are you thinking now? A. No; I ain't sure.

Q. How long did it take McCabe to do his work on that job? A. I don't remember exactly, but it was about a week's time, or two weeks' time.

Q. Was it as much as a month? A. About two weeks, I guess.

Q. It was less than a month, was it, you are positive? A. Yes.

Q. Now, McCabe testified that he started his work in April or May; are you sure that that work didn't take longer than not beyond June, or at the most July? A. I will tell you the way it

was; we started with carpenters in the beginning of May, we started to put the forms for the foundations.

Q. Yes. A. At that time the cellar was dug.

Q. Did Mr. McCabe ever send any men back there to do any grading or filling? A. No.

Q. He was all through? A. All through.

Q. McCabe testified that in October he sent men there to do some work, grading work and filling work; is that so or not? A. Nothing.

By Mr. Kanter:

Q. Do you know everything that was going on on this job all the time, everything that was going on? A. Yes.

Q. When did Perry deliver his materials?

Mr. Seclow: I object to that as improper cross-examination.

A. In the time the construction was going on.

Mr. Seclow: I object to that on the ground that he can not test his credibility. Mr. Rubenstein might have a right to ask that.

ship that was on the job.

that.

The Master: I think you are right about

During the construction of the building.

Q. When did Perry deliver his materials? A.

Mr. Kanter: We rest.

Cross-examination by Mr. Rubenstein:

Q. What were your duties around this job? A. To take care of all the workmanship.

Q. To take care of what? A. All the workman-

Q. I understand that Harry Starr did that? A. No; he was the outside man, like to sign contracts and financing and so forth.

Q. Weren't you doing the carpenter work there? A. No, I was to take care of the workers.

Q. You took care of the workers? A. Yes.

Q. During the time that this building was being constructed you were on this job every day? A. Every day.

Q. You never went to work on the First Street job at all, in Jersey City? A. On the First Street job, yes.

Q. Well, how long were you there? A. I was working after the building went into the receivership.

Q. What? A. When the building went into the receivers, I was working.

Q. When did you start? A. I don't remember the date.

Q. Well, you don't have to give it to me exactly, but give it to me approximately; was it in September, or October? A. I think it was in January, I guess.

Q. Well, that is when the receiver was appointed. A. At that time we was on the First Street job.

Q. Yes; but you were working there at that time? A. On the First Street job.

Q. How long were you working when the receiver was appointed? A. Down in Cranford?

Q. No; on the First Street job? A. Until the job was finished.

Q. When did you start?

The Master: Did you start before or after the receiver was appointed?

A. I don't remember when we started; I guess we were started in that time.

Q. Wasn't that building under construction at the time the receiver was appointed? A. Yes, it was, but we had nothing to do there; we was driving piles and excavating; we don't have to do that.

Q. You say that the excavation; no brick work was done on the First Street job when the receiver was appointed? A. I don't think so.

Q. Are you positive? A. I think there was some brick work, yes; our carpenter work was putting the roof on.

Q. So you want to change your story now to say that there was some brick work?

Mr. Rubenstein: He isn't changing it; he said he didn't work there until the receiver came in.

A. That is the only carpenter work that was done, to put the roof on; that is what we done.

Q. When did you start that work? A. The roof?

Q. No; when you came down to the First Street job. A. When did I start?

Q. Yes. A. It was in the Winter time, but I don't remember which month.

Q. Was it in the month of October? A. No; I don't remember how long ago, but it wasn't in October.

Q. Do you know how far the building advanced on the First Street job when the receiver was appointed? A. That time when the roof was up like half-way with the brick work the building was stopped for a certain time on account of the receivership, then it took a few weeks until the

things were straightened out, then we went and put on the roof.

Q. Besides the First Street job did you have any other job to do? A. No.

Q. Then you only had these two jobs on your hands at that time? A. That is all.

Q. You weren't doing any other work at all? A. No.

Q. Either for yourself or for the corporation? A. No, we didn't have any work.

Q. Can you tell me what work you had in October, 1927, on the Cranford job? A. How could I remember that?

Q. You can't remember that at all, can you? A. No; it was on the building, it was on the work.

Q. Can you tell me what mechanics were on the job in October, 1927? A. Oh, there were all mechanics, whatever was necessary at that time.

Q. Whatever were necessary? A. Yes.

Q. You know that there was some filling down on the Cranford job, don't you? A. Filling?

Q. Yes; filling in the walls. A. It was done right from the beginning.

Q. Who did that? A. With our own laborers.

Q. Your own laborers? A. Yes.

Q. McCabe didn't do that at all? A. No; he didn't have this in his contract.

Q. If McCabe did that, he did more than he was obliged to do? A. If he did it; but he didn't.

Q. You don't remember from your own knowledge whether McCabe was on the job in October or not, do you? A. I know he wasn't.

Q. How do you know that? A. Because I was on the job.

Q. Did you give McCabe a check in October? A. The check will prove.

Q. Yes; did you give him a check? A. If I gave him a check in October the check will prove.

Q. Who gave him that check; did you or your partner? A. Probably I; I don't remember; of course if I seen all the checks I could tell.

Q. Didn't he meet you on the job in Cranford to get the check? A. I don't remember where, if not Cranford.

Q. Did you ever see Mr. McCabe on the job there himself outside of any men, after he finished his work? A. No.

Q. He never came around there? A. I never seen him any more in there.

By Mr. Kanter:

Q. You don't care, as a matter of fact, what you are testifying to in this case; isn't that so? A. What do you mean, I care?

Mr. Seclow: That is objected to.

Mr. Kanter: Strike that out.

By Mr. Rubenstein:

Q. Before you went on the stand you spoke to Mr. Seclow, didn't you? A. I spoke with so many different persons.

Q. Didn't you speak to Mr. Seclow? A. Yes.

Q. What did he say to you about the McCabe work on that job? A. He asked me the amount of the contracts if this is right and I said yes, that is right.

Q. Didn't he ask you to testify as to whether you were working or not on October 28, 1927? A. Nothing at all.

Q. You are positive about that? A. No.

Q. You are sure about that? A. Yes, sir.

Q. Didn't he ask you particularly whether Mr. McCabe worked on that job at that time? A. He asked me and I says no.

Q. He asked you that, didn't he? A. Yes.

Q. Why didn't you say that when I asked you about it before? A. You asked me if Mr. Seclow talked to me about certain contracts and if that is the right amount, and in the meantime——

Q. He also asked you whether you didn't do any work in October, 1927? A. Yes.

Q. Why didn't you mention that when I asked you about it in the first place? A. I didn't understand you right.

Q. You didn't understand me right? A. No.

Q. Now, did you have anything to do with the negotiations about getting the mortgage from Tucker and Shilowitz?

Mr. Seclow: I object to that as improper cross-examination.

The Master: I think it is; I will sustain that objection.

Q. Did you pay Tucker and Shilowitz a bonus for that $20,000. mortgage?

Mr. Seclow: I object to that as not proper cross-examination.

The Master: I will sustain the objection.

By Mr. Heyman:

Q. Who did the grading around on that job? A. We had laborers by the day.

Q. Did you have a contract with anybody for the grading work? A. No, we just had a contract with the frontage, to do the grading and the planting of hedges and so forth.

Q. Is this the contract which you had (indicating)? A. Who is this.

Q. Roderick R. Crockett. Yes, sir; this is the man that done the grading on the front, but not around the building.

Q. In around the front; not around the side? A. That is it; but the sides we done it by days work.

By Mr. Rubenstein:

Q. You say you had your own men doing that work? A. Yes.

Q. You kept a record of that, didn't you? A. At that time I kept a record.

Q. Will you produce that record? A. I can't.

Q. What did you do with that record? A. I haven't got no books at all.

Q. What did you do with the books? A. I didn't keep them at all.

Q. Who kept them? A. I kept them.

Q. What did you do with them? A. I don't know where they are; I may have them when I moved from one place to another.

Q. Your books would show exactly what you testified to as to having men working there all the time? A. If I would find it.

Q. The books would show? A. The books would show.

Mr. Rubenstein: I object to his entire testimony on the ground that the best evidence is not produced.

The Master: He can testify to what he knows.

Hyman Silverman, on Behalf of McCabe Company—Cross.
Colloquy "Perry and Reid".

By the Master:

Q. Did you see McCabe around this job at any time after he finished excavating the cellar? A. Not in Cranford.

Mr. Kanter: I would like to have the admission of the books of account, lien claim, judgment and delivery slips should be offered by me in behalf of George F. Perry & Sons, and that they will be received by the Court.

The Master: Yes.

Mr. Seclow: I would like to note my objection on behalf of the defendants, Tucker and Shilowitz, to the introduction in evidence of the exhibits proffered by Mr. Kanter on behalf of the defendant Perry and by Mr. Tally on behalf of the defendant, A. S. Reid & Company.

Mr. Heyman: The receiver joins in that objection.

Mr. Stout: On behalf of the defendants which I represent I object. The Court must keep in mind that this judgment was entered against the Capitol Construction Company, and at that time the Capitol Construction Company was in the hands of a receiver.

The Master: Yes.

Mr. Stout: If any judgment should have been taken it should have gone against the receiver of the Capitol Construction Company.

Colloquy "Perry and Reid".

Mr. Tally: May I make a motion at this time? My motion is that the certified copy of a final judgment entered in the Union County Circuit Court in a suit in which A. S. Reid & Company was plaintiff, and Capitol Construction Company and others were defendant, be admitted in evidence in this suit.

The Master: That is the judgment on the lien claim?

Mr. Tally: On the lien claim. And I base my motion on the case of *Crane* v. *Brighton Mills,* 98 New Jersey Law, 308, in which the opinion was written by Chief Justice Gummere. I also rely in my motion on the case of *Peoples Building & Loan Association of Ridgefield Park, N. J.* against *Vaniewiski,* 85 New Jersey Equity 551.

Mr. Millberg: I wish to make objection to the offer of the judgment of Reid and Perry on behalf of the claimants that I represent, on the ground that on the 5th day of January a restraint was served upon both of these defendants from proceeding with the entry of any processes then pending, and I offer for the record the original order in the Court of Chancery, dated the 4th day of January, 1928, in the proceeding wherein Vengo Stone Company is complainant an Capitol Construction Company is defendant; also the affidavit of service, the original affidavit of service being on file in the Clerk's office, showing that said notice and copy of the order was sent on the 5th day of January, 1928.

Mr. Kauffman: I would like to voice my objection also on the record.

Mr. Tally: I am willing to stipulate that this copy was served on Mr. Reid.

Mr. Kanter: It is admitted that the judgment was not paid?

Mr. Tally: I would like to call the treasurer of our company for that purpose; that is the only point I want to go into the proof on.

ABRAHAM LENKOWSKY, sworn:

Direct examination by Mr. Rubenstein:

Q. Are you president of the Junction Milling Company? A. Yes, sir.

Q. I show you a mortgage made by the Capitol Construction Company, Inc. to Junction Milling Company, dated September 16, 1927, for the sum of $11,619.34, which mortgage was recorded in Book 886 of Mortgages for the County of Union, on page 390, and I ask you if you received any money on account of this mortgage? A. I did.

Q. How much? A. $2000.

Q. So that the balance due on your mortgage is $9619.34? A. Right.

Mortgage marked Exhibit 107.

Q. Have you got the bond? A. I haven't got it.

Q. You couldn't find it but you looked for it? A. Yes, sir.

Q. By the way, the $2000. you received at the time you signed the release to Mr. Pyle? A. Yes, sir.

Cross-examination by Mr. Kanter:

Q. The face amount of your mortgage is $11,619.34? A. Yes, sir.

Q. What was the consideration for this mortgage; why was it given to you? A. For materials.

Q. For materials furnished on this job? A. Not only on this job, but some other jobs.

Q. Both on this job and some other job? A. Yes.

Q. The amount of materials furnished on this job is as indicated in the lien claim of your firm? A. Yes, sir.

Q. Your firm filed a lien claim on this Cranford job? A. Yes, sir.

Q. Is that amount of your lien claim included in this mortgage? A. Yes, sir.

Q. In other words, this mortgage was given to secure the same debt for materials as the lien claim was filed for; is that correct? A. I got the mortgage before the lien claim.

Q. On this mortgage the entire principal was payable on March 16, 1928; you got notes as collateral to this mortgage, didn't you? A. I don't remember that I got any notes.

Q. Didn't you have notes evidencing this instalment of $2000 one month from the date of the mortgage, $1000 two months from date, and $1000 four months? A. I didn't have any notes.

Q. But in any event, the due date was extended as indicated in the mortgage? A. Yes.

Q. And notwithstanding that. you filed a lien claim which is referred to in this case; your firm filed a lien claim? A. Yes, sir.

Q. Your lien claim is for approximately $8700 or $8800? A. Yes.

Q. And the mortgage covers the same debt as the lien claim? A. Yes.

By the Master:

Q. Was a bond ever given to you with that mortgage? A. Yes, sir.

By Mr. Kanter:

Q. Did you ever have any other mortgage on this property except the one in evidence, Exhibit 107? A. No other mortgage.

Q. Do you remember this clause in your mortgage, "This mortgage will at all times be subordinate to a mortgage of $27,000 and agrees to execute such agreement for the purpose of enabling the owner of the premises to replace said mortgage of $27,000? A. $27,000 was already on at the time.

Q. Who held that $27,000 mortgage? A. The land people.

Q. On this mortgage of yours, Seclow & Nessenbaum were your attorneys, weren't they? A They were our attorneys.

Q. They drew this mortgage for you? A. Yes.

Q. Didn't you know at the time you received this mortgage, on September 16th, recorded October 16th, the mortgages covering this land were far in excess of $27,000?

Mr. Seclow: I object to that; that is not so.

A. I don't know.

Q. Didn't you know that Mr. Seclow's client had a mortgage on there for $20,000? A. I didn't know that; I don't remember that.

Q. Didn't you know that the Riverside Apartment Corporation had mortgages of about $58,000?

Mr. Seclow: I think we can save a lot of time on that. The purpose of that clause in the morgtage was when they were refinancing that property, then we were to subrogate. This mortgage doesn't cover the entire plot; this mortgage covers the two side pieces.

The Master: You were to release the mortgage?

Mr. Seclow: We were to release part of this property, because the description was not exactly correct.

Q. Well, Mr. Rubenstein offers the explanation, and I think it is correct, that this mortgage covered only what you say were the two side pieces? A. Right.

Q. You filed a lien, however, for the entire tract?

Mr. Rubenstein: No; that is not so; the lien was filed for the building only.

Mr. Kanter: Not on any land?

Mr. Rubenstein: No.

Q. You didn't file a lien on any land? A. No.

Q. You only filed a lien against the building and not against the land?

Mr. Rubenstein: That is right; the center tract.

Mr. Kanter: Did you file a lien against the land; against any land?

Mr. Rubenstein: I filed a lien against the center tract; the building and land upon which the building stands.

The Master: I understand you are waiving your lien.

Mr. Rubenstein: We are waiving our lien now of the Junction Milling Company. I am relying on the mortgage.

Mr. Tally: Just before recess I stipulated that A. S. Reid & Company was served with a copy of the restraining order of the Court of Chancery. I have examined my file during the noon recess and I find no copy of that order; I am not in a position to say that it was not served, except that I know it was not served on me. I would like, for that reason, to withdraw the stipulation I made at that time. I know it was not served on me.

By Mr. Stout:

Q. Mr. Lenkowsky, what was the consideration for this mortgage held by the Junction Milling Company against the Capitol Construction Company? A. Material delivered.

Q. For material and lumber delivered to the Cranford job? A. Not lumber.

Q. For materials? A. It was sash, doors, material and trim.

Q. In other words, materials delivered by your company to the Capitol Construction Company for the Cranford job? A. Yes, sir; not on the Cranford but other jobs.

Q. How much of the amount was for materials delivered for the Cranford job? A. $8800.

Q. How much for other jobs? A. About twenty-nine hundred and some odd dollars.

By Mr. Tally:

Q. Was the money which you say has been paid on this mortgage given to you in payment for

materials on this job or applied on some other job? A. I applied it on the mortgage.

Q. It wasn't specified what materials it was intended to be paid for? A. No, it wasn't specified at that time.

By Mr. Kanter:

Q. When did you get that payment? A. Oh, I can't remember now, Mr. Kanter.

Q. About when? A. Maybe it was around September; the check will prove it.

Q. In September? A. I don't remember, Mr. Kanter.

Q. Don't be afraid to answer. A. I don't remember. I am not afraid to answer.

By Mr. Stout:

Q. Is it your claim now that this mortgage, or the claim, rather, of the Junction Milling Company—that this mortgage now to the full amount thereof is a lien upon the so-called wing sections of this entire tract? A. No.

Mr. Rubenstein: I object to that; that calls for a conclusion and I think that is a matter for counsel to argue.

The Master: I think it is already testified that he has no lien except upon the end pieces.

By the Master:

Q. How much do you claim is due on your mortgage now? A. The face of the mortgage, less $2000. that I received.

By Mr. Stout:

Q. The $2000. which you received, did you credit that on the indebtedness of the Capitol Construction Company to you, or upon the mortgage? A. Well, on the mortgage, because they didn't owe me any other money but the mortgage.

Q. But this mortgage was to cover a general indebtedness, or to secure a general indebtedness? A. Yes, sir; but the mortgage covered the whole thing, whatever they owed me; they didn't owe me any other money besides the mortgage.

Q. Then when you got the $2000. what indebtedness did you apply it on? A. On the mortgage; giving them credit on the mortgage.

Q. You understand the mortgage is not an indebtedness; that is a security for an indebtedness. A. I know; I figured when I got the mortgage, that is all I have been looking for.

Q. The Junction Milling Company had an account with the Capitol Construction Company, did it not? A. Yes, sir.

Q. It had an account in respect to the Cranford job? A. Yes, sir.

Q. And it had an account in respect to other jobs, did it not? A. Yes.

Q. When you got the $2000. did you enter it in your books, or was it caused to be entered in your books as a credit on any particular account? A. No, sir.

Q. Don't you know that the $2000. payment that you received was by check and it bore a recital or notation that this was on account of the Cranford job? A. Yes, I understood it that way.

Q. What is that? A. I understood it being that way.

Q. You understood it to be that way? A. Yes, sir.

Q. Didn't you so credit it on your books? A. Well, on the books I credited it to apply on the mortgage to apply on the $11,000. mortgage.

Q. I show you check marked Exhibit 44, which was received in evidence in the matter of the mortgage of the Carteret Company in this case; that is where you noted the endorsement or the statement on that check? A. Yes; I understood at that time it was on the Cranford job.

Q. And you so supplied it, did you not? A. I did not; I applied it to my mortgage, because I already had that mortgage at that time.

Q. But your mortgage was made up of indebtednesses for materials delivered on the Cranford job. A. Yes.

Q. As well as for indebtedness for materials delivered to other jobs? A. Yes; that is right.

Q. So when you applied the $2000. on account of the mortgage, didn't you apply it on account of the indebtedness due you from the Carteret Company for materials delivered for the Cranford job? A. I didn't apply it to any particular job; I just simply applied it to the mortgage, gave them credit on the mortgage.

Mr. Rubenstein: I would like to enter on the record that the release made by the Junction Milling Company to the Capitol Construction Company, dated October 18, 1927, was turned over to James E. Pyle when this check of $2000. was delivered, and that check and this release were interchanged at the same time.

By the Master:

Q. What was the amount of indebtedness due you from the Capitol Construction Company on September 16, 1927? A. It was $8800. and the $2900. that made it at that time.

Q. I mean on the Cranford job? A. On the Cranford job at that time, $8800.

By Mr. Tally:

Q. You have received $2000. from Mr. Pyle to pay a part of the indebtedness for materials to the Cranford job? A. Why, no; I applied it on that mortgage.

Q. I know what you applied it on; but that is what it was intended for, according to the endorsement? A. I simply just had the mortgage; I didn't have any other account.

Q. There is now actually due $6800. and the balance of $2900. is due you on the other account? A. No, it is not.

Q. What is the situation? A. What is due me from these people is the amount of the mortgage, less $2000.

Q. No; not from these people; what is due you on account of the Cranford job from these people? A. On the Cranford job?

Q. Yes. A. $8800.

Q. You received $2000. from Mr. Pyle to reduce that $8800. indebtedness? A. No, I didn't figure at that time to reduce just that particular indebtedness; I figured it to apply on the mortgage, to reduce that mortgage $2000. less at that time.

Q. You signed a release to Mr. Pyle at the very time you got that check, didn't you? A. I did.

Q. Didn't you know that that money was coming out of the Cranford job? A. I did.

By Mr. Pyle:

Q. You had an agreement with the Capitol Construction Company to furnish the trim on this Cranford job? A. Yes, sir.

Q. Before you would go ahead and furnish the trim you demanded some security for what might become due to you for furnishing trim? A. No; not before.

Q. When did you demand it? A. When the material was practically delivered.

Q. After you had delivered some material? A. That is it.

Q. And before you had delivered it all? A. Before I delivered it all.

Q. In other words, in the middle of the shipping and delivering of the materials you demanded this security? A. Yes, sir; it wasn't in the middle of the job; it was nearly practically delivered.

Q. Very little of it had been delivered? A. Well, about one-third.

Q. About one-third; then you demanded security? A. Yes, sir.

Q. There had been no agreement to give you security when the contract had been made? A. Oh, yes.

Q. The original contract? A. There was an agreement made at that time to give me some kind of security.

Q. Was the understanding between you that you would get a mortgage as security? A. Well, it wasn't a mortgage; some sort of security.

Q. Then you demanded this security, and between you and the Capitol Construction Company you agreed upon this mortgage as security? A. Yes, sir.

Q. For whatever might be due you for materials delivered on the job? A. Yes, sir.

Q. And at the same time the Capitol Company owed you an old debt, or owed your company an old debt. A. Yes.

Q. Do you know how much that was? A. $2900. and some odd dollars.

Q. Was it $2900. exactly, or don't you know? A. Twenty-nine hundred and some odd dollars.

Q. $2919.38? A. That is right.

Q. That was due you for materials that you had furnished to some job here in Jersey City a year or more previous? A. Yes, sir.

Q. About a year or two previous? A. No, it wasn't that long.

Mr. Rubenstein: As far as Mr. Pyle is concerned I don't see how he could object to this mortgage. He took a bond and mortgage subject to ours, and he certainly can not go behind our mortgage at this time. He is subject to it in any event.

The Master: He may have a right to attack it as to this $2000.

Mr. Rubenstein: We did give him credit for the $2000.

The Master: $2000. on the indebtedness on the Cranford job?

Mr. Rubenstein: Well, we did give him credit for the $2000.

The Master: No, you didn't; you gave him a general credit of $2000. on the mortgage obligation. This was to be applied to a certain indebtedness.

Mr. Rubenstein: We are not claiming any lien on the building; we are not asserting our mortgage is ahead of Mr. Pyle's on the building.

Mr. Pyle: If you will agree that my mortgage in date is ahead of yours, I won't examine any further.

Mr. Rubenstein: No, no; we claim a priority on the two pieces.

Mr. Pyle: We dispute that.

Mr. Rubenstein: You have no right to dispute that.

The Master: I will allow the question.

Q. Well, it was about a year, something like that, previous to this that you furnished this material? A. No, it wasn't a year.

Q. Well, how long was it? A. Oh, it was a couple of months before that.

Q. A couple of months before? A. Yes.

Q. On a job in Jersey City? A. Yes.

Q. At the time the mortgage was made, you asked to have that included in your mortgage? A. Yes, sir.

Q. So that you would have security for that, also? A. Yes, sir.

Q. Now, at the time that this mortgage of the Carteret Company was made, you knew about it, did you not, the $35,000 mortgage? A. Who is the Carteret Company; is that the mortgagee that you represented?

Q. Yes; the Carteret Company. A. Yes; I knew about it.

Q. You were down at the office present when the first payments were made out on that mortgage, were you not? A. I was at the office when the payments were made; whether it was the first or second payment, I don't know.

Q. There were several others there with you getting payments, were there not? A. Yes, sir.

Q. Before any payments were made you were informed that you would have to sign a stipulation that the Carteret Company mortgage would be ahead of your claim? A. Yes, sir.

Mr. Rubenstein: I object to that; the stipulation speaks for itself and I think it is in evidence.

The Master: It is in evidence.

Mr. Rubenstein: He has no right to ask him any questions on that.

The Master: This man is being cross-examined and I think I will allow the question.

Q. You thereupon, in order to get this check of $2000 which has been shown to you, signed this paper, together with all the other men who were present, isn't that so; your signature I think, is on the second sheet? A. Yes, I signed it.

Q. That recites that in consideration of the payment that you release all right to file any lien or claim against the property on the whole tract, does it not? A. I didn't know it was the whole tract.

Q. Well, you signed it, didn't you? A. I didn't know that it was the whole tract; I only figured this is on the building only, only we are supplying some material on the building.

Q. You knew what you were signing, didn't you? A. That is the way I understood it when I signed that.

Q. Notwithstanding you having signed this paper releasing any such right, you did file a mechanic's lien against this property and you did make the Carteret Company, the mortgagee, a

defendant, claiming that your lien was ahead of theirs, didn't you?

Mr. Rubenstein: I spoke to Mr. Pyle the day of this hearing and I asked him to show me this postponement agreement, and he showed it to me, showing that Mr. Lenkowsky signed this paper, and I told him at that time that we will stipulate that his mortgage was prior and paramount to our lien claim.

A. Yes, sir.

Q. Do you remember when you filed this lien? A. I don't remember.

Q. Do you remember for how much you filed this lien?

Mr. Rubenstein: March 9, 1928.

A. $8800.

Mr. Kanter: $8600.

Q. How did you arrive at the figure of $8600? $8625. wasn't it? A. Yes.

Q. How did you arrive at that figure? A. My contract price was $8800.

Q. Your contract for the trim was $8800? A. Yes; and up to the time I delivered $8625. worth.

Q. Well, you had already received $2000. hadn't you? A. Yes.

Q. Well, did you give any credit for that in your lien claim? A. No, not in the lien claim.

Q. You didn't give any credit at all? A. No.

Q. In other words, you filed the lien claim for the full amount of all the materials that had been delivered to you at that time, without giving credit for any payments at all; is that so? A. That only looks that way.

Q. Well, it is that way, isn't it? A. It is.

Q. You knew at that time that you filed this lien that you received a payment of $2000. from me? A. Yes, sir.

Q. On account of this material that you delivered on this job, did you not? A. Yes, sir.

Q. Why didn't you credit it? A. Because I credited the full amount on the mortgage.

Q. You credited it, instead of on this job, you credited it, in other words, on the other job here in Jersey City; is that what you mean? A. Not on any particular job; I simply credited it on the mortgage.

Q. You had it charged on your books on two different jobs? A. I had the mortgage on my books and I just credited that mortgage.

Q. Didn't you have the jobs on your books? A. Yes, I had them, but after I took the mortgage I just took them out of the books and kept the mortgage.

Q. Where is your book; have you got your book here? A. No, sir.

Q. You came here to prove your claim without any books? A. I didn't know whether any books were necessary.

Q. You have your books showing all this, have you? A. I don't know; you will have to ask the bookkeeper.

Mr. Pyle: I think the books ought to be produced.

By the Master:

Q. At the time that you filed this lien for $8625. you knew then that you had a mortgage for $9619.36, didn't you? A. Yes, sir.

Q. Well, was there any necessity in your mind for filing the lien, when you had the protection of a mortgage? A. There wasn't anything in my mind at that time then.

Q. Why did you file it? A. By the advice of counsel.

Q. On the advice of counsel? A. Yes, sir.

By Mr. Pyle:

Q. This lien claim that you filed was filed on March 9, 1928, is that right? A. I couldn't say offhand; I haven't got the record of it.

Mr. Pyle: Do you want to stipulate as to that?

By the Master:

Q. Well, you signed this lien claim, didn't you? A. Yes, sir.

Q. Didn't you want to rely upon the lien of your mortgage when you filed your lien claim, or were you abandoning your mortgage, or did you want both? A. No; I didn't expect to get both.

Mr. Pyle: Mr. Rubenstein stipulates that the lien claim was filed March 9, 1928.

Mr. Stout: Was the filing of the lien claim a repudiation of the mortgage to that extent?

The Master: That is what I am trying to determine.

By Mr. Pyle:

Q. When did you first decide to shift from the lien claim and stand upon your mortgage; here today?

Mr. Rubenstein: I object to that. What difference does that make?

Mr. Pyle: I think it is material.

Mr. Rubenstein: It is absolutely immaterial, if the Court please, because when we came in court this morning I said I am resting on my mortgage.

Mr. Pyle: Mr. Rubenstein, didn't you say that this man had a claim which he put into this mortgage and filed it against this property, and then a long time afterwards he tries to file this mechanics' lien against the property?

Mr. Rubenstein: Right.

Mr. Pyle: For that same claim?

Mr. Rubenstein: Right; and he had a perfect right to do that. We have a perfect right to waive that claim and rest on the mortgage.

Mr. Pyle: Will you stipulate on the record that now for the first time you state that you waive your right?

Mr. Rubenstein: No; I stated that at the beginning of the hearing this afternoon.

Mr. Pyle: Now, today, for the first time.

Mr. Rubenstein: Yes, surely.

Mr. Pyle: Counsel states that for the first time today the Junction Milling Company has abandoned its lien claim and elected to stand upon its mortgage.

Mr. Rubenstein: I want to have this also on the record, that this is the first time that we had an opportunity to state it to the Court.

Mr. Stout: I also desire, on behalf of those I represent, to have it noted that the

waiver of the right to proceed on the lien claim, or the election to stand on the mortgage, does not in any way change the status of this mortgage.

The Master: It is my recollection that Mr. Rubenstein stated when he started yesterday that he appeared for the Junction Milling Company as mortgagee, and somebody else appeared on its behalf as lien claimants; or perhaps it was the other way around.

By Mr. Pyle:

Q. You have, as a matter of fact, all through these proceedings, from the beginning, had two counsel, haven't you? A. Yes, sir.

Q. One, Mr. Rubenstein, representing you on the mortgage, and the other one, Charles E. Hendrickson, representing you on the lien claim; that is correct, isn't it? A. Yes, sir.

Q. And both counsel have appeared before Vice-Chancellor Bentley at the several hearings that have been had in this case, both in this matter and in the matter of the receivership of the Capitol Construction Company; isn't that so? A. I don't know about that, Mr. Pyle.

Q. You have been present yourself, haven't you? A. I have not been present at that time.

Q. Is this the first time you have been present at any of these hearings? A. The second time.

Q. When was the other time? A. When I had to prove my claim for material that I furnished to the Receiver.

Q. You did file your claim, did you, with the Receivers? A. Yes, sir.

Q. Who represented you in that? A. Nobody.

Q. Didn't you appear at any of the hearings before Vice-Chancellor Bentley at any time? A. No, sir.

Q. Who was it you appeared before on this one occasion you speak of? A. I don't remember.

Q. You don't remember who it was? A. No.

By Mr. Kanter:

Q. On April 28 Charles Rubenstein filed an answer and counterclaim for you, asserting a lien claim which you filed against the Cranford property; and on May 15, 1928, Mr. Charles E. Hendrickson filed a notice to have your mortgage reported on; that appears according to the records in this case; now, you engaged one counsel for one purpose and another counsel for another purpose, did you not? A. No; I think both would be for the same purpose.

Q. Do you repudiate the authority of Mr. Charles Rubenstein to have filed the answer and counterclaim for you in this case? A. Yes, sir.

Mr. Rubenstein: We abandoned the lien claim this afternoon and we have nothing to do with the lien claim; we are resting on the mortgage. Anything that has anything to do with the lien claim is immaterial at this time; it is only cumbering up the record and your Honor has nothing to consider.

The Master: I don't know about that. I was looking at your answer in this suit that is before me; you say, by way of further answer this defendant says that on the 9th day of March, 1929, there was filed in the office of the Clerk of Union County

a mechanics lien claim against the Capitol Construction Company, wherein and whereby this defendant claims a lien upon the said mortgaged premises for the sum of $8625.

Mr. Rubenstein: That is true; and we abandoned that claim. Certainly a claimant has a right to abandon his claim if he wants to.

By Mr. Kanter:

Q. Now, there is no question about this statement that I am making to you, that on April 28th Mr. Charles Rubenstein, in this court and in this case, in your behalf, the Junction Milling Company, filed an answer and counterclaim setting up the lien claims to which Mr. Pyle has already referred to and which you filed against the Cranford job?

Mr. Rubenstein: I object to that; the record speaks for itself.

Q. Do you repudiate the authority of Charles Rubenstein to have filed that pleading in this case?

Mr. Rubenstein: I object to that.

The Master: I don't think the question is proper. He says now he abandoned it. He may now seek to abandon it without repudiating the authority he gave at the time the answer was filed.

Q. You authorized Mr. Rubenstein to file that answer and counterclaim for you did you not? A. I authorized him, not what to do, but I says to represent me in this matter.

Q. Then you had Mr. Hendrickson, on May 15th, file a notice to have your mortgage reported on in this case? A. I remember Mr. Hendrickson had something to do, but what he did I don't remember.

Q. You engaged him to take care of the mortgage transaction? A. I don't remember.

Q. He was to take whatever proceedings he thought proper for the collection of the mortgage in this case? A. Well, I wouldn't say the mortgage; I would say the collection of the claim.

Q. You gave him the bond and mortgage, didn't you? A. I don't remember that.

Q. Didn't you get that back from him before you came to Mr. Rubenstein about it? A. I don't remember.

Q. Didn't Mr. Hendrickson have the bond and mortgage in his possession? A. I don't remember.

Q. Do you deny the authority of Mr. Hendrickson to have filed that notice for you? A. I don't deny anything; I don't remember.

Mr. Rubenstein: I object to that; I told Mr. Hendrickson to file that notice.

Q. And that was as late as May, 1928? A. I don't remember.

By Mr. Tally:

Q. Have you ever delivered any materials since the filing of your lien claim on that Cranford job? A. Yes, sir.

Q. Since you filed it? A. Yes, sir.

Q. What was the value of it? A. I think it was one hundred and some odd dollars; a hundred or two hundred some odd.

Q. When were they delivered? A. That was delivered after the receiver got hold of it.

Q. After the receiver got hold of it? A. Yes.

Q. You put in a separate bill with the receiver, didn't you, for that? A. Yes, sir.

Q. Then the amount of your lien claim at the time it was filed was the correct amount? A. Correct.

Q. For money due you on that job? A. Correct.

Q. That was $8625? A. Right.

Q. And that was in May, 1928, or March, wasn't it? A. I don't remember.

Q. Have you received $2000. from Mr. Pyle; you did, didn't you? A. Yes, sir.

Q. Then the amount actually due you for materials furnished on the Cranford job prior to the appointment of the receivers is only $6625., isn't it? A. If you want to figure it that way, yes; but I didn't figure it that way.

Q. Well, all the materials which you have furnished on the Cranford job prior to the appointment of the receiver was $8625? A. Yes.

Q. And you received from Mr. Pyle $2000? A. Yes, sir.

By Mr. Kanter:

Q. Your mortgage was dated October 6, 1928; is that right? A. I can't remember, unless I look at the paper.

Q. Well, what is correct, Mr. Lenkowsky? A. Well, if it is correct, it is correct.

Q. Before you gave them a list showing the amount of goods that you were going to deliver —you gave the Capitol Construction Company a

list showing the goods that you were going to deliver; sash, trim and lumber? A. Yes.

Q. And that amounted to $8625? A. Yes, sir.

Q. And they were going to pay you when the job was completed? A. Yes, sir.

Q. And that was the term of the contract, was it? Yes, sir.

Mr. Rubenstein: Just a second. Mr. Kanter claims that he has got an adjudication, in which he claims priority over our mortgage. What interest has he got in that claim at the present time? Either he has a priority, an adjudication of priority, or he has not. Now you are really only cumbering up the record.

Mr. Kanter: My purpose is to show the invalidity of this mortgage on another ground as against my client. Mr. Rubenstein may try to show you that I am wrong about that adjudication, and if he did so convince you I have another ground to hold on to claim ahead of him.

Mr. Rubenstein: He has a right to rest on his adjudication or waive it. Do you waive that adjudication, or don't you?

Mr. Kanter: Of course not.

Mr. Rubenstein: Then why waste any time about it?

The Master: I think his question is proper. Suppose I didn't agree with him that his adjudication is proper, would he be foreclosed from showing that mortgage to be invalid?

Mr. Rubenstein: I understood Your Honor made a ruling on that?

The Master: No; I said I would receive the judgment in evidence; that doesn't indicate what the effect of its reception would be.

Q. Now, Mr. Lenkowsky, after you had gone along a ways, you decided that the financial condition of this company was not very good, didn't you? A. Yes, sir.

Q. Realizing that it was in a rather precarious financial condition you called upon the Capitol Construction Company to give you a mortgage? A. Yes, sir.

Q. And this mortgage was given to you in part as security for a debt that was past due, and in part as security for goods thereafter to be delivered? A. Yes, sir.

Q. But the goods thereafter to be delivered had been contracted for prior to the date of this mortgage? A. Yes, sir.

Q. And the contract was that you were going to get paid upon delivery? A. Yes, sir.

Q. And it was because you got worried about the financial situation that you executed this mortgage? A. Yes, sir.

Q. There is no question about the fact that the financial situation disturbed you? A. Yes, sir.

Q. And you were worried about it; you knew that they were in a shaky condition, didn't you? A. I didn't know exactly if they were or not.

Q. But you were sufficiently worried to compel them to give you this security? A. Yes; I told them to give me some security.

Q. You consulted counsel about it, didn't you? A. Yes.

Q. Whom did you consult? A. At that time I think it was Mr. Seclow.

Q. You explained the situation to counsel that the financial condition of the Capitol Construction Company was shaky, didn't you? A. Yes, sir.

Q. You got this mortgage on October 6th? A. I don't remember the date.

Q. October 6th is the date of record. A. Yes.

Q. And the corporation was adjudged an insolvent corporation on January 14th, 1929; you know that as a fact, don't you? A. I don't remember that.

Mr. Stout: January 4th, 1929.

By Mr. Rubenstein:

Q. Did you ever have any trouble with the Capitol Construction Company before on any jobs that you delivered material to? A. No, I haven't.

Q. You were always paid? A. Yes, sir.

Q. You didn't have any reason to believe that the company was going to go bankrupt or in the hands of a receiver, or anything like that? A. I had no reason to believe that.

Q. At the time that you made this mortgage you had an agreement signed at the same time; is that right? A. Yes, sir.

Q. Is this the agreement (indicating)? A. Yes, sir.

Q. Did you see Mr. Silverman of the Capitol Construction Company sign that? A. Yes, sir.

Agreement marked Exhibit 108.

By Mr. Stout:

Q. Did you know that this Cranford job was the first job of the Capitol Construction Company? A. I didn't know that.

Q. You didn't know that they were in existence or were not in existence ever since the Cranford job? A. The Capitol Construction?

Q. Yes. A. No; I knew them individually, Starr Brothers & Silverman.

Q. Have you ever had any dealings with the Capitol Construction Company before that particular job? A. Never did.

By Mr. Tally:

Q. You had never furnished any materials to the Capitol Construction Company before this Cranford job? A. I furnished it to them.

Q. To Starr Brothers & Silverman? A. Starr Brothers and Silverman.

Q. Not the Capitol Construction Company? A. They might have been the Capitol Construction Company at that time, but I don't know.

Q. You had never furnished materials to this corporation before this? A. No; my record shows this.

CARL G. MARQUARDT, recalled.

Direct examination by Mr. Tally:

Q. You testified at the proceedings yesterday that you are familiar with the accounts of your company? A. Yes, sir.

Q. Can you tell me without reference to them, or if you can't you may refer to them, as to whether or not your company has received anything on account of the judgment recovered in the Union County Circuit Court against Capitol

Construction Company and others? A. We haven't received anything.

Q. The full amount of that judgment, with interest and costs, is now due? A. Yes, sir.

No cross-examination.

Mr. Kanter: Will counsel admit that the Perry judgment has not been paid?

The Master: It is admitted by counsel that the judgment of Perry has not been paid.

JACOB STARR, recalled:

Direct examination by Mr. Rubenstein:

Q. Mr. Starr, you had a painter on the job there by the name of Mowre Lager? A. Yes, sir.

Mr. Kanter: Before Mr. Rubenstein starts in, I am going to insist that all the questions be asked in the regular way, not in leading form, for reasons which I don't have to express. Counsel understands.

Mr. Rubenstein: I am taking an adverse witness to prove my claim.

Q. What job was he working on, Mr. Starr? A. On the Cranford job.

Q. Did you have an agreement with him? A. Yes, sir.

Q. How much was the agreement for? A. $5500.

Q. The agreement was to perform all the painting job—

Mr. Kanter: I object to that question.

Q. What did he agree to perform; what work? A. $5500 for the painting work on the Cranford job.

Q. Did he finish all the work?

Mr. Kanter: I object to that question.

The Master: At what time?

Mr. Rubenstein: At the time the receiver was appointed.

Q. Was all the work finished? A. No, sir.

Q. How much do you think is a proper allowance—

Mr. Kanter: I object to that question.

The Master: Objection sustained.

Mr. Rubenstein: I will qualify him as an expert.

Mr. Seclow: I don't want to inject myself into this matter here, unless Mr. Rubenstein's client claims priority over our mortgage. If he does, of course, I want to.

Mr. Rubenstein: No; I won't claim priority.

Mr. Seclow: It is stipulated then that the mortgage of Tucker and Shilowitz is prior to the lien claim of Mowre Lager.

Mr. Pyle: The same stipulation as to the Carteret Company mortgage?

Mr. Rubenstein: Yes.

Q. How long have you been in the construction business? A. For the last fifteen or eighteen years.

Q. During that time you took general contracts, besides your own construction? A. Yes, sir.

Q. You estimated on contracts for painting? A. Yes, sir.

Q. Have you any idea of the prices paid to the labor in the painting business? A. Yes, sir.

Q. Have you any idea as to the reasonable value for the painting job at Cranford? A. Yes, sir.

Q. Was $5500.——

Mr. Kanter: I object to that question.

Q. Will you tell us what the reasonable value for the painting work on the Cranford job would be?

Mr. Kanter: I object to that.

Mr. Master: Haven't they agreed upon the reasonable value in their contract?

Q. Will you tell us how much was the reasonable value for the painting work performed on the Cranford job?

Mr. Kanter: It isn't shown how much was performed; what was done.

Mr. Rubenstein: He knows.

Mr. Kanter: He hasn't told us.

Q. Do you know how much work he did on the job? A. Well, I know he put two coats of paint on those walls and paint——

By the Master:

Q. Up to what time? A. Up until the receiver was appointed.

Q. You know just how much work he did do there, don't you?

Mr. Kanter: Ask him if he knows.

A. Yes; he put two coats of paint on the walls, and the interior woodwork he painted two coats.

Q. Do you know how much the reasonable value would be for that work?

Mr. Kanter: I object to that; he hasn't qualified.

By Mr. Kanter:

Q. How many square feet of painting did he do? A. I couldn't say, because you have to measure the walls.

Q. How would you estimate that price if you were going to do it; would it be by square feet? A. No; it is so much per room.

Q. How many rooms did he paint? A. Well, it was 108 rooms painted.

Q. Are they all the same size? A. No; some of them is smaller.

Q. How did you estimate them; all the same price? A. No; each one is separate.

Q. Was there an even number of small ones and big ones, or how was it arranged? A. I can't judge; I couldn't say, because it is two years ago.

Q. You don't remember? A. I don't remember how big is those rooms.

Mr. Kanter: I don't think that he is in a position to qualify.

Mr. Rubenstein: He knows from the way he has done it in estimating what it would cost to paint them; he says 108 rooms.

Mr. Kanter: They vary; he says he doesn't know how big they are.

Mr. Rubenstein: Of course he doesn't know exactly the feet and inches how big those rooms are just now, but he has a fair idea of what it is; he was down on the job; he built the building.

By Mr. Kanter:

Q. How many painting jobs did you have? A. How many painting jobs?

Q. As a boss painter. A. No; I wasn't a boss painter; I was a general contractor and builder.

Q. You said you did painting work; how many jobs did you have as a painter? A. As a painter, none.

Mr. Rubenstein: I don't claim that he did that. I say as a general contractor, in giving out large painting contracts, knowing the value or price of materials and labor, doing this over a period of years, as he says that he has been in the building business, he certainly is an expert as to values.

Q. What buildings did you erect as a general contractor? A. Well, many of them; I can't remember them all.

Q. Where are they? A. They are right in Jersey City.

Q. Name some of them? A. Well, we done one job for a fellow by the name of Greenberg.

Q. What kind of job? A. An apartment house.

Q. You built the apartment house for him? A. Yes.

Q. Where? A. On the Boulevard.

Q. Whereabouts? A. Boulevard and McAdoo Avenue; and I built a lot of two-family houses, which really I built.

Q. Let me ask you something?

Mr. Rubenstein: I think we ought to let him finish his answer.

The Master: Yes.

A. I built—I got 163 one-family houses on Neptune Avenue and Sea View Avenue.

Q. Were you the general contractor for that? A. Yes.

Q. Or did you build them for yourself? A. No, sir; I built them for a party by the name of Beroff; I built for him 163 houses, one-family houses and two-family houses.

Q. You did the complete job, painting and all? A. Complete; everything.

Q. How many houses did you build on Terrace Avenue, Jersey City? A. Those houses were built for ourselves.

Q. How many did you build there? A. Oh, I built maybe a couple of hundred houses for myself.

Mr. Rubenstein: I think the man is fully qualified as to the value of painting work.

Mr. Kanter: No, sir; not in this case.

By Mr. Kanter:

Q. You gave out the painting contract to some painting contractor? A. Yes, sir.

Q. You can't tell us how many days' work or what quantity of materials would be required to do a certain job, can you? A. What quality of material, yes.

Q. What quantity? A. Yes, sir.

Q. How many gallons of paint—if you are such an expert—would you require to coat this room with three coats of paint; can you tell us that?

Mr. Rubenstein: I object to that; I don't think that is a proper test, as far as this particular room is concerned. We are asking him as to the value of this particular building. He has been doing this kind of

work for years, building apartment houses, building two-family houses; he knows what that is worth.

Q. What you did was to receive bids from other painters? A. Yes, sir.

Q. And you took the lowest responsible bidder? A. Yes, sir.

The Master: How does that qualify him as an estimator on painting?

Mr. Rubenstein: It qualifies him to this extent, his experience of a period of years erecting hundreds of houses, as he said he did. He has been hiring painters.

Mr. Kanter: It is general knowledge; not as an expert.

Mr. Rubenstein: That is all that is necessary; he is qualified to know, and, furthermore, he is an officer of the Capitol Construction Company, in the hands of a Receiver, and he certainly can testify as against himself.

The Master: I don't think so.

(The witness was thereupon temporarily withdrawn.)

JOHN W. HEINS, sworn:

Direct examination by Mr. Pyle:

Q. Your business is what? A. Real estate.

Q. Where are you located? A. On North Avenue, Cranford.

Q. How long have you been there in business? A. Five years.

Q. Are you familiar with this property which we have been talking about as the Cranford partment, which was erected by the Capitol Construction Company, and also the property on which it is built? A. I am, sir.

Q. Did you have any part in the negotiations for the sale of this property just prior to the building of the apartment? A. Not definitely, except in a general way, assisting.

Q. You were an associate? A. Associated.

Q. You were on the ground and watched the erection of the building? A. I was.

Q. You were to have placed permanent mortgages on the building after its completion, were you not? A. Yes, I was.

Q. Application was made for that purpose to you? A. Yes, sir.

Q. You also had it on your list for sale after its completion? A. Yes, sir.

Q. I show you this diagram, marked Exhibit 82, and ask you if you are familiar with the layout in the division of the property in question? A. Yes.

Q. You have seen that division before? A. Yes, sir.

Q. Were you present at the Sheriff's sale of this property? A. Yes, sir.

Q. Do you know what it was sold for by the Sheriff? A. Yes, sir.

Mr. Stout: That, may it please the Court, is no evidence of the market value of this property, what it sold for at a forced sale.

Q. Mr. Heins, you are familiar with the value of real estate, both improved and unimproved, in

the locality in which this property is located, are you? A. I am.

Q. You have bought and sold properties in that vicinity? A. I have.

Q. Will you tell us what, in your opinion as an expert, the relative value would be of the two wing pieces, so-called, the two outside unimproved lots, as compared with the inside plot with the building upon it; what fractional value would you place upon it?

Mr. Stout: May it please the Court, we are not concerned here with any relative values. We are concerned with the value of those two wings. It seems to me that the question should be addressed to that, rather than relative values.

Mr. Pyle: I think we are only concerned with relative values. We are dealing with the sale of this property and the money received. We want to find out what relative value of that money received applies here, what relative part of that money applies here; what fractional part of it. That is my idea of it. Of course in order that this man may arrive at that fractional value, he must, of course, know or have computed what he considers the value of the whole tract and the value of each part. That is a matter of examination by anybody afterwards to see whether or not his estimate is correct.

Mr. Stout: My point is this: That the witness must testify as to his knowledge of the value of the entire tract of property and then his opinion of the value of the

one wing and the other wing and of the center piece; then we have evidence to determine the relative values.

The Master: I think that is a matter of mathematical calculation.

Mr. Rubenstein: Not only that; but it must be at the time of the sale.

The Master: What was the date of the sale?

By Mr. Kanter:

Q. How near to this property have you, within the last two years, bought any property? A. Bought, or sold?

Q. I asked you for bought. A. Oh, within a year and a half or so.

Q. How near to the property? A. Oh, I should judge about a block and a half away.

Q. On what street? A. On Union Avenue, about here (indicating).

Q. To the Northeast? A. To the North, yes.

Q. There is considerable difference in value between property a block and a half to the Northeast and this Riverside Drive, is it not? A. Yes, sir.

Q. That is the nearest you bought within the last two years? A. Yes, sir.

The Master: That you personally bought?

A. I sold.

Q. I didn't ask you for bought, Mr. Heins. A. No; I said sold; I thought your question was sold. Pardon me.

Q. Then the question is either bought or sold. A. All right.

Q. That is the only one that you either bought or sold within the last two years. A. Wait a minute; I want to say something; you are ask me a number of things all at once. That is about a block and a half up there; now, two blocks, up here on Prospect Avenue, that is relatively in the same vicinity, also I sold.

Q. One parcel? A. One parcel, 150 feet square.

Q. Those are the only two that you can think of that you have either bought or sold within the last two years; is that correct? A. In that immediate vicinity; I would say yes; there was sold some in another street, Claremont Place, the other street here, a couple of years ago.

Q. How many blocks away is that? A. That is about just one block, you see, then around the corner.

Q. So in the last two or three years, thereabouts, there have been only two or three instances of sales of property that you have been concerned with, or purchases of property that you have been concerned with? A. Well, it seems so, in that direct and immediate neighborhood.

Q. When you were asked the question whether you bought or sold when you answered the question, you meant personally or as agent, did you not? A. Yes.

Q. In either capacity? A. In either capacity.

Q. Those are the only transactions you had, either as agent or principal, in the immediate vicinity, within the last two years? A. Yes, sir.

Q. In what year were those transactions? A. Well, one was in the latter part, I think, of 1927.

Q. What property did that refer to? A. That refers, I think, to this one up there (indicating).

Q. To the Union Avenue property? A. Yes.

Q. The other one was in what year? A. About the same time, relatively near.

Q. What part of 1927? A. I think toward the end of it.

Q. Toward the end of 1927? A. Yes.

Q. And the third occasion referred to, Claremont Avenue, was in what year? A. Oh, I should say the beginning of 1927, or thereabouts.

Q. Since the end of 1927 and up to the present time you can not tell us any instances of your own personal knowledge of buying and selling property in that vicinity? A. Well, it is a question of what you call the vicinity. We sold a lot of property and bought property above there; now I am trying to confine myself as nearly as I can intelligently to your question.

Q. Within a block or two. A. In the immediate vicinity.

Q. Within a block or two? A. Yes, sir.

By the Master:

Q. Are you familiar with sales made there that you didn't personally handle? A. Reasonably so; yes, sir.

Q. Do you know the prices paid for such sales? A. Yes, sir.

Q. For property in that neighborhood? A. Yes, sir.

By Mr. Stout:

Q. You also appraised property in that locality? A. Yes, sir.

Q. And make it a point to keep in touch with the value, and make a study of the sales as made, so that you can make a comparison of values? A. Certainly.

The Master: I think he is expert enough.

By Mr. Pyle:

Q. Now, Mr. Heins, will you tell us what in your opinion is the value—and in asking these questions as to value, I want you to direct your values as of the date of the Sheriff's sale, on May 23rd, 1928—of the vacant tract or wing on the corner of Riverside Drive and Union Avenue? A. Well, I would figure the value at relatively at $100. a foot.

Q. That would make the wing on Union Avenue worth, in your opinion, how much? A. Well, allowing it to be a corner, just a little more valuable than an inside lot, I figure it at $10,000. The same I figure on Prospect Street.

Q. The Prospect Avenue corner lot you figure the same value? A. Yes; because they are very improved streets, both of them, very desirable for residential purposes and for other purposes.

Q. What in your opinion was the value of the central plot with the apartment house erected thereon, in the condition it was at the time of the Sheriff's sale? A. Including the corners, or excluding the corners?

Mr. Kanter: I object to that question on the ground that this witness is not qualified to speak of the value of buildings; he has spoken of the value of real estate particularly in this case. Where the building was clearly uncompleted, it would require the most careful consideration as to what it would cost to complete. I think Mr. Heins would admit that he

could not tell us what the value of that building in its then condition was.

The Master: I will take it.

Mr. Stout: You, Mr. Hein, are familiar with the condition of the property at the time of the Sheriff's sale?

A. Absolutely.

Q. Will you tell us the value of the central portion then? A. In my opinion the value of the center portion of the plot as of the time of the Sheriff's sale, land and building, was $230,000. and the corners each $10,000., making a total of $250,000.

Q. That is, $250,000. in your opinion would be the value of the entire tract? A. Yes, sir.

Cross-examination by Mr. Rubenstein:

Q. You say that that property is worth $100. a foot? A. Yes, sir.

Q. The corner pieces? A. Yes.

Q. How deep? A. Well, that depends, how deep: its depth is foreshortened on account of the garages having been put here.

Q. I didn't ask you that. Is that the best of your opinion? A. Yes.

Q. Is the garage on the about 150 to 200 feet depth? A. That is all you could put there.

Q. Now, Mr. Heins, you have evidently a misconception of what we want. A. Possibly.

Q. Now we want the value of this strip of land, from Riverside Drive, running along Union Avenue right down to the end of this property. A. Yes.

Q. How must is that property worth a foot? A. I told you.

Q. How much is that? A. Ten thousand per foot frontage.

Q. Ten thousand, or one hundred? A. I mean $100. Excuse me. Because the lot is cut off here on account of the garage, you can't go any further; you got to have, my dear friend, just a set-back like it is shown, which is fifty feet from the curb; you got to have, according to the laws in Cranford, a fifty foot set-back there, and that foreshortens your line; it is foreshortened again in the rear by these garages there, by a driveway, so that it is a matter of figuring what you are going to put there, a residence or additional apartment house.

Q. We are talking about a residence; can't you build your residence facing Union Avenue? A. No, sir.

Q. Why not? A. You can't go back far enough.

Q. You got 110 feet, haven't you? A. That isn't depth enough with that set-back.

Q. How do you know the set-back? A. I should judge it is about the same as it is there.

Q. You are guessing now, aren't you? A. Now, wait a minute; I was there this morning and I measured it.

Q. What did you measure? A. I measured from the curb line to the house line of these various properties; I was called down here rather hurriedly so I couldn't go to the zoning board office or anything else, but I measured it by foot measurement and it measures fifty feet, the same as it is this way (indicating).

Q. Do you know what the zoning requirements are about the set-back? A. Yes, sir.

Q. What is it? A. Well, it is relatively the same as shown here, for residence purposes, fifty feet from the curb.

Q. All set-backs in Cranford are fifty feet from the curb? A. From the curb, for residences.

Q. Do you know what class this property is in? A. Class A, sir.

Q. Do you know that to be a fact? A. Yes, sir.

Q. You haven't got a copy of the zoning ordinance map here, have you? A. Well, I beg your pardon, excuse me; I mean this is in what is called a business or apartment house section. I thought you had reference to the property surrounding it.

Q. No; I am talking about this particular piece of property. A. Yes, I know what it is; that is in either business or apartment house; when this was zoned subsequently they made a change, they didn't have an apartment house zone, but they made a special apartment house zone; whether it is A, B, C or D, that is immaterial.

Q. You don't know, do you? A. I simply told you all I know.

Q. Now, isn't it a fact that this property on the side street is worth $100 a foot? A. I wouldn't say so; not for its depth, no, sir.

Q. How much would you say it was worth? A. Well, according to its depth, I should say about $75 a front foot.

Q. $75 a front foot, figuring it on Prospect Avenue? A. Yes.

Q. So that you say that this property would be worth $75 times 358.30? A. No; not that; you can only go up to here (indicating).

Q. I am asking about the entire depth; I am not asking you to here.

Mr. Pyle: He has told you that, when he says $75 he means the useful part.

Q. Why did you point up to here (indicating)? A. Well, on account of the garages being there.

Q. Garages belonging to this property here? A. Yes; and the big driveway here.

Q. Assuming there is no driveway there; taking that out of your head about the driveway; we are talking about the value of this piece of property from the front on Riverside Drive to the rear of it, right up to here (indicating); you say it would be worth $75 times 358.30; is that right? A. No; I wouldn't say that.

Q. Why did you measure it up to this point here, Mr. Heins? A. On account of the presence of the garage and the driveway there, which will militate against any house being much deeper than about 150 or 175 feet, and it is impossible on account of the set-back that you have to put here to build any houses in this 94 feet here, so the question, as I see it, is entirely irrelevant as to its value.

Q. Suppose there is no driveway there; nothing at all coming from this property going to this garage; you have a clear piece of land running from Riverside Drive to the rear of this property; that is the way it existed at the time of the sale; is that right? A. Yes.

Q. So that you say at that time the property was worth $75 a foot fronting on Prospect Avenue; is that right? A. Yes; for a reasonable depth.

Q. How much do you say the property is worth fronting on Union Avenue? A. I would say the same.

Q. The same thing? A. Yes.

Q. $75 a foot? A. Yes, sir.

By Mr. Pyle:

Q. You are basing your estimate on the values of these lots on the conditions as were known generally there at the time of the Sheriff's sale, are you not? A. Yes, sir.

Q. Was it generally known about Cranford at the time of this Sheriff's sale that garages were going to be built in the rear of the apartment house, for use of the apartments? A. They were obligated to do that.

Mr. Rubenstein: I object to that. That is nothing to do with it.

The Master: It has something to do with it, but the testimony is bad because it is hearsay; that is not general reputation.

Q. Well, did the plans and specifications call for the erection of the garages here? A. Yes, sir.

Q. Have you seen the plans and specifications? A. Yes, sir; they were in our office for months.

Q. Had they been generally circulated around? A. Yes.

Q. Did they call for the building of garages in the rear? A. Yes; for 36 garages.

Q. Have they since been built, Mr. Heins? A. Yes, sir.

By Mr. Seclow:

Q. Mr. Heins, let us assume for the moment that at the time of the sale it was generally known in such manner that it would affect the judgment

of prospective buyers as to the value of these two wing pieces, and the fact that was known was this, that the owners of this apartment house contemplated not the erecting of garages on these two pieces, but garages on the rear of that middle piece; now, in view of that knowledge, how would it affect the value of these two wing pieces? A. Well, I don't quite just follow your question.

Q. Well, may I ask you again. At the present time garages are erected only on this rear piece (indicating)? A. Yes.

Q. This is used as a driveway (indicating)? A. A driveway.

Q. How close are these garages erected to the actual lines of this center piece? A. Well, that driveway goes up to the rear of the property and the garages are set back to back.

Q. How far? A. There are 36 garages, and each garage is about six feet or seven; then there is another driveway here yet (indicating).

Q. So that the front of the garages practically take up say 32 feet of the rear of this? A. Yes, sir.

Q. So it would affect the outlook from the rear portion of the one wing and the other wing? A. Yes, it would.

Q. Assuming now that this information had been broadcast around, how would it affect the value of this, if there were no driveway on this, and if those people had closed off the center piece and had to come into their garages on the center piece from the front of their own property?

Mr. Pyle: Or from the rear.

Q. How would it affect the value of these properties?

Mr. Pyle: You can use it for private residence.

Q. How would it affect it in value? A. Well, on account of the number of the garages there it would affect both properties materially, if they are coming this way or that way (indicating), it would be affected materially on account of the lack of depth, as I said before.

Q. Would it affect more than 75 feet of it? A. Oh, yes.

Q. More than 100 feet? A. Yes; in the first place, getting down to a little reason in the matter, you got to have your set-back, you got only 94 feet depth, and you can't put buildings on here; you have got to figure this to put a building on; that is the only way you can figure; and the same way there; that is the way I made my measurements.

Q. Isn't it a fact that your one family houses that sell for about $14,000. including land and building, don't need more than say 22 or 25 feet in depth? A. 20 feet in depth, not in Cranford.

Q. How do they run in Cranford? A. There is nothing less than 50 feet, and they run from there to anywhere over 75.

Q. About how deep? A. About 150 feet deep; that is all you could get here reasonably.

By Mr. Pyle:

Q. In other words, Mr. Hines, you figure that the greatest value for these two wing pieces is by using them as fronting on Riverside Drive? A. I do.

Mr. Rubenstein: I object to that.

By Mr. Seclow:

Q. You gave us a value of about $10,000. for this property here (indicating)? A. Yes.

Q. Because it is a corner, about 95 feet in width? A. Yes.

Q. Fronting on Riverside Drive? A. Yes.

Q. That value, I understand, would be for a building about 150 feet in depth? A. In depth, yes.

Q. Let me ask you this; wouldn't the remainder of the plot, which is practically 208 feet, have some value, notwithstanding there is a garage in back? A. Well, I don't think the garages would militate against the 150 feet, that is all I can tell you.

Q. Can't you place a value on the plot on Prospect Avenue, 150 feet from Riverside Drive, that is 94 feet in depth and 208 feet fronting along the road; can't you place a value on that as land there? A. Yes; $10,000.

Q. On this plot? A. On the whole thing.

Q. No; you testified now that this plot on the corner as it is, that is the wings, are worth $10,000. apiece, to a depth of 150 feet. A. Yes.

Q. Now, that leaves you approximately 208 feet along Prospect Avenue, and 208 feet, or approximately that on Union Avenue; how much would you sell these pieces for? A. I might also say that there are areas and various things back here, I don't think they are shown on this map, that would militate against having a proper depth here; but I don't think you will find anybody that would want to put a residence back here because of those garages and right back of the apartment. You are asking simply a hypothetical question.

Q. All the questions that are asked you are more or less hypothetical questions, calling for your opinion; now, I want your answer to this: Do you say then that, in your opinion, a tract of land on Prospect Avenue, fronting on the Southerly line of that avenue and commencing 150 feet North of Riverside Drive, with a depth of 94 feet and a frontage of 208.30 feet along Prospect Avenue has no value? A. No; well, relatively none, because you have to consider your set-back from here, the same as that, which is 50 feet, and then you take 150 feet depth here, and there is 200 feet, you take that off and you have very little left for your garage or your driveway.

Q. Your answer then is that such plot would have no value? A. Not particularly.

Q. No commercial value. A. No market value.

By the Master:

Q. It has some value, hasn't it? A. Well, the class of homes that are on this street, which as I said is one of the very important streets in town, would require more land than you would be able to get owing to the position of the garages themselves.

Q. You mean there are high class homes there? A. Very high class homes there.

Q. And the homes are high class because the land is very valuable? A. Yes.

Q. You think that a man wanting to build a home say to cost less than the average homes around there would hesitate to do it because of the more pretentious homes around there? A. Yes.

Q. He wouldn't want to go into such a very fine neighborhood with a cheaper home?

By Mr. Seclow:

Q. Now L call your attention to the sketch which is marked in evidence as Exhibit 82, and I call your attention to the wing on the Easterly side, which shows a depth of 110 feet for a distance of approximately 200 feet, and then it narrows down from 110 feet until it becomes 94 feet on Riverside Drive, and having a frontage of around 250 feet on Union Avenue; you testified that with this frontage on Riverside Drive that for a depth of about 150 feet this land being a corner would be worth $10,000?

Mr. Pyle: I object to that.

Q. Did you, or did you not, testify to that?

The Master: Did you say that?

A. No.

Q. In your opinion, what is the value of this corner fronting on Riverside Drive, running to this width of 94 feet to a width of 110 feet, and having a depth of 150 feet from Riverside Drive? A. Well, as I testified before, you have to start here with your set-back, and I said $10,000. for one house; that is all you can put on there.

By the Master:

Q. Are you confused about what counsel is driving at? What we are trying to get at is the value of this whole tract; it must have some value; there is some question whether you can use it or whether you can use it; you say the value from the front to the rear is $10,000. including the whole area? A. I do.

Q. Did you place any value on the front foot valuation at all, or did you disregard that? A. I disregard that on account of its condition.

By Mr. Pyle:

Q. In other words, a valuation placed upon the frontage on Union Avenue would be less than if they used it fronting on Riverside Drive? A. Quite so.

By Mr. Seclow:

Q. Now you have answered my question, you said that the portion of that wing fronting on Union Avenue and going to a distance of 150 feet North on Riverside Drive has a market value of about $10,000. A. I mean the whole tract.

Q. How much is that part of the tract, excluding the rear of it? A. I don't think it has any value in the rear at all.

Q. No value ? A. Not to speak of, on account of its shallowness.

Q. So that in your opinion, Mr. Heins, as far as these two wing pieces are concerned, you could get as much for a strip of land if it were 150 feet in depth along either residential street, namely, Prospect Avenue and Union Avenue, as you could for the full depth of approximately 350 feet? A. Yes, practically, under the conditions as they exist.

Q. And this is as fine a neighborhood as there is in Cranford? A. Yes, sir.

Q. That is the old Sperry homestead? A. Yes.

Q. Are there any neighborhoods in Cranford that are not so fine, that have lots that are 110 feet deep? A. Oh, yes; I can show you a lot of them that are 100 feet.

Q. Is there any neighborhood in Cranford that compares with this as a select neighborhood for homes? A. No, sir.

Q. Where you can buy a plot 110 feet in depth by 200 feet frontage for less than $5000? A. 100 feet depth; what do you call 200 feet?

Q. There (indicating). A. I don't call that frontage, because you can't use but a little of that frontage; that is no frontage; I consider it frontage when you can build a residence on it.

Q. Do you mean to say here, Mr. Heins, that in your opinion a plot of land on Union Avenue 150 feet north of Riverside Drive, having a frontage of about 250 feet on Union Avenue and a depth of 110 feet is worth less than $5000? A. I say——

Q. No matter what is in back of it? A. I don't consider that a frontage; I consider it in my opinion as siding.

Q. If I were to draw a line on this sketch making a rectangle of approximately 250 feet frontage on Union Avenue, as shown on this sketch, with a depth of 110 feet, would you say that plot is worth less than $5000? A. In that neighborhood, yes.

Q. How much less? A. Well, I will ask you to repeat the question; you got me involved.

By Mr. Rubenstein:

Q. Do you know that, as a matter of fact, that there was a mortgage contemplated on these two wings, a first mortgage of $27,000? A. No.

Q. Don't you know that? A. No.

Q. Isn't it a fact, Mr. Heins, that you had in your place of business a listing of these two wings

on a basis of $100. a foot, and that you appraised that at $100. a foot. A. Yes, sir.

Q. On a side street? A. No, not on a side street; no, sir; fronting on Riverside Drive.

Q. If I was to call your attention to the fact that there was contemplated a mortgage for $27,000. on these two wings, would that change your opinion? A. No.

Q. I am talking about at the time of this sale. A. All right; that don't puzzle me on the mortgage stuff.

Q. You weren't negotiating any mortgage loans on this property at all, were you? A. Not particularly, except when the Capitol Construction Company got in hot water, they came to me to see if I couldn't help them out, and I went to two or three places to try to help them out, but they couldn't come through with a clean bill of goods and I couldn't do anything with it.

Q. Who couldn't come over with a clean bill of goods? A. The Capitol Construction Company.

Q. What do you mean by a clean bill? A. Whatever you consider it to mean.

Q. What do you mean by that? A. For instance, I was to Feigenspan's mortgage company—

Mr. Kanter: The National Commercial.

A. I was there, and the vice-president told me if the people came in with a clean bill of goods, they will have the money; I believe they were negotiating for $165,000 or $175,000.

Q. On the building loan? A. No; not on the building loan.

Q. I mean on the building alone. A. Yes; on the building alone; therefore I saw these gentle-

men and they said if they came in with a clean bill of goods they will let them have the money.

By Mr. Kanter:

Q. As the building was going up, was there anything on the surface of the ground to indicate any separation of the two tracts?

Mr. Pyle: That isn't cross-examination.

The Master: Are you making him your own witness on that?

Mr. Kanter: Yes.

Q. As the building was going up, during the course of construction, was there anything on the ground to indicate that there were three separate building parcels there? A. No.

Mr. Kanter: If your Honor please, I move to strike out the testimony of Mr. Rubenstein to prove Mowre Lager's claim.

Mr. Rubenstein: I think, your Honor, there is sufficient testimony to prove it, but if I can't convince your Honor, you can strike it out afterwards.

Mr. Kanter: I understand Mr. Stout wants to prove Mr. Booth's claim and Mr. Van Woeart's claim.

Mr. Stout: Yes. I have these two mortgages of mine yet to prove, one of them particularly which I say is very important, because everybody seems to be interested in it, but I won't move that in the absence of counsel.

Hudson Booth, on Behalf of A. W. Booth & Brother—Direct.

HUDSON BOOTH, sworn:

Mr. Pyle: In all these matters they stipulated, I understand, that they are subject to the lien of the Carteret Company mortgages; I am not interested in them, so there is no use of my staying.

Direct examination by Mr. Stout:

Mr. Stout: I offer in evidence a true copy of the lien claim filed in this case, and if counsel insist upon it I will get a certified copy; but it seems to me like a useless waste of money. This lien claim, as appears by the bill of complaint, also by the records, was filed on February 25, 1928.

The Master: When was the last work done?

Mr. Stout: December 9, 1927, according to the lien claim.

Mr. Stout: I also desire to have it noted on the record that suit was brought on this lien claim on March 3, 1928, and the issuance of the summons and so forth endorsed upon the lien claim, according to the statute.

Marked Exhibit 109.

Mr. Seclow: Counsel is stipulating that this lien claim is subject to the mortgage of Shilowitz and Tucker.

Mr. Kanter: We are willing to let this go in evidence, provided we are not going to be subject to the strict proof we have been held to. We have been required to bring in certified copies of liens.

Mr. Seclow: I haven't expressed any opposition to anybody bringing in a lien claim that wasn't certified. It was merely stipulated that we had priority.

The Master: If it is agreeable to counsel and they are satisfied that those are true copies.

Mr. Seclow: If Mr. Stout says so, then it is so.

Mr. Kanter: Then it is stipulated on the record that all our certified copies are waived.

Mr. Seclow: We waive proof of that; let the papers go as evidence of that fact.

Mr. Kanter: In other words, whatever appears to be due as shown on the lien claims, you admit.

Mr. Seclow: So far as we have no question about them we admit.

Q. What is your official position with Alfred W. Booth & Brother? A. Treasurer.

Q. You are familiar with the account of Alfred W. Booth & Brother with the Capitol Construction Company in reference to this Cranford job? A. Yes, sir.

Q. Have you personal knowledge of that transaction? A. I have.

Q. Do you know of your own knowledge when the last materials were delivered by Alfred W. Booth & Brother on that job? A. Some time in December, 1927, I believe.

Q. If you referred to the lien claim, would that refresh your recollection? A. Yes; December 9th, 1927.

Q. Have any payments been made on account of materials delivered? A. Not directly from the Capitol Construction Company.

Q. From anybody, for their account? A. Yes.

Q. Your statement shows a cash payment of $81.63? A. Yes, that is true.

Q. Which was received then for the account of the Capitol Construction Company on the Cranford job; was it not? A. Yes, sir.

Q. You also give them credit for what? A. 36 bundles of material.

Q. Returned from that job? A. No; that was an allowance made by the wholesaler to us which we passed along to them.

Q. Have you the delivery slips for that? A. I have.

Q. By whom are they signed? A. They are signed by the various owners; Harry Starr, Jacob Starr, Hyman Silverman, Jacob Starr, Louis Roberts, Harry Starr, H. Silverman, H. Silverman, J. Starr.

Mr. Stout: I offer these delivery slips in evidence by consent.

Mr. Tally: The only objection I have that strict proof is not required of this Louis Roberts.

The Master: I think these ought to be admitted.

Mr. Kanter: Then I want mine admitted for the same purpose, to prove delivery.

Mr. Tally: Starr and Silverman claim to have no knowledge of that man.

The Master: I don't want to be put in the position of changing the record as to other claims without all counsel being present who were present at that time. I don't think we ought to do it.

Q. All of these were signed either by Silverman or Starr, with the exception of one? A. Yes.

The Master: I will admit all those except the one signed by Roberts.

Eight delivery slips marked Exhibit 110.

Q. What is the amount due on your claim? A. The amount due on your claim is $3714.14.

Q. With interest from December 9? A. Yes, sir.

ALPHEUS VAN WOEART, Sworn:

Direct examination by Mr. Stout:

Mr. Stout: I offer in evidence a true copy of the lien claim filed by Mr. Van Woeart in this matter, which was filed in the Union County Clerk's office on February 7, 1928.

Marked Exhibit 111.

Mr. Stout: I also desire to have it noted on the record that suit was brought on this claim on March 3, 1928, by the issuance of summons which was endorsed on the lien claim as provided by statute.

Q. Mr. Van Woeart, you furnished materials and did work on this Cranford apartment job for the Capitol Construction Company, did you not? A. Yes, sir.

Q. What was the nature of your contract; for what class of work? A. Heating.

Q. You mean for furnishing the heating outfit and installing it? A. Yes, sir.

Q. Did you have an oral or written contract with the Capitol Construction Company? A. Oral.

Q. What was the agreed price for the installation of the heating plant in the Cranford job? A. $10,000.

Q. You undertook to work then under this agreement? A. Yes, sir.

Q. Up to the time of the appointment of the receiver in this matter how much had been paid to you by the Capitol Construction Company on account of your work up to that time? A. $1500.

Q. By a payment of $500. and a payment of $1000? A. Yes.

Q. After the company went into the hands of the receiver you made an agreement with the receivers of the Capitol Construction Company? A. Yes, sir.

Q. To finish your work? A. Yes.

Q. And this paper is the acceptance of your estimate to complete the work? A. Yes, sir.

Acceptance of estimate marked Exhibit 112.

Q. You did the work under that order or estimate? A. Yes, sir.

Q. And you were paid that sum of money for doing the work? A. I was.

Q. So you have received altogether the $1500. which you received prior to the appointment of the receiver, and $5982. subsequently? A. Yes, sir.

Q. Leaving a balance for this job of $2518? A. Yes, sir.

Q. When did you do your last work prior to the appointment of the receivers? A. Around January; January 4th.

Alpheus Van Woeart, on Behalf of A. W. Booth & Brother—Cross.

Abraham Lipschitz, on Behalf of Lipschitz Parquet Floor Company—Direct.

Q. In other words, you worked right up to the time of the appointment of the receivers? A. Yes, sir.

Q. So that you claim there is due you $2518. with interest from January 4th, 1928? A. Yes, sir.

Cross-examination by Mr. Kanter:

Q. Mr. Van Woeart, your contract with the Capitol Construction Company was a different transaction from your contract with the receivers, was it not? A. Sure, we had two different contracts.

Q. You terminated your work with the receivers on January 4th, 1928, is that correct? A. No.

Q. With the Capitol Construction Company on January 4th? A. Yes.

Mr. Seclow: I would like counsel to stipulate that our mortgage is prior to their lien. There is a postponement here.

Mr. Stout: Yes; the Shilowitz and Tucker mortgage is prior to the lien claim of Alpheus Van Woeart.

Abraham Lipschitz, sworn:

Direct examination by Mr. Kauffman:

Mr. Kauffman: The lien claim was filed in this suit on January 12, 1928; according to the lien claim the first work was done on October 1st, 1928, and the last materials

were furnished and labor performed on October 15, 1928.

Mr. Seclow: If the Court please, I would like to ask counsel if they will stipulate that this lien claim is subject to our mortgage.

The Witness: I haven't subordinated it.

Mr. Kauffman: It is stipulated that the mortgage of the Carteret Company is prior to our lien claim.

Q. How must is due on this claim?

Mr. Seclow: I wouldn't waive proof then; I think that he should prove his claim.

Mr. Kauffman: It is stipulated that the lien claim of Lipschitz Flooring Company is subject to the mortgage of Shilowitz and Tucker.

Mr. Kanter: Is it also stipulated that no suit was started on this lien claim?

Mr. Kauffman: Yes.

Mr. Kanter: Can I ask you did you prove that fact with reference to Crouse?

Mr. Kauffman: Oh, yes; in every one of my cases I have stipulated that we have not started suit.

By Mr. Kauffman:

Q. What is your business? A. Parquet flooring.

Q. Did you do any work for the Capitol Construction Company? A. Yes.

Q. What sort of work? A. Hardwood floors.

Q. Did you furnish the materials, also? A. Yes, sir.

Q. What was the contract price for the work? A. $6400.

Q. Was there any extra work done? A. $100.

Q. What was the nature of the extra work? A. The basement apartment.

Q. That was not stipulated in the contract? A. No.

Q. Did you have a written contract? A. No.

Q. Did you receive any money on account of this work? A. $2500.

Q. Did you finish your work? A. No.

Q. What was the work yet to be finished? A. $300.

Q. What was the actual work yet to be finished? A. 10000 square feet, scraped and finished.

Q. What is the value of the scraping and finishing of 10000 square feet of hardwood floor?

Mr. Tally: I object to that.

Mr. Kauffman: I will withdraw the question.

Q. How much would it cost you to scrape 10,000 square feet of flooring?

Mr. Talley: I object to that question.

By the Master:

Q. Does that include your profit on the 10,000 square feet; that $300? A. Yes.

Q. What profit did you get out of that $300? A. Five per cent.

Q. It would cost you then $285 to complete it? A. Right.

Mr. Talley: I object to that.

The Master: I will take it now.

By Mr. Kauffman:

Q. How much money did you receive on account of this work? A. $2500.

Q. That leaves a balance due you of how much? A. $3700.

Q. Has any part of that money been paid? A. No, sir.

Mr. Kauffman: I would like to introduce into evidence a copy of the record of the lien claim filed.

The Master: That is an abstract.

Mr. Kauffman: Yes.

Marked Exhibit 113.

By Mr. Talley:

Q. When was your lien claim filed? A. About January something.

Q. When did you do your last work on this job? A. About the middle of December.

Q. What year? A. 1927.

Q. Do you know the exact time? A. I think it was the 15th of December.

Q. Who else worked on the job besides you? A. Floor layers, scrapers and finishers.

Q. About how many men altogether? A. Every time we come down to the job we had about ten men every time.

Mr. Kauffman: If your Honor please, I don't think this is proper cross-examination, how many men he had on there.

Q. How many days altogether did you put in on this job? A. I am not working myself.

Q. You didn't do any work on the job yourself? A. I supervised the job.

Q. Were you there? A. Yes.

Q. How many days did you supervise the job altogether? A. Well, I think about twenty days altogether.

Q. When did you begin your work? A. It was about October 1st.

Q. You didn't work every day from the time you began? A. No; we made some intermissions, because we couldn't go ahead with the work on account of the other contractors being there.

Q. Were you there when the work was completed? A. Well, my job wasn't entirely completed when I left it, before the receiver was appointed; we had to have some work to finish it up.

Q. Were you there when the last work you did do was done by your company? A. Yes, sir.

Q. That was about the middle of December, 1927? A. Yes, sir.

Q. From whom did you get this money that you say was paid to you? A. James E. Pyle.

Q. From Mr. Pyle? A. Yes, sir.

Q. With whom did you make this agreement? A. The original agreement?

Q. Yes. A. Starr & Silverman, Capitol Construction Company.

Q. It was an oral agreement for $6400? A. Yes.

Q. You were to furnish all the materials and all the men? A. All on the job, yes.

Mr. Kauffman: Will you reserve to me the right to file with you a certified copy of the lien claims themselves.

The Master: If that becomes necessary. I think counsel has waived that right.

Mr. Kauffman: Then I will file true copies.

Roderick N. Crocket, on Behalf of Roderick N. Crocket & Company—Direct.

John Nicaretta, on Behalf of John Nicaretta—Direct.

RODERICK N. CROCKET, sworn:

By Mr. Kanter:

Q. You are connected with the firm of Roderick N. Crocket & Company? A. Yes, sir.

Q. You did some landscape, grading and other similar work for the building in Cranford, New Jersey, concerning which we have been talking about today? A. Yes, sir.

Q. The last work done was December 8, 1927? A. Yes, sir.

Q. And the balance of $2337.25 with interest? A. Yes, sir.

Q. I show you a copy of your lien claim; is that the lien claim that you filed? A. Yes, sir.

Q. That has not been paid to you? A. No, sir.

Q. You admit that your lien claim is subject to the lien of the mortgage of Shilowitz and Tucker, and the mortgage of the Carteret Company? A. Yes, sir; I signed them.

Q. The balance due you is $3,233.75 with interest from December 8, 1927? A. Yes, sir.

JOHN NICARETTA, Sworn:

By Mr. Seclow:

Q. You filed a lien claim for the concrete work on the property described in the bill of complaint? A. Yes.

Mr. Seclow: I offer in evidence lien claim filed in the County Clerk's office of Union County, between John Nicaretto,

plaintiff, and Capitol Construction Company and others, defendants, which contains the notation that summons was issued January 3, 1928, at 3 P. M. This is a certified copy.

Marked Exhibit 114.

Q. Now, you did the concrete work there? A. Yes, sir.

Q. Did you have a contract? A. A verbal contract; not in writing.

Q. How much were you to receive for all your work? A. $2450.

Q. The whole job? A. No; I received—my contract was $4625.

Q. And how much did you receive? A. $2450.

Q. Did you finish your work? A. Yes, sir.

Q. How much is coming to you? A. $2175.

Q. When did you finish your last work? A. It was December 25th or 26th, something like that.

Q. Are you sure it was December? A. The 26th, I think; or I mean November; not December.

Q. November. You say it was after Thanksgiving? A. Yes; around the 25th or 26th.

Q. When did you start your work? A. In July.

ISIDORE SHILOWITZ, Sworn:

By Mr. Seclow:

Q. You are one of the mortgagees in the mortgage given by the Capitol Construction Company to Tucker and Shilowitz for $20,000? A. Yes, sir.

Q. What arrangement did you have as to fees or commissions in placing this mortgage? A. $1000.

Q. You were to get $1000? A. Yes, sir.

Q. What was that for? A. For the lawyers and for to go and see that the money was to be paid out for that work.

Q. For inspection? A. For inspection.

Q. Did you go there and make inspections? A. I was there.

Q. How often did you go? A. About seven or eight times.

Q. How often did you go? A. Every week, once a week. And then at the lawyers' office my time.

Q. How much were you there at the lawyers' office, do you know? A. Well, they told me at that time it cost me about $500.

Q. Did you get that money yet? A. No; not yet.

Cross-examination by Mr. Kanter:

Q. How did you get that $1000; in cash? A. By check.

By Mr. Seclow:

Q. It was given back to you, wasn't it? A. It was given by a check.

Q. Who paid you; Starr or Silverman? A. Starr and Silverman.

By Mr. Kanter:

Q. They cashed your check and gave you it back in cash; is that right? A. Right.

Q. Why did you have to do that transaction just that way? You didn't pay out $1000. You really got back the $1000. A. I got $1000. back.

Mr. Kanter: Can it be stipulated on the record then that that $1000. is one of the checks that were introduced in evidence by Mr. Seclow?

A. The check was cashed.

Q. One of your checks was cashed and the cash given to you by the bank? A. Yes, sir.

Mr. Kanter: One of Mr. Seclow's checks. Otherwise he paid out $21,000.

Q. Out of one of Mr. Seclow's checks for $1000. is was cashed by Starr & Silvermann, or the Capital Construction Company, and the cash turned over to you; is that right? A. Yes, sir.

ALEXANDER SECLOW, sworn:

By Mr. Seclow:

A. The payments which were evidenced by various checks made on the Tucker and Shilowitz mortgage were made by checks given directly by Shilowitz and some checks by Seclow & Nessenbaum, and Seclow & Nessenbaum, of which firm I am a member, received the entire amount of $20,000. and the disbursements which were made on the checks of Seclow and Nessenbaum and also checks of Shilowitz which are in evidence were made on account of the mortgage of $20,000. to Tucker and Shilowitz.

(Adjourned to July 10, 1929, at 10 A. M.)

IN CHANCERY OF NEW JERSEY.

CAPITOL CONSTRUCTION COMPANY.

Before:

HON ALOYSIUS M. MCMAHON,

Special Master in Chancery.

Hearing resumed pursuant to adjournment. July 10th, 1929.

Appearances:

(As before.)

The Master: It is stipulated that the mortgage of Shilowitz and Tucker and the Carteret Company are prior to the lien of Meyer & Ruh.

ETHEL GOLDBERG, sworn.

Direct examination by Mr. Kaufman:

Q. For whom do you work? A. Meyer & Ruh Company.

Q. In what capacity? A. Secretary and bookkeeper.

Q. Did Meyer & Ruh sell any material to the Capitol Construction Company or Starr & Silverman? A. Yes, sir.

Q. Have you got an account of the material sold to these people? A. Yes, sir.

Q. Have you the account with you? A. Yes, sir.

Q. Produce it, please. A. (Witness produces account.)

Mr. Stout: By whom are the delivery tickets signed?

The Witness: By Starr and Silverman.

Q. They are all signed? A. Signed by either Starr or Silverman.

Mr. Stout: Nobody else?

The Witness: No.

Q. J. Starr and H. Starr signed them, and Silverman? A. Yes, sir.

Mr. Stout: I have no objection.

Q. Is this the original book of account, or are these sheets taken from the original book of account of J. Starr and Silvermann? A. Yes, sir.

Mr. Kaufman: I ask that they be introduced in evidence.

(Admitted and marked Exhibit 1 of this date.)

Q. Were all the materials listed on these sheets shipped to the Cranford job? A. Yes, sir.

Q. What was the amount due and owing to Meyer & Ruh from the Capitol Construction Company? A. $791.19.

Q. What was the date of the last delivery? A. December 1, 1927.

Q. I show you a list in a mechanics' lien filed and ask you whether this is taken from the original books of account? A. Yes, sir.

Q. How much is due Meyer & Ruh on account of this mechanics' lien? A. $791.19.

Mr. Kaufman: At this time I would like to introduce a true copy of the mechanics'

lien filed by Meyer & Ruh against the Receivers for the Capitol Construction Company and the other defendants in this cause.

(Admitted and marked Exhibit 2 of this date.)

Q. Here is a slip dated November 8th, 1927, that is not signed. Do you know anything about that slip? A. I could not say, but it must have been delivered to them.

Q. It was delivered to them? A. Positively.

Q. Who makes these slips out? A. Different clerks in the store make the slips out.

Mr. Kaufman: That is all.

HYMAN SILVERMAN, sworn.

Direct examination by Mr. Kaufman:

Q. What is your position with the Capitol Construction Company?

The Master: I don't think we need qualify him in each particular case.

Mr. Stout: No.

Q. I show you an account of Meyer & Ruh billed to Starr Brothers & Silverman, Cranford, New Jersey, and ask you whether or not that is the account of the moneys due Meyer & Ruh from the Capitol Construction Company? A. Yes, sir.

The Master: What is the amount?

The Witness: About $800.

Q. $791.19? A. Yes.

Q. Now, did you buy all your hardware from Meyer & Ruh? A. Yes.

Q. I show you a slip which contains: One rule, nine sets of surface floor hinges and some butts, and ask you whether or not you received these goods? A. I suppose I did.

The Master: Don't you know?

The Witness: Yes, I used that hardware there; I didn't take hardware no other place.

Q. You didn't buy hardware anywhere else? A. No.

Q. Here is an item of sash weights involving about 1000 sash weights; were those delivered to your job? A. Yes, sir.

Q. This is the delivery slip dated September 19th, 1927? A. Yes.

Q. Here are some of the items, bags of stucco, plaster of paris. A. Yes.

Q. Delivered on September 10th, 1927. Were those delivered to your job? A. Yes.

Q. Did you receive two kegs of nails on August 8th, 1927? A. Yes, I received nails on that day.

Q. Did you sign any of these slips? A. I don't remember.

Q. Is that your signature? A. Yes.

Q. Pointing to item of July 6th, 1927. You signed most of these slips, didn't you, Mr. Silverman? A. Yes, sir.

Mr. Kaufman: I would like to introduce these into evidence.

(Slips admitted and marked Exhibit 3 of this date.)

The Master: Is it admitted that no suit has been started on the lien claim?

Mr. Kaufman: Yes.

Mr. Kantor: I would like to have it noted on the record, if the lien claim is already in evidence before you, that the lien claim does not include in it the name of the contractors with whom the lien claimant is alleged to have made the contract in respect to which the lien is claimed and that no suit was started on the lien claim.

The lien claim, in paragraph three of the lien claim says that the labor was performed and material furnished for the Capitol Construction Company, Inc. and the bill of particulars annexed to the lien claim shows the debit made to Starr Brothers and Silverman and not to the Capitol Construction Company.

Mr. Kaufman: With reference to the first stipulation, I suppose the whole document, the lien claim, speaks for itself, and as to the second we have already stipulated that, that the suit was not started.

Mr. Stout: In the matter of the claim of Alfred W. Booth and Bros., I would like to have Mr. Silverman sworn.

HYMAN SILVERMAN, sworn.

Mr. Stout: The court will recall that I attempted to prove that claim at the last hearing. There was one item in that claim consisting of 75,000 spruce lath, the delivery ticket was signed by somebody other than Starr or Silverman.

Q. Mr. Silverman, you were the superintendent of construction on this Cranford job? A. Yes, sir.

Q. You were on the job every day? A. Every day.

Q. Do you know from whom you purchased the spruce lath for that building? A. Yes.

Q. From whom? A. A. W. Booth Bros.

Q. Do you know of your own knowledge whether the 75,000 spruce lath were actually delivered there on that job? A. Yes, sir.

Q. And were they used in the construction of the apartment house under consideration? A. Yes, they certainly were.

The Master: Did you order 75,000 spruce laths from A. W. Booth and Bros.?

The Witness: Yes, sir.

The Master: And it was delivered?

The Witness: Yes, sir, it was delivered.

Mr. Stout: That is all.

I would like to have Mr. Silverman sworn now in the matter of the claim of Michael Tozzi and Joseph Marcasiano.

HYMAN SILVERMAN, sworn.

Direct examination by Mr. Stout:

Mr. Stout: I stipulate in this matter the priority of the mortgage of Shilowitz and Tucker and the Carteret Company to this lien claim now to be proved.

Q. Did the Capitol Construction Company have any transactions with Tozzi or Marcasiano in respect to the Cranford job? A. Yes, sir.

Q. What was the transaction? A. With delivering ashes.

Q. That you purchased or the Capitol Construction Company purchased, that is, the ashes for this job? A. Yes, the Capitol Construction Company ordered them from Tozzi.

Q. What were the ashes used for? A. For concrete, cellar and also for the concrete floor and sidewalk.

Q. Do you know whether the Capitol Construction Company is indebted to Tozzi and Marcasiano for the balance due for ashes delivered? A. Yes, sir.

Q. You do not know the amount of it, do you? A. I do not know the amount.

Mr. Stout: That is all. I desire at this time to offer in evidence a true copy of the lien claim in this matter which was filed February 7, 1928; under the lien claim it shows that the last delivery was made on October 18th, 1927.

The Master: Was suit started on your lien claim?

Mr. Stout: Yes. I also desire to have noted on the record that suit was instituted on this lien claim on February 14th, 1928 and the issuing of the summons, and so forth, endorsed on the lien claim.

Mr. Kauffman: We agree that the building was started before Mr. Shilowitz's mortgage was recorded. The building was under construction at the time his client took the mortgage, July 29th, 1927; the building was already under way.

The Master: There is some evidence here that somebody has a lien started on April, 1927.

Mr. Kauffman: I don't think it would be material because certainly it was started prior to July, 1927 and the validity of all mortgages as affecting lien claims would be as of that date anyhow.

The Master: If there is any lienor who has not subrogated his right to the mortgage, wouldn't he be ahead of the mortgages? I think he would. Then don't you think it is important to have that date established?

Mr. Kauffman: It was stipulated on the record and counsel will now stipulate that the building was started prior to the time of Mr. Shilowitz's mortgage, prior to July 29th, 1927.

The Master: That is the first mortgage, is it?

Mr. Kauffman: Yes.

MICHAEL TOZZI, sworn.

Direct examination by Mr. Stout:

Q. Where do you live? A. 368 Monmouth Street, Jersey City.

Q. Mr. Tozzi, you and Joseph Marcasiano are in business trading under the name of M. Tozzi and J. Marcasiano? A. Before, not now.

Q. And you were partners doing business under that name from and including July 19th, 1927, up to and including October 18th, 1927? A. Yes.

Q. You sold and delivered to the Cranford job, this apartment house, the Capitol Construction

Company, the ashes that were used on that job, did you not? A. Yes, sir.

Q. You actually had to do with the ashes yourself, you and your partner? A. Well, both.

Q. Are these the delivery slips for the ashes delivered on that job? A. Yes, sir.

Q. Who is John Nicaretto? A. The concrete man.

Mr. Stout: I offer in evidence these slips which are purported to be signed by either H. Silverman, one of the officers of the Capitol Construction Company, some by Jacob Starr and others by John Nicaretto.

(Admitted and marked Exhibit 5 of this date.)

Q. The total amount of the ashes delivered on this job came to $1156? A. Yes, sir.

Q. You received one payment of $200 on account? A. Yes, sir.

Q. Which leaves a balance of $956? A. Something like that.

Q. The last delivery was on October 18th, 1927? A. Yes, sir.

Q. You claim there is due you from the Capitol Construction Company the sum of $956. with interest from October 18th, 1927? A. Yes, sir.

Mr. Stout: That is all.

HARRY LEVINE, sworn.

Direct examination by Mr. Haber:

Q. Where do you live? A. 728 Maneda Street, the Bronx.

Harry Levine, on Behalf of Royal Marble Works—Direct.

Q. You are an officer of the Royal Marble Works supply tile, marble, and so forth, for the Cranford job? A. Only marble.

Q. For the Cranford job? A. Yes, sir.

Q. Did you have a contract with the Capitol Construction Company? A. I did.

Q. Have you got it with you? A. Yes.

Q. Who signed it? A. Jacob Starr, Secretary.

Mr. Haber: I offer it in evidence.

(Admitted and marked Exhibit 6 of this date.)

Q. You are not claiming the full amount of that contract, are you? A. No, sir.

Q. At the time of the appointment of the receiver, all the work under that contract had not been done? A. No, sir.

Q. And after the appointment of the receiver your company did work for the receiver for which a claim went in? A. Yes, sir.

Q. For the work which you did for the receivers? A. Yes, sir.

Q. Have you a statement showing the amount due from the company?

Mr. Seclow: That is objected to, that is not the way to prove it.

The Master: Sustain the objection.

Q. Do you know what work you did for the company? A. Yes, sir.

Q. And what materials were delivered? A. Yes, sir.

Q. Have you a delivery receipt? A. I have.

Q. How many have you? A. Three.

Mr. Haber: I offer them in evidence.

Mr. Seclow: That is objected to unless the delivery is proved. May I ask this man a question?

The Master: Yes.

Cross-examination by Mr. Seclow:

Q. Did you deliver these goods personally? A. My truck delivered them.

Q. Did you deliver them personally? A. What do you mean, myself?

Q. Yes. A. I cannot understand.

The Master: Did you go with the truck and deliver these goods:

The Witness: No, sir, my truck delivered it.

The Master: You did not personally?

The Witness: I helped load the material on the truck.

Q. Were you there when they were unloaded? A. No, sir.

Mr. Seclow: That is all.

Direct examination by Mr. Heber:

Q. Who is Pizzanni, do you know? A. My foreman. There were three teams working and he was in charge.

Q. Is that his signature?

Mr. Seclow: Objected to as immaterial. You cannot bind the defendant by the signatures of his own agent.

The Witness: I can bring that man here.

The Master: Then you had better bring him.

Q. What is this statement you show now?

Mr. Seclow: Objected to as self serving. It makes no difference what his own statement is.

Mr. Haber: You do not know what I am trying to prove.

The Master: Sustain the objection.

Q. Have you any books of account showing the work and the marble that was delivered and the work done on this job? A. The only thing we have is our receipt.

Q. What receipts? A. Receipts for the merchandise that was shipped there.

Q. What receipts are you speaking of? A. These three.

Q. And those three receipts were signed by this man? A. Giovanni Pizzanni, our foreman on that job.

Q. Could you produce him here? A. Yes, sir.

Q. What other evidence have you?

Mr. Seclow: I object.

Mr. Haber: I withdraw the question.

Q. What books do you keep outside of these receipts you mention?

Mr. Seclow: Objected to. The witness has stated that he has no books except those receipts signed by his own foreman.

Mr. McMahon: Do you keep books of account of your customers?

The Witness: Yes, if you will permit me to explain.

The Master: No, no. Have you any books of account showing your account with the Capitol Construction Company?

The Witness: This was a lump sum job.

The Master: You have no books of account, then?

The Witness: I have books stating we have $3,700 charged to this account. We have a ledger and a journal, cash book, and so forth, a regular set of double entry books. When we have a lump sum job it is only posted with one item, the amount of that contract, but we keep receipts for each individual delivery made on that job. If every job went wrong we would carry our books differently. This job, after we made three deliveries and the work was done, I personally appeared before Mr. Starr and asked him for a payment. He was postponing it, dragging it from day to day, and I thought it was time to quit, and things went wrong and we got notice of a meeting.

Q. Now, you say you have a journal or a ledger or something? A. Yes, sir.

Q. Will you produce them at the next hearing? A. Yes, sir.

Mr. Haber: I offer in evidence a mechanics' lien that was filed.

(Admitted and marked Exhibit 7 of this date.)

The Master: Issued the 7th day of April, 1928.

Cross-examination by Mr. Kanter:

Q. Mr. Levine, you had a man by the name of Theodore Harris employed in your concern who was vice-president of the company? A. Yes.

Q. And he is in charge of the accounts of your company, isn't he? A. Yes—as a general man.

Q. As vice-president of your company? A. Yes, but he is not in charge of any particular item.

Q. He is not in charge of the accounts would you say? A. I say he is a general man.

Q. On the affidavit annexed to the lien claim Mr. Harris states that he has charge of the accounts of said company. Is that statement correct? A. Well, he is a general man, in charge of everything.

Q. Is he in charge of the accounts of your company? A. Sure; he takes as much care as I do of the accounts.

Q. He has charge of the accounts, hasn't he? A. Yes.

Q. The contract called for a payment of $3700? A. It called for $3,700 after I done all my work.

Q. After you did all your work? A. Absolutely.

Q. The payments were to be made as the work progressed? A. Yes, sir.

Q. In other words, no promise was made on the part of the Capitol that you were to get any different amount of payments?

Mr. Seclow: Obected to; tending to vary the written agreement.

(Question withdrawn.)

Q. When did you quit the job? A. A few days after November 11th.

Q. At that time there was still a considerable amount of work to be comleted, wasn't there? A. Yes, sir.

Q. Work which should have to be done under your contract of November 1, Exhibit 6? A. If I got money, sure.

Q. You subsequently performed that work which was completed for the receiver? A. I did part of that uncompleted work for the Receiver.

Q. And part still remains uncompleted? A. Yes, sir.

Q. In other words, you have completed part of your work with the Capitol up to November 11th? A. That is right.

Q. Then you left a balance uncompleted, did you not? A. Yes.

Q. And a part of the uncompleted work so left by you was thereafter done by you for the Receiver? A. In other words, you mean I done part of the work for the Capitol, then I done part for the Receiver, and I didn't complete part of it?

Q. Part is still uncompleted? A. Yes, sir.

Q. What is the value of the work that is still entirely uncompleted?

Mr. Seclow: Objected to.

A. I don't know.

Mr. Seclow: It is objected to for this reason: that the witness has not shown that he knows what is completed.

Mr. McMahon: Sustain the objection on that ground.

Q. You do know, however, that part of the work is still uncompleted? A. Yes.

Q. But you are not able to tell us exactly the figure? A. I think there was $1,100 worth of work done for the Receiver.

Q. $1,122.27 is a fair value of the work you did for the Receiver? A. Yes, sir.

Mr. Seclow: Obected to. That is immaterial, what the value of the work was done for the Receiver.

The Master: I think it is. The question we are interested in is what was the worth of the work done for the Capitol?

Mr. Seclow: I move to strike the answer out.

The Master: Strike it out.

Mr. Haber: Were you ready and willing to complete your contract?

The Witness: If I received the money, yes.

Mr. Seclow: No questions.

Cross-examination by Mr. Kantor:

Q. You said a few days after November 11th? A. Yes, sir.

Q. Do you mean a matter of two or three days? A. I asked for money and they were telling me wait a few days, and they strung it along.

Q. Was it more than a week? A. I could not say exactly.

Q. Then you do not know when you did the last work there, do you? A. On November 11th was when I finished the work.

Q. That is the last time you did work there? A. I had men on the Job November 11th.

Q. And that is the last day you had men on the job? A. November 11th, Capitol Construction.

Q. You say on November 11th, 1927, was the last day that you had any men on that job? A.

Harry Levine, on Behalf of Royal Marble Works—Cross.
Edward Stout, on Behalf of West Bergen Trust Company—Direct.

Under the Capitol Construction Company, not under the receivers—under the Capitol.

Mr. Seclow: I desire to call attention of the court to the fact that the interest of Tucker and Shellowitz and mortgagees is not set up in the lien claim, and there is no proof here that any summons was ever issued making Tucker and Shellowitz party defendants.

Mr. Pyle: The same objection is made on behalf of the Carteret Company.

Mr. Haber: May I ask now the privilege to put in evidence a copy of the complaint in this matter wherein it appears that Shellowitz and Tucker, and the Carteret Company, among others, were named as defendants.

Mr. Pyle: We object to that.

The Master: If there is any objection to it, I cannot receive it.

Edward Stout, sworn.

(In the matter of the claim of the West Bergen Trust Company on its mortgage of $6,000.)

Mr. Pyle: Mr. Stout, I understand, will stipulate that the mortgage of the Carteret Company in the full amount shown to have been advanced on it, $32,003.46 is prior to the claim of the West Bergen Trust Company mortgage.

Mr. Stout: I think it is to the extent that you have proved the moneys advanced, and

I understand you have proved it to have been advanced.

Mr. Pyle: I understood you to say for the full amount $32,003.46, the full amount advanced. Do I understand it right?

Mr. Stout: To the amount that has been proven to have been paid under the mortgage.

Mr. Pyle: Yes, that is $32,003.46, prior to the lien of the West Bergen Trust Company.

Mr. Stout: Yes, and I will stipulate the same as to Shellowitz and Tucker. Those mortgages were on record at the time the West Bergen Trust Company was recorded.

Mr. Seclow: It is stipulated then, that the mortgage of Tucker and Shellowitz was prior to the mortgage of the West Bergen Trust Company.

Mr. Kantor: Will you stipulate the same as far as our lien claim is concerned?

Mr. Stout: I cannot admit that, no.

Mr. McMahon: Proceed, Mr. Stout.

Mr. Stout: In this matter on September 10th, 1927, Harry Starr and Hyman Silverman and I think Jacob Starr, called at my office, 15 Exchange Place. I was then the vice-president of the West Bergen Trust Company. I am now the president of that company. These men were officers of the Capitol Construction Company. Hyman Silverman was president, Harry Starr treasurer and Jacob Starr secretary. They told me that they had come to see me about borrowing some money from the West

Bergen Trust Company in respect to the Cranford job, the apartment house which the Capitol Construction Company was erecting in Cranford, New Jersey, that the Capitol had issued checks aggregating quite a considerable amount, something like $3,000 if I recall, and there was no money in the bank to meet those checks. The Capitol had previously to this opened an account in the West Bergen Trust Company. They opened an account there on or about the time that the Capitol Construction Company secured a construction mortgage from the West Bergen. They gave the West Bergen Trust Company a construction mortgage in respect to a job which the Capitol had, of erecting a garage building on First Street, Jersey City.

I think Mr. Harry Starr was the spokesman. He said that they wanted $5,000. That the Capitol Construction Company would give the West Bergen Trust Company a mortgage to secure the payment of the moneys so advanced. This conversation I think was somewhere around the noon hour, and a note was drawn in my office for $5,000 made payable to the West Bergen Trust Company and signed by the Starrs and Silverman. It was too late that day to get the money from the bank, but on the following Monday, September 12th, this note was deposited in their account, or the proceeds of it, the amount being $4,974.17, and the checks that were then outstanding were later presented that week and were paid out of this fund.

The Capitol Construction Company at the time of the making of this note and receiving the moneys from the West Bergen Trust Company only had on deposit $151.53. As I say, they had outstanding checks something like $3,000.

On the same day, September 10th, 1927, the Capitol Construction Company deposited in the West Bergen Trust Company a check for $500. That $500 was money received by the Capitol Construction Company from a job they were doing for a man by the name of Goldberg and what I shall attempt to do in this case is to show that the proceeds of that note actually went to pay labor and material men and contractors on this Cranford job.

Mr. Kantor: I object to this proof on the part of Mr. Stout because there are no questions being asked and I want to put my objection in now on the ground that our judgment is in the Union County Circuit Court and I contend takes priority over the claim of the West Bergen Trust Company, therefore any evidence the purpose of which is to attack the validity of that judgment would be immaterial as against John F. Terry Company, Incorporated.

Mr. Stout: I am making a statement under oath as to the history of this mortgage.

Mr. Talley: I would like to ask this question: The $500 which was deposited in this account of the Capitol in the West Bergen Trust Company constituted the pro-

ceeds of a payment of some other job? That certainly is hearsay evidence. It may be immaterial, anyway.

Mr. Stout: I said that for your information, that these moneys, or the proceeds of this note were loaned to the Capitol Construction Company for a specific purpose, to pay contractors, laborers and materials on this Cranford job, and that as to this $500 deposit which was made on September 10th, it was immediately checked out to pay a claim of $500 which had nothing to do whatever with the Cranford job. That is the reason I made the statement, that is what our records show, and I don't think that that is immaterial or hearsay. I will prove the history of these checks and what they were payments for.

Mr. Kantor: I must insist upon my objection.

The Master: I take it that you are going to introduce into evidence the bank account. That would show $500 more than you loaned the company?

Mr. Stout: Yes.

The Master: And you desire to explain what that $500 is?

Mr. Stout: Yes.

The Master: I don't see how that hurts anybody. Do you know yourself where that money came from?

Mr. Stout: I know from what the representative of the Capitol Construction Company stated to me.

On September 24th, and as I recall it that was noon Saturday, the same gentle-

men, the Starrs and Silverman came to my office and said that they did not have the money to pay the payroll and I think Mr. Harry Starr, speaking for them, said that if the West Bergen loaned them this $800, they could also give a mortgage. At that time I had not placed the mortgage on the property. Another note was drawn up for $800 with interest and that was deposited in the West Bergen Trust Company and a check drawn that day for $800 which I will attempt to prove. That went to pay the payroll on this job.

On October 25th, 1927, the Capitol by its officers Hyman Silverman, president, and Jacob Starr, secretary, came to my office and executed the bond and mortgage which I now offer in evidence.

(Bond admitted and marked Exhibit 8 of this date.)

(Mortgage admitted and marked Exhibit 9 of this date.)

In the meantime I had looked up the title to the property and found that there were five mortgages then existing. A mortgage to the Standard Building Block Company, $59,000; a mortgage to the Riverside Apartment Corporation, $21,000; a mortgage to the Riverside Apartment Corporation for $30,000; a mortgage to Shellowitz and Tucker for $20,000 and a mortgage to the Carteret Company for $35,000. As I was told by Starr and Silverman that there was interest due on these mortgages, in making up the amount of the $6,000 for this mortgage, I made it up as follows:

The amount of money actually advanced by the West Bergen Trust Company to the Capitol Construction Company and which Starr and Silverman, speaking for the Capitol Construction Company said had actually gone into this job as shown by checks which had been drawn on this account, $5,758.76, we figured the interest on that amount from the time the several amounts were advanced down to the date of the mortgage here in evidence, which amounts to $38.82; the amount of the charge which was agreed upon for my services, and disbursements, examining the title, negotiating the loan, and so forth, $202.22. I take it under the law and authorities that that amount cannot be a claim superior to the mechanics lien, because that is not, as I take it, money which actually went into the cost of constructing the building, although if it had not been for this particular lawyer, they would not have had any of the money to go into the building.

The Master: That was necessary to finance the loan, was it?

Mr. Stout: Yes. Then I have a statement here which I would like to present for the aid of the Master. This is only a summation of how I made up the costs for the mortgage.

(Admitted and marked Exhibit 10 of this date.)

Mr. Kantor: The West Bergen Trust Company is a corporation of the State of

New Jersey, organized under the Trust Company laws of this State, Mr. Stout?

Mr. Stout: Yes, sir.

By Mr. Kantor:

Q. And you were its vice-president at the time of this transaction? A. Yes, and I had particular charge of it.

Q. And you are a member of the Bar? A. Yes, sir.

Q. This loan was started as a commercial loan first, was it not? A. No, sir—if you mean by a commercial loan that the money was just advanced to them on a note, I would say no, sir, positively no.

Q. You received no mortgage at the time? A. No, sir.

Q. Nor was there any agreement to give you a mortgage? A. There certainly was.

Q. You failed to mention that on your direct examination. A. I think you ought to have the direct examination read to you.

Q. Were you familiar with the laws of this State showing what authority a trust company has to make loans? A. I think I know a little something about it.

Q. And with that knowledge in mind you agreed to loan them how much money? A. At this particular time $5,000.

Q. And you took as security for that loan a $5,000 or $6,000 mortgage on this property, is that correct? A. Yes, sir. I might say there that it was represented to me at the time that Starr and Silverman came to my office on September 10, 1927, that they had negotiated or were negotiating a loan, a building and loan mortgage of $200,-

000 and that this mortgage when given would be paid off as soon as they received the $200,000 on the Building and Loan mortgage.

Q. Did you submit their application for this loan to the Board of Directors of your company? A. I did not.

Q. It was all done through you? A. It was afterwards ratified by the Executive Committee and by the Board.

Q. But I mean on September 14th— A. September 10th.

Q. September 10th, 1927, when these people first came to your office for a loan of $5,000, there was no prior action taken by your Board or the Executive Committee with reference to this particular loan? A. No, sir.

Q. You passed upon it yourself? A. I had charge of it.

Q. And you had authority to pass upon that question ? A. Yes, sir.

Q. You had authority to make the loan of $5,000? A. Yes, sir.

Q. The agreement you now speak of was a matter of an oral contract that they were to execute a mortgage? A. The note was a mere formality in the transaction; we wanted some record in the bank that we were lending this money.

Q. Were you circumventing the banking laws of this State in any way? A. I don't have those thoughts in my mind. I may have them, but I don't think that way.

Q. You knew that your bank had no authority to grant this type of a mortgage loan, didn't you? A. We have the right to take a $10,000 mortgage if we want to on property, if there is ample security.

Q. You had not, up to that time, September 10th, 1927, seen the property? A. Yes, sir.

Q. You had? A. Yes. The Capitol had been after me for a construction loan of, I think, something like fifteen or twenty thousand dollars.

Q. When did you see this property for the first time, Mr. Stout? A. I saw this property for the first time, the exact date I don't remember, but it was prior to the giving of this mortgage.

Q. Well, when? A. I don't know.

Q. Well, with reference to the date of the mortgage, which was October 25th, about how shortly prior to that time did you see the property? A. Oh, I think it was sometime in August that I was out there.

Q. August, 1927? A. Yes. What recalled this to my mind, the Capitol had been to see me in respect to the loan which they secured from the West Bergen on the First Street property in Jersey City, and they told me about the job in Cranford and wanted me to go out and look at it, what a beautiful building that they were putting up there.

Q. And you went out to look at it? A. Yes, sir.

Q. Was anybody else with you? A. Yes, I think Mr. James Bowen, the contractor from Jersey City, was with me.

Q. Anybody else with you? A. No.

Q. What was the value of the property at that time, in your opinion? A. Well, the value of the property at the time was in the neighborhood of $200,000.

Q. Very good. And that opinion of yours was re-enforced by the opinion of Mr. Bowen, I take it? A. I don't know whether it was or not.

Q. Well, you consulted him? A. I think I understand a little something about the value of real estate and I relied on that. Probably I talked it over with him, but I don't remember.

Q. You replied upon your judgment of the value of real estate in determining that the real estate and building was worth $200,000, is that correct? A. I wouldn't say that it was correct or not.

Q. You just said a moment ago—A. I said that was my opinion. Whether I formed the opinion that the building was worth $200,000, or not, I probably relied a great deal upon the fact that they had taken this building and loan mortgage and were going to pay our mortgage off.

Q. Please answer the question and we will get along faster. You formed an opinion in August, 1927, that the property was then worth approximately $200,000. A. I don't think I did.

Q. You did not form any opinion? A. I don't know whether I did or not.

Q. But you think that by going back in your mind, you must have then formed the opinion that the property was then worth $200,000? A. I think, looking back now, if I had formed an opinion then, I would have said it was worth about $200,000.

Q. The occasion of your going out to Cranford was the fact that they had applied to you for a loan of something like ten or fifteen thousand dollars? A. I would not say that was the reason.

Q. Well, what is the fact? A. The fact is, as I have already told you, that when they applied for the loan on the First Street job, which I think was sometime in August or at the time that they made the contract for the purchase of that property on First Street, that they spoke about

New Jersey State Library

this Cranford job and what a beautiful building they were putting up out there and suggested that I go and look at it and as I recall it Mr. Bowen and myself were out in the country somewhere in that locality and we stopped and looked at the building.

Q. There was no idea of giving them a loan on the Cranford property at the time you looked at it? A. No.

Q. You did not go out there at any time between the occasion in August you refer to and September 10th, 1927, did you? A. I don't know whether I did or not.

Q. You did not go out there for the purpose of appraising the building and the property, did you? A. No.

Q. On September 10th Mr. Starr and Mr. Silverman, the three of them came to you and asked you for a loan of $5,000? A. Yes, sir.

Q. And the transaction, so far as your written evidence is concerned was completed by your bank excepting a note of $5,000 made by the Capitol Construction Company and endorsed by the three individuals, and crediting the proceeds to this account ? A. I won't say that.

Q. Was there anything else you did that day in the shape of written evidence? A. I have told you all the facts. I am going to answer that question the way I think it should be answered, not the way you want me to answer it.

My answer to that question is this: These men came to my office as I have stated. They wanted to borrow——

Q. Was this your law office, please? A. My law office, yes.

Q. So they came to your law office? A. Yes.

Q. Go on. A. They told me the predicament they were in, that they had issued checks and did not have the money in the bank to pay the checks, for the payment to contractors and others for labor and materials on this Cranford job, and they wanted $5,000 and that they had to have the money to make these checks good; that if the West Bergen would loan them this $5,000, that they would give a mortgage on this property in Cranford as security and that they would use the money to pay these checks and also as a balance toward paying labor and material for work and labor on the Cranford job.

Q. Did they tell you what the checks issued amounted to? A. They said something like $3,000. They spoke of one check to the plasterer of something like $2,000.

Q. They came to you as a lawyer or as the vice-president of the bank? A. I think you had better answer that question.

Q. I am asking you. I wasn't there. Did they come to you and ask you for advice? A. They came to me as the vice-president of the West Bergen Trust Company and an attorney-at-law of this State.

Q. They came to you and told you about the fact that they had issued checks for which they had no money in the bank, is that the idea? A. That was part of the conversation. They stated the predicament they were in in reference to this Cranford job and told me that they needed money.

Q. And they came to you, you acting in a double capacity, both as vice-president of the bank and as an attorney of this State? A. I suppose that I was acting as vice-president of the bank when I negotiated the loan, and when I was looking up

the security and during that work I was doing it as counsel. By the way, I am also counsel to the bank.

Q. I am trying to get down to the occasion on September 10th, 1927, when they came to you. Did they come to you as clients looking for favors, or did they come to you as men trying to get a loan? A. I only know how they came by the way they talked. They came in and told me their predicament in regard to the Cranford job and they wanted to borrow some money from the West Bergen.

Q. And that is all they told you? A. No, they told me all this I have heretofore related.

Q. That they had issued checks for which they had no money in the bank? A. That was one of the things, yes.

Q. And they wanted money to make those checks good? A. Yes, and to have money in the bank to pay the plasterer the following week. He would not continue on the job unless he knew the money was there.

Q. You then agreed to loan them $5,000, did you not? A. Yes, sir.

The Master: For the bank?
The Witness: Yes, sir.

Q. When I say you, I mean for the bank? A. Yes, sir.

Q. And was a note executed in your office? A. I said so on my direct examination.

Q. Mr. Stout, you are only a witness now, please. A. Yes, but I understand I have the same rights as a witness.

Q. This note was executed in your office, wasn't it? A. I said so; and I directed them to go down

to the bank. I called up the treasurer of the bank as to what should be done with the note.

Q. Have you the note still in your possession? A. No.

Q. What was done with the note? A. As far as the receipts of the bank show, it was turned over to Starr & Silverman.

Q. When? A. I don't know.

Q. You were the vice-president of this bank. Weren't you concerned with the question of their recovering the $5,000 or the $6,000? A. Just as much concerned then as I am now.

Q. So that when you got this mortgage you turned back the note, didn't you? A. I don't think that the note was turned back then, it was a three-months note.

Q. Has it since been renewed? A. No.

Q. You carried it on your account as an open account for a note? A. We are carrying a note of Starr & Silverman, individually endorsed by a man named Frazer as further security for this.

Q. And the note which you now hold and which you are now carrying and reporting to the State Department of Banking is the note that was taken in substitution of the $6,000 note you originally had of the Capitol Construction Company, isn't it? A. No. Sometime after this came due, when the Capitol got in trouble, I got this additional paper from the Starrs and Silverman individually endorsed by a man named Harry Frazer. Questions were being raised at the time.

Q. Who were these questions being asked by? A. We had meetings in Bayonne, creditors' meetings about the situation.

Q. No, Mr. Stout, the questions were being raised by the State Department of Banking as to

this note, weren't they? A. No, it has never been raised by the Banking Department, to my knowledge.

Mr. McMahon: Unless you know that to be a fact——

Mr. Kantor: I know that this note is still being carried in the reports of this bank.

Mr. Stout: Not this note. I said the note of the Starrs and Silverman individually, endorsed by Harry Frazer is carried in the bank today.

Q. Let's get back a moment. On September 10th you got a note which was secured by whom? Who were the makers? A. The original note?

Q. Yes. A. It was made by the Capitol Construction Company, endorsed as I recall it by the three individuals, Harry Starr, Hyman Silverman and Jacob Starr.

Q. And by anybody else? A. No.

Q. This note was dated September 10th? A. Yes, sir.

Q. And it was a three months' note? A. Yes, sir.

Q. Due December 10th? A. Yes, sir.

Q. It was not paid on December 10th? A. No, sir.

Q. On December 10th did your bank get a renewal note? A. I don't think so. I think we did shortly after that.

Q. On what date? A. I don't know. You have the record there. I don't keep those things in my mind.

Q. You have a record of no transactions, haven't you, in your bank? A. Yes.

Q. I would like to have you produce that? A. I have not got it with me.

Q. Will you produce it please, Mr. Stout, when you come back after the noon hour. That note was originally for five thousand dollars? A. Yes.

Q. When you furnished them the additional amount did you get another note in substitution of the five thousand dollar note, for six thousand dollars? A. I testified about that three or four times.

Q. When those notes became due you then got a new note for six thousand dollars sometime after December 10th? A. Sometime after December 10th we got a note signed by the Starrs and Silverman individually, endorsed by a man by the name of Harry Frazer.

Q. And that note was subsequent to the making of the mortgage? A. Yes, sir.

Q. Was that for collateral security in addition to the mortgage? A. Yes. In the meantime the question arose whether this mortgage was going to be made good and I got after these fellows.

Q. And you then surrendered the five thousand dollar note and the eight hundred dollar note when you got the new note of six thousand dollars or thereabouts made by the two Starrs and Silverman individually and endorsed by Frazer, is that correct? A. I think that is so. Now, right here on this line of examination, as I understand the law, it does not make any difference whether it was a note transaction in the inception or later, in respect to this matter if the money was loaned for the purpose of going into the property, that is to say, for material men and labor, for materials furnished and labor performed. The

money was actually advanced for that purpose and went into the building, even if the mortgage was made ten years after, if it was recorded before the mechanics lien was filed it is prior to the mechanics lien. In other words, the time of the making of the mortgage, or whether it was before the money was advanced or after the money was advanced if the money advanced actually went into the property, and the note transaction at best could only be a collateral matter and not support——

Mr. Kantor: I object to the witness going on in this way.

Mr. Stout: I am arguing the question.

The Master: I will allow it.

A. The leading case in this State is Young *v.* Haight reported in 69 N. J. L., page 453 in which Chief Justice Gummere, speaking for the Supreme Court said "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 course of erection. And this priority is given whether the mortgage be made to secure further 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.

Edward Stout, on Behalf of West Bergen Trust Company—Direct.

In the case of the Improvement Building and Loan Association *against* Riker, 88 N. J. Equity, 88, vice-chancellor Stevenson, citing and commenting upon Young *v.* Haight said "Referring to Chief Justice Gummere in the latter case, Young *v.* Haight, 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. If labor or material have gone into the building, money loaned 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 subcontractor 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."

In other words, as I understand the law, where money is advanced to pay for labor and materials used in the erection of a building, the person advancing the money, in order to show that his mortgage was taken as security for the loan must show that the money was actually paid over to the contractor and the contractor actually took the money to pay labor and material men; and if such a mortgage is recorded prior to the filing of the lien claim, it has priority over a lien claim.

Q. My question was what happened when the $5,800 note became due, how it was renewed, who took up the note? A. I say it makes no difference, it is immaterial.

Q. Well, the transaction started—there is no question about that—with a note as collateral security orally agreed upon. You were to get a bond and mortgage, is that correct? A. No. The transaction started off with the promise of the

Capitol to give a mortgage on the Cranford property as security for the $5,000 loan and to get the $5,000 from the bank the note was used as the instrumentality.

Q. You said on your direct examination, if I am not mistaken, that they had agreed and you had agreed to lend them five thousand dollars and as collateral security you were to get a bond and mortgage for five thousand dollars. A. I don't think I used the words collateral security.

Q. You certainly did, Mr. Stout. A. I think I said that they, speaking for the Capitol, agreed to give the West Bergen Trust Company a mortgage of $5,000 to secure the payment of this money that the West Bergen was to advance.

Q. The primary obligation was a note, wasn't it? A. It certainly was not. You do not suppose that the West Bergen Trust Company, knowing the situation of the Capitol in its trouble with this job, owing the money that it did, and the Starrs and Silverman not having any money outside of what they had tied up in these operations, would take the note of the Capitol Construction Company outside of that building as security. It was not worth the paper it was written on.

Q. That was September 10th? A. Yes.

Q. And yet you advanced the money? A. Yes, because it was an instrumentality, that is the reason why.

Q. Then you mean to say that the note was merely a subterfuge to lend the money on a bond and mortgage? A. No. Understand, I could have said when I called up our secretary and treasurer that the $5,000 was to be put to the account of the Capitol and when they came down there to have them give a receipt that so much of the bank's

money had been turned over. I used it as a record for the transaction. It is done time and time again.

Q. I know, that is why I am asking you about it. A. You want to see whether I know how to do it

Q. No, no, Mr. Stout. They already agreed, did they not, to give you this bond and mortgage?

The Master: He said that.

Q. Why didn't you have the bond and mortgage executed on September 10th? A. I was not in any hurry about it. It was even long after the $800 loan.

Q. That was when? A. September 24th.

Q. Then you got nervous about the financial condition of the company, didn't you? A. Yes. In the meantime they had borrowed $35,000 from the Carteret Company and that mortgage had been placed on there. I was assuming that this Building and Loan mortgage was going to go through and the West Bergen Trust Company would be paid off before it was necessary to put a mortgage on.

Q. You were assuming the note would be paid off before the mortgage was put on? A. Yes.

Q. But then when you got nervous over the financial condition of the Capitol, you got the Capitol to execute this bond and this mortgage, didn't you? A. Well, I want you to strike out the word nervous.

Q. Well, worried? A. I was not worried, either. I thought it was good business to put this mortgage on since they had placed this $35,000 mortgage on and the $200,000 Building and Loan mortgage had not yet materialized.

Q. You said a moment ago that the condition of the Capitol on September 10th was such that the note was not worth the paper it was written on. A. Outside of this property.

Q. And you knew that they were having trouble completing this building, didn't you? A. I knew that they had trouble, that they owed the material men, and they told me the amount of money they had actually put into the property thus far, and if they did not get money they could not go on with the enterprise.

Q. And you knew that they had given out checks which were no good? A. I have said that a dozen times.

Q. I suppose the records will furnish the best evidence of what happened. Will you have them here at two o'clock, Mr. Stout? A. As I stated to you before, the West Bergen Trust Company only holds today one note in this matter, and that is the note of the Starrs and Silverman endorsed by Harry Frazer. The other notes have been turned over to them.

Q. Can you tell us when the note signed by the Capitol Construction Company was returned to Starr & Silverman, or either of them? A. I know it was some time after December 10th.

Q. And, of course, this man Frazer is considered a responsible party by your bank? A. Well, we thought he was at the time we took the endorsement, but there is a question about it now.

Q. How much is the amount of the present note? A. I think it is—I am not sure whether it is $5,800 or $6,000, but I think it is $5,800.

Q. Well, your note loan will show what happened to all the notes? A. Yes.

Q. Do you know, Mr. Stout, that the bank was made a party defendant in the suit brought by George F. Perry & Sons against the Capitol Construction Company? A. Yes, sir.

Q. There is a Mr. Clarence H. Thees connected with the West Bergen Trust Company as secretary? A. Yes.

Q. I am reading from your ratio account of Capitol Construction Company, and I ask you whether it is not a fact that the credit side of the ratio of deposits commencing with September 4th show the following deposits: September 4th, $408.75; September 10th, $500; September 13th, $4,974.17, that being the discounted value of the $5,000 note; September 15th, $2,250; September 19th, $200; September 21st, $50; September 24th, $800; October 24th, $2,000; October 29th, $600. Have I read that correctly, Mr. Stout? A. I think so.

Q. Will you tell us what this notice is under the deposit of September 15th, 1927 $2250? A. That is the first payment on the First Street Garage mortgage. That was a construction mortgage.

Q. You mean $2250 which was deposited in their account? A. Yes.

Q. Now, the withdrawals. From September 4th, 1927 to October 29th, 1927 there are various items $55, $100, $2,000, $9,000, big amounts? A. Yes.

Q. There was no separate account of the Capitol in the West Bergen Trust Company separating the moneys received as a result of the fifth loan from the moneys that they received from other sources. A. I have already testified that the Capitol Construction Company opened an ac-

count with the West Bergen Trust Company some time in August, 1927 and that in this first loan to the Capitol Construction Company for the Cranford job the proceeds of this note were deposited in this account which was opened in August, 1927.

Q. May I read the other slip so that we will have the whole thing in evidence. Starting with September 10th the charges against the account representing check charges are as follows:

September 10th, $2,000.
September 12th, $500, $5473 and $150.
September 13th, $48, $42, 50.
September 13th, $1000.
September 14th, $26.65, $44.80.
September 14th, $50, $50.
September 14th, $63.63.
September 16th, $44.80, $16.31, $500.00.
September 16th, $1000. 37.50, 36.00.
September 16th, $100.
September 16th, $900.
September 17th, $400.
September 17th, $17.97, $15.00, $25.00. $505.
September 19th, $114.20, $200.00.
September 20th, $25.00.
September 21st, $9.00, $25.00.
September 22nd, $28.28, $36.00.
September 24th, $800.00
October 18th——

Mr. Stout: I object. That has nothing to do with this transaction.

Mr. Haber: I will offer this paper in evidence. May I ask Mr. Stout to produce the ratio account of the West Bergan Trust Company which he has before him.

I would like to have it marked for identification.

(Admitted and marked Exhibit 11 of this date for identification.)

Q. Do you care to make any other explanation of why you waited from September 10th to October 24th to get this bond and mortgage if you were to get one as part of the original transaction? A. No. I was given to understand, as I stated before that they were to get a Building and Loan mortgage, and it didn't come through. They came back with this additional $800, then later I learned of Mr. Pyle's mortgage going on record and I thought then it was time for me to get busy with mine.

Q. The checks representing the withdrawals on this account were, in the regular course of the bank's business, returned to the customer, that is, the Capitol? A. What do you mean by that?

Q. The bank did not keep the vouchers which were drawn on the account? A. I understand, the checks came back to the bank as any check would, drawn on an account.

Q. And the cancelled vouchers were returned to your depositor, the Capitol Construction Company? A. Along with the notice, surely.

Q. I would like to have the loan account, Mr. Stout. You say you have the records showing the ratification of this loan by the bank? A. That I have the record of it?

Q. Yes. A. I said it is my recollection that the matter was submitted to the Executive Committee of the Bank and the act of making this loan ratified.

Harry Starr, on Behalf of Carteret Company—Direct.

Q. Was any personal loan made by you to these people about September 10th, 127? A. No, sir.

Mr. Kantor: I would like to have the Master direct the witness to bring with him, for the purpose of further cross-examination, the note record of this bank and the records of the bank showing the ratification of this loan, if any. Can you conveniently have them here by two o'clock, Mr. Stout?

Mr. Stout: I will see what I can do.

HARRY STARR, sworn.

Direct examination by Mr. Pyle:

Q. Were you the man actually in charge and supervision of the construction of the building at the time of the advances of the Carteret Company mortgage moneys? A. Yes, sir.

Q. Were all of these checks for payments made as advances of the Carteret Company mortgage which have been offered in evidence, payments made on account for labor and material which was furnished for that job with the exception of check for $2,130, exhibit 42, and check for $400 to Grossman, exhibit 49.

Mr. Kantor: I object to the question on the ground of its form.

Mr. McMahon: Do you know what became of the money given to you by the Carteret Company?

The Witness: Every Saturday I came in with the contractor or whatever it is, and

Harry Starr, on Behalf of Carteret Company—Cross.
Harry Starr, on Behalf of West Bergen Trust Company—Cross.

I came in to Mr. Pyle and he gave out the check direct to each man.

Mr. McMahon: And all of the money you received from that company went into material?

The Witness: Right into the building.

Cross-examination by Mr. Kantor:

Q. That is not true. Here are checks, $500, $2,000, deposited in the West Bergen Trust Company. Didn't you? A. Yes, sir.

Q. Then why do you say you cashed checks and took them over to the building? A. We cashed the checks and we paid it at once to the building, for the labor, whatever it is.

Q. Tell us to whom you paid the $2,000 to specifically. A. It was paid to the carpenters.

Q. Who? You have records showing to whom you paid money to. A. The names I could not remember; it is two years ago.

Mr. Pyle: That has all been testified to by Jacob Starr.

Mr. Kantor: That is all.

(Recess until two p. m.)

After Recess.

2 P. M.

The Master: It is stipulated among counsel that the signed delivery slips, three in number, in the amount of $1,122, of the Royal Marble Company may be received in evidence as proof of de-

livery of goods therein recited to the building at Cranford, in that amount, the reasonable value of work and material delivered.

The Master: In the matter of the claim of Mowre Lager, Mr. Rubenstein offers in evidence copy of the lien claim filed on February 21, 1928, on which is endorsed that a summons was issued on the 21st day of February, 1928.

It is further stipulated among counsel that the amount of this lien claim is $3,000 and that this lien claim may be offered as proof of the value of the work actually done and performed.

It is also stipulated that the mortgages of the Carteret Company and Tucker and Shellowitz are prior to the lien of the said Mowre Lager.

HYMAN SILVERMAN, sworn.

Direct examination by Mr. Stout:

Q. Mr. Silverman, you were the president of the Capitol Construction Company? A. Yes, sir.

Q. And the Capitol Construction Company during the year 1927 was erecting an apartment house in Cranford, New Jersey? A. Yes, sir.

Q. And you were the superintendent in charge of the construction of that building? A. Yes.

Q. And you had also to do with the payments of claims of labor and material men for labor performed and material furnished for that job? A. Yes, sir.

Q. You recall coming to my office at 15 Exchange Place, Jersey City, in September, 1927, to obtain a loan?

Mr. Kantor: I object to the question on the ground it is leading.

Q. Were you in my office on September 10th, 1927? A. Yes, sir.

Q. Who was with you? A. Mr. Harry Starr.

Q. Was Jacob Starr with you? A. I don't remember. I guess he was. I don't remember, but Harry Starr I am sure.

Q. Do you recall at that——

Mr. Kantor: I object to the introduction of the question and to the question as it will be propounded, because it is going to be leading.

Mr. Stout: I am going to fix an incident.

The Master: We will hear the question and then determine.

Mr. Kantor: After the question is asked the damage is done as far as this witness is concerned.

Q. Do you recall what was talked about in my office on that date in respect to the Cranford job?

Mr. Kantor: I object to the question, on the ground that it is leading.

The Master: I don't think it is leading in a way to affect you at all. (Addressing witness): Do you recall a conversation which took place in Mr. Stout's office that day?

The Witness: Yes, sir.

Q. What was the conversation as nearly as you can recall? A. Well, the conversation was we were short in money to run the job at Cranford

and we were asking to lend money from the West Bergen Trust Company. We were asking to lend money for the job.

Q. Well, was there anything else said? A. Well, we were giving out checks that time and there was not enough money in the bank.

The Master: How did you expect to get the money?

The Witness: From the bank.

The Master: In what way?

The Witness: Giving a note and also a mortgage on the building.

The Master: Was that talked about?

The Witness: Yes.

The Master: What was said about it?

The Witness: It was promised—we attempted to get a mortgage on the building and in the meantime we didn't have money to run the building and we went to Mr. Stout and we asked for a loan on that basis, that we will give a note and also a mortgage and as soon as we got the mortgage on the building, then we will pay off the loan from the bank.

The Master: Was it talked about where you were negotiating the other mortgage?

The Witness: Yes, in Mr. Stout's office.

Q. What mortgage was this that you were talking about getting to pay off the mortgage you were going to give the West Bergen Trust Company? A. We were going to get a Building and Loan mortgage on the property.

Q. Had there been any negotiation at the time with any Building and Loan Company? A. Yes, we had negotiations.

Q. Where? A. In Newark and Elizabeth.

Q. What happened there at my office that day in response to this request for a loan? A. Well it happened you gave us $5,000.

Q. How did I give it to you? A. It was given us just on a note and also it was Saturday nearly twelve o'clock that time and the way I understand, you called up the bank that time to O. K. it and we went down and got the money.

The Master: Did you get the money or was it put in your account?

The Witness: Well, it was put in our account, but we gave out the checks from that basis.

Q. Do you know when the note was actually put into your account? A. It was the following Monday.

Q. Do you recall being in my office on September 24th, 1927, in respect to the Cranford job? A. Yes, sir.

Q. Who was present at that meeting in my office? A. Was I and Harry Starr and Jacob Starr.

Q. What did you talk about then? A. Then we were short money again, short for the payroll.

Q. And how much money did you say you wanted? A. Eight hundred dollars.

Q. What did you say, if anything, after you got the eight hundred dollars from the West Bergen Trust Company? A. Well, the same way as the $5000.

Q. In other words, part of the mortgage? A. Yes, sir.

Q. Mr. Silverman, who were Siegel and Levine? A. They were our plasterers.

Q. You say they had to do the plastering work on the Cranford job? A. Yes, sir.

Q. You had given them a check before you came to my office on September 10th, 1927, had you not? A. Yes, I gave them a check on Friday.

Q. Have you seen this paper which purports to be a cancelled check before? A. I gave this on Friday.

Q. You gave it to Siegel and Levine? A. Yes, sir.

Q. And what did you give it to them for? A. For the work they done on the job.

Q. Payment on account of the plastering work? A. Yes.

Mr. Stout: I offer that check in evidence.

(Admitted and Marked Exhibit 13 of this date.)

Q. Who is Jan Nicaretto? A. That is the concrete man.

Q. What did he have to do with the Cranford job if anything? A. He done the concrete work.

Q. Have you seen this paper which purports to be a cancelled check before? A. Absolutely.

Q. What do you know about that check? A. Well, I know I gave him a check.

Q. You gave him this check? A. Yes, sir.

Q. And what did you give that check for? A. For the reason he done the job.

Q. $150? A. Yes.

Mr. Stout: I offer this check in evidence.

(Admitted and marked Exhibit 14 of this date.)

Q. Who is Max Resnick? A. Carpenter.

Q. Did he have anything to do with the Cranford job? A. He was working there.

Q. Have you seen the paper which purports to be the cancelled check? A. Yes, sir.

Q. What did you do with this check if anything? A. I gave it to him.

Q. What did you give it to him for? A. For the work he did.

Q. And was that a week's pay? A. It was the full week, just whatever it is, with so many hours.

Mr. Stout: I offer the check in evidence.

(Admitted and marked Exhibit 15 of this date.)

Q. Who is L. Starr? A. He is a carpenter also.

Q. Did he have anything to do with the Cranford job? A. Yes, he worked there.

Q. Have you seen this paper which purports to be a cancelled check before? A. Yes, sir.

Q. Did you give him this check personally? A. Yes, sir.

Q. You handed it to him yourself? A. Yes, sir.

Q. Where did you hand it to him? A. Right on the job.

Q. What was that check given for? A. For his work.

Q. That was paid on this job, $32? A. Yes, sir.

Mr. Stout: I offer this check in evidence.

(Admitted and marked Exhibit 16 of this date.)

Q. Who were McCabe Brothers? A. They were the excavators.

Q. They had to do the excavating work on the Cranford job? A. Yes, sir.

Q. Have you seen this paper before which purports to be a cancelled check? A. Yes, sir.

Q. Did you give this check to McCabe Brothers? A. Yes.

Q. Where did you give this check to them? A. I gave them one in the City.

Q. What was that check given for? A. For excavating.

Q. On account of the excavating work? A. Yes, sir.

Mr. Stout: I offer the check in evidence.

(Admitted and marked Exhibit 17 of this date.)

Q. Who is H. Silverman? A. Myself.

Q. Have you seen this check before? A. Yes, sir.

Q. What was that check given for? A. That was for items I spent on the job. I took it back.

Mr. Stout: I offer the check in evidence.

(Admitted and marked Exhibit 18 of this dated.)

Q. Who is H. Starr? A. Harry Starr.

Q. He was the treasurer of the Capitol Construction Company? A. Yes, sir.

Q. Have you seen this paper which purports to be a cancelled check before? A. Yes.

Q. Do you know what that check was for? A. That is a check the same way. He spent also money and whatever he spent was coming to him.

Q. Did you figure it out, just fifty dollars? A. Yes, fifty dollars or forty-nine dollars and something, I don't remember exactly.

Mr. Stout: I offer the check in evidence.

(Admitted and marked Exhibit 19 of this date.)

Q. Who is J. Starr? A. The secretary.

Q. Have you seen this paper which purports to be a cancelled check before? A. Yes, sir.

Q. What was that check given for? A. For whatever he spent.

Q. You each took fifty dollars? A. Yes, sir.

Mr. Stout: I offer this check in evidence.

(Admitted and marked Exhibit 20 of this day.)

Q. Who is Sam Silverman? A. He was a carpenter.

Q. Did he have anything to do with the Cranford job? A. He was working there.

Q. Have you seen this paper which purports to be a cancelled check before? A. Yes, sir.

Q. Did you have anything to do with this check? A. I gave him the check for the work, whatever he done.

Q. You gave him a check for $44.80 for work which you had done on the Cranford job? A. Yes, sir.

Mr. Stout: I offer the check in evidence.

(Admitted and marked Exhibit 21 of this date.)

Q. Who is M. Silverman? A. He was also a carpenter.

Q. Did he do any work on the Cranford job? A. Yes, sir.

Q. And you paid him $26.65 on September 8th? A. Yes, sir.

Q. Did you give him this check? A. Yes.

Q. What did you give him the check for? A. Also for the work that he done.

Mr. Stout: I offer this check in evidence.

(Admitted and marked Exhibit 22 of this date.)

Q. Who is Bob Kassen? A. Carpenter.

Q. Did he have anything to do with the Cranford job? A. Yes, carpenter work.

Q. Have you seen this paper before? A. Yes.

Q. Did you give what purports to be a cancelled check to him? A. Yes, sir.

Q. What was it for? A. For the work he done on the job.

Mr. Stout: I offer this check in evidence.

(Admitted and marked Exhibit 23 of this date.)

Q. Who is the Lafayette Iron Works? A. They done work on the Cranford job.

Q. Have you seen this paper which purports to be a cancelled check before? A. Yes, sir.

Q. What do you know about this check? A. I gave it as a payment, $500.

Q. Where did you give this to the Lafayette Iron Works? A. In this city.

Q. That was to pay for iron work which went on the Cranford job? A. Yes, sir.

Mr. Stout: I offer this check in evidence.

(Admitted and marked Exhibit 24 of this date.)

Q. Who is Leo Starr? A. Leo Starr, a carpenter.

Q. Have you seen this paper before? A. Yes, sir.

Q. What did you have to do with it? A. I gave it to him for the work he done on the Cranford job.

Mr. Stout: I offer this check in evidence.

(Admitted and marked Exhibit 25 of this date.)

Q. Who is N. Starr? A. A carpenter.

Q. Have you seen this paper before? A. Yes, sir.

Q. Did you give that check to N. Starr? A. Yes.

Q. What did you give it to him for? A. For the work he done on the Cranford job.

Mr. Stout: I offer this check in evidence.

(Admitted and marked Exhibit 26 of this date.)

Q. Siegel and Levine; are they the Siegel and Levine you have spoken about earlier in your testimony? A. Yes, plasterers.

Q. Did the Capitol Construction Company on September 16, 1927, owe them $900 for the plaster work on the job? A. Yes, sir.

Q. Did you give them that check? A. Yes, sir.

Mr. Stout: I offer this check in evidence.

(Admitted and marked Exhibit 27 of this date.)

Q. I show you cancelled check dated September 23rd, 1927, and ask you whether you have ever seen that paper before? A. Yes.

Q. Do you know what that check was drawn for? A. It was drawn for the payroll.

Q. The payroll of what date? A. The date it is here.

Q. This is September 23rd. You did not have a payroll on September 23rd, did you? A. It must have been the next day, the 24th. Sometimes on Friday we had money in the bank. If we did not we could not draw Saturdays.

Q. Is this the payroll check you talked about earlier in your testimony that you came to my office to get the money for? A. Yes, sir.

Q. Was the $800, all of it, actually paid out for the payroll on that date? A. Absolutely.

Mr. Stout: I offer the check in evidence.

(Admitted and marked Exhibit 28 of this date.)

Q. Mr. Silverman, at the time that you gave these checks to the respective payee, the Capitol Construction Company owed for either labor or material or both on the Cranford job, to the amount of those checks? A. Yes, sir.

Mr. Stout: Cross-examine.

Cross-examination by Mr. Kantor:

Q. Mr. Silverman, when did you turn these checks over to Mr. Stout? A. What?

Q. You heard me. A. About two months ago.

Q. Well, today is July 10th. You mean about May 10th, 1929? A. Yes, sir.

Q. This year? A. Yes, sir.

Q. You picked these out of your checks, did you? A. Yes, sir.

Q. And at the request of Mr. Stout you picked out certain checks which he had to use in evidence in this case, is that correct? You turned over to Mr. Stout all the checks in the case? A. All the checks that belong in the case of the loan in the bank.

Q. Do you remember being here and testifying before the Master and telling us all your records and check books and checks were destroyed? A. I never said that. I never said the checks were destroyed.

Q. You never said you had any records? A. I have not got no books.

Q. And you never said your bank book had been destroyed? A. No, sir.

Q. And you never said your checks had been destroyed? A. I got some of them left, but all the books were destroyed.

Q. All your books have been destroyed? A. I don't know where they are, I didn't destroy them.

Q. You also testified, let me remind you again, that in each case you turned over the checks yourself, that is, you personally, and not your partner or anybody else? A. Yes.

Q. Do you understand me? A. Yes.

Q. I emphasize again, when I say you, I mean you alone. A. I understand.

Q. So you mean to say that again, is that correct? A. I turned over the checks.

Q. You personally did that? A. Yes, sir.

Q. You did not have any lawyer do it, and you did not have your partner do it? A. No.

Q. And you did not have the other Mr. Starr do it? A. The reason——

Q. I don't care about your reasons. You personally did it? A. Absolutely.

Q. And you personally paid out the $800 representing the proceeds of check Exhibit 28, didn't you? A. Yes, sir.

Q. You did not pay out the payroll or Mr. Pyle's checks, did you? A. Sometimes.

Q. Why was a different procedure adopted with reference to the checks of the West Bergen from that which had been the case with reference to Mr. Pyle's payroll checks?

Mr. Stout: It seems to me this is immaterial.

The Master: Sustain the objection.

Mr. Kantor: I withdraw the question.

Q. You passed this check on September 24th, on a Saturday, didn't you? A. If it says so on the check.

Mr. Kantor: Mr. Stout, will you agree that that is a fact?

Mr. Stout: On the 24th?

Mr. Kantor: It says here 9/24/27.

Mr. Stout: Yes.

Q. And you passed it yourself, did you? A. Yes, sir.

Q. Jersey City? A. Yes.

Q. And you went out to Cranford and paid the men? A. Yes.

Q. What men did you pay? A. The men I mentioned before, all the names, Starr and all the others.

Q. How much did you pay Starr that day? A. No, no, excuse me. That was a cash payroll. That is another date.

Q. I ask you again. On September 24th you got $800 at the bank, didn't you? A. Yes, sir.

Q. Your first name is what? A. Hyman.

Q. You did not turn this check over to Mr. Starr, did you? A. This check?

Q. This $800 check; look at it again. A. I don't remember. We both was in the bank probably.

Q. Why did you tell us once that you went to the bank and cashed this and why do you say the second time that maybe both of you went to cash it?

Mr. Stout: He didn't say that.

Mr. Kantor: I submit Mr. Stout has no right to interfere.

Mr. Stout: You have no right to put into your question something that is not testimony. The testimony is that Mr. Silverman said Mr. Harry Starr may have been there with him, but he has not testified that they were both there and cashed the check, and that is your question.

Q. Did you cash this $800 check on September 24th? A. I don't remember whether I or Mr. Starr, because we were both at the bank to draw the payroll.

Q. Did you get the $800? A. Yes, we got it.

Q. You personally? A. I don't remember.

Q. I asked you before and Mr. Stout asked you on direct examination did you personally get the cash for this and what did you do with it and you said you did so and so. A. Well, I say it again—probably I was myself or I was with Mr. Starr.

Q. In other words, you do not know whether you cashed the check or whether Mr. Starr cashed the check or whether somebody else cashed the check? A. No, no, it was handled between us two.

Q. Between who two? A. Between me and Mr. Starr.

Q. Which Starr? A. Harry Starr.

Q. Between you and Harry Starr? A. Yes, sir.

Q. Did you pay the men that Saturday, September 24th? A. Probably I did.

Q. Not probably. Did you? A. One of us, sure.

Q. Then you do not know of your own knowledge that you did, do you? A. I don't remember, it is two years ago already.

Q. And you don't remember? A. Once I handled the payroll and once he handled the payroll, once the other fellow You cannot remember yourself all the time; you did not recognize me even from last week.

Q. September 24th, 1927, you testified that you got $800 from the West Bergen Trust Company? A. Yes, sir.

Q. And you paid it out to the men on the job? A. No, sir, first I took the payroll on the job——

Q. You do not remember whether you paid out this $800, do you? A I don't remember if I did or Mr. Starr.

Q. Now, if you did pay it out, can you tell us the names of a single man you gave any part of this $800 to? A. Oh, yes.

Q. Who? A. The same men we mentioned before.

Q. Mention them again. A. There was Max Starr.

Q. How much did you give him? A. That is a fine question. How could I remember?

Q. You do not know, do you? A. It was a cash payroll.

Q. You do not know, do you? A. I don't remember.

Q. You had records showing how much you gave these men, didn't you? A. I had records, but I have not got them now.

Q. You have not got them with you? A. No.

Q. Have you got them home? A. Maybe I got them.

Q. Do you remember at the last examination you were told to bring your records back with you about the moneys you paid out to the working men? A. Yes, sir.

Q. Did you bring them back? A. I have not got them.

Q. Did you look for them? A. I looked for them and I could not find them.

Q. So that you do not produce them, do you? A. No, sir.

Q. And you cannot tell us whether you paid them or Starr paid them? A. No, sir, I cannot tell.

Q. I am talking now of this check for $800, exhibit 28. You cannot tell us who paid it out? A. No, sir.

Q. I show you the back of the check, Exhibit 28. It has your name on it, Hyman Silverman, then it has Harry Starr's name on it. Now, I will ask you if that refreshes your recollection as to what you did with the check? A. We drew the money.

Q. Both of you were there and you got the money? A. Yes, that is what I said before.

Q. Did you take part of the money in your pocket? A. No, sir.

Q. Did Starr take part of the money in his pocket? A. No, sir.

Q. Who took it in his pocket? A. Whichever man who got it.

Q. Who actually took the money?

The Master: Who carried the money from the bank to the job?

The Witness: Well, I carried it, probably Mr. Starr. I don't remember those things.

Q. Now, of that $800, how much money did you keep? A. There was nothing left.

Q. How much did you keep for your work? A. Not a cent.

Q. And how much did Starr keep? A. Not a cent, just for the payroll.

Q. Max Starr, $36. Was that his weekly wages, Exhibit 26? A. No, his weekly wages was $12 a day.

Q. You paid him $36 on September 10th? A. He was working three days and that is all he gets.

Q. And you paid him up to that date, did you? A. Yes, sir.

Q. Leo Starr, September 13th, got $16; you paid him up to that date, did you? A. Yes, sir.

Q. George Cashin, Exhibit 27, September 9th, that paid him up to date? A. Yes, sir.

Q. M. Silverman, $26.65, that paid him up to that date, did it? A. Yes, sir.

Q. Sam Silverman, $44.80, Exhibit 21, that paid him up to that date? A. Yes, sir.

Q. By the way, did you give Sam Silverman the money personally? A. Yes, sir.

Q. Harry Starr didn't give it to him, did he? A. He was present, but I remember I handled it.

Q. Exhibit 20, J. Starr, $50, that paid him up to that time? A. That was for expenses.

Q. By expenses you mean money he laid out? A. Yes, sir.

Q. Harry Starr, $50, Exhibit 19, that was money he laid out, too? A. Yes, sir.

Q. And that was to repay him? A. Yes, sir.

Q. H. Silverman $50, that was paying him for money he laid out? A. Yes.

Q. H. Silverman, that is you? A. Yes, sir.

Q. And you cashed that check with a man by the name of Abramowitz? A. Yes, sir.

Q. You laid out cash, money out of your own pocket? A. Yes, sir.

Q. And you repaid yourself that $50? A. Yes, sir.

Q. The same is true of the check Exhibit 19 for $50 and Exhibit 20 for $50, is that right? A. Yes, sir.

Q. Now, McCabe Brothers were doing work on two jobs? A. Yes, sir.

Q. One in Jersey City and one in Cranford? A. Yes, sir.

Q. And you gave them $1000 payment? A. Well, when he done——

Q. You gave them $1000 payment? A. Yes, sir.

Q. And McCabe Brothers have already testified in this case, Mr. Rubenstein's client, when you gave them this $1000, to what account was it credited? A. Cranford.

Q. Are you sure? A. Yes, sir.

Q. Did you tell them to credit it to the Cranford account? A. Yes, sir.

Q. And you personally gave this check to McCabe Brothers? A. Yes, sir.

Q. And you say it was so credited? A. Yes, sir.

Q. September 10th, Exhibit 16, check $42, that was also for money paid out, L. Starr? A. Yes, sir.

Q. September 10th, Exhibit 15, Max Resnik, $48, that was also cash money he laid out? A. No, sir, that is for his money.

Q. Here are four checks, Exhibits 16, 18, 19 and 20, for $50, $50, $42, and $50, a total of $192. A. The $42 is L. Starr, one week.

Q. He was a carpenter? A. Yes, sir.

Q. Well, these three checks, Exhibits 18, 19 and 20, $50 each, respectively, to the order of H. Silverman, H. Starr and J. Starr were for cash disbursements you laid out while you were on the job? A. Yes, sir.

Q. Now, you are sure you came to Mr. Stout's office on September 10th? A. Absolutely.

Q. What makes you so sure about that? A. Because we needed money that time.

Q. And that was on what day of the week? A. It was on a Saturday, I don't remember the week but I know it was a Saturday.

Q. I show you a calendar for 1927. Look at September 10th and see if it is Saturday. Can you read the calendar? A. I cannot see it without my glasses.

Q. Well, September 10th, 1927, was a Saturday? A. Yes, sir.

Q. We all admit that. Now, the fact that the calendar shows September 10th was a Saturday, does that make you more sure that you were in Mr. Stout's office on a Saturday? A. Yes, sir.

Q. You are sure it was Saturday, September 10th? A. I don't remember the date, but I know it was a Saturday.

Q. In any event, the following Monday you got a credit in your account of $4900 and some odd dollars? A. Yes, sir.

Q. And you know that the Saturday before you got that credit is the Saturday you were in Mr. Stout's office? A. Yes, sir.

Q. Now, the records of the bank indicate that you got the credit on September 12, 1927? A. Yes, sir.

Q. Didn't the Lafayette Iron Works also do other work for you on another job? A. It done it, but not that time when we had the Cranford job.

Q. Weren't you working on the Jersey City job and the Cranford job about the same time? A. Not the Lafayette Iron Works, didn't have the first job. It was another party.

Q. Who was it?

Mr. Stout: I object to the question, immaterial.

Q. Didn't the Lafayette Iron Works have another job from you? A. No.

Q. They did no other work for you except the Cranford job? A. That is all that summer.

Q. All summer? A. When we built in Cranford.

Q. What year was that? A. 1927.

Q. You cannot remember the year unless you think hard, is that right?

Mr. Stout: I object to that as an unfair question.

Q. Levine was the man who did the plastering? A. Yes, sir.

Q. And you gave them your check personally? A. Yes, sir.

Q. $2,000? A. Yes, sir.

Q. That was due them on the job? A. Yes, sir.

Q. Sure about that? A. Yes, sir.

Q. September 9, 1927? A. Yes, sir.

Q. This check you gave to Siegel and Levine apparently came out of a different check book than the checks that followed? A. Right. I gave them a check before we got the money in the bank.

Q. You gave them a check before you got the money in the bank? A. Yes, it was a Friday. I remember they needed the money for the payroll and we gave it to them. In the meantime we didn't have money to cover the check and we went to Mr. Stout to make that loan.

Q. Look at the date on which this check was paid. A. I cannot see it.

Q. It says 9/9/27. A. Yes, sir.

Q. That means September 9, 1927. A. Yes, sir.

Q. And that was before you saw Mr. Stout? A. Right.

Q. This check had been paid, isn't that correct?

Mr. Stout: It does not mean that. When that check came in the account was overdrawn.

Q. Is that a fact that the check was paid on September 9th, 1927?

The Master: How does he know that?

Q. Did you give the check on September 9th, 1927? A. Yes. He went right to the bank and cashed it, probably.

Q. Did you give the check on September 9th, 1927? A. I don't remember.

Q. Did you give it before September 9th? A. I don't remember. Maybe he got it the same day

and went down to the bank and cashed the check. That happened.

Q. Then when this check of $2,000, Exhibit 13 (which I would like now to have noted on the record was paid, the bank endorsements showing paid September 9th, 1927, the cancelled vouchers— A. Was this deposited in Siegel and Levine's account?

Q. Are you asking me this question for a certain purpose? What do you want to know? A. Probably I gave him the same day a check on our bank.

Q. This check shows it was paid by your bank September 9th, 1927? A. Yes, sir.

Q. So on September 9th, 1927 you had an overdraft in the bank, didn't you? A. Yes, sir.

Q. So, to take care of the overdraft you came to Mr. Stout and you asked him to lend you $5,000, didn't you? A. Yes, sir.

Q. And this check had already been paid by the bank and you had an overdraft in the bank? A. Yes, sir.

Q. That means your account had been overdrawn? A. Yes, sir.

Q. How long was this note for that you gave to Mr. Stout? A. Three months.

Q. What rate of interest? A. Six per cent, I suppose.

Q. Was the discount deducted right away?

Mr. Stout: Be sure you know what you are asking him. Was that an interest bearing note?

The Witness: I don't know the rate but——

Mr. Stout: Then if you are supposing something, don't testify to that as a fact.

I want to call the Master's attention to the fact that the check that was offered for identification shows that this check was presented and paid on September 10th in error.

Q. Now Mr. Silverman, how long was this note for? A. Three months.

Q. And who was it signed by? A. By Harry Starr, Jacob Starr and Hyman Silverman, and also by the Capitol Construction Company.

Q. What did it say? A. It is a note for five thousand dollars.

Q. To whose order? A. To the order of the Capitol Construction Company and we signed individually.

Q. And you turned the note over to Mr. Stout? A. To Mr. Stout or the bank, I don't remember.

Q. Did you get cash when you turned this note over? A. We got credit in the bank.

Q. And the discount was to be fifty per cent? A. I am not a banker, but the way I know the rules of the bank it is six per cent.

Q. Were you interested in knowing how much money should be put to your credit as a result of the $5,000 note? A. I suppose the bank is correct, they would not put down any less or more, whatever is coming to me.

Q. Do you know how much interest is on $5,000 for one month? A. Well, if it is six per cent it is so much; if it is three per cent it is less.

Q. Do you know how much the interest on $5,000 for one month is? A. Well——

Q. You cannot figure that? A. No.

Q. When you went to the bank you went with your passbook, didn't you? A. Yes, sir.

Q. And you had the teller make an entry in your passbook as to how much money was put to your credit? A. Yes.

Q. You did that yourself, didn't you?

The Master: You went to the bank yourself to get the credit?

The Witness: It was Mr. Starr that time, too.

Q. Did you see how much credit the bank put to your account in the passbook? A. Of course I seen it.

Q. How much was it? A. I don't remember.

Q. Didn't it strike you that you were getting too much credit? A. I know the bank is for everybody, not for myself.

Mr. Stout: May it please the Court, that is an unfair question. It contains improper assumption, that there was an improper credit given by the bank.

Mr. Kantor: I say it is an improper credit for this reason. The discount rate was six percent and the discount for three months is $75 on a $5,000 note and the credit was $4974, $25 a month.

Mr. Stout: It must have been a one month note then.

Mr. Kantor: The witness testified it was a three month note, and so did you.

Mr. Stout: I know he did.

The Witness: One month. Afterward we get it for three months, but the first note was one month.

Mr. Stout: I am going to produce the note here.

Q. Now that you have heard the conversation between counsel, as a result of which you heard Mr. Stout suggest that the note may have been a one-month note, you now say the note may have been a note for one month only, is that correct? A. Probably it was.

Q. Why did you say before that it was a three month note? A. Because after when the note was due we didn't have anything to renew, I guess we made it for a longer term.

Q. Did you go in on October 10th and discount the note and take a renewal note? A. Of course we done it, I guess.

Q. You did not ever discount another note, did you after that? A. I don't remember.

Q. I show you a note——

Mr. Stout: I object to the witness being examined upon a record that is not in evidence.

Q. Did you get any other sums of money from Mr. Stout or Mr. Stout's bank by way of discount after this original discount of $5,000? A. I don't remember.

Q. Well, you did get $800 you told us? A. Yes, $800.

Q. Did you get any other money? A. I don't remember.

Q. Didn't you give Mr. Stout another mortgage for $5,000?

Mr. Stout: I object to that as immaterial, a mortgage given to me.

The Master: I understood this mortgage was to the Trust Company.

Mr. Kantor: Yes, but there is still another mortgage, sir, for $7500.

Mr. Stout: There is a mortgage to Edward P. Stout, trustee, for $7500 which has nothing to do with it.

Mr. Kantor: I don't want Mr. Stout to say anything to the witness about it.

Q. You got other moneys from the West Bergen Trust Company after you got the $5,000 and the $800? A. That is all we got on the loan.

Q. You got no other moneys by way of a loan? A. The mortgage on the First Street garage.

Mr. Stout: That is the mortgage they gave the bank on the First Street garage.

Q. When was that mortgage given? A. I don't remember, it was later.

Q. How much of a mortgage was that?

Mr. Stout: I think this is immaterial.

Mr. Kantor: I withdraw the question.

Q. Does your company owe this money to the West Bergen Trust Company?

Mr. Stout: I object.

The Master: Which money?

Mr. Kantor: This $5800.

Mr. Stout: I object to the question because it calls for a conclusion as to who owes it.

The Master: I think I will let him answer the question, if he can.

The Master: As an officer of the company do you deem that the Capitol Construction Company owes to the West Bergen Trust Company a mortgage of $6000?

The Witness: Yes, sir.

Q. Now, you borrowed other moneys from the West Bergen Trust Company, didn't you? A. Not on this job.

Q. I didn't ask you on this job or any other job.

Mr. Stout: I object to this as immaterial, if he borrowed money for some other job.

Mr. Kantor: I withdraw the question. I will terminate my examination and ask this witness to produce all his checks drawn from September 10th, 1927, up to January 4th, 1928.

Mr. Stout: I object to that request except insofar as the checks that were presented between September 10th and September 24th, inclusive, are concerned.

The Master: Have you got the checks?

The Witness: I have not got them.

Mr. Stout: I think I have all the checks with me.

Mr. Kantor: Will you let me have them? Check of November 14th, 1927, $5,002.48.

Mr. Stout: I do not seem to find that check.

Q. What do you know about that check? A. What date?

Q. November 14, 1927. You got a mortgage on the first property and you got credited to your account $6010. You drew this check for $5002 and gave it to the bank. What was that check given for? A. We never paid off the note.

Q. What did you give them a check for? A. Probably the note was due at the time and instead of giving them another note we had to pay off that one, then we got credit for another note.

Q. This is a check transaction? A. That is the way the bank did it.

Mr. Stout: If it please the court, I would like to have an opportunity of looking this up.

Q. Mr. Silverman, did you give Mr. Stout all the checks for that period? He has looked through the batch covering November and that $5,000 check is missing. A. That is all I had.

Mr. Kantor: I will excuse the witness for further cross-examination until Friday, July 12th, at two p. m.

HARRY STARR, sworn.

Direct examination by Mr. Stout:

Q. Mr. Starr, you were the treasurer of the Capitol Construction Company during the year 1927? A. Yes, sir.

Q. And you were connected with the building of the apartment house at Cranford, New Jersey, were you not? A. Yes, sir.

Q. What was principally your work there? A. Taking care of the outside work.

Q. What do you mean, getting loans, financing, and so forth? A. Yes, sir.

Q. Do you recall coming to my office on September 10th, 1927? A. Yes, sir.

Q. Did you talk to me about the Cranford job? A. Yes, sir.

Q. Will you state what was said at that conference or meeting? A. Why, I came to you, you should lend us $5,000.

Q. That I should, or who? A. The bank.

Q. The West Bergen Trust Company? A. Yes, being I am seeing you because you were at that time the vice-president of the bank, so I came to you and you should lend us the $5,000 and we should endorse it ourselves, the Capitol Construction Company and we endorsed it ourselves and then secure you with a mortgage on top of it.

Q. Did you tell me what you wanted the money for? A. For the Cranford building.

Q. Did you tell me at the time about any checks outstanding? A. Yes, I did. I told you we gave out checks and we are short now in cash we had to make good those checks, we will have to stop the building, the building would not be able to progress.

Q. And this was around noon, was it not, on that day? A. Exactly.

Mr. Kantor: I will concede that that conversation took place you with, so don't go over it again.

Mr. Stout: As I have related it?

Mr. Kantor: Yes.

Q. Have you seen these checks which are marked Exhibits 13 to 28 inclusive? A. Yes, sir.

Q. You have seen them before, haven't you? A. Yes, sir.

Q. And do you know of your own knowledge that these checks were to pay for labor performed and materials furnished for the Cranford job? A. Yes, sir.

Mr. Kantor: It will be considered that Mr. Starr repeated the testimony of Mr. Silverman, the same direct and the same cross.

The Master: All right.

Q. You recall getting a check from Goldberg for $500 on or about September 10th? A. Yes, I got it myself.

Q. Deposited in the West Bergen Trust Company? A. Yes, sir.

Q. Do you know what was done with that $500? A. We gave it out to Abraham and Company.

Q. What did you give that to them for? A. We took a loan from them and we gave it to them back.

Q. Referring to the payroll check of September 4th, 1927, do you recall that you and Hyman Silverman came to my office on September 24th, 1927 and got the additional loan of $800? A. Yes, sir.

Q. And that was also to be secured by the mortgage? A. Exactly.

Q. And you went to the bank, you and Silverman, and discounted that note of $800 and then cashed this check dated September 23rd, 1927? A. Yes, sir.

Q. Do you know who actually took the money from the bank? A. We were going, me and him.

The Master: You mean Hyman Silverman?

The Witness: Yes, sir, and he put the check in the window or I put it in, I cannot say.

The Master: But you were there?

The Witness: I was there.

Q. Well, after you got the $800 did you and he then go out to the Cranford job? A. We went down to Cranford and paid off the men.

Q. Do you know whether you took the money or whether he took it? A. I don't remember whether it was in my pocket or in his pocket.

Q. But you were there when you saw these men paid $800? A. Yes, sir.

Q. And was the whole $800 paid out? A. The whole $800 was paid out.

Q. To the men who had worked there during the week on this job? A. Yes, sir.

Mr. Stout: That is all.

Mr. Kantor: I would like to have Mr. Silverman excused from the room while I ask this witness some questions.

Cross-examination by Mr. Kantor:

Q. I show you a check dated September 12, 1929, for $54.73. What was that for? It is to the West Bergen Trust Company. A. I cannot tell you.

Q. You do not know what that was for? A. No, because he used to give out the checks.

Q. Look on the back of it and see what is written there. There is a notation apparently by the bank "on account note Abraham Company, interest". A. Yes, we had a couple of notes with Abraham Company which we paid $900 to him cash and then $750 a note we paid the interest on that note; $500 we gave him in cash.

Q. Now I show you five slips, clipped together, four of which are deposit slips and one a memorandum——

Mr. Kantor: I would like to have these marked for identification.

(Marked Exhibit 29 for identification of this date.)

Q. On this deposit slip dated September 10th, 1927 is written "Check, $500", then there are some words apparently in Jewish, then $4,974.17? A. Yes.

Q. Can you read Jewish? A. A little, yes.

Q. Well, will you read it please? A. This is Silverman's writing, $500 from Goldberg——

Q. Another $500. Now, what does the Jewish say? A. "From Goldberg, from garage, Union Avenue." On Union Avenue we were building a garage so we took a——

Q. Read it. A. This is a note for $5,000 and it is on the book.

Q. Does that mean that you discounted Goldberg's note of $5,000? A. Yes.

Q. What is the name of this man Goldberg? A. Goldberg.

Q. What is his first name? A. I don't know his first name.

Q. Where does he live? A. In Jersey City.

Q. Whereabouts? A. I don't know.

Q. Where did he build the garage? A. On Union Avenue, Jersey City.

Q. And how much was the whole contract? A. I don't know that.

Q. And you got a note from him for $5,000? A. I don't think so.

Q. Didn't you discount a note for $5,000? There is a check for $500? A. Yes, sir.

Q. Then it says in Jewish "From Goldberg for garage". A. Yes. It says $500 from Goldberg on garage on Union Avenue, and then it says——

Q. $5,000 note. A. This is a note for $5,000 on the book.

Q. Who wrote that? A. Silverman.

Q. Now, do you know Goldberg's first name? A. No.

Q. You say you built a garage on Union Avenue? A. Union Street, I think, near Jackson.

Q. How big a garage was that? A. A three car garage.

Q. And you did not get a note from him for $5,000? A. The whole garage was worth maybe $1,400 or $1,500.

Q. Do you know, Mr. Starr, why you gave this check for $5,002.48 on November 14, 1927? A. I don't remember, but I could say that was to renew that note.

Q. To pay the note, you mean? A. Not to pay it, it was renewed, because we didn't have nobody to pay; we never had $5,000 balance.

Q. Your account shows a check drawn for $5,002.48 and on the same day deposits of $5,000 and $1,000. Now, you drew a check for $5,002.48 on November 14th, 1927? A. No, sir, not to the bank.

Q. Well, to whom did you draw it? A. I don't remember.

Q. You do not know to whom you gave it? A. We will have to look it up somehow, but I don't remember it.

Q. Where did you get the money totaling $6,000 on November 14th, 1927? A. I don't remember.

Q. Where did you get $1,702 November 15th? A. I don't remember.

Q. Or $6,010 on November 16th? A. I don't remember.

Mr. Stout: Might it not have been advanced under the Capitol Construction Company's mortgage on the First Street job? We advanced $12,000 and some odd dollars on that. Didn't you sell some property and get some money?

The Witness: But I don't know if that is that time. At that time we had about $7,500 or $7,300 from West Orange, and I had checks, if you remember it was from the West Orange property we sold, or from a mortgage—I cannot remember exactly how that transaction was, but I know we made that deposit at that time when we sold some property.

Mr. Kantor: I will excuse this witness until Friday for further cross-examination.

HYMAN SILVERMAN, recalled.

Cross-examination by Mr. Kanter:

Q. I show you a slip marked Exhibit 29 of this date for identification. Are the words in Jewish there in your handwriting? A. Yes.

Q. What does it say? A. From Goldberg for garage on Union Avenue. We discounted a note for $500.

Q. Where does it say "discounted note for $500" or "discounted note $5,000"? A. $5,000 from Goldberg for the garage. We got $500 and also a note for $5,000.

Q. You got from Goldberg a note for $5,000? A. No, sir, we got a note from Goldberg $500.

Q. A check? A. A check.

Q. Not a $500 note from Goldberg? A. No, sir, we discounted in the bank $5000 from Goldberg. We got $500 on the garage on Union Avenue and the note in the bank we discounted for $5000 and in the book we got so much.

Q. Did Goldberg give you a note for $5000? A. I think he gave us a note.

Q. How much was the note? A. $500.

Q. It says check $500. A. Check I don't remember.

Q. Did he give you a note also? A. He didn't give us any note.

Q. How big a garage was this? A. A two-car garage.

Q. On what street? A. Union Avenue.

Q. Union Avenue and where? A. Union and Jackson.

Q. Jersey City? A. Yes, sir.

Q. Do you know Goldberg's first name? A. I don't know his first name.

Q. Do you know where he lives? A. No, he lives somewheres else. It is his property. I think he got a saloon somewheres.

Q. In Jersey City? A. Yes, sir.

Q. You do not know his first name? A. No, sir.

Mr. Kantor: That is all.

Re-direct examination by Mr. Stout:

Q. The memorandum that you have referred to here, marked Exhibit 29 for identification, is a copy of a slip that you made out that day, to make a deposit? A. Yes, when we made a deposit I made another slip and I made this memorandum.

Q. And the figures on it $4974.17 represent the proceeds of the $5000 note? A. Yes.

Q. The $5000 note was discounted on that day? A. Yes, sir.

Mr. Stout: That is all for today.

Harry Starr, on Behalf of West Bergen Trust Company—Direct.

HARRY STARR, sworn.

Direct examination by Mr. Stout:

Q. Mr. Starr, you were treasurer of the Capitol Construction Company during the year 1927? A. Yes, sir.

Q. Hyman Silverman was president and Jacob Starr was secretary? A. Yes, sir.

Q. Was there some agreement or arrangement between the Capitol Construction Company and you three men as to your being paid anything for your work on the Cranford job? A. Yes, sir, $2500 each.

Q. What was that for? A. For taking care of the building.

Q. What was your position in the transaction in respect to this Cranford job? What were you to do? A. Well, I was taking care of the outside work like placing mortgages and seeing we should have enough money to go ahead with the building.

Q. In other words, you were getting money to finance it and taking care of the business end of the building of this apartment house? A. Yes, sir.

Q. What was Hyman Silverman's position under this undertaking between the Capitol Construction Company and yourselves? A. He used to take care of the general work.

Q. Like superintendent of construction? A. Yes, sir.

Q. What was Jacob Starr's position under this arrangment? A. He took care of the carpenter work.

Q. And in November, 1927, did the Capitol Construction Company execute a bond and mortgage to Edward P. Stout as trustee to secure you three

men $2,500 each under this agreement between you and the Capitol Construction Company? A. Yes, sir.

Q. No part of that sum has ever been paid? A. No.

Mr. Stout: That is all.

Mr. Kantor: No questions.

HYMAN SILVERMAN, sworn.

Direct examination by Mr. Pyle:

Q. I show you those checks made by James E. Pyle marked Exhibits 42 to 81, inclusive, and ask you if you are familiar with those checks? A. Yes.

Q. Do you know what those checks were given for? A. Given for material and labor.

Q. Now, with the exception of this check for $2,130.80, Exhibit 42, and this check for $400, which is Exhibit 49, endorsed to Harry Grossman, were these checks given in payment of labor and material used in the construction of the Cranford apartment house? A. Right.

Q. You were the superintendent during the period in which these checks were given, in charge of the construction of that apartment house, were you not? A. Yes, sir.

Q. And you know that from your own knowledge, that these moneys were used in payment of labor and material that went into that job with the exception of the checks I have shown you? A. Yes, sir.

Mr. Pyle: That is all.

Hyman Silverman, on Behalf of Carteret Company—Cross.

Cross-examination by Mr. Kantor:

Q. How much of this money that you got from Mr. Pyle went to Jacob Starr, Hyman Silverman and Harry Starr? A. None of it.

Q. Not a dollar? A. No, sir.

Q. Look at this check $871.30, October 24th, 1927.

Mr. Pyle: You are showing him somebody's else's check and I am talking about my check.

Q. Here is check number 64 dated October 24th, 1927, for $871.30, made by your company to the order of Jacob Starr and not included in any of those checks which Mr. Stout includes in his $6,000 mortgage; where did you get this?

Mr. Stout: I object to that as immaterial, where he got the money.

A. It was from this bank, isn't it?

Q. Didn't you take Mr. Pyle's money, put it in your bank and then draw a check to Starr for $871.30? A. I don't remember those things.

Q. You do not know what you did with Mr. Pyle's money? A. Most of the check was paid out to the creditors themselves.

Q. But those two were made out to the order of the Capitol Construction Company and not endorsed to any specific creditor.

Mr. Stout: They were all endorsed to some specific creditor.

Q. I am referring to the Jacob Starr check. Take for instance this check, $2,000, check dated October 22nd, 1927, made by Mr. Pyle to the order

of the Capitol Construction Company and endorsed to J. Starr. A. Yes.

Q. Now you have already testified I take it, Mr. Starr testified that he could not tell, and you said you could not tell what particular labor you paid this to or how much you paid that particular labor.

Mr. Stout: Mr. Jacob Starr didn't testify to any such thing. He testified he knew just who he paid it to. He paid it to laborers on the job. He said he could not designate their full names at the present time, but he told you that that check there was cashed and he drew the cash out of the West Bergen Trust Company.

Q. Look at check October 22nd marked "Received payment West Bergen Trust Company October 25, 1927," which is the date the check was paid at the drawee's bank, Commercial Trust Company. Now, on October 24th another check was drawn for $871.30. A. That check was merely $2,000. We were behind two or three weeks pay.

Q. One minute. You testified that you got a $2,000 check from Mr. Pyle and that check was cashed? A. Yes.

Q. And Mr. Starr paid the men on the job? A. Yes.

Q. Now, you did not have any money in the bank when you deposited this check of October 22nd, 1927 in the West Bergen Trust Company? A. Maybe we didn't.

Q. And on October 24th you drew a check for $871.30? A. Yes.

Q. To Jacob Starr? A. Yes.

Q. This check $871.30 is check number 64, which is not included in the check which Mr. Stout has

talked about. A. It is a different payroll. We have payrolls every Saturday.

Q. What did you do with this $871.30? A. Used it for the payroll.

Q. And he paid out the difference between $2,000 and $871.30? A. I say we were behind in the pay two or three weeks.

Q. You were not able to identify a single man to whom this $2,000 was paid or $871.30? A. There are so many carpenters and laborers working you cannot remember.

Q. Is that answer also true with reference to any other checks Mr. Pyle may have that were endorsed in the manner of check Exhibit 51? Did that happen the same way? A. Yes.

Q. Can you tell us who you paid the money to? A. No, sir.

Q. Neither their names nor the amounts? A. No. I know the building was done by working men and by ourselves.

Mr. Pyle: The detail of payment to the carpenters was left to Mr. Jacob Starr who was the man in charge of the carpenters?

The Witness: Right.

Q. You remember, I suppose, who those carpenters were working at the time? A. Yes, I remember.

Q. Well, who were they? A. There was a lot of men on the Cranford job.

Q. Tell us some of them. A. There was Carlson, Johnson, Maloney, Johnnie, Tony, there was Resnik and another Resnik and about three Silvermans and two Starrs. I got two brothers who are carpenters.

Q. How many carpenters did you have working on the job and for which the checks went to pay? A. We didn't have steady——

Q. About. A. About from fifteen to twenty men.

Mr. Kantor: That is all.

Cross-examination by Mr. Stout:

Q. Do you recall making up in my office or giving me the names and the amounts of the payroll of September 24th, 1927 in the West Bergen Trust Company matter? A. Yes, sir.

Q. I show you this paper and ask you if that refreshes your recollection as to whom you paid the money and the amount? A. I cannot read it.

Q. You remember making the memorandum up in my office, don't you? A. Yes, sir.

Q. Can you read the amounts? A. Yes.

The Master: Do you recall these men on this list?

The Witness: Yes.

Mr. Stout: I offer the memorandum in evidence.

Mr. Kantor: I object to its introduction.

Q. You gave to me, upon inquiry, the information that is contained on this yellow piece of paper? A. Yes, sir, I gave you the information.

Q. And you looked it over after I had made it up as to whether it was correct or not? A. Yes, sir.

Q. Are the statements contained in this paper correct? A. Yes, sir.

Mr. Kantor: I object to the question. That is not the way to prove a memorandum made at the time.

Mr. Stout: This is a statement of his as to whom he gave this money. I offer it in evidence.

Mr. Kantor: I would like to examine.

Cross-examination by Mr. Kantor:

Q. Mr. Silverman, where did you get this information from? From a book? A. Not from a book, but Mr. Starr was assisting me to keep a record where we paid the $5,000.

Q. And you had a book from which you took the names? A. I had a book from which I took the names, yes.

Q. And you read from the book and gave it to Mr. Stout? A. Yes, sir.

Q. And that book had various names in it? A. Yes, sir.

Q. And certain amounts in it? A. Yes, sir.

Q. Did you read the names and the amounts to Mr. Stout or did you read them to a stenographer in his office? A. To Mr. Stout.

Q. Then Mr. Stout dictated them to a stenographer? A. I don't know what Mr. Stout does.

Q. Then you walked out? A. That is it.

Q. Then afterward the stenographer made up the statement? A. Yes.

Q. And this is the first time you saw it, today? A. Yes.

Q. You did not see it again? A. I seen it later, yes.

Q. When did you see it? A. I think it was two or three or four weeks ago.

Q. About a month ago? A. Yes.

Q. June 10th of this year? A. Yes.

Q. You never saw the statement before this year, did you? A. No, sir.

Q. And all the information you gave to Mr. Stout was from a book which Mr. Stout had and was reading to his stenographer? A. It was not a book; I had a memorandum especially of that $5,000.

Q. And that paper Mr. Starr had? A. Yes, sir.

Mr. Stout: I withdraw the offer.

(Adjourned until July 12th, 1929, at two p. m.)

Hearing resumed pursuant to adjournment.

July 12th, 1929, 2 p. m.

Before:

Hon. Aloysius M. McMahon,
Special Master in Chancery.

Appearances:
(The same.)

Edward Stout resumes the stand.

Mr. Stout: I desire, if the Court please, to correct my testimony about these notes—one of $5,000 and the other of $800. When I testified on Wednesday last I didn't have before me the record. I have since consulted the record and I find that the $5,000 note was for one month instead of three months. I think I testified on cross-examination it was for three months. The bank statement itself indicated that it was only for one month. At the expiration or the maturity of that note it was renewed for two weeks, no payment

on account, and at maturity it was protested for non-payment. Then on——

The Master: That maturity was the end of the second week extension?

The Witness: Yes; in other words, October 24th. The first note was dated September 10th, 1927, payable one month after date, which brought it to October 10th, 1927, the maturity date of the first note. Then on October 10th, 1927, a new note was given, the interest having been paid on the first note, and the second note was drawn for two weeks, due October 24th. That note, as I have stated, was protested for non-payment on October 24th, and on November 14th, 1927, that note was renewed by the giving of a new note for $5,000, payable on demand—taken in from a time note and made a demand note—and that was the time under discussion the other day as to what that payment of $5,002.48 was on November 14th, 1927.

The transaction was that a new note for $5,000 made by the same parties was deposited. It was an interest bearing note payable on demand, and the $2.48 which was the protest fee on the note which fell due October 24th, 1927, was paid out of the general balance of the Commercial Trust Company. They had a small balance there. In other words, it is a matter of bookkeeping, charging the payment of that note up on the check side and depositing the $5,000 on the deposit side.

Mr. Rubinstein: Did you say Commercial Trust? You mean West Bergen, don't you?

The Witness: Yes. I thought I said West Bergen.

This demand note for $5,000 dated November 14th, 1927, was taken up on March 5th, 1928, by a note of Harry Starr, Jacob Starr and Hyman

Silberman, endorsed by Harry Frager. That note was for $5,990.47, which represented the $5,800, and the accumulation of interest and protest fee. This note was to run for three months, coming due June 5th, 1928. On June 13th, 1928, a new note was given to take up the note bearing date March 5th, 1928, in the amount of $5,929.50. That note was to run for one month, or it became due July 5th, 1928. On July 17th, 1928, a new note was given in renewal of the note due July 5th, 1928, in the amount of $5,931.47. That note became due August 6th, 1928. On August 8th, 1928, a note was given in renewal of the note which fell due on August 6th, 1928, for one month in the amount of $5,930.48. On September 10th, 1928, a new note was given in renewal of the note which fell due on September 6th, 1928, for $5,989.48. All of these notes that I have referred to, beginning with the note dated March 5th, 1928, were signed by Harry Starr, Jacob Starr and Hyman Silberman, and endorsed by Harry Frager. When that last note fell due—which became due December 6, 1928—it has since been carried as past due paper. These notes of Starr and Silberman, endorsed by Frager, were given as collateral security for the payment of the mortgage which encumbered the Cranford property, which I have heretofore testified to.

Now, another item I desire to straighten out is this: It was called to the court's attention on Wednesday last that the check, cancelled check Marked Exhibit 13 of July 10th, dated September 9th, 1927 to the order of Siegel and Levine for $2,000 was paid as shown by the perforation on September 9th, 1927. That is not the fact. That check wasn't paid on September 9th, 1927, but as

the records show it was paid on September 10th, 1927. On September 9th, 1927 there weren't funds in the account of the Capital Construction Company to pay this check, and evidently the person who stamped or perforated that check as paid on September 9th, 1927 must have taken the stamp of the day before. That sometimes happens, because the record is to the credit transaction of the bank, and this $2,000 check, marked Exhibit 13th, July 10th, was paid out of the proceeds of the $5,000 note which was presented to the bank on September 10th, 1927 after banking hours, and therefore was not entered on the books until September 12th, 1927.

The Master: This check was paid on the 10th?

The Witness: Instead of being paid on the 9th, as stamped—as shown in the record of the 10th.

The Master: Was it paid before the amount was credited, the proceeds of that $5,000?

The Witness: In other words, the transaction was this, as I heretofore testified: That on this Saturday morning, September 10th, the Starrs and Silberman came to my office—they had previously been to the bank—they came down to get this loan of $5,000 because they needed the money to meet checks which they had already issued and also to pay their material accounts and laborers on this Cranford job, and after the note was drawn in my office it was taken by them up to the bank, and as the business of that day was closed the note was there turned over but not entered upon the books. The check to the order of Siegel and Levine had been presented earlier in the day and it couldn't be paid. The bank couldn't pay unless there were funds to pay it, and the fund came in when the note came. It came there on Saturday.

That is the history of this note, the $5,000 note transaction.

Now, as to the $800 note. My recollection is I testified that that note was made in my office. I am not sure. I testified that the Starrs and Silberman came to my office on Saturday morning, September 24th, 1927. That's true. They had been to the bank the day before, September 23rd, and had seen the President of the bank and he had referred them to me, and this note for $800 was drawn at the West Bergen Trust Company on September 23rd, 1927, and they came to my office, as I have stated, on Saturday morning and told me, as they had told the president of the bank, they needed this $800 for the payroll, and I told them to go back to the bank, that I would communicate with some one there to deposit this note, or discount it. The note bears notation "see stub" and it was discounted on September 24th, 1927.

The Master: This note is marked paid. How was that paid?

The Witness: I am going through the history of that. This note, as I have testified the other day, was to be secured by a mortgage on the property. Now, the history of that $800 note was that it was, as appears on its face, for three months, and it became due December 23, 1927. Then this $800 note was renewed by the same parties. On December 23rd, 1927 the $800 note bearing date September 23rd, 1927 was taken up by giving a demand note to the same parties for $800 and on March 5th, 1928 this $800 demand note was put into a note along with the $5,000 note and the interest accrued, making a note for $5,990.47. That note was signed by Hyman Silberman and Harry Starr and Jacob Starr and endorsed by Harry

Frager, and that runs down through the different renewals because it became a part of that $5,990.47 note. What I have testified to about the $5,000 note as to renewals is the same as to the $800 because it was a part of it.

Now, as to the action of the executive committee and the board of directors. This $5,000 note——

Mr. Kantor: I object to the witness testifying as to the action of the board of directors or the executive committee, except as to the minutes.

The Master: Are you a member of it?

The Witness: Yes.

Mr. Kantor: I object except as the minutes of the executive committee or board of directors will disclose that action. That will be the best testimony, not Mr. Stout's testimony.

The Master: He was a member present.

Mr. Stout: As I understand the law, a member can testify as to what took place. The minutes are not the best evidence of what took place; the best evidence is those who were present and actually knew what took place. Here is the record of the minutes. The minutes do not record the whole transaction in detail. In other words, the minutes have got to have some explanation.

Mr. Kantor: I object to the witness testifying what action was taken by the board, excepting as evidenced by the minutes of the board or executive committee.

The Master: If he was present at the meeting I think I will allow it.

Mr. Kantor: Your Honor will grant me an exception?

The Master: You may have it.

The Witness (Continuing): On September 15th, 1927, which was the first meeting of the executive

committee of the bank,—the executive committee meetings are held every week, and this was the first meeting after the discounting of the note of $5,000—that note was read off along with all other notes that had been discounted previous to that meeting. That is the practice of the bank to read off all notes. When this note of $5,000 was read off I brought to the attention of the committee—by the way, I was a member of the committee by virtue of my office as vice-president—I related that this note had been taken by the bank for a loan of $5,000, or the proceeds of a note of $5,000 which loan was to be used by the Capital Construction Company to meet checks that had been issued for labor and material and also to pay other claims against the building as they accrued, and that the Capital Construction Company was to give a mortgage on the Cranford property, which was to be a fifth mortgage to secure the repayment of the loan, and it appears in the minutes that the action of the president in discounting loans 8512 to 8572, aggregating $113,929.20 was ratified by the committee, and the number of this was 8549, and the last was 8572; and as to the $800 note, that was presented at the following meeting of the executive committee. It was discounted September 24th. At the meeting of the executive committee September 29th, 1927 that note was read along with other notes and I stated to the committee that this note had been given for a loan of $800 which the Capital Construction Company required for their payroll on September 24th, 1927, and that the note was discounted—it was an interest bearing note—and a check was immediately drawn by the Capital Construction Company on the $800 for that purpose.

That this note was—rather this loan was to be secured by a mortgage on the Cranford property and this note appears in the minutes of the executive committee meeting of September 29th, 1927 under the action of the president discounting loans 8637 to 8696 aggregating $70,047.50, which comes within that. 8666 is included in 8696.

The Master: That action was ratified?

The Witness: Yes, and later at the meeting of the board of directors the action of the executive committee, with this explanation, was presented to the board of directors and ratified by the board of directors.

I am now open to cross-examination.

Cross-examination by Mr. Kantor:

Q. Is it a fact, as you know, neither the bond or mortgage, exhibits 8 and 9 of July 10th, refer in any way to a loan evidenced by a note, that is correct? A. They speak for themselves.

Q. And this bond and mortgage—I want you to refresh your memory so as to go on with your examination on the case—was due January 25th, 1928, principal and interest at six per cent., is that correct? A. Yes.

Q. And appearing on the face of the bond and mortgage it would appear to be a straight mortgage transaction?

Mr. Stout: I object. The mortgage and bond speak for themselves.

Mr. Kantor: I withdraw it.

Q. Have you produced the original $5,000 note of September 10th? A. The original $5,000 note was turned over by the bank to the Capital Construction Company and they haven't it. I called

upon them to produce it and they haven't it. They have the renewal, I saw that the other day.

Q. Mr. Stout, you testified, I understand, if I am correctly informed, that this check, exhibit 13, of July 10th, for $2,000 being a check drawn to the order of Siegel and Levine, which appears to be perforated as having been paid on September 9th, 1927, you said that that perforation was made through an error? A. Yes.

Q. Do you so testify? A. Yes.

Q. You, personally, of course, didn't cash this check? A. No.

Q. You personally were not present in the bank when the check was presented for payment or when it was paid? A. I said I was testifying from the record.

Q. By the records you mean the ledger account of the Capital Construction Company, exhibit P-11 for identification? A. Yes.

Q. That record wasn't made by yourself either, was it? A. No.

Q. Now, you have produced here, Mr. Stout, a sheet which is headed September 15th, 1927, and starts with the sentence "regular meeting of the executive committee was held at 9:30 a. m." Now, the only reference to loans in that sheet is this, in the following paragraph: "The action of the president in discounting loans Nos. 8512-8572, aggregating $113,929.20 was ratified by the committee". That is the only paragraph in the minutes referring to action taken with respect to loans, is that correct? A. Yes.

Q. And the sheet which you have produced here is signed by Louis A. Miele, Assistant Secretary?

Mr. Stout: If the Court please, I think it ought to be noted on the record that I pro-

duced this note record of the bank, and produced these sheets from the minute book as to the minutes of the meetings of September 15th and September 29th, 1927, respectively, because of the call of Mr. Kantor; but I say it is my idea that this note transaction and the minutes in respect to them have nothing whatever to do with the validity or effect of this mortgage. As I understand the law an advance money mortgage may be given for future advances, where the mortgage is made in advance and the monies advanced afterwards, or it may be made after all the money is advanced and at the time the advancements were made there was no understanding or agreement that there was to be any mortgage. That is the way I read the law. The test is, has the money been advanced and was the money advanced for the purpose of paying labor and material accounts on the job? Nothing said about a mortgage at that time. If the money is so advanced, and the person getting the money actually applies it to the payment of labor and materials, and later gives a mortgage and that mortgage is recorded before the mechanic's lien is filed, it is ahead of the mechanic's lien; the theory being if the money has gone into the building it has created a greater asset for the lienor, and when the Court said the only test is was the money advanced and has it gone into the building, I say that all of this talk about notes or about minutes is immaterial to the issue.

Q. Now, Mr. Stout, the other sheet that you produced is a sheet headed September 29th, 1927, and starts off with the sentence: "A regular meeting of the executive committee", and then notes the appearance of each person, and then goes on with reference to loans. The only paragraph in the minutes with reference to loans is "The action of the president in discounting loans 8637-8696, aggregating $70,047.50, was ratified by the committee"? A. Right.

Q. That is the only paragraph in the minutes of September 29th? A. Yes.

Q. And the sheet which I just read, September 29th, is signed by Mr. Clarence Thees? A. He is Secretary and Treasurer, and Mr. Miele was Assistant Secretary and Treasurer at that time.

Q. Now, in each of these cases you identify the numbers of the loans as inclusive of the $5,000 loan and the $800 loan? That is included in the minutes of the executive committee? A. Yes.

Q. You also said, did you not, Mr. Stout, that you reported to your committee that the loan was to be secured by a mortgage, either a fourth mortgage or a fifth mortgage, on the property in Cranford? A. Yes.

Q. Didn't you know whether it was to be a fourth or fifth? A. I did, but I am not sure what I reported to the committee.

Q. Did it make any difference to you as to whether it was a fourth or fifth? A. No; not in particular, because I had ascertained or was then told of the amount of mortgage represented. It was question about whether there were two mortgages there to the same parties. I didn't have the record of it then. As I understand it, part of it was a purchase money mortgage, and part of it

was to advance money for the building. I didn't have a record as to whether there were two mortgages or not. At the time of this loan of $5,000 was applied for I thought that there was then only four mortgages on the property. Later, before this mortgage was put on, the Carteret Company came along with a fifth mortgage.

Q. Mr. Stout, you did testify, I believe, that the security of the property entered into your consideration in writing this loan, and that you didn't think you would loan this money to the Capital without the security of a mortgage? A. Yes; that's right. I said this, I said the company would not, no, because I didn't think it was any good, but that the Starrs and Silberman said that they had negotiated a building mortgage loan of $225,000 and would be paid out of this, and if the mortgages then on the property with this didn't aggregate that sum there was sufficient collateral. I thought it was all right.

Q. You also testified, you thought the property was then worth roughly $200,000? A. Yes.

Q. Did you know that there was a mortgage on this property given to the Standard Building for $59,000? A. Did I know at that time?

Q. Yes. A. I don't think I had the accurate figures. At the time I took this I only had the say so of Starr and Silberman as to those mortgages. $59,000 or $80,000.

Q. There was another mortgage to the Riverside Apartment for $21,000. This is you made up the $80,000? A. Yes.

Q. And there was another mortgage to the Riverside Apartment for $30,000; there was another mortgage to Schwartz for $80,000; there was another mortgage to Schwartz for $5,150? A.

I think I was told about that, but that mortgage didn't have anything to do with the building.

Q. But did you know about the $5,150 mortgage to Schwartz? A. I was told by them that they held a mortgage. I don't know whether I got the amount of it. They said that didn't have anything to do with the building.

Q. Were the mortgages covering the same property as appears in your mortgage? A. Yes.

Q. Did you know about the $11,619.34 given the Milling Company? A. I think I did.

Q. Then at the time there were more than five mortgages antecedent to your mortgage? A. There weren't more than five mortgages that be ahead. That was all I was concerned with.

Q. Did you know, Mr. Stout, what the amount of the mortgages ahead of you were? A. Why, I think that I figured, and stated in the mortgage, somewhere around $177,000. That is what I figures on because I stated in the mortgage about something of that kind. That is, the mortgage being subject to five certain mortgages amounting to $177,000.

Q. Then there were five mortgages ahead of you? A. That was the opinion that I formed after looking into the matter.

Q. You made an examination of the title before this mortgage was executed, or had one made? A. Yes.

Q. Your searcher must have reported to you what the aggregate mortgages on the property were? A. I knew of the Schwartz mortgage and I knew of the Milling Company mortgage, but my belief was these mortgages wouldn't be ahead of this mortgage, because if it was an advance money mortgage it would be ahead.

Q. You have a card here called direct, does that mean anything not printed in there? A. It means direct loans.

Q. Now, this card, which is card number 1, starts off with the date September 12th, 1927, and goes down through March 26th, 1928, is that correct? A. Yes.

Q. And the note of September 12th became due October 10th? A. Yes; this gives the date of discount before the entry. (Indicating.)

Q. It was renewed on October 10th and became due October 24th? A. Right.

Q. On October 24th, 1927, the $5,000 note became due? A. Yes; protested for non-payment.

Q. When was it taken up? A. It was taken up on November 14th, 1927.

Q. Now, Mr. Stout, you have two cards, yellow cards, called direct, the entries of which run as follows: On the first card the entries are from September 12th, 1927, through March 26th, 1928, and on the second card from March 5th, 1928, through May 23d, 1929, is that correct? A. Yes.

Q. Then you have a red card called demand. The first entry on that is 11/14/27, and ends with March 5th, 1928, is that correct? A. Yes.

Q. Now, why the two sets of cards with reference to this one transaction? A. You mean two direct cards?

Q. No, I don't mean two direct cards. Why two sets of cards, one a direct loan card, and one demand? A. I will explain the cards. This loan, as far as the records go starts off as a loan to the Capitol Construction Company on a note. Later the note was taken up by the Starrs and Silverman, by Hyman Silverman, Jacob Starr and Harry Starr, and so we have a card taking

up this note of the Capitol Construction Company. In other words, they came in as the makers of the note, as a means of security for this mortgage.

Q. Then you finish your transactions with the Capitol Construction Company on March 26th, 1928? A. On that card, yes.

Q. And you take up the new card with Silverman, Starr and Starr, taking up the obligation and continuing it down practically to date, is that right? A. And also it will be noted the note is endorsed Harry Frager, and the note continues down to December 28th, 1928, when it is marked "past due payment".

Q. The last entry on this card is May 27th, 1927, isn't it? A. But that is in reference to another note.

Q. Who made up this card? A. I think this card is made up by a man by the name of Miele, and he is away on his vacation.

Q. You notice the first entry on the card marked Direct and headed Silverman, Starr and Starr, starts with "Harry Frager, assignment of mortgage, $5,990.47", and that is in reference to this transaction? A. Yes.

Q. What is this assignment of mortgage? A. That is an inaccurate statement, because there wasn't any assignment of mortgage. What he meant is secured by mortgage.

Q. You don't know that; you didn't mark the card? A. I know this from the records of the bank, there was never any assignment of mortgage.

Q. There appears to be some other transactions with Harry Frager, bringing the total up to $7,898.67? A. Yes; but the Capitol Construction Company had another job at the time the

Cranford job was going on, I think it was in September, 1927, and the Capitol Construction Company, with Harry Frager's endorsement, borrowed two thousand dollars for that job, and that is why that $2,000 appears.

Q. You get down finally to where you show the balance due on this account. You start with that balance due there (indicating) $5,990.47? A. That indicates what is due on the note of Silberman and Starr endorsed by Frager.

Q. And that includes the mortgages transaction, Exhibits 8 and 9, of July 10th? A. It includes it in this way. That this note was given as security for the mortgage.

Q. The note was given as security for a mortgage? A. Yes.

Q. And it means what you got on one would be applied on the other? A. Right.

Q. Your next entry on debit balance is $7,818.67; then you show a payment of $5,990.47, reducing the balance to $1,828.20; then you show the next entry on June 13th, 1928, No. 11100, apparently, due July 5th, 1928, under the column new paper, $5,929.50, making a new balance of $7,757.70? A. That is just a bookkeeping entry. On one side we charge up that note, on the other side you give credit for the new one.

Q. This indicated your highest balance runs up to $9,626.38, is that correct? A. According to that card.

Q. And what is the balance on this card as of May 23d, 1929? A. This card shows that there is $1,246.99 still due on the $2,000 note, which was originally a $2,000 note; and shows that on December 28th, 1928, there was $5,989.48 due on the two original notes—the $5,000 note and the

$800, respectively. That is what the card shows.

Q. The card shows a balance here of $1,246.99, which was renewed by a note becoming due July 24th, 1927, doesn't it show that? A. No. In order to arrive at this balance intelligently you got to trace down the history of these notes. From the time of this $5,990.47, $5,931.47, and so on. Those notes include the $5,000 and $800, respectively.

Q. You start off with the first entry $5,990.47? A. Start off with that.

Q. Which is their own paper discounted? A. Just a minute now. That note is originally $5,000, with the $800, with nothing ever paid off on account of principal, including interest and protest fees, when the bank substituted Silberman, Starr and Starr with Frager as endorser for the Capital Construction Company.

Q. Then you start off with the original indebtedness due from them of $5,990.47, is that correct, on March 5th, 1928? A. Yes.

Q. Subsequently they must have borrowed from your bank, or became indebted to it in some way for $1,828.20? A. No; they had, prior to this time, borrowed $2,000 for the First Street job, Jersey City, and at the time that it was transferred to Silberman, Starr and Starr with Frager as endorser as of that date March 26th, 1928, the amount due on that $2,000 note as to the First Street job, Jersey City, was $1,828.20.

Q. Then the total amount due on both jobs was $7,818.67? A. Right.

Q. Then by renewals and re-discounts and further renewals and re-discounts you get down to the basis of where there is due today, as you can see, $1,246.90? A. $1,246.90, on the original $2,000 note.

Mr. Kantor: That's all.

By Mr. Rubinstein:

Q. The last time that note was due, was it protested? A. Yes, sir.

Q. Did the bank make any effort to collect it? A. Yes; the bank reduced it to judgment.

The Master: And then found out that it was uncollected?

The Witness: That is the record we have.

Mr. Kantor: If you haven't any objection, I offer the cards.

Mr. Stout: I object to their receipt in evidence as irrelevant and immaterial.

The Master: If that is your only objection, I will receive them for what they are worth.

(Received and marked Exhibits 1, 2, 3, as of this date.)

Clarence Thees, sworn.

Direct examination by Mr. Stout:

Q. Mr. Thees, you are secretary and treasurer of the West Bergen Trust Company? A. I am.

Q. And have been so how long? A. Three years.

Q. You recall the transaction of September 10th, 1927, in respect to the $5,000 note of the Capital Construction Company? A. I do.

Q. Tell us what you know about that note? A. The morning of September 10th, 1927, Silberman and the Starrs came to the bank and spoke with our president and said that they were in need——

The Master: Were you there?

The Witness: I was present.

—that they were in need of funds in order to pay for labor and material on their Cranford job. Our president couldn't do anything for them and he suggested they go down to see Mr. Stout.

Q. Right there, Mr. Thees. Did they say anything about checks they had issued? A. They mentioned that they had issued checks for the payroll and materials and that they absolutely needed this money.

Mr. Rubinstein: What date was that?

The Witness: September 10th. And then they went down to Mr. Stout.

The Master: You weren't there?

The Witness: I wasn't there.

Q. All right. Did you hear anything about the transaction after that? You can only testify as to what you heard. A. I did.

Mr. Kantor: I object to what this witness heard about this transaction from any source.

The Master: He may testify to anything Starr or Silberman told him.

Mr. Stout: I take it, anything he heard from the lips of anyone that had to do with this transaction between the Starrs and the Capital Construction Company and the bank proper.

The Master: Yes.

Q. Did you hear anything later that day from any of the parties relative to this note?

Mr. Kantor: I want the parties designated. I want to know who we are going to talk about.

Q. All right. Either from Starr, Silberman or myself? A. I did.

Q. From whom did you hear? A. I heard from the Starrs and Silberman.

Q. Where did you hear from them? A. At the bank.

Q. What did they say to you? A. They brought the note back and said that they had arranged with you——

Mr. Kantor: I don't think that is proper, as to what they told him; what they did with the note and what could happen.

The Master: These are the bank officers who are handing out the bank's money, and it was on a statement I presume these men made to the bank at that time that they got the money.

Mr. Stout: And it was up to the secretary and treasurer to arrange for the money and know what authority he was to pay it on.

The Witness: They brought the note back to the bank and said that they had arranged with Mr. Stout for this loan of $5,000, and some mention was made at that time about giving the bank a mortgage in order to secure this obligation.

Q. On September 10th, 1927 were there any notes, rather any check of the Capital Construction Company presented to the bank? A. Yes; there was.

Q. Look at the sheet, the statement that you have before you, marked Exhibit P-11 for identification, July 10th, and also at these checks marked Exhibit 13, July 10th to Exhibit 28, July 10th, inclusive and state whether any of those checks were presented to the bank on September 10th, 1927? A. Yes, there was. A $2,000 check marked Exhibit 13, July 10th, 1929.

Q. Any other? A. None of the other checks were presented September 10th.

Q. Look at that check dated September 9th, and marked Exhibit 13, July 10th; look at the perforation, what does it show? A. Perforation shows it was paid September 9th, 1927.

Q. Will you state what is the method of stamping checks paid? A. The method of perforating or cancelling checks paid is: The check is paid. The check is paid one day, and is perforated the following morning by a junior clerk just before this clerk files the checks. It so happens on numerous occasions that the junior clerk forgets to turn perforation wheel around to the proper date, such as done in this transaction.

Q. Which is the accurate record then, the perforation on the check or the entry on the statement marked P-11 for identification, July 10th? A. Without a question the transaction as appears on the ledger or statement sheet is the correct one.

Q. On September 9th, 1927, the date of that check and the date of the perforation, was there money of the Capital Construction Company at the West Bergen Trust Company to meet that check? A. There was not sufficient funds on September 9th to meet this check. The funds on September 9th were $151.53.

Q. Out of what fund was that check paid?

Mr. Kantor: I object to the question on the ground this witness can't possibly tell.

The Witness: I can possibly tell. I handled the transaction.

The Master: This check was paid on September 10th. There was no other fund excepting the balance existing September 10th.

Mr. Stout: I am asking the question if he knows out of what funds this check was paid.

The Master: Answer yes or no.

The Witness: I do.

Q. Out of what fund was it paid? A. Out of the discounting of the note of $5,000.

Q. And that wasn't entered on the books on September 10th for what reason? A. Because September 10th, 1927 being a Saturday, no bank ever puts notes through on Saturday, it was held over to the following Monday and the transaction was put through at that time.

Q. Would it have been possible on September 10th, 1927 to have paid this $2,000 check without having this note of the Capital Construction Company for $5,000? A. No. The fact is the check wasn't paid until after the note was presented to the bank.

Q. They had nothing to pay it with? A. They had nothing to pay it with.

Q. In your experience as a banker, can you pay a check without having funds to pay it?

Mr. Kantor: I object to that question. (To witness.) There was no overdraft, was there?

The Witness: Actually there was no overdraft.

Q. As a matter of fact, you entered it up on September 10th as an overdraft? A. Absolutely. If September 10th were any other day but Saturday, the overdraft would not appear on the records. The only reason the overdraft appears is because of the fact September 10th was a Saturday and no notes were ever put through on Saturday.

The Master: Before this check of $2,000, marked Exhibit 13, July 10, was paid by your bank, was this note of $5,000 made by the Capital Construction Company in your possession?

The Witness: It was in our possession.

Mr. Kantor: Why didn't you enter it on your books?

The Witness: Because—I explained it once—no notes are ever credited to an account on Saturday.

The Master: Did you personally take charge of the Starr Silberman account?

The Witness: I was there at that time; yes.

The Master: Were you there when this check Exhibit 13 of July 10th was paid?

The Witness: As far as I recall I was.

Q. You were there on that Saturday? A. I was there on that Saturday.

Q. Now, then, Mr. Thees, returning to the note of $800, were you present at the bank when that was discounted?

The Master: Let us have it marked.

(Received and marked Exhibit 4 of July 12, 1929.)

Q. Mr. Thees, have you seen that note before? A. I have.

Q. Will you tell us its history?

Mr. Kantor: I don't think we are concerned with that. We have a lot of history about everything.

Mr. Stout: What I mean is how that note got into the bank, for what purpose.

The Master: I think you can ask him if he knows how the bank got possession of the note.

Mr. Stout: The circumstances surrounding it is what I mean by the history, the discounting of the note.

The Witness: I know all the circumstances surrounding the discounting of the note.

Q. Will you relate them? A. Starrs and Silberman needed money to meet a payroll and they came to the bank, as I recall. In fact I didn't handle this transaction.

Q. You didn't? A. No.

Q. You were away on your vacation? A. I was away on my vacation at that time.

Q. Were present at the executive committee meeting on September 29th, 1927? A. I was.

Q. Did you hear what I said, if anything, concerning that note of $800? A. At that meeting, as I recall, as I remember, you mentioned to the members of the executive committee the fact that Silberman and the Starrs needed additional money to meet a payroll and that you would be

secured by a mortgage, or the bank would be secured by a mortgage which we were to receive on the Cranford property.

Q. That was said at the time the notes were read off? A. That was said at the time the notes were read off at the executive committee.

Q. And the bank did later get such a mortgage? A. We did get such a mortgage.

Cross-examination by Mr. Kantor:

Q. These records, Exhibit P-11, were made contemporaneous with the transactions, were they not? These are detailed entries? A. Those are detailed entries of our bank's transactions.

Q. There is no question these are the original records of the transactions as they occurred from day to day? A. No question.

Q. Weren't altered in any way? A. Not to my knowledge.

Q. Did you make them personally? A. I did not.

Q. They were made under your supervision? A. Under my supervision.

Q. Now, Mr. Stout questioned you regarding this check of September 9th, and you said the balance then in bank was $151.53 at the close of business on that day? A. That's correct.

Q. On September 10th you started with a balance of $151.53, didn't you? A. That's right.

Q. And there are no withdrawals on that day; no checks presented for payment September 10th. I withdraw that question.

Q. It shows a $500 deposit was made on September 10th? A. That's right.

Q. Can you tell from this sheet, Exhibit P-11, what form that deposit was in? A. I can't.

Q. You can't tell whether that was check, cash, specie or some other form of paper which your company would accept? A. I can't from this record.

Q. What record could you tell from? A. The deposit ticket.

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

Q. In any event, the highest balance on September 10th, 1927, was $651.53? A. That's correct.

Q. A check was presented to your bank for $2,000? A. That's correct.

Q. And by reason of charging that check the account resulted in an overdraft of $1,348.47, and as was noted on that record, is it not? A. It is so noted.

Q. I now call your attention to card, Exhibit 1, 7/12/29, and the entry on there is that you received a $5,000 note on September 12th, 1927, is that correct, is that the entry? A. The entry shows that a note was discounted on September 12th and was dated October 10th, 1927?

Q. It was dated October 10th, 1927? A. Pardon me, it was due October 10th, 1927.

Q. I didn't ask you that. It shows you received a note on September 12th, 1927? A. It doesn't show we received it; it shows the date we put through the entry.

Q. What? Does it show the date of the note? A. It doesn't show the date of the note. This represents the date of the transaction. Our discount register will show the date of the note.

Q. And the date of the transaction, then, was September 12th, 1927? A. Absolutely.

Q. The credit for the discounted value of that note was put upon the account of the Capital Con-

struction Company on what date? A. September 12th.

Q. 1927? A. 1927.

Q. This wiped out the overdraft that had been debited by reason of the payment on the $2,000 check? A. That's correct.

Q. That was in accordance with your regular line of business? A. That was in accordance with our regular line of business.

Q. You have that note registered? A. We have.

Q. Will you let me look at the note register on that day? (Register is produced.)

Q. You are referring to your note register. The reference is to this loan 8549? A. Right.

Q. And that shows the note was discounted on September 12th, 1927, does it not? A. That's right; it does.

Q. The discount was $25.83, leaving a total deposit of $4,974.17. There is no question that represents the entry in this book? The note register represents the transaction made contemporaneously with the transaction? A. That's right.

Q. This entry in this book was made at the same time the transaction was made? A. Yes.

Q. That was September 12th, 1927. A. When you speak of transaction, the day the transaction was actually put through our records, that is the day this record was made.

Q. Yes. That is the day when the transaction was made. The actual transaction as I testified before. The note was presented to the bank on a Saturday and taken by us, but we didn't put notes through on Saturday,

Q. Why didn't you credit the account? A. Because of the fact we don't put notes through on Saturday.

Q. The actual fact is you credited these proceeds of this note on September 12th? A. That's right.

Q. And when you so credited the note it wiped out the overdraft theretofore existing? A. That's right.

Q. Is Mr. Rector connected with your bank still? A. No; he is not.

Q. I call your attention to the fact that these minutes which you testified to—Mr. Stout testified to—withdraw that.

Q. Is the statement of the amount of loans that were negotiated or discounted by the officers of your bank given orally? A. Yes; orally.

Q. Is there not a written report made by the officer making the statement and presented to the meeting? A. No; by the officer discounting the note.

Q. By some officer in his behalf, doesn't he make up a statement for him? A. No; he doesn't.

Q. Take for instance the minutes of September 15th, action 8512-8572, isn't there presented to that meeting a list, Loan 8512, John Smith, $1,000; 8513, Harry Brown, and so on down the list? A. From this record?

Q. From the note record? A. From the note record.

Q. Then the only thing read into the record is the statement contained in that record? A. Yes.

Q. And nothing else? A. The special conditions of a note, the way a note was discounted is given orally by the officer who discounted that note.

Q. Is Mr. Rector still connected with your bank? A. No; he is not.

Q. He severed his relationship before Mr. Stout became president? A. That's right.

Q. I notice in the meeting of September 15th, "The action of the president in discounting notes was ratified by the committee". Nothing said about the action of Mr. Stout as Vice-president discounting notes? A. No.

Q. Nor is there any explanation in the minutes as to what explanation Mr. Stout made? A. No.

Q. The minutes of September 29th, 1927 also refer to the fact "Action of the president in discounting notes and so forth was ratified by the committee". Were these minutes written by you? A. Written by me.

Q. And there is nothing there said about what is to be done with them? A. No; nothing said.

Q. Now, when you have a note for which you are to get collateral, you mention that fact, don't you, on your note register? A. On the note register?

Q. Yes. A. Collateral loans are just recorded collateral loan.

Q. In loans where you are to get security they are marked so, aren't they? A. They are not. They weren't so marked at that time.

Q. Turn to your register, please. Look at your entry for September 12th, 1927. Now, see if you have in the register a statement as to what security is to go with a loan? A. Not when it has collateral security for your note.

Q. Where are the entries showing notes are made with collateral? A. Right here (indicating).

Q. I see you have an entry of September 13th, loan 8552 where you show collateral, and for loan 8551 you show an entry September 13th, assigned mortgage; and you were to have a mortgage, or assigned mortgage for loan 8549, weren't you? A. That's correct.

Q. And no mention is made in your record of the fact that you were to have a mortgage as security for such loan, is that correct? A. That's correct.

Q. Although on the next day, with reference to loan 8551 you did make a record of the fact you were to get a mortgage as security for a loan? A. Because they are direct loans.

Q. You made mention of the fact you were to get security? A. We did.

Q. Why did you omit it from the record of 8549? A. Because the collateral wasn't at the bank at that time.

Q. The collateral wasn't at the bank for the loan of the Cozy Home Building Company, was it? A. It was.

Q. You did mention otherwise when you have security for your loans whether you were to get security? A. We did.

The Master: Whether you are to get it, or whether you got it?

The Witness: Whether we got it. The record is made when we get the security.

Q. Suppose Mr. Stout had passed away and these men hadn't given you the mortgage, what would there be for your bank to enforce against these people?

Mr. Stout: I object to the question.

The Master: I think it is objectionable.

Q. You had nothing to do with the details of loans, how they were to be repaid, or anything like that? A. I didn't.

Q. Was the president of the bank consulted about it? A. I believe he was.

Q. On that Saturday? A. On that Saturday.

Q. You were in charge of the loans, were you?

A. Not directly. I was in charge under the president. I was responsible to the president.

Q. Was the president of the bank the officer in charge of lending money or approving loans? A. The officers had authority to pass loans up to a certain amount, but the president was directly responsible for all loans.

Q. You weren't in charge of the lending department? A. No; I wasn't.

Q. If I were a customer of the bank and came in that bank for accommodation, it wasn't up to you to say yes or no? A. It would all depend on what amount of accommodation you would require.

Q. Suppose I was of the status of the Capital Construction Company, and would require a loan of $5,000, was it then within your province? A. It was not.

Q. You would have to pass it on to the president? A. To the president, and in his absence the vice president.

Q. You would pass it on in this case to the president? A. The president was there at the time Silberman and the Starrs called at the bank.

Q. You were present when the application was made for this loan and you heard what was said? A. Yes.

Q. And as a result of which Mr. Rector turned them down? A. He turned them down.

Q. Rector didn't send them to Stout, did he? A. He suggested they see Mr. Stout.

Q. For the purpose of getting a loan from the bank, Mr. Rector suggested that? A. That's right.

Re-direct examination by Mr. Stout:

Q. Mr. Thees, the record always in the minutes as to the discounting of paper was recorded as

the action of the president, wasn't it? A. That was the customary way of recording the ratification of a loan.

Q. Do you know what the practice was on passing of loans at that time? A. The passing of loans as I recall it at that time, the Secretary and treasurer had authority to pass loans up to $500; the president and vice-president had authority to pass loans up to $5,000, and $5,000 and over up to $10,000 the president and vice-president were to consult one another, and amounts over $10,000 had to be submitted to the executive committee.

Q. Now, Mr. Thees, on September 10th, 1927, did the West Bergen Trust Company advance any money of its own to pay that check of $2,000, marked Exhibit 13, July 10th?

Mr. Kantor: I object on two grounds. It is an attempt to vary its own records, and this witness is asked to give a conclusion as to whose money it was, whether it was his money, the bank's money or Mr. Stout's money.

The Master: I think the question is objectionable. I think the most you can show is that the note was accepted by the bank as a note for payment by the bank on September 10th, and that thereafter after accepting the note they paid it out without making an entry in their books.

Mr. Stout: I think I have the further right to show when a check is presented such as this check marked Exhibit 13, July 10th, and the sum paid whether the bank did actually pay it out of its own funds when there was no fund there at the time to meet it.

The Master: I think you could ask whether it is an overdraft?

Mr. Stout: If it was an overdraft. (To witness): What does an overdraft mean?

Mr. Kantor: I object to the question. We all know what an overdraft means. The court can take judicial notice of what an overdraft is.

The Master: I will hear his statement.

The Witness: An overdraft in the sense of the word is extension of credit to a depositor.

Q That is what it means, extension of credit? A. Yes.

Re-cross examination by Mr. Kantor:

Q. In other words, Mr. Thees, that company owes your bank $1,300 some odd as a result of the overdraft, and you extended credit for that much money? A. I mean we take it in a general term; I explained an overdraft in the general sense of the word.

Q. I don't care. In this case it was an extension of credit on the overdraft by reason of the Capital Construction Company presenting a check for more than they had money, isn't that the fact? A. The West Bergen Trust Company would not extend this credit to the Capital Construction Company without the security, or without the note. They weren't entitled to that credit extension unless we had security for that note.

Q. You didn't have the security?

The Master: You had the security of the note?

Clarence Thees, on Behalf of West Bergen Trust Company—Re-cross.

The Witness: The security of the note.
Mr. Kantor: That is all.

The following was read into the record by Mr. Kantor: Note record of 8549 reads as follows: Due date October 10th, 1927; West Bergen Trust Company; dated discounted 9/12/27; date of note 9/9/27; time, one month; rate 6%; maker Capital Construction Company; where payable, here; endorsers; Hyman Silberman, Jacob Starr, Harry Starr; $5,000; less discount $25.83; total credit $4,974.17; credit Capital Construction Company, 211 Fowler Avenue, Jersey City, New Jersey.

SHILOWITZ AND TUCKER.

Exhibit 1.

Bond of Capitol Construction Co., Inc., to Israel Shilowitz and Jacob Tucker, Dated July 29th, 1927.

KNOW ALL MEN BY THESE PRESENTS: That CAPITOL CONSTRUCTION CO., INC., a corporation of the State of New Jersey, is held and firmly bound unto Israel Shilowitz and Jacob Tucker, in the penal sum of Forty thousand ($40,000) Dollars, lawful money of the United States of America, to be paid to the said Israel Shilowitz and Jacob Tucker, their heirs or assigns: FOR WHICH PAYMENT well and truly to be made, it binds itself and its successors firmly by these presents. Sealed with its corporate seal and signed by its President. Dated the 29th day of July One Thousand Nine Hundred and twenty-seven.

THE CONDITION of the above obligation is such that if the above bounden corporation or its successors, shall well and truly pay, or cause to be paid, unto the above named Israel Shilowitz and Jacob Tucker, their heirs or assigns, the just and full sum of Twenty thousand ($20,000) Dollars, on the 29th day of November which will be in the year One Thousand Nine Hundred and twenty-seven, and the interest thereon, to be computed from the date hereof at and after the rate of six per cent. per annum, and to be paid at maturity, without any fraud or other delay, then the above Obligation to be Void, otherwise to remain in full force and virtue.

Exhibit 1—Shilowitz and Tucker.

AND IT IS HEREBY EXPRESSLY AGREED, that should any default be made in the payment of the said interest, or of any part thereof, on any day whereon the same is made payable as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond, and become due and payable; and should the said interest remain unpaid and in arrears for the space of thirty days, or said tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien, or any or either of them, remain unpaid and in arrear for the space of ninety days then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of Twenty thousand ($20,000) Dollars, with all arrearage of interest thereon, shall, at the option of the said Israel Shilowitz and Jacob Tucker, or their legal representatives or assigns, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding, and the said Obligee may at their option, pay such tax, assessment, or water rent in arrear, and the amount so paid shall be added to and become part of the principal sum secured by the said mortgage

and by this Bond, and shall be payable on demand with interest at six per centum per annum.

CAPITOL CONSTRUCTION CO., INC.

By HYMAN SILVERMAN
President.

(SEAL)

(Revenue Stamp $10 attached)

Signed, Sealed and Delivered in the Presence of

Attest:
JACOB STARR

Exhibit 2.

Mortgage of Capitol Construction Co., Inc., to Israel Shilowitz and Jacob Tucker, Dated July 29th, 1927, Recorded August 2nd, 1927.

THIS MORTGAGE, made the 29th day of July, One Thousand, Nine Hundred and twenty-seven, BETWEEN CAPITOL CONSTRUCTION CO., INC., a corporation of the State of New Jersey, with its principal office in the City of Bayonne in the County of Hudson and State of New Jersey, party of the First Part, hereinafter known as the Mortgagor,

AND ISRAEL SHILOWITZ and JACOB TUCKER of the City of Bayonne in the County of Hudson and State of New Jersey, party of the Second Part, hereinafter known as the Mortgagee,

WITNESSETH, that the said mortgagor, for and in consideration of the sum of Twenty thousand ($20,000) Dollars, lawful money of the United

States of America, to it in hand well and truly paid by the mortgagee at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said mortgagor therewith fully satisfied, contented and paid, ha given, granted, bargained, sold, aliened, enfeoffed, conveyed and confirmed, and by these presents does give, grant, bargain, sell, alien, enfeoff, convey and confirm to the said mortgagee and to their heirs and assigns, ALL that certain tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the Township of Cranford in the County of Union and State of New Jersey,

BEGINNING at a point formed by the intersection of the Northeasterly side of Riverside Drive with the Southeasterly side of Prospect Avenue; thence North Forty-seven degrees, thirty-six minutes East along said side of Prospect Avenue, Three hundred fifty-eight and thirty hundredths (358.30) feet to a point; thence South Forty-two degrees twenty-four minutes East Two hundred (200) feet to a point; thence North Forty-seven degrees thirty-six minutes East, Thirteen and seventy-six hundredths (13.76) feet to a point; thence South Forty-two degrees twenty-four minutes East One hundred ninety-five and ninety-eight hundredths (195.98) feet to the Northwesterly side of Union Avenue; thence South Forty-nine degrees sixteen minutes West Eighty-seven and ninety-seven hundredths (87.97) feet along said side of Union Avenue to a point; thence still along said side of Union Avenue South Forty-one degrees and fifty-one minutes West One hundred fifty-two and thirty-four hundredths (152.34) feet to said side of Riverside Drive; thence Northwesterly along

said side of Riverside Drive its various courses, Four hundred and forty-three (443) feet more or less to the point or place of beginning.

The foregoing description is according to survey made by J. L. Bauer, Civil Engineer and Surveyor, Elizabeth, N. J.

Being the same premises conveyed to Capitol Construction Co., Inc. by Jacob Starr, *et ux. et als.*, by deed dated May 25th 1927, which deed is recorded in the Union County Register's Office in Book 1112 of Deeds page 171.

Subject to three mortgages aggregating $110,000.

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

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

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

3. Upon the abandonment of the work for 10 days or upon the failure of the said party of the first part or its successors and assigns, to prose-

cute the work in a diligent and effective manner for a similar period; cessation of work on account of strikes not to be deemed abandonment.

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

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

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

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

It is agreed that upon the default of the owners of said premises in the performance of the terms and covenants herein contained, or their failure to complete with dispatch construction of the said buildings in the manner above set forth, or upon the abandonment of the work for ten days or upon the absconding of said owners from the State of New Jersey, or their absence from said work for ten days, or should any event occur which entitles the holder of this mortgage to demand the principal thereof or to refuse any further advancements on account of said principal, the holder of this mortgage shall be fully and completely entitled, empowered and authorized and is hereby em-

powered and authorized, irrevocably, by the said owners, without any further consent or authorization, to expend all sums of money which in their judgment and discretion shall be reasonably necessary, for the following purposes:—

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

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

To induce the mortgagee to advance the principal sum secured hereby or any part thereof, and as a prime and essential consideration to the mortgagee, the said owners do, for themselves, their heirs and executors, administrators, successors and assigns, hereby constitute and appoint the mortgagee, irrevocably, as their agent for the purpose of making the expenditures aforesaid and the purpose of carrying out in every respect the authorities herein granted and, upon the completion of the said building, to enter into written or oral contracts, in the name of and on behalf of the said owners, for the renting or hiring of the said prem-

ises or any part thereof, under such terms and conditions as may seem advisable to the mortgagee and to use the rents, issues and profits for the upkeep and maintenance of the said premises and for the payment of prior liens and the liquidation of all interest due on mortgages as well to the mortgagee as to others, and for taxes, insurance, water charges, etc., and to apply any surplus to the amount due for principal on the within mortgage.

The lien of this mortgage shall attach to all materials brought in and about the premises, used or intended to be used in connection with the building to be erected.

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

TO HAVE AND TO HOLD all and singular the above described tract or lot of land and premises with the appurtenances, unto the said mortgagee, their heirs and assigns, to the only proper use, benefit and behoof of the said mortgagee, their heirs and assigns forever. Provided always, and it is agreed by and between the parties to these presents that if the said mortgagor, its successors and assigns do and shall well and truly pay, or cause to be paid, to the said mortgagee, the sum of Twenty thousand ($20,000) Dollars, on the 29th day of November, nineteen hundred and twenty-seven, and interest thereon to be computed from the date hereof, at and after the rate of six per cent per annum and to be paid at maturity, according to

the conditions of a certain bond, bearing even date herewith, in the penal sum of Forty thousand ($40,000) Dollars, made by said mortgagor without any deduction or defalcation for taxes, assessments, or any other imposition whatsoever, thence and from thenceforth these presents and said obligation shall cease and be void, anything herein and therein contained to the contrary in anywise notwithstanding.

And the said Mortgagor, for itself, its successors and assigns does covenant and grant to and with the said mortgagee, that it shall not nor will claim or demand or be entitled to receive any credit or credits on the interest payable hereon, or on the moneys to secure payment of which this mortgage is made, for so much of the taxes assessed against said lands as is equal to the tax rate applied to the amount due on this mortgage or any part thereof.

And the Mortgagor hereby warrants and defends the title to the said lands and premises.

The mortgagor its successors and assigns shall and will keep the buildings erected and to be erected upon the lands above conveyed insured against loss or damage by fire by insurers, through such broker or brokers selected and in an amount approved by the mortgagee, their heirs and assigns, and assign the policy or policies and certificate or certificates thereof to the mortgagee, their heirs and assigns, as collateral security for the payment of the principal and interest aforesaid; and it is agreed that if the mortgagor, its successors and assigns, shall neglect to pay and permit to remain in default for a period of thirty days, all or any tax, assessment or other municipal or governmental rate, charge, imposition, or

any installment or installments of monthly Building Loan dues and interest, or any sums payable under any lien superior hereto, or any premium for insurance, as aforesaid, on any day whereon the same shall become due and payable, after the period of default aforesaid, then it shall be lawful for the mortgagee, their heirs and assigns, to pay such charges, and the sum or sums so paid shall be a lien on the said mortgaged premises added to the amount secured hereby, with interest at six per cent. per annum, and, in the event of such payment, at the option of the mortgagee, their heirs or assigns, the principal sum secured hereunder shall become due and payable, and agrees that if default be made in the payment of any installment of principal or of the said interest, or any part thereof, on any day whereon the same is made payable as hereinbefore expressed, and should the same remain unpaid and in arrears for the space of ninety days, or if default be made in the payment of any of said taxes, water rents or other municipal or governmental rate, charge, imposition or any money payable under the terms of any mortgage lien paramount hereto, on any day whereon the same shall become due and payable, and should the same remain unpaid and in arrears for the space of ten days, or in the event that any building shall be demolished or removed from the mortgaged premises (or if the removal or demolition thereof is threatened) without the consent in writing of the mortgagee or holder of this mortgage, or in the event that the owner of the mortgaged premises shall fail, within ten days after written request therefor, to furnish a statement of the amount due and owing for principal and interest hereunder, or evidence of the payment of taxes, water rents, interest and principal

of prior mortgages or any carrying charges, or in the event that default shall be made in any of the terms, covenants and conditions herein contained, or contained in any mortgage constituting a lien upon the mortgaged premises prior and superior to the lien hereof, or should any action be commenced to foreclose any such prior mortgage, or should the owner of the mortgaged premises fail, for a period of thirty days, to begin compliance with any requirements, recommendation or recommendations of any of the Departments or authority of the State of New Jersey, or the municipality where such mortgaged premises are situate, such municipality or State Department or authority having jurisdiction over the mortgaged premises, or in the event of the adjudication in bankruptcy or insolvency of the mortgagor or the owner of the mortgaged premises, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of money, with all arrearages of interest thereon, and any other charges paid by the holder of this mortgage, shall, at the option of the mortgagee and assigns, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

And agrees that the said mortgagee, their heirs or assigns shall and may, from time to time, and at all times after default shall be made in the performance of the proviso or condition herein contained, peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy all and singular the above granted and bargained premises, with the appurtenances, without the let, suit,

trouble, hindrance or denial of the said mortgagor, its successors or assigns, or of any other person or persons whatsoever.

And agrees that if default shall be made, as aforesaid, the mortgagee, their heirs and assigns, shall have the right forthwith, after any such default, to enter upon and take possession of the said mortgaged premises, and to let the said premises, and receive the rents, issues and profits thereof, and to apply the same, after payment of all necessary charges and expenses, on account of the amount hereby secured, and said rents and profits are, in the event of any such default, hereby assigned to the mortgagee, their heirs and assigns and the mortgagee, their heirs and assigns shall also be at liberty immediately after any such default, upon proceedings being commenced for the foreclosure of this mortgage, to apply for the appointment of a receiver of the rents and profits of the said premises, and be entitled to the appointment of such receiver as a matter of right, as security for the amounts due the mortgagee, their heirs and assigns without consideration of the value of the mortgaged premises or solvency of any person or persons liable for the payment of such amounts.

And it is agreed that the said Mortgagor shall and will keep the building or buildings and improvements now on said premises or that may hereafter be erected thereon, in good and substantial repair. Upon failure so to do, the whole indebtedness secured and represented by this mortgage and the bond accompanying same shall at once become due and payable, and also the said mortgagee may enter upon the premises and repair and keep in repair the same, and the expense

thereof shall be added to the principal sum secured hereby with legal interest.

All of the covenants and conditions herein contained shall be for the benefit of and bind the heirs, executors, administrators, successors and assigns of the respective parties hereto.

IN WITNESS WHEREOF, the mortgagor hath caused its corporate seal to be hereto affixed and attested by its Secretary, and these presents to be signed by its President, the day and year first above written.

CAPITOL CONSTRUCTION CO., INC.

By HYMAN SILVERMAN,
President.

[SEAL]

Signed, Sealed and Delivered in the presence of

Attest:

JACOB STARR
Secretary.

Exhibit 2—Shilowitz and Tucker.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

BE IT REMEMBERED, That on this 29th day of July, Nineteen hundred and twenty-seven before me the subscriber, a Master in Chancery of New Jersey personally appeared Jacob Starr who being by me duly sworn on his oath says that he is the Secretary of the Capitol Construction Co., Inc. the mortgagor named in the foregoing Instrument; that he well knows the corporate seal of said corporation; that the seal affixed to said Instrument is the corporate seal of said corporation; that the said seal was so affixed and the said Instrument signed and delivered by Hyman Silverman who was at the date thereof the President of said corporation, in the presence of this deponent, and said President, at the same time acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, and as the voluntary act and deed of said corporation, and that deponent, at the same time, subscribed his name to said Instrument as an attesting witness to the execution thereof.

JACOB STARR (L. S.)

Sworn and subscribed before me at }
Bayonne, N. J., the date aforesaid. }

ALEXANDER SECLOW,
Master in Chancery of N. J.

RECEIVED in the Registers Office of the County of Union on the 2 day of Aug. A. D., 1927, at 1:35 o'clock, in the afternoon and recorded in Book 878 of MORTGAGES for said County, on page 347, &c.

EDWARD BAUER,
Register.

Exhibit 3.

Stipulation That Shilowitz and Tucker Mortgage Shall Be Prior to Mechanics' Liens, Dated July 26th, 1927.

WE, THE UNDERSIGNED, being persons who have agreed by contracts in writing, duly filed, or to be filed, to furnish labor and materials for the erection of a certain building for CAPITOL CONSTRUCTION CO., INC., owner described and located as follows to wit

All that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Cranford, in the County of Union and State of New Jersey.

BEGINNING at a point formed by the intersection of the Northeasterly side of Riverside Drive with the Southeasterly side of Prospect Avenue; thence North Forty-seven degrees, thirty-six minutes East along said side of Prospect Avenue Three hundred fifty-eight and thirty hundredths (358.30) feet to a point; thence South Forty-two degrees twenty-four minutes East Two hundred (200) feet to a point; thence North Forty-seven degrees thirty-six minutes East, Thirteen and seventy-six hundredths (13.76) feet to a point; thence South Forty-two degrees twenty-four minutes East One hundred ninety-five and ninety-eight hundredths (195.98) feet to the Northwesterly side of Union Avenue; thence South Forty-nine degrees sixteen minutes West Eighty-seven and ninety-seven hundredths (87.97) feet along said side of Union Avenue to a point; thence still along said side of Union Avenue South Forty-one degrees and fifty-one minutes West One hun-

dred fifty-two and thirty-four hundredths (152.34) feet to said side of Riverside Drive, its various course Four hundred forty-three (443) feet more or less to the point or place of beginning.

In Consideration that Israel Shilowitz and Jacob Tucker for the purpose of aiding said owner to erect said building ha agreed to loan to said owner the sum of Twenty thousand ($20,000) dollars, to be secured by a mortgage or mortgages upon said building and lands, and for the further consideration of One Dollar to us paid by the said Israel Shilowitz and Jacob Tucker, the receipt whereof is hereby acknowledged,

Do hereby Stipulate and Agree, that the mortgage or mortgages, given or to be given, to secure said loan shall be and remain a lien upon said building and lands prior and paramount to any (now or hereafter can) claim or lien we may ^ have upon or against said building and lands by virtue of the provisions of "An act to secure to mechanics and others payment for their labor and material in erecting any building," and the supplements thereto, or otherwise, howsoever, but the foregoing stipulation shall not be construed as a waiver of our lien, except as to the lien of said mortgage.

Witness our hands and seals the 26th day of July in the year of our Lord One Thousand Nine Hundred and twenty-seven.

Joseph Machetto (L. S.)
A. S. Van Woeart (L. S.)
Lafayette Iron Works, Inc (L. S.)
S. Katz By E. Weingarten, Secy Pres. (L. S.)
Ira R. Crouse (L. S.)
Louis Moore, Plumber (L. S.)
Starr & Silverman (L. S.)
John Nicaretta (L. S.)

Exhibit 3—Shilowitz and Tucker.

N. J. Rfg & Sheet Metal Wks.
Wm. Z. Fromer, Pres. (L. S.)

Elizabeth Light Fix. Co.
Samuel Newman, Pres.

Chas. Matts, Secy. (L. S.)
Michael Tozzi (L. S.)
Max Platt (L. S.)
Siegal & Levin (L. S.)
Isador Levin (L. S.)

Signed, Seal and Delivered
In the Presence of

Harry Starr

The undersigned are some of the persons mentioned in the stipulation hereto annexed and which is herein incorporated by reference.

In Consideration of One Dollar to us in hand paid and other good and valuable consideration, we covenant and agree with the Capitol Construction Co, Inc., Israel Shilowitz and Jacob Tucker that in the event any person, firm or corporation shall file any lien claim or demand or take any proceedings against the lands and building described in the annexed stipulation, (on the reverse side hereof) that we will indemnify and save harmless the said Capitol Construction Co., Inc. Israel Shilowitz and Jacob Tucker from any and all losses, damages, claims and obligations that may in any way arise or grow out of the filing of the said lien claims or the making of any demands or the institution of any suits by any other person, firm or corporation for any materials used by us upon said lands and building or for any services performed for us upon said lands and building.

Dated: August 12th 1927.

Louis Moore Plumber (L.S.)

Exhibit 4.

Check.

No. 5508

SECLOW AND NESSANBAUM
Attorneys
Bayonne, N. J., 8/5/1927

Pay to the
Order of Capitol Const Co. Starr & Silverman $1650.00
Sixteen hundred fifty dollars ..... Dollars

Par in New York City Through Northern New Jersey Clearing House
To THE BAYONNE NATIONAL BANK,
55-126 BAYONNE, NEW JERSEY.
Member of the Federal Reserve System.

SECLOW & NESSANBAUM
Attorneys.

Endorsement:—Star & Silverman, Capitol Const Co. by Hyman Silverman, Pres. Harry Starr, Treas.

Exhibit 5.

Check.

No. 338

I. SHILOWITZ
69 West 39th Street
Bayonne, N. J.

August 12, 1927

Pay to the
Order of Seclow & Nessanbaum and Elizabeth Light & Fixture Co., Inc. $500.00
Five hundred and 3/100 ..... Dollars
Net Amount $500.
To the BANK OF SOUTH HUDSON
Broadway at 45th Street
55-124 BAYONNE, N. J.

I. SHILOWITZ.

Endorsement:—Pay to the order of Elizabeth Light & Fixture Co. Seclow & Nessanbaum—Capitol Const. Co. Harry Starr.

Exhibit 6.

Check.

No. 5562

SECLOW AND NESSANBAUM
Attorneys
Bayonne, N. J., August 13, 1927

Pay to the
Order of Starr & Silverman.....$650.00
Six Hundred Fifty Dollars.....Dollars
To THE BAYONNE NATIONAL BANK,
55-126 BAYONNE, NEW JERSEY.
Member of the Federal Reserve System.
SECLOW & NESSANBAUM
Attorneys.

Endorsement:—Star & Silverman, Endorsement guaranteed Seclow & Nessanbaum.

Exhibit 7.

Check.

No. 5591

SECLOW AND NESSANBAUM
Attorneys
Bayonne, N. J., August 20, 1927

Pay to the
Order of Capitol Construction
Company $350.00
Three hundred fifty Dollars.....Dollars
Par in New York City Through Northern
New Jersey Clearing House
To THE BAYONNE NATIONAL BANK,
55-126 BAYONNE, NEW JERSEY.
Member of the Federal Reserve System.
SECLOW & NESSANBAUM
Attorneys.

Endorsement:—Capitol Construction Co. by Hyman Silverman, Pres., Harry Starr, Treas., Starr & Silverman. Endorsement of payee guaranteed, Seclow & Nessanbaum.

Exhibit 8.

Check.

No. 5622

SECLOW AND NESSANBAUM
Attorneys
Bayonne, N. J., August 26, 1927

Pay to the
Order of Starr & Silverman.....$300.00
Three Hundred Dollars.....Dollars
Par in New York City Through Northern
New Jersey Clearing House
To THE BAYONNE NATIONAL BANK,
55-126 BAYONNE, NEW JERSEY.
Member of the Federal Reserve System.
SECLOW & NESSANBAUM
Attorneys.

Endorsement:—Starr & Silverman, H. Silverman, Capitol Const. Co. by Harry Starr.

Exhibit 9.

Check.

No. 27

I. SHILOWITZ
69 West 39th Street
Bayonne, N. J., August 12, 1927.

Pay to the Order of Starr and Silverman..$550.00
Five Hundred Fifty 00/100.....Dollars
To The BAYONNE BRANCH
UNION TRUST AND HUDSON COUNTY NATIONAL BANK
23rd Street & Broadway
55-122 BAYONNE, N. J.
Payable in New York
City Through Northern New
Jersey Clearing House
I. SHILOWITZ.

Endorsement:—Capitol Construction Co. By Harry Starr, Star & Silverman. For Deposit only Seclow & Nessanbaum.

Exhibit 10.

Check.

No. 18

I. Shilowitz
69 West 39th Street
Bayonne, N. J. August 12, 1927

Pay to the order of Allan Moore.....$1500.00
Fifteen hundred 00/100.....Dollars
To the Bayonne Branch
Union Trust and Hudson County National Bank
23rd Street & Broadway
55-122 Bayonne, N. J.

Payable in New York
City through Northern New
Jersey Clearing House.

I. Shilowitz.

Endorsement:—Allan Moore, Louis Moore,
Capitol Const. Co. by Harry Starr, Treas.

Exhibit 11.

Check.

No. 246

I. Shilowitz
69 West 39th Street
Bayonne, N. J.

August 12th 1927

Pay to the
Order of Seclow & Nessanbaum.....$200.00
Two hundred and #.....Dollars
Net Amount $200
To the Bank of South Hudson
Broadway at 45th Street
55-124 Bayonne, N. J.

I. Shilowitz.

Endorsement:—Pay to Mr. Tozzi or order Seclow
& Nessanbaum, Michael Tozzi, Thomas O'Brien,
Capitol Const. Co. by Harry Starr.

Exhibit 12.

Check.

No. 5711

SECLOW AND NESSANBAUM
Attorneys
Bayonne, N. J. Sept. 9, 1927.

Pay to the
Order of Max Platt.....$450.00
Four hundred fifty dollars.....Dollars
Par in New York City Through Northern
New Jersey Clearing House
To THE BAYONNE NATIONAL BANK,
55-126 BAYONNE, NEW JERSEY.
Member of the Federal Reserve System.
SECLOW & NESSANBAUM
Attorneys.

Endorsement:—Capitol Const Co. by Harry Starr
—Max Platt

Exhibit 13.

Check.

No. 5668

SECLOW AND NESSANBAUM
Attorneys
Bayonne, N. J. September 2, 1927

Pay to the
Order of John Nicaretto.....$400.00
Four hundred dollars.....Dollars
Par in New York City Through Northern
New Jersey Clearing House
To THE BAYONNE NATIONAL BANK,
55-126 BAYONNE, NEW JERSEY.
Member of the Federal Reserve System.
SECLOW & NESSANBAUM
Attorneys.

Endorsement:—John Nicaretta—Capitol Const.
Co. by Harry Starr, Treas.

Exhibit 14.

Check.

No. 5666

SECLOW & NESSANBAUM
Attorneys
Bayonne, N. J., September 2, 1927

Pay to the
Order of Siegel & Levine.....$1100.00
Eleven Hundred Dollars.....Dollars
Par in New York City Through Northern
New Jersey Clearing House
To THE BAYONNE NATIONAL BANK,
55-126 BAYONNE, NEW JERSEY.
Member of the Federal Reserve System.
SECLOW & NESSANBAUM
Attorneys.

Endorsement:—H. Siegel, I. Levin, Capitol Const Co. by H. Starr.

Exhibit 15.

Check.

No. 5623

SECLOW AND NESSANBAUM
Attorneys
Bayonne, N. J., August 26, 1927

Pay to the
Order of John Nicaretta.....$250.00
Two Hundred fifty Dollars.....Dollars
Par in New York City Through Northern
New Jersey Clearing House
To THE BAYONNE NATIONAL BANK,
55-126 BAYONNE, NEW JERSEY.
Member of the Federal Reserve System.
SECLOW & NESSANBAUM
Attorneys.

Endorsement:—Capitol Const Co. by Harry Starr. Treas. H. Silverman, John Nicaretta.

Exhibit 16.

Check.

No. 5615

SECLOW AND NESSANBAUM
Attorneys
Bayonne, N. J. Aug. 25, 1927

Pay to the
Order of Max Platt.....$1,000.00
One thousand Dollars.....Dollars
Par in New York City Through Northern
New Jersey Clearing House
To THE BAYONNE NATIONAL BANK,
55-126 BAYONNE, NEW JERSEY.
Member of the Federal Reserve System.
SECLOW & NESSANBAUM
Attorneys.

Endorsement:—Capitol Const Co., H. Silverman, Pres., Harry Starr, Treas. Max Platt.

Exhibit 17.

Check.

No. 5620

SECLOW AND NESSANBAUM
Attorneys
Bayonne, N. J., August 26, 1927

Pay to the
Order of Max Platt.....$500.00
Par in New York City Through Northern
New Jersey Clearing House
To THE BAYONNE NATIONAL BANK,
55-126 BAYONNE, NEW JERSEY.
Member of the Federal Reserve System.
SECLOW & NESSANBAUM
Attorneys.

Endorsements:—Capitol Const Co. Harry Starr, Treas. Max Platt.

Exhibit 18.

Check.

No. 5590

SECLOW AND NESSANBAUM
Attorneys
Bayonne, N. J. August 20, 1927

Pay to the
Order of John Nicaretta.....$200.00
Two hundred Dollars.....Dollars
Par in New York City Through Northern
New Jersey Clearing House
To THE BAYONNE NATIONAL BANK,
55-126 BAYONNE, NEW JERSEY.
Member of the Federal Reserve System.
SECLOW & NESSANBAUM
Attorneys.

Endorsements:—Capitol Const Co. Hyman Silverman, John Nicaretta.

Exhibit 19.

Check.

No. 5588

SECLOW AND NESSANBAUM
Attorneys
Bayonne, N. J., August 20, 1927

Pay to the
Order of New Jersey Roofing and Sheet
Metal Works.....$250.00
Two hundred fifty dollars.....Dollars
Par in New York City Through Northern
New Jersey Clearing House
To THE BAYONNE NATIONAL BANK,
55-126 BAYONNE, NEW JERSEY.
Member of the Federal Reserve System.
SECLOW & NESSANBAUM
Attorneys.

Endorsement:—For Deposit N. J. Rfg. & S. M. Wks. Capitol Construction Co. by Harry Starr.

Exhibit 20.

Check.

No. 5510

SECLOW AND NESSANBAUM
Attorneys
Bayonne, N. J., Aug. 5, 1927

Pay to the
Order of Ira R. Crouse.....$4,000.00
Four thousand Dollars.....Dollars
Par in New York City Through Northern
New Jersey Clearing House
To THE BAYONNE NATIONAL BANK,
55-126 BAYONNE, NEW JERSEY.
Member of the Federal Reserve System.
SECLOW & NESSANBAUM
Attorneys.

Endorsement:—Capitol Construction Co, By Harry Starr, Ira R. Course.

Exhibit 21.

Check.

No. 5509

SECLOW AND NESSANBAUM
Attorneys
Bayonne, N. J., August 5, 1927

Pay to the
Order of Alfred Van Woert.....$500.00
Five Hundred Dollars.....Dollars
Par in New York City Through Northern
New Jersey Clearing House
To THE BAYONNE NATIONAL BANK,
55-126 BAYONNE, NEW JERSEY.
Member of the Federal Reserve System.
SECLOW & NESSANBAUM
Attorneys.

Endorsements:—Payment on Cranford job Alfred Van Woert, A. S. Van Woert Capitol Construction Co. by Harry Starr.

Exhibit 22.

Check.

No. 5507

SECLOW AND NESSANBAUM
Attorneys

Bayonne, N. J. 8/5 1927

Pay to the
Order of John Nicaretto.....$450.00
Par in New York City Through Northern
New Jersey Clearing House
To THE BAYONNE NATIONAL BANK,
55-126 BAYONNE, NEW JERSEY.
Member of the Federal Reserve System.
SECLOW & NESSANBAUM
Attorneys.

Endorsements:—John Nicaretta, Capitol Construction Co. by Harry Starr.

Exhibit 23.

Check.

No. 5506

SECLOW AND NESSANBAUM
Attorneys

Bayonne, N. J., Aug. 5, 1927

Pay to the
Order of N. J. Roofing & Sheet Metal
Works $400.00
Four hundred Dollars.....Dollars
Par in New York City Through Northern
New Jersey Clearing House
To THE BAYONNE NATIONAL BANK,
55-126 BAYONNE, NEW JERSEY.
Member of the Federal Reserve System.
SECLOW & NESSANBAUM
Attorneys.

Endorsement:—For Deposit N. J. Roofing & S. M. Wks., Capitol Const Co. by J. Starr.

Exhibit 24.

Check.

No. 5478

SECLOW AND NESSANBAUM
Attorneys
Bayonne, N. J. Aug. 2, 1927

Pay to the
Order of JOSEPH MACHETTO.....$500.00
Five Hundred Dollars.....Dollars
Par in New York City Through Northern
New Jersey Clearing House
To THE BAYONNE NATIONAL BANK,
55-126 BAYONNE, NEW JERSEY.
Member of the Federal Reserve System.
SECLOW & NESSANBAUM
Attorneys.

Endorsement:—Joseph Machetto, Capitol Construction Co, by Harry Starr.

Exhibit 25.

Check.

No. 5477

SECLOW AND NESSANBAUM
Attorneys
Bayonne, N. J., July 29, 1927

Pay to the
Order of Capitol Construction Co. and
John Nicaretta.....$600.00
Six Hundred Dollars.....Dollars
Par in New York City Through Northern
New Jersey Clearing House
To THE BAYONNE NATIONAL BANK,
55-126 BAYONNE, NEW JERSEY.
Member of the Federal Reserve System.
.....
Attorneys.

Endorsement:—Capitol Construction Co., Hyman Silverman, Pres., Jacob Starr, Sec., Harry Starr, Treas., John Nicaretta.

Exhibit 26.

Check.

No. 5476

SECLOW AND NESSANBAUM
Attorneys
Bayonne, N. J., July 29, 1927

Pay to the
Order of Capitol Construction Co. and
Lafayette Iron Works.....$1,000.00
One thousand Dollars.....Dollars
Par in New York City Through Northern
New Jersey Clearing House
To THE BAYONNE NATIONAL BANK,
55-126 BAYONNE, NEW JERSEY.
Member of the Federal Reserve System.

SECLOW & NESSANBAUM
Attorneys.

Endorsement:—Capitol Construction Co., Hyman Silverman, Pres., Jacob Starr, Sec., Harry Starr. Treas.

Exhibit 27.

Check.

No. 5669

SECLOW AND NESSANBAUM
Attorneys
Bayonne, N. J., September 2, 1927

Pay to the
Order of Starr & Silverman.....$600.00
Six hundred dollars.....Dollars
Par in New York City Through Northern
New Jersey Clearing House
To THE BAYONNE NATIONAL BANK,
55-126 BAYONNE, NEW JERSEY.
Member of the Federal Reserve System.

SECLOW & NESSANBAUM
Attorneys.

Endorsement:—Capitol Const. Co. by Harry Starr, Star & Silverman, Jacob Tucker & Sons.

Exhibit 28.

Check.

No. 5479

SECLOW AND NESSANBAUM
Attorneys
Bayonne, N. J., July 29, 1927

Pay to the
Order of Capitol Construction Co., Starr & Silverman $1,400.00
Fourteen hundred dollars ..... Dollars
Par in New York City Through Northern New Jersey Clearing House
To THE BAYONNE NATIONAL BANK,
55-126 BAYONNE, NEW JERSEY.
Member of the Federal Reserve System.

SECLOW & NESSANBAUM
Attorneys.

Endorsement:—Starr & Silverman, Capitol Construction Co., Hyman Silverman Pres., Jacob Starr, Sec., Harry Starr, Treas.

Exhibit 29.

Check.

No. 5474

SECLOW AND NESSANBAUM
Attorneys
Bayonne, N. J., July 29, 1927.

Pay to the
Order of Jacob Tucker & Israel Shilowitz $1000.00
One thousand dollars ..... Dollars
Par in New York City Through Northern New Jersey Clearing House
To THE BAYONNE NATIONAL BANK,
55-126 BAYONNE, NEW JERSEY.
Member of the Federal Reserve System.

SECLOW & NESSANBAUM
Attorneys.

Endorsement:—Jacob Tucker, Israel Shilowitz, I. Shilowitz, Jacob Starr, Starr & Silverman, Capitol Const. Co. by Harry Starr.

Exhibit 30.

Agreement for Carpenter Work, Dated May 26th, 1927.

AGREEMENT dated May 26th 1927, between Capitol Construction Co., Inc., a corporation of the State of New Jersey, party of the first part, herein called the Owner, and Jacob Starr and Hyman Silverman, party of the second part, herein called the contractors.

1. In consideration of the sum of $15,650, the contractors agree to perform all the labor and services necessary for the completion of the carpenter work in the twenty-eight family brick apartment house, to be located on the Northeast side of Riverside Drive, between Prospect and Union Avenues, in the Township of Cranford, County of Union and State of New Jersey, all according to the plans and specifications of Nathan Welitoff, Architect.

2. The payments shall be made in the following manner:—On Saturday morning of each week, an estimate shall be made of the ratio of the work done during said current week to the entire job, based upon the entire contract price, and of the amount then estimated to be due, the owner shall pay to the contractors eighty-five per cent thereof, leaving at all times standing a balance of fifteen per cent which shall be paid within sixty days after the completion of the building.

All the work shall be done in a good and workmanlike manner and in conformance with the reg-

ulations, ordinances of the Township of Cranford and the requirements and regulations of the State Board of Tenement House Supervision.

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

Capitol Construction Co., Inc.

By Hyman Silverman
President.

Starr & Silverman (L. S.)

Signed, sealed and delivered
in the presence of

Attest: Jacob Starr
Secretary.

GEO. F. PERRY & SONS, INC.

Exhibits 31, 33.

Lien Claim, Filed November 12th, 1927.

UNION COUNTY CLERK'S OFFICE

GEO. F. PERRY & SONS, INC., a corporation, Claimant, *vs.* CAPITOL CONSTRUCTION CO., INC., a corporation, Builder and Owner.	Lien Claim

Be it known that Geo. F. Perry & Sons, Inc., a corporation, of the State of New Jersey, having its principal office in the City of Newark, County of Essex and State of New Jersey, claims a lien upon the building and lands hereinafter described, pursuant to the Statute in such case made and provided, for a debt contracted and owing to it for materials furnished for the erection and construction of said building, and therefore shows:—

First. Said building is an apartment building, together with its appurtenances, on a lot or curtilage situated in the Township of Cranford, County of Union and State of New Jersey, which may be described as follows:—

BEGINNING at a point formed by the intersection of the northeasterly side of Riverside Drive with the southeasterly side of Prospect Avenue;

thence north forty seven degrees thirty six minutes east long said side of Prospect Avenue three hundred and fifty eight feet and thirty hundredths of a foot to a point; thence south forty two degrees twenty four minutes east two hundred feet to a point; thence north forty seven degrees thirty six minutes east thirteen feet and seventy six hundredths of a foot to a point; thence south forty two degrees twenty four minutes east one hundred and ninety five feet and ninety eight hundredths of a foot to the northwesterly side of Union Avenue; thence south forty nine degrees sixteen minutes west eighty seven feet and ninety seven hundredths of a foot along said side of Union Avenue to a point; thence still along said side of Union Avenue south forty one degrees and fifty one minutes west one hundred and fifty two feet and thirty four hundredths of a foot to said side of Riverside Drive; thence northwesterly along said side of Riverside Drive, its various courses, four hundred and forty three feet, more or less to the point or place of BEGINNING. The foregoing description is according to survey made by J. L. Bauer, Civil Engineer and Surveyor, Elizabeth, N. J., June, 1911.

Second. The name of the owner of all of the aforesaid lands and building and of the estate therein on which the lien is claimed in Capitol Construction Co. Inc., a corporation.

Third. The name of the person who contracted the debt and at whose request the materials were furnished for which said lien is claimed is Capitol Construction Co. Inc., a corporation.

Fourth. The following is a bill of particulars, exhibiting the amount and kind of materials furnished, and the price at which, and the times when,

the same were furnished, and giving credit for all the payments made thereon and deductions that ought to be made therefrom, and exhibiting the balance justly due to the said Geo. F. Perry & Sons, Inc., a corporation, the claimant, herein, from the said Capitol Construction Co. Inc., a corporation.

DEBITS

Ticket No.	*Date 1927*		*Unit*	*Charges*
36939	5/24	400 Solid Stretchers	135.00	54.00
	5/24	Cartage on 400 Stretchers	15.00	6.00
37109	5/25	225 Solid Headers	135.00	30.38
	5/25	Cartage on 225 Solid Headers	15.00	3.38
37095	5/25	300 Solid Stretchers	135.00	40.50
	5/25	Cartage on 300 Solid Stret	15.00	4.50
37057	5/26	300 Solid Stretchers	135.00	40.50
	5/25	Cartage on 300 Solid Stret	15.00	4.50
37018	5/25	225 Solid Stretchers	135.00	30.38
	5/25	Cartage on 225 Solid Stret	15.00	3.38
37036	5/25	650 Concrete Tile	90.00	58.50
	5/25	Cartage on 650 Concrete Tile	10.00	6.50
37042	5/25	825—5 x 4 x 12 Hollow Block	65.00	53.63
	5/25	Cartage on 825 Hollow Block	5.00	4.13
37020	5/25	500—5 x 4 x 12 Solid Block	93.00	46.50
	5/25	Cartage on 500 Solid Block	7.50	3.75
37096	5/25	600 Solid Stretchers	135.00	81.00
	5/25	Cartage on 600 Solid Stret	15.00	9.00
37221	5/26	400—5 x 4 x 12 Solid Block	93.00	37.20
	5/26	Cartage on 400 Solid Block	7.50	3.00
37144	5/26	300 Solid Headers	135.00	40.50
	5/26	Cartage on 300 Solid Headers	15.00	4.50
37181	5/26	350 Solid Headers	135.00	47.25
	5/26	Cartage on (360) 350 Headers	15.00	5.25
37247	5/27	700—5 x 4 x 12 Hollow Block	65.00	45.50
	5/27	Cartage on 700 Hollow Block	5.00	3.50
37443	5/27	450 Concrete Tile	90.00	40.50
	5/27	Cartage on 450 Conc. Tile	10.00	4.50
37411	5/27	450 Solid Headers	135.00	60.75
	5/27	Cartage on 450 Solid Headers	15.00	6.75
37400	5/27	400 Concrete Tile	90.00	36.00
	5/27	Cartage on 400 Conc. Tile	10.00	4.00
37368	5/27	500—5 x 4 x 12 Solid Block	93.00	46.50
	5/27	Cartage on 500 Solid Block	7.50	3.75
37456	5/27	900 Concrete Tile	90.00	81.00
	5/27	Cartage on 900 Conc. Tile	10.00	9.00
37448	5/27	450 Solid Headers	135.00	60.75
	5/27	Cartage on 450 Solid Headers	15.00	6.75
37224	5/27	650 Solid Headers	135.00	87.75
	5/27	Cartage on 650 Solid Headers	15.00	9.75
37837	6/11	350 Solid Stretchers	135.00	47.25
	6/1	Cartage on 350 Stretchers	15.00	5.25
37855	6/1	1045—5 x 4 x 12 Solid Tile	93.00	97.19

Exhibits 31, 33—Geo. F. Perry & Sons, Inc.

Ticket No.	*Date*		*Unit*	*Charges*
	6/1	Cartage on 1045 Solid Tile	7.50	7.84
37602	6/1	400 Solid Headers	135.00	54.00
	6/1	Cartage on 400 Solid Heads	15.00	6.00
37879	6/1	250 Solid Stretchers	135.00	33.75
	6/1	Cartage on 250 Stretchers	15.00	3.75
37880	6/1	250 Solid Stretchers	135.00	33.75
	6/1	Cartage on 250 Solid Stret	15.00	3.75
37881	6/1	250 Solid Stretchers	135.00	33.75
	6/1	Cartage on 250 Stretchers	15.00	3.75
38039	6/2	300 Solid Stretchers	135.00	40.50
	6/2	Cartage on 300 Solid Stret	15.00	4.50
38041	6/2	300 Solid Stretchers	135.00	40.50
	6/2	Cartage on 300 Solid Stret	15.00	4.50
38040	6/2	300 Solid Stretchers	135.00	40.50
	6/2	Cartage on 300 Solid Stret	15.00	4.50
38229	6/3	300 Solid Stretchers	135.00	40.50
	6/3	Cartage on 300 Solid Stret	15.00	4.50
38227	6/3	300 Solid Headers	135.00	40.50
	6/3	Cartage on 300 Solid Headers	15.00	4.50
38228	6/3	600—5 x 4 x 12 Solid Tile	93.00	55.80
	6/3	Cartage on 600 Solid Tile	7.50	4.50
38198	6/3	420 Solid Headers	135.00	56.70
	6/3	Cartage on 420 Solid Headers	15.00	6.30
38178	6/3	300 Solid Headers	135.00	40.50
	6/3	Cartage on 300 Solid Headers	15.00	4.50
38106	6/3	300 Solid Stretchers	135.00	40.50
	6/3	Cartage on 300 Solid Stret	15.00	4.50
38106	6/3	400 Solid Stretchers	135.00	54.00
	6/3	Cartage on 400 Solid Stret	15.00	6.00
38147	6/3	600—5 x 4 x 12 Solid Tile	93.00	55.80
	6/3	Cartage on 600 Solid Tile	7.50	4.50
38136	6/3	675—5 x 4 x 12 Solid Tile	93.00	62.78
	6/3	Cartage on 675 Solid Tile	7.50	5.06
38233	6/4	400 Solid Headers	135.00	54.00
	6/4	Cartage on 400 Solid Headers	15.00	6.00
38244	6/3	300 Solid Stretchers	135.00	40.50
	6/3	Cartage on 300 Solid Stretchers	15.00	4.50
38298	6/4	300 Solid Stretchers	135.00	40.50
	6/4	Cartage on 300 Solid Stret	15.00	4.50
38341	6/4	600—5 x 4 x 12 Solid Tile	93.00	55.80
	6/4	Cartage on 600 Solid Tile	7.50	4.50
38367	6/6	450 Conc. Tile	90.00	40.50
	6/6	Cartage on 450 Conc. Tile	10.00	4.50
38364	6/6	515 Concrete Tile	90.00	46.35
	6/6	Cartage on 515 Conc. Tile	10.00	5.15
	6/7	300 Solid Headers	135.00	40.50
	6/7	Cartage on 300 Solid Headers	15.00	4.50
38737	6/7	500 Concrete Tile	90.00	45.00
	6/7	Cartage on 500 Conc. Tile	10.00	5.00
38583	6/7	515 Concrete Tile	90.00	46.35
	6/7	Cartage on 515 Conc. Tile	10.00	5.15
38479	6/7	700 Concrete Tile	90.00	63.00
	6/7	Cartage on 700 Conc. Tile	10.00	7.00
38672	6/7	700—5 x 4 x 12 Hollow Tile	65.00	45.50
	6/7	Cartage on 700 Hollow Tile	5.00	3.50
38839	6/8	300 Solid Headers	135.00	40.50
	6/8	Cartage on 300 Solid Headers	15.00	4.50
38815	6/8	700—5 x 4 x 12 Conc. Tile (H)	65.00	45.50

Exhibits 31, 33—Geo. F. Perry & Sons, Inc.

	Ticket No.	*Date*		*Unit*	*Charges*
		6/8	Cartage on 700 Conc. Tile (H)	5.00	3.50
	38739	6/8	700—5 x 4 x 12 Hollow Tile	65.00	45.50
		6/8	Cartage on 700 Hollow Tile	5.00	3.50
	38895	6/8	700—5 x 4 x 12 Conc. H. Tile	65.00	45.50
		6/8	Cartage on 700 Conc. H. Tile	5.00	3.50
	38943	6/8	450 Conc. Tile	90.00	40.50
		6/8	Cartage on 450 Conc. Tile	10.00	4.50
	38992	6/8	450 Concrete Tile	90.00	40.50
10		6/8	Cartage on 450 Conc. Tile	10.00	4.50
	38990	6/8	700—5 x 4 x 12 Conc. H. Tile	65.00	45.50
		6/8	Cartage on 700 H. Tile	5.00	3.50
	39119	6/9	700—5 x 4 x 12 Conc. Tile	65.00	45.50
		6/9	Cartage on 700 Conc. Tile	5.00	3.50
	39224	6/9	700 Concrete Tile	90.00	63.00
		6/9	Cartage on 700 Conc. Tile	10.00	7.00
	39487	6/10	450 Concrete Tile	90.00	40.50
		6/10	Cartage on 450 Conc. Tile	10.00	4.50
	39513	6/11	450 Concrete Tile	90.00	40.50
		6/11	Cartage on 450 Conc. Tile	10.00	4.50
	39530	6/11	400 Concrete Tile	90.00	36.00
		6/11	Cartage on 400 Conc. Tile	10.00	4.00
	39545	6/11	700 Concrete Tile	90.00	63.00
		6/11	Cartage on 700 Conc. Tile	10.00	7.00
	39238	6/11	600 Concrete Tile	90.00	54.00
20	39374	6/11	700 Concrete Tile	90.00	63.00
		6/11	Cartage on 700 Conc. Tile	10.00	7.00
	39279	6/11	700 Concrete Tile	90.00	63.00
		6/11	Cartage on 700 Concrete Tile	10.00	7.00
	39420	6/11	500 Concrete Tile	90.00	45.00
		6/11	Cartage on 500 Conc. Tile	10.00	5.00
	39419	6/11	700 Concrete Tile	90.00	63.00
		6/11	Cartage on 700 Conc. Tile	10.00	7.00
	39238	6/11	Cartage on 600 Conc. Tile	10.00	6.00
	39532	6/13	500 Concrete Tile	90.00	54.00
		6/13	Cartage on 600 Conc. Tile	10.00	6.00
	39550	6/13	700 Concrete Tile	90.00	63.00
		6/13	Cartage on 700 Conc. Tile	10.00	7.00
	37595	6/13	450 Solid Headers	135.00	60.75
		6/13	Cartage on 450 Solid Headers	15.00	6.75
	39587	6/13	400 Concrete Tile	90.00	36.00
		6/13	Cartage on 400 Concrete Tile	10.00	4.00
30	39549	6/13	450 Concrete Tile	90.00	40.50
		6/13	Cartage on 450 Conc. Tile	10.00	4.50
	40148	6/16	900—5 x 4 x 12 Concrete Tile	65.00	58.50
		6/16	Cartage on 900 Conc. Tile	5.00	4.50
	40137	6/16	700—5 x 4 x 12 Concrete Tile	65.00	45.50
		6/16	Cartage on 700—5 x 4 x 12 Tile	5.00	3.50
	49679	6/20	900—5 x 4 x 12 Concrete Tile	65.00	58.50
		6/20	Cartage on 900 Conc. Tile	5.00	4.50
	41063	6/23	800—5 x 4 x 12 Concrete Tile	65.00	52.00
		6/23	Cartage on 800—5 x 4 x 12 Tile	5.00	4.00
	41080	6/23	900—5 x 4 x 12 Concrete Tile	65.00	58.50
		6/23	450 Concrete Tile	90.00	40.50
		6/23	Cartage on 900 Block	10.00	9.00
	41551	6/27	1050—5 x 4 x 12 Concrete Tile	65.00	68.25
		6/27	Cartage on 1050—5 x 4 x 12 Tile	5.00	5.25
	41633	6/27	500 Concrete Tile	90.00	45.00
40		6/27	Cartage on 500 Concrete Tile	10.00	5.00

Exhibits 31, 33—Geo. F. Perry & Sons, Inc.

Ticket No.	*Date*		*Unit*	*Charges*
41679	6/27	1050—5 x 4 x 12 Concrete Tile	65.00	68.25
	6/27	Cartage on 1050—5 x 4 x 12 Tile	5.00	5.25
41842	6/28	350 Concrete Tile	90.00	31.50
	6/28	Cartage on 350 Concrete Tile	10.00	3.50
41845	6/28	400 Concrete Tile	90.00	36.00
	6/28	Cartage on 400 Conc. Tile	10.00	4.00
41874	6/29	500 Concrete Tile	90.00	45.00
	6/29	Cartage on 500 Conc. Tile	10.00	5.00
41728	6/29	500 Concrete Tile	90.00	45.00
	6/29	Cartage on 500 Conc. Tile	10.00	5.00
41941	6/29	650 Concrete Tile	90.00	58.50
	6/29	Cartage on 650 Conc. Tile	10.00	6.50
42046	6/29	400 Concrete Tile	90.00	36.00
	6/29	Cartage on 400 Conc. Tile	10.00	4.00
42060	6/30	500 Concrete Tile	90.00	45.00
	6/30	Cartage on 500 Concrete Tile	10.00	5.00
42530	7/5	1150—5 x 4 x 12 Conc. Tile	65.00	74.75
	7/5	Cartage on 1150—5 x 4 x 12 Tile	5.00	5.75
42498	7/5	500 Concrete Tile	90.00	45.00
	7/5	Cartage on 500 Conc. Tile	10.00	5.00
42715	7/6	300 Concrete Tile	90.00	27.00
	7/6	Cartage on 300 Conc. Tile	10.00	3.00
42746	7/6	400 Concrete Tile	90.00	36.00
	7/6	Cartage on 400 Conc. Tile	10.00	4.00
42569	7/6	700 Concrete Tile	90.00	63.00
	7/6	Cartage on 700 Conc. Tile	10.00	7.00
42718	7/7	600 Concrete Tile	90.00	54.00
	7/7	Cartage on 600 Conc. Tile	10.00	6.00
47229	7/7	800—5 x 4 x 12 Conc. Tile	65.00	52.00
	7/7	Cartage on 800—5 x 4 x 12 Tile	5.00	4.00
39480	7/7	700 Concrete Tile	90.00	63.00
	7/7	Cartage on 8—Conc. Tile	10.00	7.00
43077	7/8	600 Concrete Tile	90.00	54.00
	7/8	Cartage on 600 Conc. Tile	10.00	6.00
43078	7/8	650 Concrete Tile	90.00	58.50
	7/8	Cartage on 650 Concrete Tile	10.00	6.50
42750	7/8	500 Concrete Tile	90.00	45.00
	7/8	Cartage on 500 Concrete Tile	10.00	5.00
43368	7/12	1050—5 x 4 x 12 Conc. Tile	65.00	68.25
	7/12	Cartage on 1050—5 x 4 x 12 Tile	5.00	5.25
43359	7/12	600 Concrete Tile	90.00	54.00
	7/12	Cartage on 600 Concrete Tile	10.00	6.00
43735	7/13	400 Concrete Tile	90.00	36.00
	7/13	Cartage on 400 Conc. Tile	10.00	4.00
43730	7/14	600 Concrete Tile	90.00	54.00
	7/13	Cartage on 600 Concrete Tile	10.00	6.00
43454	7/14	500 Concrete Tile	90.00	45.00
	7/14	Cartage on 500 Conc. Tile	10.00	5.00
43762	7/14	400 Concrete Tile	90.00	36.00
	7/14	Cartage on 400 Conc. Tile	10.00	4.00
43817	7/14	650 Concrete Tile	90.00	58.50
	7/14	Cartage on 650 Concrete Tile	10.00	6.50
		TOTAL		$5792.25

Fifth. All the above materials were furnished between the twenty-fourth day of May, 1927 and the fourteenth day of July, 1927, which said last mentioned date is the date of the last materials furnished for which such debt is due.

GEO. F. PERRY & SONS, INC.

BY: J. Franklin Perry
Treasurer.

STATE OF NEW JERSEY }
COUNTY OF ESSEX } SS:

J. FRANKLIN PERRY, of full age, being duly sworn, according to law, on his oath, deposes and says that Geo. F. Perry & Sons, Inc., a corporation, is the claimant named in the foregoing claim, that he (said deponent) is the treasurer of the said claimant, duly authorized to execute the foregoing lien claim and to execute this affidavit, that he is personally familiar with all the facts and circumstances set forth in said lien claim, that the bill of particulars and the statements therein and in said lien claim set forth and shown are true, that the same is for materials furnished in the erection of the buildings in such lien claim described at the time therein specified, and that the amount as claimed therein is justly due and owing from Capitol Construction Co. Inc., a corporation, to the said claimant.

J. FRANKLIN PERRY.

Sworn and subscribed to before me this 10th day of November, A. D. 1927.

CHARLES TRACHTENBERG
A Notary Public of New Jersey.

STATE OF NEW JERSEY

UNION COUNTY, SS:

I, WILLIAM B. MARTIN, Clerk of the County of Union, aforesaid, and also Clerk of the Circuit Court and Court of Common Pleas, holden therein,

DO HEREBY CERTIFY, That the foregoing is a true and correct copy of a certain Lien Claim Geo. F. Perry & Sons Inc. vs Capitol Const. Co. Inc. as the same is taken from and compared with the original on file as of Nov. 12, 1927 in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Courts and County, at Elizabeth, this 3d day of December 1930.

(Seal)

WM. B. MARTIN
Clerk.

UNION COUNTY NEW JERSEY

Summons signed, sealed and issued the 12 day of Nov. 1927 at 9.00 A. M.

WM. B. MARTIN,
County Clerk.

Received Union County Clerk's Office, Nov. 12, 8.20 A. M., 1927.

Elizabeth, N. J.,

WILLIAM B. MARTIN, Clerk.

Exhibits 32, 34.

Final Judgment and Cost of Geo. F. Perry & Sons, Inc., vs. Capitol Construction Co., Inc., et al., Filed January 13th, 1928, Docket 8, Page 390.

UNION COUNTY CIRCUIT COURT.

GEO. F. PERRY & SONS, INC., a corporation, Plaintiff, *vs.* CAPITOL CONSTRUCTION CO. INC., a corporation, *et als.*, Defendants.	Action at Law. Final Judgment *vs.* Capitol Construction Co. Inc., a corporation, Louis Schwartz, Junction Milling Co., a corporation, and West Bergen Trust Company, a corporation.

The summons and complaint in this cause having been duly served upon the defendants, Capitol Construction Co., Inc., a corporation, Louis Schwartz, Junction Milling Co., a corporation, and West Bergen Trust Company, a corporation, and interlocutory judgment having heretofore been entered in favor of the plaintiff, Geo. F. Perry & Sons, Inc., a corporation, and against the aforesaid defendants, last named, and the Clerk of this Court having assessed the damages of the plaintiff, Geo. F. Perry & Sons, Inc., a corporation, against the defendant, Capitol Construction Co. Inc., a corporation, at the sum of Five Thousand Nine Hundred and Sixty Five Dollars ($5,965);

It is thereupon, on this thirteenth day of January, A. D. 1928, ORDERED and ADJUDGED that judg-

ment final shall be, and hereby is, entered in favor of the plaintiff, Geo. F. Perry & Sons, Inc., a corporation, generally against the defendant, Capitol Construction Co. Inc., a corporation, for the sum of Five Thousand Nine Hundred and Sixty Five Dollars ($5,965), with costs of suit to be taxed, specially to be made of the land and building (described in the complaint and the lien claim whereon this action is founded) situate lying and being in the Township of Cranford, County of Union and State of New Jersey, which may be described as follows:—

BEGINNING at a point formed by the intersection of the northeasterly side of Riverside Drive with the southeasterly side of Prospect Avenue; thence north forty seven degrees thirty six minutes east along said side of Prospect Avenue three hundred and fifty eight feet and thirty hundredths of a foot to a point; thence south forty two degrees twenty four minutes east two hundred feet to a point; thence north forty seven degrees thirty six minutes east thirteen feet and seventy six hundredths of a foot to a point; thence south forty two degrees twenty four minutes east one hundred and ninety five feet and ninety eight hundredths of a foot to the northwesterly side of Union Avenue; thence south forty nine degrees sixteen minutes west eighty seven feet and ninety seven hundredths of a foot along said side of Union Avenue to a point; thence still along said side of Union Avenue south forty one degrees and fifty one minutes west one hundred and fifty two feet and thirty four hundredths of a foot to said side of Riverside Drive; thence northwesterly along said side of Riverside Drive, its various courses, four hundred and forty three feet, more or less to the point or place of BEGINNING. The foregoing description is according to survey made

by J. L. Bauer, Civil Engineer and Surveyor, Elizabeth, N. J., June 1911.

It is further ORDERED and ADJUDGED that the lien claim of said plaintiff, and the lien of this judgment, are prior and paramount to the lien of the mortgage dated August 22nd, 1927, acknowledged August 22nd, 1927, and recorded on August 25th, 1927, in the office of the Register of Union County in book 884 of Mortgages for said County, at page 127, made or given by said Capitol Construction Co. Inc., a corporation, to the defendant, Louis Schwartz.

It is further ORDERED and ADJUDGED that the lien claim of said plaintiff, and the lien of this judgment, are prior and paramount to the lien of the mortgage dated September 16th, 1927, acknowledged September 26th, 1927, and recorded on October 6th, 1927, in the office of the Register of Union County in book 886 of Mortgages for said County, at page 390, made or given by said Capitol Construction Co. Inc., a corporation, to the defendant, Junction Milling Co., a corporation.

It is further ORDERED and ADJUDGED that the lien claim of said plaintiff, and the lien of this judgment, are prior and paramount to the lien of the mortgage dated October 25th, 1927, acknowledged October 25th, 1927, and recorded on October 26th, 1927, in the office of the Register of Union County in book 895 of Mortgages for said County, at page 38, made or given by said Capitol Construction Co. Inc., a corporation, to the defendant, West Bergen Trust Company, a corporation.

It is further ORDERED and ADJUDGED that the determination of the matters in issue in this action as to the defendants, Standard Building Block Company, a corporation, Aetna Realty Company, a corporation, Riverside Apartment Corporation, a corporation, Israel Shilowitz, Jacob Tucker,

Carteret Company, a corporation, and The Trust Company of New Jersey, a corporation, and as to the mortgages held by said defendants respectively, and as to the priority thereof with respect to the lien of the plaintiff, shall be, and hereby is, reserved for further proceedings herein.

Rule actually entered
January 13th, 1928.

On Motion of

KANTER & KANTER
Attorneys of Plaintiff.

KANTER & KANTER,
1060 Broad St.,
Newark, N. J.

UNION CIRCUIT COURT.

GEORGE F. PERRY & SONS, INC.	On Costs of Assessment of Damages.
vs.	Judgment by Default.
CAPITOL CONSTRUCTION CO.	Term of Jan., 1928.

COSTS.		DISBURSEMENTS.	
Fees for Proceedings before Notice of Trial..	$20.00	Sheriff's Service Fees, Summons, etc.	$ 9.02
Entering Judgment Interlocutory by Default	2.50	Clerk's Fees, 1st Paper..	3.00
Assessment of Damages upon Default	15.00	Filing Lien.....	4.10
		Filing Assessment of Damages	2.00
Total Costs	$37.50	Filing Judgment.....	2.00
" Disbursements	25.87	Recording Judgment.....	3.00
		Entering Judgment Interlocutory	1.00
" Taxed Costs....	$63.37	Taxing Costs.....	1.25
		Copy of Costs.....	.50
		Total Disbursements	$25.87

Costs taxed by Clerk at Sixty-three Dollars and thirty-seven cents this 14th day of January, A. D., 1928.

WM. B. MARTIN,
Clerk.

STATE OF NEW JERSEY.

UNION COUNTY, SS.:

I, WILLIAM B. MARTIN, Clerk of the County of Union, aforesaid, and also Clerk of the Circuit Court and Court of Common Pleas, holden herein,

DO HEREBY CERTIFY, That the foregoing is a true and correct copy of a certain Rule for Judgment and Taxed Costs. *Geo. F. Perry & Sons, Inc.* vs. *Capitol Const. Co., Inc.,* as the same is taken from and compared with the original on file as of Jan. 13, 1928, in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Courts and County, at Elizabeth, this 3d day of December, 1930.

(Seal)

WM. B. MARTIN,
Clerk.

Exhibit 35.

(Printed at page 296 herein.)

CARTERET COMPANY.

Exhibit 36.

Bond of Capitol Construction Co., Inc., to Carteret Company, Dated October 14th, 1927.

KNOW ALL MEN BY THESE PRESENTS, that Capitol Construction Co., Inc., a corporation of New Jersey, is, held and firmly bound unto Carteret Company, a corporation of New Jersey, in the penal sum of Seventy Thousand Dollars, lawful money of the United States of America, to be paid to the said Carteret Company, its successors, or assigns for which payment well and truly to be made, it binds itself, its successors and assigns firmly by these presents. Sealed with its seal. Dated the fourteenth day of October One Thousand Nine Hundred and twenty-seven.

The condition of the above obligation is such that if the above bounden Capitol Construction Co. Inc. its successors or assigns shall well and truly pay, or cause to be paid, unto the above named Carteret Company, its successors or assigns, the just and full sum of Thirty-five Thousand Dollars, on the fourteenth day of January which will be in the year One Thousand Nine Hundred and twenty-eight, and the interest thereon, to be computed from the date hereof at and after the rate of six per cent. per annum, and to be paid monthly on the 14th day of each month without any fraud or other delay, then the above Obligation to be Void, otherwise to remain in full force and virtue.

And it is hereby expressly agreed, that should any default be made in the payment of the said interest, or of any part thereof, on any day whereon the same is made payable as above ex-

pressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond, and become due and payable; and should the said interest remain unpaid and in arrear for the space of thirty days, or said tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien, or any or either of them, remain unpaid and in arrear for the space of sixty days then and from thenceforth, that is to say after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of Thirty-five Thousand Dollars, with all arrearage of interest thereon, shall, at the option of the said Carteret Company, or its legal representatives, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

Signed, Sealed and Delivered in the presence of

CAPITOL CONSTRUCTION CO., INC.

By HYMAN SILVERMAN,
President.

Attest:

JACOB STARR,
Secretary.

Exhibit 37.

Mortgage of Capitol Construction Co., Inc., to Carteret Company, Dated October 14th, 1927—Recorded October 25th, 1927.

THIS INDENTURE, made the fourteenth day of October, in the year of our Lord One Thousand Nine Hundred and twenty-seven,

BETWEEN CAPITOL CONSTRUCTION CO. INC., a corporation of New Jersey, party of the first part;

AND CARTERET COMPANY, a corporation of New Jersey, party of the second part;

WHEREAS, the said Capitol Construction Co., Inc., is justly indebted to the said party of the second part, in the sum of Thirty-five Thousand Dollars, lawful money of the United States of America, secured to be paid by its certain bond or obligation, bearing even date with these presents, in the penal sum of Seventy Thousand Dollars, lawful money as aforesaid conditioned for the payment of the said first-mentioned sum of Thirty-five Thousand Dollars, lawful money as aforesaid, to the said party of the second part, its successors or assigns on the fourteenth day of January which will be in the year One Thousand Nine Hundred and twenty-eight and interest thereon, to be computed from the date hereof at and after the rate of six per cent. per annum, and to be paid monthly; on the 14th day of each month;

AND IT IS HEREBY EXPRESSLY AGREED, that should any default be made in the payment of the said interest or of any part thereof, on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent

or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage, and become due and payable, and should the said interest remain unpaid and in arrear for the space of thirty days, or said tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien, or any or either of them remain unpaid and in arrear for the space of sixty days then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods as the case may be, the aforesaid principal sum of Thirty-five Thousand dollars, with all arrearage of interest thereon, shall, at the option of the said party of the second part, or its legal representatives, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything herein before contained to the contrary hereof in anywise notwithstanding: as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear.

Now this Indenture Witnesseth That the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar, to it in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents does grant, bargain, sell, alien, release, convey and con-

firm, unto the said party of the second part, and to its successors and assigns forever,

ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Cranford, in the County of Union and State of New Jersey,

BEGINNING at a point formed by the intersection of the Northeasterly side of Riverside Drive with the southeasterly side of Prospect Avenue; thence North Forty-seven Degrees, thirty-six minutes East along said side of Prospect Avenue, Three hundred fifty-eight and thirty hundredths (358.30) feet to a point; thence South Forty-two degrees twenty-four minutes East Two hundred (200) feet to a point; thence North Forty-seven degrees thirty-six minutes East, Thirteen and seventy-six hundredths (13.76) feet to a point; thence South Forty-two degrees Twenty-four minutes East, One hundred Ninety-five and Ninety-eight hundredths (195.98) feet to the Northwesterly side of Union Avenue; thence South Forty-nine degrees Sixteen minutes West Eighty-seven and Ninety-seven hundredths (87.97) feet along said side of Union Avenue to a point; thence still along said side of Union Avenue, South Forty-one degrees and fifty-one minutes West One hundred fifty-two and thirty-four hundredths (152.34) feet to said side of Riverside Drive thence Northwesterly along said side of Riverside Drive, its various course Four Hundred forty-three (443) feet more or less to the point or place of beginning. The foregoing description is according to survey made by J. L. Bauer, C. E. & Surveyor, Elizabeth, N. J. June 1911.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto be-

longing, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rent, issues and profits thereof.

And also, all the estate, right, title interest, property possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part of, of in and to the same, and every part and parcel thereof, with the appurtenances:

To have and to hold, the above granted and described premises, with the appurtenances unto the said party of the second part, its successors and assigns to its and their own proper use, benefit and behoof forever.

The mortgagor its successors and assigns shall and will keep the buildings erected and to be erected upon the lands above conveyed insured against loss or damage by fire by insurers, through such broker or brokers selected and in an amount approved by the mortgagee its successors or assigns and assign the policy or policies and certificate or certificates thereof to the mortgagee, its successors or assigns, as collateral security for the payment of the principal and interest aforesaid; and it is agreed that if the mortgagor its successors and assigns, shall neglect to pay all or any tax, assessment or other municipal or governmental rate, charge, imposition, or any installment or installments of principal and interest, or any sums payable under any lien superior thereto or any premium for insurance as aforesaid, on any day whereon the same shall become due and payable, after the period of default aforesaid or fail for ten days to proceed diligently with the work of completing the three story apartment house now being erected on said premises, then it shall

be lawful for the mortgagee, its successors and assigns, to pay such charges or to enter upon said premises and complete said building and to pay all necessary expenses incidental to complete said building, and the sum or sums so paid shall be a lien on the said mortgaged premises added to the amount secured hereby, with interest at six per- 10
cent per annum, and, in the event of such payment, at the option of the mortgagee its successors or assigns, the principal sum secured hereunder shall become due and payable, and agrees that if default be made in the payment of any installment of principal or of the said interest, or any part thereof, on any day whereon the same is made payable, as hereinbefore expressed, and should the same remain unpaid and in arrears for the space of thirty days of if default be made 20
in the payment of any of said taxes, water rents, or other municipal or governmental rate, charge, imposition or any money payable under the terms of any mortgage lien paramount hereto, on any day whereon the same shall be due and payable, and should the same remain unpaid and in arrears for the space of Ninety days, or in the event that any building shall be demolished or removed from the mortgaged premises (or if the removal or demolition thereof is threatened) without the con- 30
sent in writing of the mortgagee or holder of this mortgage, or in the event that the owner of the mortgaged premises shall fail within ten days after written request therefor, to furnish a statement of the amount due and owing for principal and interest hereunder, or evidence of the payment of taxes, water rents, interest and principal or prior mortgages or any carrying charges, or in the event that default shall be made in any of the terms, covenants and conditions herein con- 40

tained, or contained in any mortgage constituting a lien upon the mortgaged premises prior and superior to the lien hereof, or should any action be commenced to foreclose any such prior mortgage, or should the owner of the mortgaged premises fail, for a period of thirty days, to begin compliance with any requirements, recommendation or recommendations of any of the Departments or authority of the State of New Jersey, or the municipality where such mortgaged premises are situate, such municipality or State Department or authority having jurisdiction over the mortgaged premises, or in the event of the adjudication in bankruptcy or insolvency of the mortgagor or the owner of the mortgaged premises, then and from thenceforth that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of money, with all arrearages of interest thereon, and any other charges paid by the holder of this mortgage, shall, at the option of the mortgagee and assigns, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary hereof in anywise notwithstanding.

And agrees that if default shall be made as aforesaid, the mortgagee, its successors and assigns, shall have the right forthwith after any such default, to enter upon and take possession of the said mortgaged premises, and to let the said premises, and receive the rents, issues and profits thereof and to apply the same, after payment of all necessary charges and expenses, on account of the amount hereby secured, and said rents and profits are, in the event of any such default hereby assigned to the mortgagee, its successors and as-

signs, and the mortgagee its successors and assigns, shall also be at liberty immediately after any such default, upon proceedings being commenced for the foreclosure of this mortgage or any prior mortgage to apply for the appointment of a receiver of the rents and profits of the said premises, and be entitled to the appointment of such receiver as a matter of right, as security for the amounts due the mortgagee, without consideration of the value of the mortgaged premises, or solvency of any person or persons liable for the payment of such amounts.

PROVIDED ALWAYS, and these presents are upon this express condition, that if the said party of the first part, its successors or assigns, shall well and truly pay unto the said party of the second part, its successors or assigns, the said sum of money mentioned in the condition of said bond or obligation, and the interest thereon, at the time and times, and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine and be void.

AND the said party of the first part for itself, its successors and assigns, does covenant and agree to pay unto the said party of the second part, its successors or assigns, the said sum of money and interest, as mentioned above and expressed in the conditions of the said bond.

AND IT IS ALSO AGREED, by and between the parties to these presents, that the said party of the first part, its successors and assigns, shall and will keep the buildings erected, and to be erected, upon the lands above conveyed, insured against loss or damage by fire, by insurers, and in an amount

approved by the said party of the second part, its successors or assigns, and assign the policy and certificates thereof to the said party of the second part; and in default thereof, it shall be lawful for the said party of the second part to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents, payable on demand, with interest at the rate of six per cent. per annum, from the time of payment of such premium or premiums.

And the said party of the first part the owner of the lands above described for itself, its successors and assigns, does further covenant and agree to and with the said party of the second part, its successors and assigns, that it or they will pay in full, all taxes levied, or to be levied, upon the lands embraced in this mortgage, and will not claim any credit on, or make any deduction from the interest or principal hereby secured by reason of the payment of any taxes so levied, or to be levied, during the continuance of the lien of this mortgage, and upon the breach of this covenant or any part thereof, this mortgage may become and be due and payable immediately, at the option of the said party of the second part hereto.

All the covenants and conditions hereinabove contained shall be for the benefit of and shall apply to and bind the said parties hereto and their respective heirs, executors, administrators, successors and assigns.

In Witness Whereof, the said party of the first part has hereunto caused this Indenture to be signed by its President, and its corporate seal, to

be affixed, attested to by its Secretary, the day and year first above written.

Signed, Sealed and Delivered in the presence of

CAPITOL CONSTRUCTION CO., INC.,
by HYMAN SILVERMAN
President

Attest:

JACOB STARR
Secretary

STATE OF NEW JERSEY
COUNTY OF HUDSON } SS.:

BE IT REMEMBERED, that on this 22nd day of October, 1927, before me the subscriber, a Master in Chancery of New Jersey, personally appeared, JACOB STARR who being by me duly sworn doth depose and make proof to my satisfaction that he well knows the corporate seal of the CAPITOL CONSTRUCTION CO. INC., a corporation of New Jersey, the mortgagor named in the foregoing Mortgage; that the seal thereto affixed is the proper corporate seal of the said Company, that the same was so affixed thereto, and the said Mortgaged signed and delivered by HYMAN SILVERMAN who was at the date and execution thereof the President of the said Company, in the presence of the said deponent as the voluntary act and deed of the said Company, and that the said deponent thereupon signed the same as subscribing witness.

JACOB STARR

Sworn and subscribed before me the date aforesaid

HARRY GROSSMAN
A Master in Chancery of New Jersey

Exhibit 38—Carteret Company.

RECEIVED in the Registered Office of the County of Union on the 24 day of October A. D. 1927 at 10.44 o'clock, in the forenoon, and Recorded in Book 892 of Mortgages for said County, on pages 89 &c.

EDWARD BAUER
Register

Exhibit 38.

Release of Junction Milling Company to Carteret Company, Dated October 18th, 1927— Recorded October 24th, 1927.

THIS INDENTURE, Made this 18th day of October in the year One Thousand, Nine Hundred and Twenty-seven,

BETWEEN Junction Milling Company, a corporation of New Jersey party of the first part,

AND Capitol Construction Co., Inc., a corporation of New Jersey, party of the second part:

WHEREAS, Capitol Construction Co., Inc., a corporation of New Jersey, did by Indenture of Mortgage, bearing date the 16th day of September 1927, for the consideration therein mentioned, and to secure the payment of the money therein specified, did convey certain lands and tenements, of which the lands hereinafter described are part, unto Junction Milling Co., which said Mortgage was recorded in the office of the Register of the County of Union in the State of New Jersey, in Liber 886 of Mortgages, on page 390 on October 6th 1927.

AND WHEREAS, the said party of the first part, at the request of the said party of the second part

has agreed to give up and surrender the lands hereinafter described, unto the said party of the second part, and to hold and retain the residue of said mortgaged lands as security for the money remaining due on the said mortgage:

NOW THIS INDENTURE WITNESSETH, That the said party of the first part, in pursuance of the said agreement, and in consideration of the sum of One Dollar and other valuable consideration, to it paid at the time of the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has released, quit-claimed, given, granted and conveyed, and by these presents does release, quit-claim, give, grant and convey unto the said party of the second part, all that part of the said mortgaged lands, to wit:

ALL that certain lot, tract or parcel of land and premises, situate, lying and being in the Township of Cranford, in the County of Union and State of New Jersey.

BEGINNING at a point in the Northeasterly side of Riverside Drive, distant thereon Ninety-four and ninety-eight hundredths (94.98) feet southeasterly from the corner formed by the intersection of the Northeasterly side of Riverside Drive with the Southeasterly side of Prospect Avenue; thence running (1) North 37 degrees, 36 minutes east Three hundred seventy-one and ninety-three hundredths (371.93) feet; thence (2) South 42 degrees 24 minutes East, One hundred and six (106) feet; thence (3) North 47 degrees 36 minutes East, Thirteen and seventy-six hundredths (13.76) feet; thence (4) South 42 degrees 24 minutes East, Eighty-five and ninety-eight hundredths (85.98) feet; thence (5) South 47 degrees 36 minutes West,

One hundred ninety-nine and sixty-five hundredths (199.65) feet; thence (6) South 22 degrees nine minutes West Ninty-six and fifty-seven hundredths (96.57) feet to said side of Riverside Drive; thence (7) North 72 degrees 39 minutes, West along said side of Riverside Drive Ninety-one (91) feet to a point; and thence (8) continuing northwesterly Along the Northeasterly side of Riverside Drive and its various courses, One hundred and fifty-seven (157) feet to the point or place of beginning.

It being the intention to release from the lien of the above described mortgage all the lands hereinbefore described, so that the party of the first part shall continue to hold in its mortgage the entire tract conveyed to the party of the second part by Jacob Star, et als., by deed dated May 25th 1927 and recorded in Book 1112 of Mortgages on page 171 in the Register's Office of Union County, with the exception of the plot hereinbefore described. The description in the mortgage held by the party of the first part having been incorrect.

Together with the hereditaments and appurtenances thereunto belonging; and all the right, title and interest of the said party of the first part to the same, to the intent that the lands hereby conveyed may be discharged from the said mortgage, and that the rest of the lands in the said mortgage contained, may remain to the said party of the first part, as heretofore.

To Have and to Hold, the lands and premises hereby released and conveyed, to the said party of the second part, its successors and assigns forever, free from the encumbrance of the Indenture of Mortgage aforesaid.

Exhibit 38—Carteret Company.

In Witness Whereof, the said party of the first part hath caused its corporate Seal to be hereto affixed and attested by its Secretary and these presents to be signed by its President, the day and year first above written.

Junction Milling Company,

By Abraham Lenkowsky,
Prest.

Signed, Sealed and Delivered in the presence of

Attest:

Louis Lenkowsky,
Secretary.

(Seal)

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

Be it Remembered that on this 18th day of October in the year of our Lord One Thousand Nine Hundred and twenty-seven, before me, the subscriber, personally appeared Louis Lenkowsky who, being by me duly sworn on his oath, says that he is the Secretary of the Junction Milling Company, grantor named in the within instrument; that Abraham Lenkowsky is the President of said corporation; that deponent well knows the corporate seal of said corporation; and the seal affixed to said Instrument is such corporate seal and was thereto affixed, and said Instrument signed and delivered by said President, as and for his voluntary act and deed and as and for the voluntary act and deed of said corporation, in

presence of deponent, who thereupon subscribed his name thereto as witness.

LOUIS LENKOWSKY.

Sworn and subscribed before me, at Jersey City the date aforesaid Oct. 18, 1927.

MINERVA STRUBLE,
Notary Public, New Jersey.

(Notarial Seal)

RECEIVED in the office of the Registers of the County of Union, N. J., on the 24 day of Oct. A. D., 1927, at 10:41 o'clock A. M., and Recorded in Book 67 of Releases of Mortgaged Premises for said County on page 180, &c.

EDWARD BAUER,
Register.

Exhibit 39.

Agreement Subordinating Schwartz Mortgage to Carteret Company Mortgage, Dated October 20th, 1927—Recorded October 24th, 1927.

THIS INDENTURE made this 20th day of October, Nineteen Hundred and twenty-seven, between LOUIS SCHWARTZ of Bayonne, New Jersey, party of the first part, and CAPITOL CONSTRUCTION CO. INC., a corporation of New Jersey, party of the second part, and CARTERET COMPANY, a corporation of New Jersey, party of the third part.

WHEREAS, the said Capitol Construction Co. Inc., by mortgage dated August 22nd, 1927, and to secure the payment of $5150.00 therein men-

tioned, did mortgage certain lands and premises hereinafter described, to the aforesaid Louis Schwartz, which mortgage is recorded in the Register's office of Union County in Book 884 of Mortgages for said County on page 127;

WHEREAS on condition that the said mortgage to Louis Schwartz, be subordinated in the manner hereinafter set out to the mortgage of said Carteret Company, hereinafter set out, the party of the third part, is about to accept a mortgage upon said premises, made by the said Capitol Construction Co. Inc., to the said Carteret Company, to secure the sum of $35,000, dated October 14th, 1927, and advance the amount thereof, which aforesaid premises are now owned by the said party of the second part, and are described as follows:—

ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Cranford, in the County of Union and State of New Jersey:—

BEGINNING at a point formed by the intersection of the Northeasterly side of Riverside Drive, with the southeasterly side of Prospect Avenue; thence North Forty-seven degrees, thirty-six minutes east along said side of Prospect Avenue, Three hundred fifty-eight and thirty hundredths (358.30) feet to a point; thence South Forty-two degrees twenty-four minutes East Two hundred (200) feet to a point; thence North Forty-seven degrees thirty-six minutes east, Thirteen and seventy-six hundredths (13.76) feet to a point; thence South Forty-two degrees twenty-four minutes east One hundred Ninety-five and Ninety-eight hundredths (195.98) feet to the Northwesterly side of Union Avenue; thence South Forty-

nine degrees Sixteen minutes West Eighty-seven and Ninety-seven hundredths (87.97) feet along said side of Union Avenue to a point; thence still along said side of Union Avenue, South Forty-one degrees and fifty-one minutes West One hundred fifty-two and thirty-four hundredths (152.34) feet to the said side of Riverside Drive, thence Northwesterly along same and its various courses Four Hundred forty-three (443) feet more or less to the point or place of beginning. The foregoing description is according to survey made by J. L. Bauer, C. E. & Surveyor, Elizabeth, N. J. June 1911.

NOW THEREFORE in consideration of the mutual stipulations herein and to induce the said party of the third part to accept the aforesaid mortgage and advance the moneys secured thereby, and also in consideration of the sum of One Dollar to the parties of the first and second part in hand paid by the party of the third part, the receipt whereof is hereby acknowledged, the parties of the first and second part to each severally and respectively covenant and agree to and with the party of the third part, that the said mortgage and its accompanying bond, held by the party of the first part as aforesaid, shall be and the same hereby is made subject and subsequent to the lien of the said mortgage made by Capitol Construction Co. Inc., to the said Carteret Company, for $35,000 dated October 14th, 1927, in like manner as if the said mortgage to the Carteret Company had been executed, delivered and recorded prior to the recording of the aforesaid mortgage to the said Louis Schwartz.

THIS INDENTURE shall be binding upon and shall inure to the benefit of the respective, heirs, legal

representatives, successors and assigns of the respective parties.

In Witness Whereof, the party of the first part has hereunto set his hand and seal, and the party of the second part has hereunto caused this Indenture to be signed by its President and its corporate seal to be affixed, attested by its Secretary, the day and year first above written.

Louis Schwartz
Louis Schwartz (Seal)

Capitol Construction Co. Inc.
by Hyman Silverman
President.

Signed sealed & delivered in
the presence of

Percival G. Cruden

Attest:—
Jacob Starr
Secretary

(Corporate Seal)

State of New Jersey }
County of Hudson } ss:—

Be it remembered, that on this 20 day of October, Nineteen Hundred and twenty-seven, before me the subscriber a Master in Chancery of New Jersey, personally appeared Louis Schwartz, who I am satisfied is the person named in and who executed the foregoing Subordination Agreement, and I having first made known to him the contents thereof, he did thereupon acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

Percival G. Cruden
Master in Chancery of New Jersey

Exhibit 39—Carteret Company.

STATE OF NEW JERSEY }
COUNTY OF HUDSON } SS:—

BE IT REMEMBERED, that on this 22nd day of October, Nineteen Hundred and twenty-seven, before me the subscriber, a Master in Chancery of New Jersey, personally appeared JACOB STARR who being by me duly sworn doth depose and make proof to my satisfaction that he well knows the corporate seal of the CAPITOL CONSTRUCTION Co. INC., a corporation of New Jersey, the grantor named in the foregoing Subordination Agreement; that the seal thereto affixed is the proper corporate seal of the said Company, that the same was so affixed thereto and the said Agreement signed and delivered by HYMAN SILVERMAN who was at the date and execution thereof the President of the said Company, in the presence of the said deponent as the voluntary act and deed of the said Company, that thereupon the said deponent thereupon signed the same as subscribing witness.

JACOB STARR

Sworn and subscribed before me the date aforesaid }

JAS E PYLE
Master in Chancery
of New Jersey

Exhibit 40.

Agreement Subordinating Mechanics' Liens to Carteret Company Mortgage, Dated October 13th, 1927.

WHEREAS, Capitol Construction Co. Inc., a corporation of New Jersey, is the owner of and is erecting or has erected a building upon a certain plot of land in the Township of Cranford, in the County of Union and State of New Jersey,—BEGINNING at a point formed by the intersection of the Northeasterly side of Riverside Drive, with the southeasterly side of Prospect Avenue; thence North 47 degrees, 36 minutes East along said side of Prospect Avenue, 358.30 feet to a point; thence South 42 degrees 24 minutes east 200 feet to a point; thence North 27 degrees, 26 minutes east, 13.76 to a point; thence South 42 degrees 24 minutes east 195.98 feet to the Northwesterly side of Union Avenue; thence South 49 degrees 16 minutes West 87.97 feet along said side of Union Avenue to a point; thence still along said side of Union Avenue South 41 degrees and 51 minutes West 152.34 feet to said side of Riverside Drive, thence Northwesterly along the same, its various courses 443 feet more or less to the point or place of beginning. The foregoing description is according to survey made by J. L. Bauer, C. E. & Surveyor, Elizabeth, N. J. June 1911;

AND WHEREAS, said owner is desirous of obtaining a loan of money of $35,000 from CARTERET COMPANY, a corporation of New Jersey, secured by a mortgage upon said premises which mortgage it is intended shall be prior to any claim or demand against said premises by virtue of an Act

of the Legislature of the State of New Jersey, entitled, "An Act to secure to mechanics and others payments for their labor and materials in erecting and building", approved June 14th, 1898 and the supplements thereto and amendments thereof.

NOW THEREFORE, the undersigned, who have furnished or shall furnish work or materials for said building or contract for the same, in consideration of the premises and of the sum of one dollar to it in hand paid by the said mortgagee, the receipt whereof is hereby acknowledged, have released and discharged, and by these presents do hereby release and discharge, the said mortgagee its successors, executors, administrators and assigns, and the said building and the lot or curtilage whereon the same is erected, from all claims, demands and any liens by reason of labor performed or to be performed or materials furnished or to be furnished in the erection, construction and completion of said building, so that the said mortgagee, its successors, executors, administrators, heirs and assigns, shall and may have, hold and use the said building and the lot, or curtilage whereon the same is erected fully released and discharged from all liens, claims and demands, which we or either of us, have or may have under the provisions of the act aforesaid, and the supplements thereto and amendments thereof;

IN WITNESS WHEREOF, the undersigned have hereunto set our hands and seals, this thirteenth day of October in the year Nineteen hundred and twenty-seven.

JOHN NICARETTA	SEAL
MOWRE LAGER	SEAL
SANITARY MARBLE & TILE CO.	SEAL
JOSEPH MACHETTO	SEAL

Exhibit 40—Carteret Company.

A. S. Van Woeart Seal
Samuel Neuman Seal

Venango Stone Company Seal
R. Cianfrone
Ira R. Crouse Seal
R. M. Crocket Seal

Lipschitz Parquet Floor Co. Seal
By A. Lipschitz, Prop.
Max Platt Seal

N. J. Rfg. & Sheet Metal Works Seal
Wm. Z. Fromer, Pres.

Alfred W. Booth & Bro. Seal
By Hudson Booth, Treas.

Lafayette Iron Works Seal
Per E. Weingarten

Winchester Muhlberg, Inc. Seal
By Julius A. Rose, Treas.

A. S. Reid & Co. Seal
Edwin F. Knight, V. Pres.

Electric Refrigerator Sales
Corporation Seal
J. C. Messersmith, Pres.

Junction Milling Co. Seal
By Abraham Lenkowsky, Pres.
Harry Siegel Seal
Isador Levine Seal
Jacob Starr Seal
McCabe Bros. Seal
By James McCabe

Elizabeth Light Ftx. Co. Inc. Seal
By Samuel Naisson, Pres.

Bayonne Supply Co. Seal
G. E. Keenen, Treas.

Exhibit 41.

Agreement Subordinating Louis Moore's Mechanic's Lien to Carteret Company Mortgage, Dated October 22nd, 1927.

We, the undersigned, being persons or corporations who have furnished material or performed labor (or have contracted to furnish material or labor, or perform labor) for the erection of a certain building for CAPITOL CONSTRUCTION CO. INC., Owner, described and located as follows, to wit: In the Township of Cranford, County of Union, and State of New Jersey, BEGINNING at the point formed by the intersection of the Northeasterly side of Riverside Drive, with the southeasterly side of Prospect Avenue; thence North Forty-seven degrees thirty-six minutes east along said side of Prospect Avenue, three hundred fifty-eight and thirty one-hundredths feet to a point; thence South forty-two degrees twenty-four minutes east Two hundred feet to a point; thence North Forty-seven degrees thirty-six minutes east Thirteen and seventy-six hundredths feet to a point; thence South Forty-two degrees twenty-four minutes east One hundred Ninety-five and ninety-eight hundredths feet to the Northwesterly side of Union Avenue; thence South forty-nine degrees sixteen minutes west Eighty-seven and Ninety-seven hundredths feet along said side of Union Avenue to a point; thence still along said side of Union Avenue South Forty-one degrees Fifty-one minutes west One hundred fifty-two and thirty-four hundredths feet to the said side of Riverside Drive; thence Northwesterly along said side of Riverside Drive, its various courses, four hundred forty-three feet, more or less to the point or place of beginning. According to survey made by

Exhibit 41—Carteret Company.

J. L. Bauer, C. E. & Surveyor, Elizabeth, N. J. June, 1911;

In consideration, that Carteret Company for the purpose of aiding said owner to erect said building has agreed to loan said owner the sum of Thirty-five Thousand Dollars, by a mortgage or mortgages upon said building and lands, and for the further consideration of one dollar to us paid by the said Carteret Company, a corporation of New Jersey, the receipt whereof is hereby acknowledged.

Do hereby stipulate and agree, that the mortgage or mortgages, given or to be given, to secure said loan shall be and remain a lien upon said building and lands prior and paramount to any claim or lien we now have or may hereafter have upon said or against said building and lands by virtue of the provisions of "An act to secure to mechanics and others payment for their labor and materials in erecting any building" and the supplements thereto, or otherwise, howsoever but the foregoing stipulation shall not be construed as a waiver of our lien, except as to the lien of said mortgage.

Witness our hands and seals the 22nd day of October in the year of our Lord, One Thousand Nine hundred and twenty-seven.

Louis Moore (Seal)
Walworth Co. Inc. (Seal)
by Wm. S. Iorson

Walworth Co. Inc. (Seal)
by J. S. Mattimore
Vice Pres.

Signed, sealed and delivered in the presence of

As to L. M.
Harry Grossman
Teresa E. Schroeder
F. H. Meadowesoft.

Exhibit 42.

Check.

James E. Pyle No. A 1261

Jersey City, N. J. Oct. 22, 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. Inc.
Twenty-one hundred & thirty 80/100.....Dollars

$2130 80/100 JAMES E. PYLE

Endorsed: Capitol Construction Co. Inc.
by Hyman Silverman, Pres.
Jacob Star, Trs.
Harry Starr, Sec.
James E. Pyle

Exhibit 43.

Check.

James E. Pyle No. A 1269

Jersey City. N. J. Oct. 22 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. Inc.
Seven thousand 00/100.....Dollars

$7000 00/100 JAMES E. PYLE

Endorsed: Pay to order of Louis Moore
c/o plumbing Cranford Apt.
Capitol Construction Co. Inc.
by Hyman Silverman Pres.
Harry Starr Trs.
Jacob Starr Sec.
Louis Moore

Exhibit 44.

Check.

James E. Pyle No. A 1263
Jersey City, N. J. Oct. 22 1927
Commercial Trust Company of New Jersey
15 Exchange Place
Pay to the order of Capitol Construction Co. Inc.
Two thousand 00/100.....Dollars
$2000 00/100 James E. Pyle
Endorsed: Pay to the order of Junction Milling Co. c/o Material Cranford Apt.
Capitol Construction Co. Inc.
by Hyman Silverman Pres.
Harry Starr Trs.
Jacob Starr Sec.
For Deposit
Junction Milling Co.

Exhibit 45.

Check.

James E. Pyle No. A 1264
Jersey City, N. J. Oct. 22 1927
Commercial Trust Company of New Jersey
15 Exchange Place
Pay to the order of Capitol Construction Co. Inc.
Five hundred 00/100.....Dollars
$500 00/100 James E. Pyle
Endorsed: Pay to order of N. J. Roofing & Sheet Metal Co.
c/o Roofing &c—Cranford Apt.
Capitol Construction Co. Inc.
by Hyman Silverman Pres.
Harry Starr Trs.
Jacob Starr Sec.
For Deposit
N. J. Roofing & S. M. Wks.

Exhibit 46.

Check.

James E. Pyle No. A 1266

Jersey City, N. J. Oct. 22 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY

15 Exchange Place

Pay to the order of Capitol Construction Co. Inc.

One thousand 00/100.....Dollars

$1000 00/100 JAMES E. PYLE

Endorsed: Pay to order of A. W. Booth & Bro.
c/o Material—Cranford Apt.
Capitol Construction Co. Inc.
by Hyman Silverman Pres.
Jacob Starr Sec.
Harry Starr Trs.
Pay to the
Bayonne Trust Company,
or order,
Alfred W. Booth & Brother.

Exhibit 47.

Check.

James E. Pyle No. A 1267

Jersey City, N. J. Oct. 22 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY

15 Exchange Place

Pay to the order of Capitol Construction Co. Inc.

Five hundred 00/100.....Dollars

$500 00/100 JAMES E. PYLE

Endorsed: Pay to order of Jno. Nicaretta
c/o Concrete Cranford Apt.
Capitol Construction Co. Inc.
by Hyman Silverman Pres.
Jacob Starr Sec.
Harry Starr Trs.
John Nicaretta
A. Cerbene

Exhibit 48.

Check.

James E. Pyle No. A 1265

Jersey City, N. J. Oct 22 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. Inc.
Twenty-five Hundred 00/100.....Dollars
$2,500 00/100 JAMES E. PYLE

Endorsed: Pay to order of Lipschitz Parquet Floor Co.
a/c Flooring Cranford Apt.
Capitol Construction Co. Inc.
Hyman Silverman Pres.
Harry Starr Trs.
Jacob Starr Sec.
For Deposit
Lipschitz Parquet Floor Co.

Exhibit 49.

Check.

James E. Pyle No. A 1262

Jersey City, N. J. Oct. 22d 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. Inc.
Four hundred 00/100.....Dollars

$400 00/100 JAMES E. PYLE.

Endorsed: Pay to the order of Harry Grossman
Capitol Construction Co. Inc.
By Hyman Silverman President
Harry Starr, Treasurer
Jacob Starr Secretary
Harry Grossman

Exhibit 50.

Cancelled Mortgage of Capitol Construction Co., Inc., to Harry Grossman, Dated October 8th, 1927.

THIS INDENTURE made the eighth day of October in the year of our Lord One Thousand Nine Hundred and twenty seven

BETWEEN CAPITOL CONSTRUCTION CO. INC. a corporation of the State of New Jersey, party of the first part;

AND HARRY GROSSMAN, of the City of Elizabeth in the County of Union and State of New Jersey party of the second part;

WHEREAS, the said party of the first part is justly indebted to the said party of the second part, in the sum of TWENTY ONE THOUSAND SEVEN HUNDRED FIFTY ($21750.00) Dollars, lawful money of the United States of America, secured to be paid by its certain bond or obligation, bearing even date with these presents, in the penal sum of FORTY THREE THOUSAND FIVE HUNDRED ($43500.00) Dollars, lawful money as aforesaid conditioned for the payment of the said first-mentioned sum of TWENTY ONE THOUSAND SEVEN HUNDRED FIFTY ($21750.00) Dollars, lawful money as aforesaid, to the said party of the second part, his heirs, executors, administrators and assigns on the eighth day of January, which will be in the year One Thousand Nine Hundred and twenty eight and interest thereon, to be computed from October 8th, 1927 at and after the rate of six per cent. per annum, and to be paid at maturity.

AND IT IS THEREBY EXPRESSLY AGREED that should any default be made in the payment of the said

interest or of any part thereof, on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage, and become due and payable, and should the said interest or any part thereof remain unpaid and in arrear for the space of thirty days, or said tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien, or any or either of them remain unpaid and in arrear for the space of thirty days then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods as the case may be, the aforesaid principal sum of Twenty One Thousand Seven Hundred Fifty ($21750.00) Dollars, with all arrearage of interest thereon, shall, at the option of the said party of the second part, or his legal representatives or assigns, become and be due and payable immediately thereafter although the period above limited for the payment thereof may not then have expired, anything therein before contained to the contrary thereof in anywise notwithstanding: and the holder of this mortgage may, at his option, pay such tax, assessment, or water rent in arrear, and the amount so paid shall be added to and become part of the principal sum secured by the said bond and by this mortgage, and shall be payable on demand with interest at six per centum per annum, as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear.

Now this Indenture Witnesseth, That the said party of the first part, for the better securing the payment of the said sum of money mentioned in

the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar, to it in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged has granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents does grant, bargain, sell, alien, release, convey and confirm, unto the said party of the second part, and to his heirs and assigns forever.

ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Cranford in the County of Union and State of New Jersey.

BEGINNING at the point formed by the intersection of the northeasterly side of Riverside Drive with the southeasterly side of Prospect Avenue; thence north forty seven degrees thirty six minutes east along said side of Prospect Avenue three hundred fifty eight and thirty hundredths feet to a point; thence south forty two degrees twenty four minutes east two hundred feet to a point; thence north forty seven degrees thirty six minutes east thirteen and seventy six hundredths feet to a point; thence south forty two degrees twenty four minutes east one hundred ninety five and ninety eight hundredths feet to the northwesterly side of Union Avenue; thence south forty nine degrees sixteen minutes west eighty seven and ninety seven hundredths feet along said side of Union Avenue to a point; thence still along said side of Union Avenue south forty one degrees fifty one minutes west one hundred fifty two and thirty four hundredths feet to said side of River-

side Drive; thence northwesterly along said side of Riverside Drive, its various courses four hundred forty three feet more or less to the point or place of BEGINNING.

The foregoing description is according to a survey made by J. L. Bauer, C. E. and Surveyor, Elizabeth, N. J. June, 1911.

Being the same premises conveyed to the said party of the first part by deed of Jacob Starr and Sadie Starr, his wife, Hyman Silverman and Annie Silverman, his wife, dated May 25, 1927 and recorded in the Union County Register's Office in book 1112 of Deeds for said County on page 171.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, and remainder and remainders, rents, issues and profits thereof. AND ALSO, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances: To HAVE AND TO HOLD the above granted and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit and behoof for ever. PROVIDED ALWAYS, and these presents are upon this express condition, that if the said party of the first part, its successors or assigns shall well and truly pay unto the said party of the second part, his heirs, executors, administrators and assigns, the said sum of money mentioned in the condition of said bond or obligation, and the interest thereon, at the time and times, and in the manner mentioned in the said condi-

tion, according to the true intent and meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine and be void.

And the said party of the first part for itself, its successors and assigns does covenant and agree to pay unto the said party of the second part, his heirs, executors, administrators and assigns, the said sum of money and interest, as mentioned above and expressed in the conditions of the said bond.

And it is also agreed, by and between the parties to these presents, that the said party of the first part, its successors and assigns shall and will keep the buildings erected, and to be erected, upon the lands above conveyed, insured against loss or damage by fire by insurers, and in an amount approved by the said party of the second part, his heirs, executors, administrators and assigns, and assign the policy and certificates thereof to the said party of the second part; and in default thereof, it shall be lawful for the said party of the second part to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents, payable on demand, with interest at the rate of six per cent, per annum, from the time of payment of such premium or premiums.

And the said party of the first part the owner of the lands above described for itself, its successors and assigns does further covenant and agree to and with the said party of the second part, his heirs, executors, administrators and assigns, that it or they will pay in full, all taxes

levied, or to be levied, upon the lands embraced in this mortgage, and will not claim any credit on, or make any deduction from the interest or principal hereby secured by reason of the payment of any taxes so levied, or to be levied, during the continuance of the lien of this mortgage, and upon the breach of this covenant or any part thereof, this mortgage may become and be due and payable immediately, at the option of the said party of the second part hereto.

And the said mortgagor Capitol Construction Co. Inc. does covenant with the mortgagee that it is seized of an indefeasible estate in the fee simple in said premises, and will warrant and forever defend the title thereof unto the mortgagee, his heirs, executors, administrators and assigns, against all lawful claims whatsoever.

All of the covenants and conditions hereinabove contained shall be for the benefit of and shall apply to and bind the said parties hereto and their respective heirs, executors, administrators, successors and assigns.

In Witness Whereof, the said party of the first part has caused these presents to be signed by its President and Attested by its Secretary, and its corporate seal to be hereto affixed the day and year first above written.

Capitol Construction Co. Inc.

By Hyman Silverman
President

(Corporate Seal)

Attest:

Jacob Starr
Secretary

Exhibit 50—Carteret Company.

STATE OF NEW JERSEY, }
COUNTY OF UNION } ss.:

BE IT REMEMBERED, that on this eighth day of October, Nineteen hundred and twenty seven before me the subscriber, an attorney at law of New Jersey, personally appeared Jacob Starr, who being by me duly sworn on his oath, says that he is the Secretary of CAPITOL CONSTRUCTION CO. INC. the mortgagor named in the foregoing Instrument; that he well knows the corporate seal of said corporation; that the seal affixed to said Instrument is the corporate seal of said corporation; that the said seal was so affixed and the said Instrument signed and delivered by Hyman Silverman who was at the date thereof the President of said corporation, in the presence of this deponent, and said President, at the same time acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, and as the voluntary act and deed of said corporation, and that deponent, at the same time, subscribed his name to said Instrument as an attesting witness to the execution thereof.

JACOB STARR

Sworn and subscribed before me
at Elizabeth New Jersey
the date aforesaid

JULIUS KWALICK
An Attorney at Law
of New Jersey.

Exhibit 50—Carteret Company.

Received in the Register's Office of the County of Union on the 8th day of Oct. A. D. 1927, at 10:04 o'clock in the forenoon, and Registered in Book 888 of Mortgages for said County on page 386 etc.

EDWARD BAUER
Register.

Oct. 24—1927

The Register of Union County is hereby authorized to cancel the record of the within mortgage.

HARRY GROSSMAN

Cancelled of Record this 24th day of Oct. 1927

EDWARD BAUER
Register

Signature of mortgagee certified to as genuine

JACOB PFEFERSTEIN
An Attorney at Law of New Jersey

Exhibit 51.

Check.

James E. Pyle No. A 1268

Jersey City, N. J. Oct. 22 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. Inc.
Two thousand 00/100.....Dollars

$2000 00/100 JAMES E. PYLE

Endorsed: Pay to the order of J. Starr
a/c Carpenter Work—Cranford Apt.
Capitol Construction Co. Inc.
by Hyman Silverman Pres.
Harry Starr Trs.
Jacob Starr Sec.
J. Starr

Exhibit 52.

Check.

James E. Pyle No. A 1274

Jersey City, N. J. Oct. 29 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. &
Seigel & Levine
Five hundred 00/100.....Dollars

$500 00/100 JAMES E. PYLE

Endorsed: a/c plastering in Cranford Apt.
Capitol Construction Co.
Harry Starr Trs.
Jacob Starr Sec.
Hyman Silverman Pres.
H. Siegel I Levine

Exhibit 53.

Check.

James E. Pyle No. A 1275
Jersey City, N. J. Oct. 29 1927
COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place
Pay to the order of Capitol Construction Co. & McCabe Bros.
One thousand 00/100.....Dollars
$1000 00/100 JAMES E. PYLE
Endorsed: a/c excavating on Cranford Apt.
Harry Starr Trs.
Hyman Silverman Pres.
Jacob Starr Sec.
McCabe Bros.
James McCabe

Exhibit 54.

Check.

James E. Pyle No. A 1273
Jersey City, N. J. Oct. 29th 19 7
COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place
Pay to the order of Capitol Construction Co. & Sanitary Marble & Tile Co.
One Thousand 00/100.....Dollars
$1,000 00/100 JAMES E. PYLE
Endorsed: a/c Tile Work in Cranford Apt.
Capitol Construction Co.
by Harry Starr Trs.
Hyman Silverman Pres.
Jacob Starr Sec.
Sanitary Marble & Tile Co.
Benj. Parnis Prop.
Endorsements O. K.
Jas. E. Pyle

Exhibit 55.

Check.

James E. Pyle No. A 1271

Jersey City, N. J. Oct. 29 1927.

COMMERCIAL TRUST COMPANY OF NEW JERSEY

15 Exchange Place

Pay to the order of Capitol Construction Co. & Mowre Lager

One Hundred Sixty-five 00/100.....Dollars

$165 00/100 JAMES E. PYLE.

Endorsed: a/c Painting Work on Cranford Apt.
Capitol Construction Co.
by Harry Starr Trs.
Mowre Lager
Endorsements O. K.
Jas. E. Pyle

Exhibit 56.

Check.

James E. Pyle No. A 1276

Jersey City, N. J. Oct. 29 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY

15 Exchange Place

Pay to the order of Capitol Construction Co. & Jos. T. Ryerson & Sons

Four hundred & thirty-four.....Dollars

$434 16/100 JAMES E. PYLE

Endorsed: a/c Reinforcement for concrete in Cranford Apt.
Capitol Construction Co.
by Harry Starr Trs.
Hyman Silverman Pres.
Jacob Starr Sec.
Pay to the order of Illinois Merchants Company, Chicago, Ill.
Joseph T. Ryerson & Son
Joseph T. Ryerson & Son, Inc.

Exhibit 57.

Check.

James E. Pyle No. A 1277

Jersey City, N. J. Oct. 29 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. &
Jacob Starr
Six hundred 00/100.....Dollars

$600 00/100 JAMES E. PYLE

Endorsed: a/c Carpenter work in Cranford Apt.
Capitol Construction Co.
by Hyman Starr Trs.
Jacob Starr Sec.
Jacob Starr

Exhibit 58.

Check.

James E. Pyle No. A 1282

Jersey City, N. J. Nov. 3 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. &
M. Lager
Four hundred 00/100.....Dollars

$400 00/100 JAMES E. PYLE

Endorsed: a/c painting in Cranford Apt.
M. Lager
Capitol Construction Co.
by Harry Starr Trs.
Endorsements O. K.
Jas. E. Pyle

Exhibit 59.

Check.

James E. Pyle No. A 1283

Jersey City, N. J. Nov. 5 1927.

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. & Jacob Starr
Five Hundred Fifty 00/100.....Dollars
$550 00/100 JAMES E. PYLE

Endorsed: a/c Carpenter work Cranford Apt.
Capitol Construction Co.
by Jacob Starr
Hyman Silverman Pres.
Harry Starr Trs.
J. Starr, Sec.

Exhibit 60.

Check.

No. A 1284

Jersey City, N. J. Nov 5 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. & Sanitary Marble & Tile Co.
Four hundred 00/100.....Dollars
$400 00/100 JAMES E. PYLE

Endorsed: a/c Marble & tile on Cranford Apt.
Capitol Construction Co.
by Hyman Silverman Pres.
Sanitary Marble & Tile Co.
Benj. Parnis Prop.
Kaplan Bernstein Build. and Inv. Co.
Max Kaplan
Sam Bernstein

Exhibit 61.

Check.

James E. Pyle No. A 1285

Jersey City, N. J. Nov. 5 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. & Siegel & Levine
Five hundred 00/100.....Dollars
$500 00/100 JAMES E. PYLE
Endorsed: a/c Plastering work in Cranford Apt.
Capitol Construction Co.
by Siegel & Levine
Hyman Silverman Pres.
Harry Starr Trs.
Jacob Starr Sec.
H. Siegel I. Levine

Exhibit 62.

Check.

James E. Pyle No. A 1286

Jersey City, N. J. Nov. 5 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. & John Nicaretta
Two hundred 00/100.....Dollars
$200 00/100 JAMES E. PYLE
Endorsed: for Concrete work on Cranford Apt.
Capitol Construction Co.
by Hyman Silverman Pres.
Harry Starr Trs.
Jacob Starr Sec.
John Nicaretta

Exhibit 63.

Check.

James E. Pyle No. A 1287

Jersey City, N. J. Nov 5 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY

15 Exchange Place

Pay to the order of Capitol Construction Co. & Elizabeth Light & Fixture Co.

One Thousand 00/100.....Dollars

$1,000 00/100 JAMES E. PYLE

Endorsed: for a/c Electric wiring in Cranford Apt.

Capitol Construction Co.
Hyman Silverman Pres.
Harry Starr Trs.

Pay Elizabeth Trust Co. or order
Elizabeth Light & Fixture Co.

Exhibit 64.

Check.

James E. Pyle No. A 1288

Jersey City, N. J. Nov. 5 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY

15 Exchange Place

Pay to the order of Capitol Construction Co. & Walworth Co.

Two thousand 00/100.....Dollars

$2000 00/100 JAMES E. PYLE

Endorsed: for a/c plumbing supplies in Cranford Apt.

Capitol Construction Co.
by Hyman Silverman Pres.
Harry Starr Trs.

Pay to the order of The Corn Exchange Bank N. Y.
Walworth Company
G. A. Ricker Treas.

Exhibit 65.

Check.

James E. Pyle No. A 1480
Jersey City, N. J. Nov 10 1927
COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place
Pay to the order of Capitol Construction Co. &
M. Lager
Two Hundred forty 00/100.....Dollars
$240 00/100 JAMES E. PYLE
Endorsed: a/c Painting on Cranford Apt.
Capitol Construction Co.
by Harry Starr Trs.
Hyman Silverman Pres.
M. Lager
S. Silverman

Exhibit 66.

(No Exhibit marked 66 in testimony.)

Exhibit 67.

Check.

James E. Pyle No. A 1295
Jersey City, N. J. Nov. 10 1927
COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place
Pay to the order of Capitol Construction Co. &
N. J. Roofing & Sheet Metal Works
Five hundred 00/100.....Dollars
$500 00/100 JAMES E. PYLE
Endorsed: For roof tiling &c on Cranford Apt.
Capitol Construction Co.
by Harry Starr Trs.
Hyman Silverman
For Deposit
N. J. Roofing & S. M. Wks.

Exhibit 68.

Check.

James E. Pyle No. A 1301

Jersey City, N. J. Nov. 12 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. & A. S. Van Woeart
One Thousand 00/100.....Dollars

$1,000 00/100 JAMES E. PYLE

Endorsed: for Steam Heating on Cranford Apt.
Capitol Construction Co.
Harry Starr Trs.
Jacob Starr
A. S. Van Woeart

Exhibit 69.

Check.

James E. Pyle No. A 1300

Jersey City, N. J. Nov 14 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. & Siegel & Levine
Two hundred 00/100.....Dollars

$200 00/100 JAMES E. PYLE

Endorsed: for plastering in Cranford Apt.
Capitol Construction Co.
by Harry Starr Trs.
Hyman Silverman Pres.
H. Siegel I. Levine

Exhibit 70.

Check.

James E. Pyle No. A 1311

Jersey City, N. J. Nov 18 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. &
M. Lager
Four Hundred & twenty 00/100.....Dollars

$420 00/100 JAMES E. PYLE

Endorsed: For Painting on Cranford Apt.
Capitol Construction Co.
by Harry Starr Trs.
M. Lager
Joseph Polnick

Exhibit 71.

Check.

James E. Pyle No. A 1312

Jersey City, N. J. Nov. 18 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. &
Lipschitz Parquet Floor Co.
One hundred & twenty five 00/100.....Dollars

$125 00/100 JAMES E. PYLE

Endorsed: for hard wood floors in Cranford Apt.
Capitol Construction Co.
by Harry Starr Trs.
For Deposit
Lipschitz Parquet Floor Co.

Exhibit 72.

Check.

James E. Pyle No. A 1313

Jersey City, N. J. Nov 18 1927.

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. & Jacob Starr
Six Hundred 00/100.....Dollars

$600 00/100 JAMES E. PYLE

Endorsed: For Carpenter Labor on Cranford Apt.
Capitol Construction Co.
by Harry Starr Trs.
Jacob Starr

Exhibit 73.

Check.

James E. Pyle No. A 1332

Jersey City, N. J. Nov. 25 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. & M. Lager
Two hundred & seventy-five 00/100.....Dollars

$275 00/100 JAMES E. PYLE

Endorsed: for painting in Cranford Apt.
Capitol Construction Co.
by Hyman Silverman Pres.
M. Lager

Exhibit 74.

Check.

James E. Pyle No. A 1334

Jersey City, N. J. Nov. 25 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. &
Siegel & Levine
Two hundred 00/100.....Dollars

$200 00/100 JAMES E. PYLE

Endorsed: for plastering in Cranford Apt.
Capitol Construction Co.
by Hyman Silverman Pres.
Siegel & Levine
by Harry Siegel

Exhibit 75.

Check.

James E. Pyle No. A 1333

Jersey City, N. J. Nov. 25 1927.

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. &
Jacob Starr
Two hundred & 00/100.....Dollars

$200. 00/100 JAMES E. PYLE

Endorsed: for Carpenter work on Cranford Apt.
Capitol Construction Co.
by Hyman Silverman Pres.
Jacob Starr

Exhibit 76.

Check.

James E. Pyle No. A 1341

Jersey City, N. J. Nov. 29 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. & N. J. Roofing & Sheet & Metal Works
Five hundred 00/100.....Dollars

$500 00/100 JAMES E. PYLE

Endorsed: For roofing & metal work on Cranford Apt.
Capitol Construction Co.
by Harry Starr Trs.
N. J. Rfg. & Sheet Metal Wks.
Wm. Z. Fromer Pres.

Exhibit 77.

Check.

James E. Pyle No. A 1346

Jersey City, N. J. Dec 3 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. & Jacob Starr
Two hundred 00/100.....Dollars

$200 00/100 JAMES E. PYLE

Endorsed: For Carpenter Work on Cranford Apt.
Capitol Construction Co.
Hyman Silverman, Pres.
Jacob Starr

Exhibit 78.

Check.

James E. Pyle No. A 1347

Jersey City, N. J. Dec 3 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. &
Siegel & Levine
Two hundred 00/100.....Dollars

$200 00/100 JAMES E. PYLE

Endorsed: For plastering in Cranford Apt.
Capitol Construction Co.
Hyman Silverman Pres.
Siegel & Levine
Sam Botwinck

Exhibit 79.

Check.

James E. Pyle No. A 1365

Jersey City, N. J. Dec 10 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. &
Jacob Starr
One hundred & fifty 00/100.....Dollars

$150 00/100 JAMES E. PYLE

Endorsed: For Carpenter work on Cranford Apt.
Capitol Construction Co.
by Harry Starr Trs.
Jacob Starr

Exhibit 80.

Check.

James E. Pyle No. A 1366

Jersey City, N. J. Dec. 10 1927

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of Capitol Construction Co. & Seigel & Levine
Two hundred 00/100.....Dollars

$200 00/100 JAMES E. PYLE

Endorsed: for plastering in Cranford Apt.
Capitol Construction Co.
Hyman Silverman Pres.
H. Siegel I. Levine

Exhibit 81.

Check.

James E. Pyle No. A 1449

Jersey City, N. J. Apr 23 1928

COMMERCIAL TRUST COMPANY OF NEW JERSEY
15 Exchange Place

Pay to the order of F. E. Older & Co.
Two Hundred & Thirteen 50/100.....Dollars

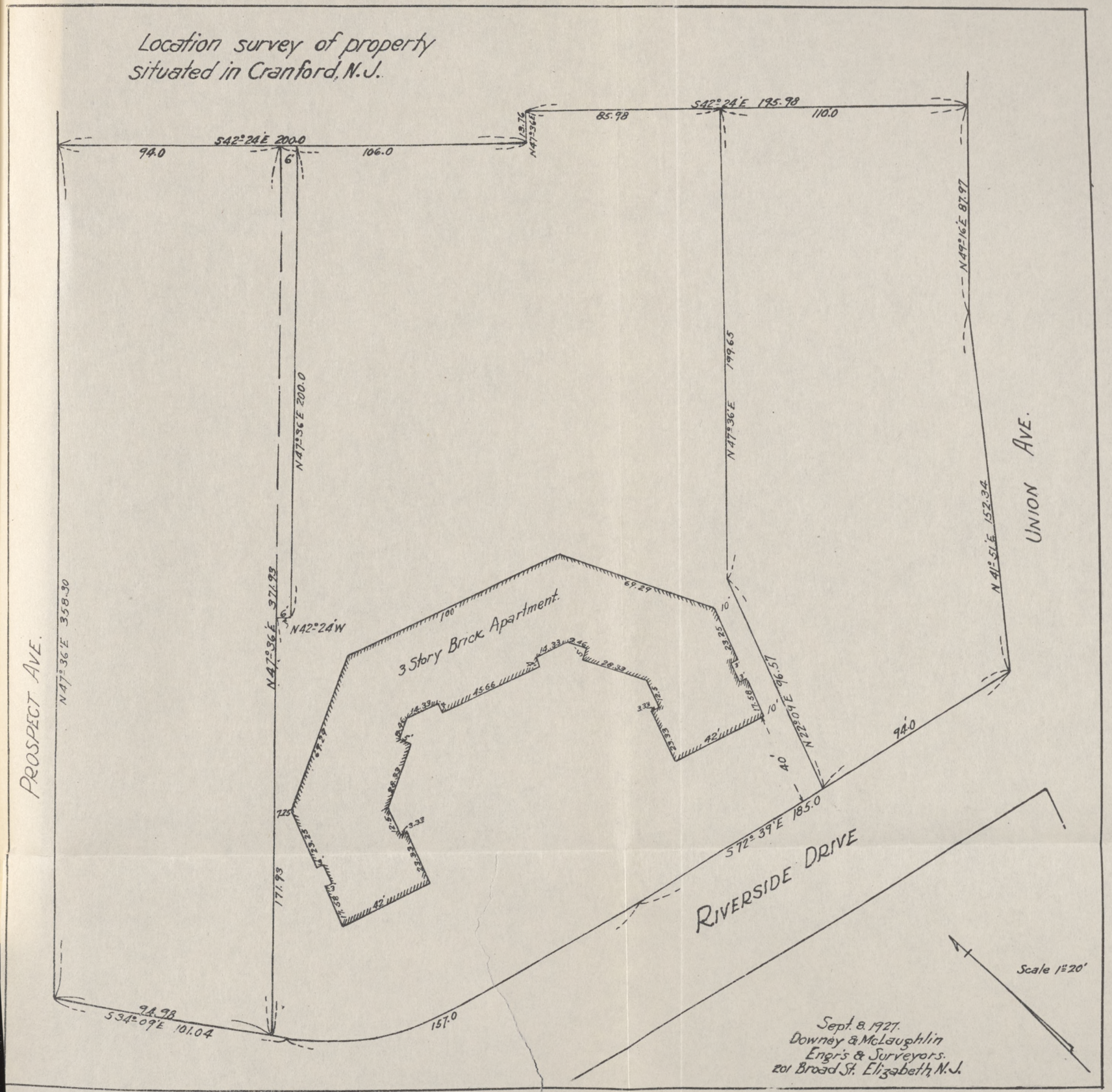
$213 50/100 JAMES E. PYLE

Endorsed: Pay to The Trust Co. of New Jersey
Bergen & Lafayette Branch
or order
Frank E. Older & Co.

Exhibit 82.

(*Opposite*) ☞

EXHIBIT 82


Location survey of property
situated in Cranford, N.J.
S42°24'E 200.0
94.0
106.0
6'
13.76
N47°36'E
S42°24'E 195.98
85.98
110.0
N49°16'E 87.97
N47°36'E 200.0
N47°36'E 199.65
N41°51'E 152.34
UNION AVE.
N47°36'E 358.30
N47°36'E 371.93
N42°24'W
3 Story Brick Apartment.
100'
69.29
10'
N22°09'E 96.57
40'
94.0
S72°39'E 185.0
RIVERSIDE DRIVE
PROSPECT AVE.
171.93
94.98
S34°09'E 101.04
157.0
Scale 1"=20'
Sept. 8. 1927.
Downey & McLaughlin
Engr's & Surveyors.
201 Broad St. Elizabeth, N.J.

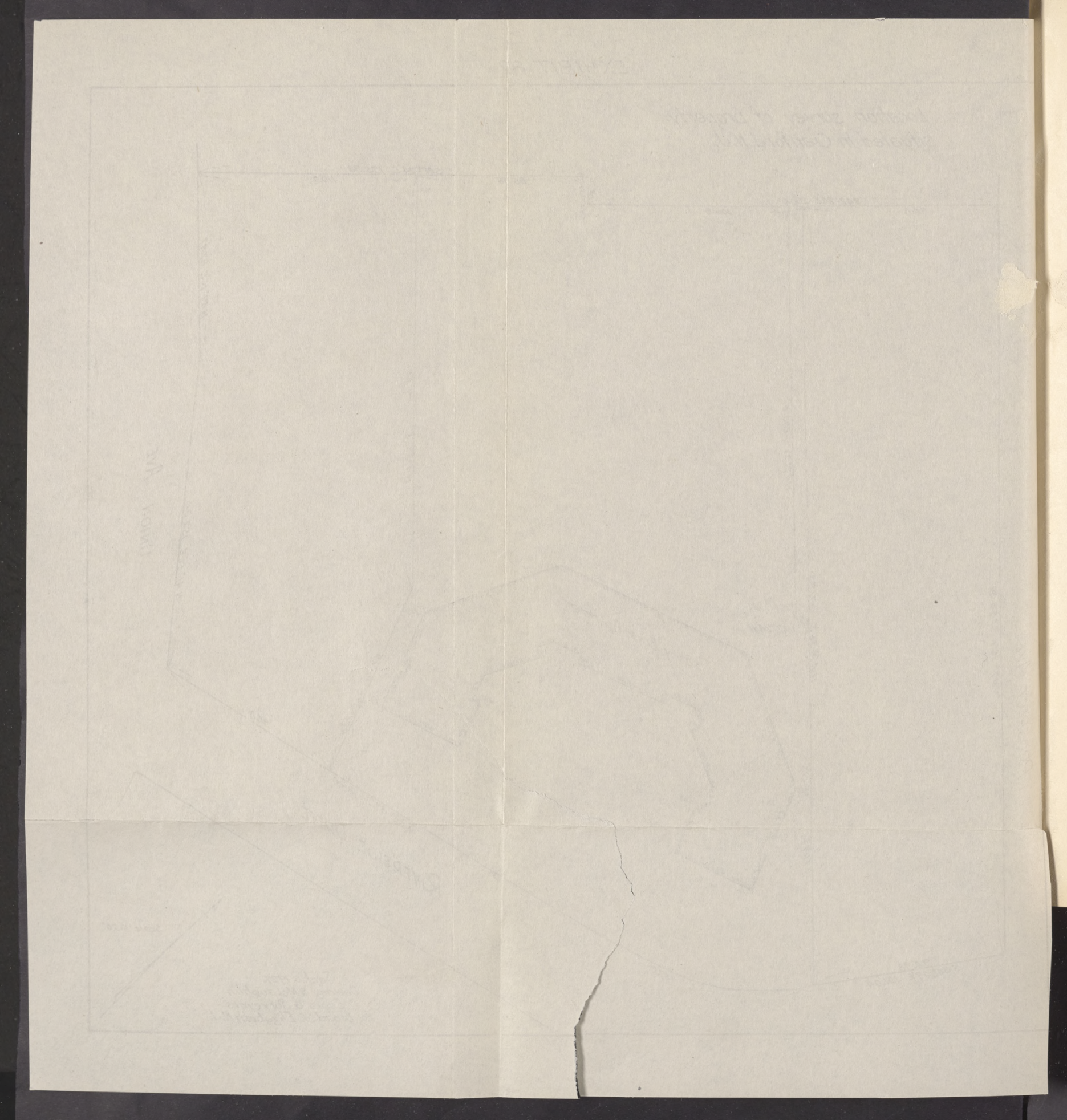


Exhibit 82—Carteret Company.

A. S. REID & COMPANY.

Exhibit 83.

Order for Bricks.

Order No.....

To A. S. Reid & Company
a Corporation
68-70 Clinton Avenue

Newark, N. J., April 26 1927

Gentlemen:

Please enter this order as follows, subject to conditions printed on back hereof.
Apprx 15000 Factory 53 Tan Brick at $38.00 per M
Aprx 45000 Factory 6B Full Range Reds at $36 per M
Delivered at Building Site in Cranford
Terms: 40% in Cash in 30 days
Balance 2 *months note* with interest
Same as ordered by Riverside Hotel Corp.
Consignee
Station Cranford N J
Railroad C R R of N J
Date to Ship 1 Car each at once—Balance as advanced
Location of Job Union & Riverside
Building Apt House
Architect N. Welitoff
Owner Capitol Construction Co. Inc
Charge to Account of Capitol Construction Co. Inc
Address 41 Neptune Ave
Jersey City N J

Harry Starr Treas.

Approved
Credit Dept.

Per.....

Exhibit 84.

Rule for Judgment, Filed July 7th, 1928.

UNION COUNTY CIRCUIT COURT.

A. S. Reid & Company, a corporation of the State of New Jersey, Claimant,

Plaintiff,

vs.

Capitol Construction Co., Inc., a corporation of the State of New Jersey, Builder and Owner, Israel Shilowitz, Jacob Tucker, Louis Schwartz, Junction Milling Co., a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, Trustee, Cartaret Company, a corporation, and West Bergen Trust Co., a corporation, Mortgagees,

Defendants.

Action at Law. On Mechanic's Lien.

Rule for Judgment by Default.

The summons and complaint in this cause having been duly served upon the defendant, Capitol Construction Co. Inc., on December 21st, 1927, and upon the defendant Israel Shilowitz on November 30th, 1927, and upon the defendant, Jacob Tucker on November 28th, 1927, and on the defendant, Louis Schwartz on December 21, 1927, and upon the defendant, Junction Milling Co., a corpora-

tion, on November 30th, 1927, and on the defendant, The Trust Company of New Jersey, a corporation, on November 28, 1927, and on the defendant, Edward P. Stout, Trustee on November 30th, 1927, and on the defendant Cartaret Company, a corporation, on November 26, 1927, and on the defendant, West Bergen Trust Company, a corporation, on November 26, 1927, and the said defendants Capitol Construction Co. Inc., a corporation, Louis Schwartz, Junction Milling Co., a corporation, and Edward P. Stout, Trustee, having filed no answer, nor taken any other step in response to the complaint within the time limited by the rules of Court;

It is ordered that judgment interlocutory be entered in favor of the plaintiff and against the said defendant, Capitol Construction Co. Inc., a corporation;

And the damages of the plaintiff having been assessed by the Clerk of this Court at the sum of $3163.63;

It is further ordered that judgment final be entered for the sum of Three Thousand One Hundred Sixty-three Dollars and sixty-three ($3,163.63) cents, with costs to be taxed, in favor of the plaintiff generally against the said Capitol Construction Co. Inc., a corporation, Builder and Owner, and specially to be made of the land and building in the complaint described;

And it is further ordered that judgment be also entered, that the mortgages of the defendants, Louis Schwartz, Junction Milling Co., a corporation, and Edward P. Stout, Trustee, in the complaint mentioned, are subject to the plaintiff's lien claim.

Exhibit 84—A. S. Reid & Company.

Rule actually entered this 7th day of July, Nineteen Hundred and Twenty-eight.

Costs $70.27.

On Motion of

LEAVITT, ULBRICH & TALLEY,
Attorneys for Plaintiff.

STATE OF NEW JERSEY.

UNION COUNTY, SS.:

I, WILLIAM B. MARTIN, Clerk of the County of Union, aforesaid, and also Clerk of the Circuit Court and Court of Common Pleas, holden therein,

DO HEREBY CERTIFY, That the foregoing is a true and correct copy of a certain Rule for Judgment by Default.

A. S. Reid & Company vs. Capitol Construction Co., *et als.*, as the same is taken from and compared with the original on file as of July 7, 1928 in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Courts and County, at Elizabeth, this 9th day of July 1928.

WM. B. MARTIN,
(Seal) Clerk.

RECEIVED UNION COUNTY CLERK'S OFFICE July 7 9:02 A. M. 1928, ELIZABETH, N. J.

WILLIAM B. MARTIN,
Clerk.

Exhibit 85.

Lien Claim, Filed November 18th, 1927.

UNION COUNTY CLERK'S OFFICE.

A. S. Reid & Company, a corporation of the State of New Jersey, Claimant,

Plaintiff,

vs.

Capitol Construction Co. Inc., a corporation of the State of New Jersey, Builder and Owner, Israel Shilowitz, Jacob Tucker, Louis Schwartz, Junction Milling Co. a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, Trustee, Carteret Company, a corporation, and West Bergen Trust Co., a corporation, Mortgagees,

Defendants.

Lien Claim.

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

Exhibit 85—A. S. Reid & Company.

1. The said building is a three (3) story brick building on a lot or curtilage upon which this lien is claimed, and which is situated in the Township of Cranford, in the County of Union and State of New Jersey, and is more particularly described as follows:

BEGINNING at a point formed by the intersection of the Northeasterly side of Riverside Drive with the Southeasterly side of Prospect Avenue; thence North 47 degrees 36 minutes East along said side of Prospect Avenue 358.31 feet to a point; thence South 42 degrees 24 minutes East 200 feet to a point; thence North 47 degrees 36 minutes East 13.76 feet to a point; thence South 42 degrees 24 minutes East 195.98 feet to the Northwesterly side of Union Avenue; thence South 49 degrees 16 minutes West 87.97 feet along said side of Union Avenue to a point; thence still along said side of Union Avenue South 41 degrees 51 minutes West 152.34 feet to the said side of Riverside Drive; thence Northwesterly along said side of Riverside Drive, its various courses 443 feet more or less to the point or place of Beginning. According to a survey made by J. L. Bauer, C. E. & Surveyor, Elizabeth, New Jersey, June 11, 1927.

2. The name of the owner of the land and of the estate therein on which the lien is claimed is Capitol Construction Co. Inc., a corporation of New Jersey.

3. The name of the person who contracted the debt and for whom and at whose request the labor was performed and the materials furnished for which such lien is claimed is the said Capitol Construction Co. Inc., a corporation of New Jersey.

Exhibit 85—A. S. Reid & Company.

4. The following is a bill of particulars, exhibiting the amount and kind of labor performed and of materials furnished, and the price at which, and times when, the same was performed and furnished, and giving credit for all the payments made thereupon and deductions that ought to be made therefrom and exhibiting the balance justly due to the said A. S. Reid & Company, claimant, from the said Capitol Construction Co. Inc., a corporation.

CAPITOL CONSTRUCTION CO. INC.,

TO A. S. REID & COMPANY, Dr.

To furnishing from the 3rd day of May, 1927, to the 20th day of July, 1927, all the bricks necessary to sufficiently erect and finish the three story brick building above mentioned, pursuant to contract at the agreed price of $38.00 per M. for tan bricks known as factory No. 53, and $36.00 per M. for full range red bricks known as factory No. 6-B	$3613.60

CREDIT:

June 25th, 1927, By Check	$520.00	
August 30, " " "	101.97	
Total Credits		621.97
Balance justly due claimant		$2991.63
Add interest thereon from July 20th, 1927, until paid.		

All the above labor was performed and materials furnished between the 3rd day of May, 1927, and the 20th day of July, 1927, which said last

mentioned date is the date of the last work done and materials furnished for which such debt is due.

A. S. Reid & Company,

By:
Edwin F. Knight.

State of New Jersey,
County of Union. } ss.

Edwin F. Knight, of full age, being duly sworn on his oath, says that he is the Vice-President and Manager of A. S. Reid & Company, a corporation, the claimant named in the foregoing action; that the bill of particulars and the statements therein and in said claim set forth and shown are true; that the same is for labor done and materials furnished in the erection of the building in such claim described, at the time therein specified; and that the amount as claimed therein is justly due and owing, from the said Capitol Construction Co. Inc., a corporation, to said claimant.

Edwin F. Knight

Sworn and subscribed this 18th day of November, A. D. Nineteen Hundred and Twenty-Seven.

Fayette N. Talley,
Notary Public of N. J.

Exhibit 85—A. S. Reid & Company.

STATE OF NEW JERSEY

UNION COUNTY, SS.:

I, WILLIAM B. MARTIN, Clerk of the County of Union, aforesaid, and also Clerk of the Circuit Court and Court of Common Pleas, holden therein.

DO HEREBY CERTIFY, That the foregoing is a true and correct copy of a certain Lien Claim, A. S. Reid & Co. *vs.* Capitol Construction Co. Inc. *et als.*, as the same is taken from and compared with the original on file as of Nov. 18, 1927 in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal (Seal) of said Courts and County, at Elizabeth, this 7th day of July 1928.

WM. B. MARTIN Clerk.

ENDORSEMENT.

RECEIVED
UNION COUNTY
CLERKS OFFICE
Nov. 18, 1:32 P. M. 1927
ELIZABETH, N. J.
WM. B. MARTIN, Clerk.
UNION COUNTY NEW JERSEY

Summons signed sealed and issued the 18th day of November 1927 at 1:45 P. M.

WM. B. MARTIN,
County Clerk.

Exhibit 86.

Delivery Ticket, Dated June 9th, 1927.

A. S. Reid & Company

(A Corporation)

Deliver to Capital Cont. Co.—
Location—Riverside Drive & Union St., Cranford

Car 596708—15000 Brick
36774—15000 "

J. Starr.

Received the above in good condition
Date June 9/27
No. 10904 (To be returned to our office)

Exhibit 87.

Order for Bricks, Dated April 26th, 1927.

Order No. 3887
3887A

To A. S. Reid & Company
A Corporation
68-70 Clinton Avenue

Newark, N. J., April 26, 1927

Gentlemen:

Please enter this order as follows, subject to conditions printed on back hereof.

Approx. 15,000 more or less
Factory #53—Tan Brick..@ $38.00 per M.
Approx. 45,000 more or less
Factory 6-B—Full Range
Reds .....@ $36.00 " "

Delivered at Building Site in Cranford.

TERMS: 40% in cash in thirty days; balance two months' note with interest endorsed by the officers of the corporation.

Same as ordered by Riverside Hotel Corporation.

Station—Cranford, N. J.

Railroad—Central Railroad of N. J.

Date to Ship—One car of each at once—balance as advised.

Location of Job—Union & Riverside.

Building—Apartment House.

Architect—N. Welitoff.

Owner—Capitol Construction Co., Inc.

Charge to Account of Capitol Construction Co., Inc.

Address—41 Neptune Avenue, Jersey City, N. J.

by HYMAN SILVERMAN,
Pres.

Approved Credit Dept.
Per E. T. K.

Exhibit 88.

Delivery Ticket, Dated May 11th, 1927.

A. S. REID & COMPANY

(A Corporation)

Deliver to Capitol Const Co.
Location River Side Drive & Union St., Cranford
From 165819—L. Fellows Co.
20,000 Brick

Received the above in good condition
Date May 11/27 By J. STARR

(To be returned to our office)
No. 14873

Exhibit 89.

Delivery Ticket, Dated May 10th, 1927.

A. S. Reid & Company

(A Corporation)

Deliver to Capitol Const Co.
Location River Side Drive & Union St. Cranford
From 18641—L. Fellows Co.
15000 Brick

Received the above in good condition
Date May 10/27 By J Starr

(To be returned to our office)

No. 14869

Exhibit 90.

Delivery Ticket, Dated June 29th, 1927.

A. S. Reid & Company

(A Corporation)

Deliver to Capital Const Co.
Location Cranford, N. J.
From Stock—L. Fellows Co
700—#6

Received the above in good condition
Date June 29/27 By Nat Starr

(To be returned to our office)

No. 10954

Exhibit 91.

Delivery Ticket, Dated July 1st, 1927.

A. S. Reid & Company

(A Corporation)

Deliver to Capital Const Co.
Location Cranford, N. J.
From Stock—L. Fellows Co.
500 Brick #6

Received the above in good condition
Date July 1/27 By Nat Starr

(To be returned to our office)

No. 10962

Exhibit 92.

Delivery Ticket, Dated July 1st, 1927.

A. S. Reid & Company

(A Corporation)

Deliver to Capital Const Co.
Location Cranford, N. J.
From Stock—L. Fellows Co.
1400 Brick

Received the above in good condition
Date July 1/27 By Nat Starr

(To be returned to our office)

No. 10961

Exhibit 93.

Delivery Ticket, Dated July 20th, 1927.

A. S. Reid & Company

(A Corporation)

Deliver to Capital Const Co.
Location River Side Drive & Union St., Cranford
From Stock—L. Fellows Co.
3000 #6

Received the above in good condition
Date July 20/27 By Nat Starr

(To be returned to our office)

No. 10997

Exhibit 94.

Delivery Ticket, Dated July 27th, 1927.

A. S. Reid & Company

(A Corporation)

Deliver to Capitol Const Co.
Location Riverside Drive & Union St—Cranford
From Stock—L. Fellows Co.
3000—#6

Received the above in good condition
Dated June 27/27 By H. Silverman

(To be returned to our office)

No. 10950

MAX PLATT.

Exhibit 95.

Lien Claim, Filed January 3rd, 1928.

IN THE OFFICE OF THE CLERK OF THE COUNTY OF UNION.

MAX PLATT,
Claimant,

vs.

CAPITOL CONSTRUCTION CO. INC., a corporation of the State of New Jersey,—Builder and Owner, ISREAL SHILOWITZ, JACOB TUCKER, LOUIS SCHWARTZ, JUNCTION MILLING CO., a corporation of N. J., THE TRUST COMPANY OF NEW JERSEY, a corporation, EDWARD P. STOUT, Trustee, CARTARET COMPANY, a corp., and WEST BERGEN TRUST CO., a corporation,
Mortgagees.

Lien Claim.

COUNTY OF HUDSON, STATE OF NEW JERSEY, SS.:

BE IT KNOWN, that MAX PLATT of the City of Bayonne, in said County, claims a lien upon the building and lands hereinafter described, pursuant to the provisions of "An Act to secure to mechanics and others, payment for their labor and materials in erecting any building", and the sev-

eral supplements thereto, for a debt contracted and owing to him for labor performed and materials furnished for the erection and construction of said building as hereinafter set forth, to wit:

First.—The said building is a brick structure three (3) stories in height, on a lot of land or curtilage, situated in the Township of Cranford, in the County of Union and State of New Jersey, and more particularly described as follows: Beginning at a point formed by the intersection of the northeasterly side of Riverside Drive with the Southeasterly side of Prospect Avenue; thence North 47 degrees 36 minutes East along said side of Prospect Avenue 358.31 feet to a point; thence South 42 degrees 24 minutes East 200 feet to a point; thence North 47 degrees 36 minutes East 13.76 feet to a point; thence South 42 degrees 24 minutes East 195.98 feet to the Northwesterly side of Union Avenue; thence South 49 degrees 16 minutes West 87.97 feet along said side of Union Avenue to a point; thence still along said side of Union Avenue South 41 degrees 51 minutes West 152.34 feet to the said side of Riverside Drive; thence Northwesterly along said side of Riverside Drive, its various courses 443 feet more or less to the point or place of beginning. According to a survey made by J. L. Bauer, C. E. & Surveyor, Elizabeth, New Jersey, June 11, 1927.

Second:—The name of the Owner of the said land and the estate therein, on which said lien is claimed, is Capitol Construction Co. Inc., a corporation of New Jersey, who has an estate in fee simple therein.

Third:—The name of the person who contracted the said debt, and for whom and at whose request

the said labor was performed, and materials furnished, for which the aforesaid lien is claimed, is the said Capitol Construction Co. Inc., a corporation of New Jersey.

FOURTH:—The following is a bill of particulars of the aforesaid labor performed and materials furnished by the said MAX PLATT, the amount and kind of labor performed, and of materials furnished, and the prices at which and times when the same were performed and furnished, and giving credit for all the payments thereupon, and deductions that ought to be made therefrom, and exhibiting the balance justly due to him from the said Capitol Construction Co. Inc. a corp. of N. J. viz:

From August 15th, 1927, to December 2nd, 1927.

For furnishing labor for the wood lath and plaster boards, and furnishing the labor and materials for the metal lath and metal corners, and supplying the necessary nails etc. complete at the agreed sum of $5500.00		$5500.00
Furnishing labor for lathing work in the clothes closets, which were originally excepted from the agreement, but which work was ordered subsequent to the making of the agreement aforesaid		400.00
		$5900.00
Received on account August 25th, 1927	$1000.00	
Received on account September 29th, 1927	500.00	
Received on account September 9th, 1927	450.00	1950.00
Balance justly due claimant		$3950.00

5. Israel Shilowitz and Jacob Tucker, are made defendants, because they hold a mortgage of record upon said lands, dated the 29th day of July, 1927, and recorded in the Union County Register's Office in Book 878 of Mortgages for said County on page 347, to secure the sum of $20,000.00; which is subject to the plaintiff's lien, and which will be cut off by a sale under the said plaintiff's lien.

6. Louis Schwartz, is made a defendant, because he holds a mortgage of record upon said lands, dated the 22nd day of August, 1927, and recorded in the Union County Register's Office in Book 884 of Mortgages, for said County on page 127, to secure the sum of $5150.00.; which is subject to the plaintiff's lien, and which will be cut off by a sale under the said plaintiff's lien.

7. Junction Milling Co. a corporation, is made a defendant, because it holds a mortgage of record upon said lands, dated the 16th day of September, 1927, and recorded in the Union County Register's Office in Book 886 of Mortgages for said County on Page 390, to secure the sum of $11,619.34; which is subject to the plaintiff's lien, and which will be cut off by a sale under the said plaintiff's lien.

8. Cartaret Company, a corporation, is made a defendant, because it holds a mortgage of record upon said lands, dated 14th day of October, 1927, and recorded in the Union County Register's Office in Book 892 of Mortgages for said County on page 89, to secure the sum of $35,000.00; which is subject to the plaintiff's lien, and which will be cut off by a sale under the said plaintiff's lien.

Exhibit 95—Max Platt.

9. West Bergen Trust Co. a corporation, is made a defendant because it holds a mortgage of record upon said lands, dated the 25th day of October, 1927, and recorded in the Union County Register's Office in Book 895 of Mortgages for said County, on page 38, to secure the sum of $6,000.00; which is subject to the plaintiff's lien, and which will be cut off by a sale under the said plaintiff's lien.

10. The Trust Company of New Jersey, a corporation is made a defendant, because it holds a mortgage of record upon said lands, dated the 28th day of October, 1927, and recorded in the Union County Register's Office of Mortgage #60283, to secure the sum of $16,000.00; which is subject to the plaintiff's lien, and which will be cut off by a sale under the said plaintiff's lien.

11. Edward P. Stout, Trustee, is made a defendant, because he holds a mortgage of record upon said lands, dated the 1st day of November, 1927, and recorded in the Union County Register's Office as Mortgage No. 60515 to secure the sum of $7500.00; which is subject to the plaintiff lien, and which will be cut off by a sale under the said plaintiff's lien.

All the above labor was performed and materials furnished between the 15th day of August 1927, and the 2nd day of December 1927.

MAX PLATT
Claimant

Exhibit 95—Max Platt.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

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

MAX PLATT

Sworn and subscribed before me }
this 30th day of December 1927 }

ANNA RUBENSTEIN
A Notary Public of New Jersey.

Exhibit 95—Max Platt.

STATE OF NEW JERSEY

UNION COUNTY, SS.:

I, WILLIAM B. MARTIN, Clerk of the County of Union, aforesaid, and also Clerk of the Circuit Court and Court of Common Pleas, holden therein,

DO HEREBY CERTIFY, That the foregoing is a true and correct copy of a certain Lien Claim Max Platt *vs.* Capitol Construction Co. Inc. *et als* as the same is taken from and compared with the original on file as of Jan. 3, 1928 in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said (Seal) Courts and County, at Elizabeth this 2nd day of October 1928.

W. B. MARTIN
Clerk.

UNION COUNTY NEW JERSEY

Summons signed sealed and issued the 20th day of Feby 1928, at 12.00 M.

WM. B. MARTIN
County Clerk.

RECEIVED
UNION COUNTY
CLERK'S OFFICE
JAN. 3—10.16 A. M. 1928.
ELIZABETH, N. J.
WM. B. MARTIN, Clerk.

Exhibit 95—Max Platt.

Order Amending Lien Claim.

UNION COUNTY CIRCUIT COURT.

MAX PLATT, Claimant-plaintiff, *vs.* CAPITOL CONSTRUCTION CO., INC., *et als.*, Defendants.	On Mechanic's Lien. Order.

This matter being opened to the Court upon application of Chas. Rubenstein, Attorney for the plaintiff-claimant herein, and it appearing that due notice of this application has been given to the proper parties in interest in accordance with the provisions of an act entitled "An Act to secure to mechanics and others payment for their labor and materials in erecting any building and in making certain improvements to land";

And it appearing that the description of the curtilage and of the lands and premises contained in the lien claim heretofore filed in this matter is erroneous in that it contains or includes more curtilage than was intended to be used and occupied with the building for this cost of which the lien is claimed;

And it is further appearing that the said notice referred to aforesaid provides that application is made to amend or alter the said description heretofore filed so that the same shall read as hereinafter provided;

And it further appearing that final judgment in the above entitled matter has not been entered;

Exhibit 95—Max Platt.

And it further appearing that no one appeared to oppose to this application or to set up any good reason to disallow the within application and sufficient reason appearing;

Therefore, it is on this 7th day of September, 1929, ORDERED that the description contained in the lien claim heretofore filed in the above entitled matter, be and the same is hereby altered and amended or to read as follows:

All that certain lot, tract or parcel of land and premises, situate, lying and being in the Township of Cranford, County of Union and State of New Jersey, and being more particularly described as follows:—BEGINNING at a point on the northerly side of Riverside Drive distant southeasterly along the same 94.90 feet from the corner formed by the intersection of the said northerly side of Riverside Drive and the easterly side of Prospect Avenue; thence running (1) North 47° 36′ east and parallel with Prospect Avenue 371.93 feet to a point; thence running (2) south 42° 24′ east 106 feet to a point; thence running (3) North 47° 36′ east and parallel with Prospect Avenue 13.76 feet to a point; thence running (4) South 42° 24′ east 85.98 feet to a point; thence running (5) South 47° 35′ west and parallel with Prospect Avenue 199.65 feet to a point; thence running (6) South 22° 09′ west 96.57 feet to a point in Riverside Drive which point is 94 feet south 72° 39′ east from the corner formed by the intersection of the said northerly side of Riverside Drive and the northwesterly side of Union Avenue; thence running (7) along the several courses and curves of Riverside Drive to the point or place of beginning.

CLARENCE A. CASE,
Justice, Supreme Court.

IRA R. CROUSE.

Exhibit 96.

Lien Claim, Filed January 12th, 1928.

FIRST: The name of the owner of the said land and estate therein on which said lien is claimed is the CAPITOL CONSTRUCTION CO. INC., a corporation of New Jersey.

SECOND: The name of the person who contracted the said debt, and for whom and at whose request the said labor was performed and materials furnished, for which the aforesaid lien is claimed, is the said CAPITOL CONSTRUCTION CO., INC.

IRA R. CROUSE and BENJAMIN HEYMAN, are mentioned in this lien claim as Receivers for Capitol Construction Co., Inc., a corp. of New Jersey, Builder and owner.

RIVERSIDE APARTMENT CORPORATION, a corp, of New Jersey, ISRAEL SHILOWITZ, JACOB TUCKER, LOUIS SCHWARTZ, JUNCTION MILLING CO., a corp. of New Jersey, CARTERET COMPANY, a corp. of New Jersey, WEST BERGEN TRUST COMPANY, a corporation of New Jersey, THE TRUST COMPANY OF NEW JERSEY, a corp. of New Jersey and EDWARD P. STOUT, Trustee, are mentioned in this lien claim as Mortgagees.

THIRD: The said building is a three story apartment house on a lot of land or curtilage, situated in the Township of Cranford, County of Union and State of New Jersey, and more particularly described as follows:

BEGINNING at a point formed by the intersection of the northeasterly side of Riverside Drive,

Exhibit 96—Ira R. Crouse.

with the southeasterly side of Prospect Avenue; thence north forty seven (47) degrees thirty six (36) minutes east along said side of Prospect Avenue three hundred fifty eight feet and thirty one hundredths of a foot (358.31′) to a point; thence south forty two (42) degrees, twenty four (24) minutes east two hundred (200) feet to a point; thence north forty-seven (47) degrees thirty-six (36) feet east 13.76 feet (thirteen feet and seventy six hundredths of a foot) to a point; thence south forty two (42) degrees twenty four (24) minutes east one hundred ninety five feet and ninety eight hundredths of a foot (195.98′) to the northwesterly side of Union Avenue; thence south forty-nine (49) degrees sixteen (16) minutes west eighty-seven feet and ninety seven hundredths of a foot (87.97′) along said side of Union Avenue to a point; thence still along said side of Union Avenue south forty one (41) degrees fifty one (51) minutes west one hundred fifty two feet and thirty four hundredths of a foot (152.34′) to the said side of Riverside Drive; thence northwesterly along said side of Riverside Drive, its various courses four hundred forty three feet (443′) more or less to the point or place of BEGINNING. According to survey made by J. L. Bauer, Civil Engineer & Surveyor, Elizabeth, N. J., June, 1911.

Being the same premises conveyed to the Capitol Construction Co., Inc., a corporation of New Jersey, by deed of Jacob Starr, *et ux.* and Hyman Silverman, *et ux.* bearing date May 25th, 1927, and recorded in Book 1121 on page 328 in the Register's office of Union County.

The amount claimed as justly due and owing is $19,383.79.

The claimant's name is IRA R. CROUSE.

Rec'd January 12, 1928.

Exhibit 96—Ira R. Crouse.

STATE OF NEW JERSEY

UNION COUNTY, SS:

I, WILLIAM B. MARTIN, Clerk of the County of Union, aforesaid, and also Clerk of the Circuit Court of Common Pleas, holden therein,

DO HEREBY CERTIFY, That the foregoing is a true and correct copy of a certain Mechanic's Lien, Ira R. Crouse *vs.* Ira R. Crouse & Benjamin Heyman Receivers for Capitol Const. Co. Inc. Builders and Owners, *et als.* as the same is taken from and compared with the original on file in Mechanic's Lien Book on page 399 in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Courts and County, at Elizabeth, this 28th day of May 1929.

(Seal)

WM. B. MARTIN
Clerk.

LOUIS MOORE.

Exhibit 97.

Lien Claim, Filed January 12th, 1928.

FIRST: The name of the owner of the said land and estate therein on which said lien is claimed, is the CAPITOL CONSTRUCTION CO., INC., a corporation of New Jersey.

SECOND: The name of the person who contracted the said debt, and for whom and at whose request the said labor was performed and materials furnished, for which the aforesaid lien is claimed is the said CAPTIOL CONSTRUCTION CO., INC.

IRA R. CROUSE and BENJAMIN HEYMAN, are mentioned in this lien claim as Receivers for the Capitol Construction Co., Inc., a corp. of New Jersey, Builder and Owner.

RIVERSIDE APARTMENT CORPORATION, a corp. of New Jersey, ISRAEL SHILOWITZ, JACOB TUCKER, LOUIS SCHWARTZ, JUNCTION MILLING CO., a corp. of New Jersey, CARTERET COMPANY, a corp. of New Jersey, WEST BERGEN TRUST COMPANY, a corp. of New Jersey, THE TRUST COMPANY OF NEW JERSEY, a corp. of New Jersey, and EDWARD P. STOUT, Trustee, are mentioned in this lien claim as Mortgagees.

THIRD: The said building is a three story apartment house on a lot of land or curtilage, situated in the Township of Cranford, County of Union and State of New Jersey, and more particularly described as follows:

BEGINNING at a point formed by the intersection of the northeasterly side of Riverside Drive, with the southeasterly side of Prospect Avenue;

thence north forty-seven (47) degrees, thirty-six (36) minutes east along said side of Prospect Avenue three hundred fifty-eight feet and thirty one hundredths of a foot (358.31′) to a point; thence south forty two (42) degrees twenty four (24) minutes east two hundred (200) feet to a point; thence north forty-seven (47) degrees thirty-six (36) feet east 13.76 feet (thirteen feet and seventy-six hundredths of a foot) to a point; thence south forty-two (42) degrees twenty four (24) minutes east one hundred ninety-five feet and ninety eight hundredths of a foot (195.98′) to the northwesterly side of Union Avenue; thence south forty-nine (49) degrees sixteen (16) minutes west eighty seven feet and ninety-seven hundredths of a foot (87.97′) along said side of Union Avenue to a point; thence still along said side of Union Avenue south forty one (41) degrees fifty-one (51) minutes west one hundred fifty two feet and thirty four hundredths of a foot (152.34′) to the said side of Riverside Drive; thence northwesterly along said side of Riverside Drive, its various courses four hundred forty three feet (443′) more or less to the point or place of BEGINNING. According to survey made by J. L. Bauer, Civil Engineer & Surveyor, Elizabeth, N. J., June 1911.

Being the same premises conveyed to the Capitol Construction Co., Inc., a corporation of New Jersey, by deed of Jacob Starr, *et ux* and Hyman Silverman, *et ux* bearing date May 25th, 1927, and recorded in Book 1121 on page 328 in the Register's office of Union County.

The amount claimed as justly due and owing is $10,500.00

The claimant's name is LOUIS MOORE.

Rec'd January 12, 1928.

STATE OF NEW JERSEY

UNION COUNTY, SS:

I, WILLIAM B. MARTIN, Clerk of the County of Union, aforesaid, and also Clerk of the Circuit Court of Common Pleas, holden therein,

DO HEREBY CERTIFY, That the foregoing is a true and correct copy of a certain Mechanic's Lien, Louis Moore, *vs.* Ira R. Crouse *et als.* etc., as the same is taken from and compared with the original on file in Mechanic's Lien Book on page 397 in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Courts and County, at Elizabeth, this 28th day of May 1929.

(Seal)

WM. B. MARTIN
Clerk.

Exhibit 98.

Acknowledgment of Indebtedness.

We, The Capitol Construction Company agree that the amount due Louis Moore, after going over his statement of accounts, is the sum of Ten Thousand Five Hundred Dollars ($10,500.00) for plumbing work done in the construction of the three story apartment house situated in Cranford, New Jersey.

Dated: January 4th, 1928.

CAPITOL CONSTRUCTION COMPANY

By HYMAN SILVERMAN
President

Attest:

JACOB STARR
Secretary.

JULIUS STENKAUSKAS.

Exhibit 99.

(Note offered in evidence on behalf of Julius Stenkauskas. Note cannot be located.)

JOSEPH MACHETTO.

Exhibit 100.

Lien Claim, Filed January 3rd, 1928.

UNION COUNTY CLERK'S OFFICE

JOSEPH MACHETTO,
Builder,

vs.

CAPITOL CONSTRUCTION CO., INC.,
a corporation of New Jersey,
Owner.

Lien Claim.

Be it known, that Joseph Machetto, of North Bergen, Hudson County, New Jersey, claims a lien upon the building and lands hereinafter described, pursuant to the statute in such case made and provided, for a debt contracted and owing to him for labor performed and materials furnished for the erection and construction of said building; and, therefore, shows:

Exhibit 100—Joseph Machetto.

First: The said building is a 3-story apartment house, brick building on a lot or curtilage upon which this lien is claimed, and which is situated in Cranford, Union County, New Jersey, and is more particularly described as follows, viz.:

BEGINNING at a point formed by the intersection of the northeasterly side of Riverside Drive with the southeasterly side of Prospect Avenue; thence north 47 degrees 36 minutes east along said side of Prospect Avenue 358.31 feet to a point; thence south 42 degrees 24 minutes east 200 feet to a point; thence north 47 degrees 36 miutes east 13.76 feet to a point; thence south 42 degrees 24 minutes east 195.98 feet to the northwesterly side of Union Avenue; thence south 49 degrees 16 minutes west 87.97 feet along said side of Union Avenue to a point; thence still along said side of Union Avenue south 41 degrees 51 minutes west 152.34 feet to the said side of Riverside Drive; thence northwesterly along said side of Riverside Drive, its various courses 443 feet more or less to the point or place of BEGINNING. According to a survey made by J. L. Bauer, C. E. & Surveyor, Elizabeth, New Jersey June 11th 1927.

Second: The name of the owner of the land and of the estate therein on which the lien is claimed is the Capitol Construction Co. Inc., a corporation of New Jersey.

Third: The name of the person who contracted the debt and for whom and at whose request the labor was performed and the materials furnished, for which such lien is claimed, is said Capitol Construction Co. Inc.

Fourth: The following is a bill of particulars, exhibiting the amount and kind of labor per-

formed and of materials furnished, and the price at which, and times when, the same was performed and furnished, and giving credit for all the payments made thereupon and deductions that ought to be made therefrom and exhibiting the balance just due to said Joseph Machetto, claimant, from said Capitol Construction Co. Inc,. viz.:

CAPITOL CONSTRUCTION CO. INC. to JOSEPH MACHETTO,

Dr.

To furnishing, from the 24th day of May 1927, to the 16th day of December 1927, all the labor and materials necessary to sufficiently erect and finish the brick-work, and setting of the limestone in front and for stucco panel in the rear, of said 3-story apartment house brick building at Cranford, N. J., above-mentioned, pursuant to contracts, at the agreed price of $19,500.00

Cr.

June	4th	1927, By cash on account	$1,600.00	
	11th	" " " "	1,500.00	
	18th	" " " "	1,500.00	
	25th	" " " "	1,600.00	
July	2nd	" " " "	1,300.00	
	8th	" " " "	1,100.00	
	16th	" " " "	1,500.00	
	23rd	" " " "	900.00	
Aug.	2nd	" " " "	500.00	
			$11,500.00	11,500.00
Balance justly due claimant				$8,000.00

Eight thousand dollars, as per contracts.

All of the above labor was performed and materials furnished between the 24th day of May 1927, and the 16th day of December 1927, which said last mentioned date is the date of the last work done and materials furnished for which such debt is due.

JOSEPH MACHETTO,
Claimant.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } SS.:

JOSEPH MACHETTO, of full age, being duly sworn on his oath, says that he is the claimant named in the foregoing claim; that the bill of particulars and statements therein set forth, shown in said claim, are true; that the same is for labor done and materials furnished in the erection and finishing of the brick-work, setting of the limestone in front and for stucco panel in the rear, of the building in such claim described, at the times therein specified; and that the amount as claimed therein is justly due and owing from said Capitol Construction Co. Inc. to said claimant.

JOSEPH MACHETTO.

Subscribed and sworn to before me, at Jersey City, N. J., this 31st day of December, 1927.

HELEN E. RECTOR,
Notary Public of New Jersey.

Exhibit 101.

Contract.

THIS AGREEMENT made the second day of May One Thousand Nine Hundred and twenty-seven between the Capitol Construction Company, a corporation of the State of New Jersey, party of the first part; Joseph Machetto of the town of North Bergen in the County of Hudson and State of New Jersey, party of the second part:

WITNESSETH, FIRST, The said party of the second part does hereby for himself, his heirs, execu-

tors and administrators, covenant, promise and agree to and with the said party of the first part, its successors or assigns, that he, the said party of the second part, his executors or administrators shall and will, for the consideration hereinafter mentioned, on or before December 1, 1927 well and sufficiently erect and finish the brickwork in the new building to be erected at Riverside Avenue, Cranford, New Jersey, which premises are represented to be the property of the party of the first part and on which it has full authority to build agreeably to the Drawings made by Nathan Welitoff, Architect, and signed by the said parties within the time aforesaid, in a good workmanlike and substantial manner, under the direction of the said architect to be testified by a writing, or certificate, under the hand of the said architect this agreement being for the furnishing of labor only, all material to be furnished by the party of the first part for the sum of seventeen thousand ($17,000.) Dollars,

And the said party of the first part, does hereby, for itself, its successors and assigns, covenant, promise and agree, to and with the said party of the second part, his executors and administrators, that it, the said party of the first part, its successors and assigns, shall and will, in consideration of the covenants and agreements being strictly performed and kept by the said party of the second part as specified, well and truly pay, or cause to be paid unto the said party of the second part, his executors, administrators or assigns, the sum of seventeen thousand ($17,000.) Dollars, lawful money of the United States of America, in manner following: Seventy-five percent. (75%) during the progress of the work, the balance of twenty-five percent. (25%) to be paid when the party of

the first part obtains a new mortgage loan on the premises, but not later than six (6) months after the completion of the work. The party of the first part agrees to furnish the necessary materials which are to be incorporated into the building, these materials to be furnished so that the party of the second part shall suffer no loss by reason of the lack of material with which to perform his part of the contract. For failure to furnish the necessary material the party of the first part is to be liable to the party of the second part for any loss suffered by him.

PROVIDED, That in each of the said cases a certificate shall be produced, signed by the said architect to the effect that the work is done in accordance with said Drawings, said certificate, however, in no way lessening the total and final responsibility of the Contractor; neither shall it exempt the Contractor from liability to replace work if it be afterwards discovered to have been done ill or not according to the Drawings either in execution or materials.

And it is hereby further agreed by and between the said parties:

FIRST:—The Architect shall furnish to the Contractor all drawings or explanations of drawings as may be necessary to illustrate the work to be done, and the Contractor shall conform to the same as part of this contract, so far as they may be consistent with the original Drawings, and all plans must be furnished to the Contractor at the time of signing contract.

SECOND:—The Contractor, at his own proper costs and charges, to provide all manner of labor, of every description, for the due performance of the work.

Exhibit 101—Joseph Machetto.

THIRD:—Should the Owner at any time during the progress of the said BUILDING request any alterations, deviations, additions or omissions from the said contract, it shall be at liberty to do so, and the same shall in no way affect or make void the contract, but will be added to or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation.

FOURTH:—Should the Contractor, at any time during the progress of said work, refuse or neglect to supply a sufficiency of workmen, the Owner shall have power to provide workmen, after three days' notice in writing being given, to finish the said works, and the expense shall be deducted from the amount of the contract.

FIFTH:—Should any dispute arise respecting the true construction or meaning of the Drawings, the same shall be decided by the architect and his decision shall be final and conclusive; but should any dispute arise respecting the true value of the extra work, or of the work omitted, the same shall be valued by two competent persons—one employed by the Owner, and the other by the Contractor, and those two shall have power to name an umpire, whose decision shall be binding on all parties.

SIXTH:—The Owner shall be answerable or accountable for any loss or damage that shall or may happen to the said work, or any part or parts thereof respectively, or for any of the materials or other things used and employed in finishing and completing the same, only if the loss or damage is caused by the act or negligence of the Owner or his agent.

SEVENTH:—No alterations or extra work shall be done without a written order from the Owner

approved by the architect and an express agreement in writing as to the cost.

EIGHTH:—The Owner will insure the building in the joint names and interest of itself and the Contractor against loss or damage by fire, in such sums as may from time to time be agreed upon with the Contractor to cover work and materials used in the building and around the premises, and the policies to be made payable to Owner and Contractor, as their interests may appear. The Contractor shall see to it that this insurance is satisfactorily effected.

NINTH:—All work and materials delivered on the premises to form part of the work, whether actually incorporated therein or not, are to be considered the property of the Contractor until the same shall have been paid for, in accordance with the terms hereof; unless said Contractor shall, after receiving a payment thereon, have refused to proceed with the work in accordance with the terms of this contract. And the Contractor shall have free access at all reasonable times to the said material and to the said work until the same shall have been fully paid for as provided for by this contract. The Contractor shall remove all surplus material after the completion of the work.

TENTH:—Neither the Contractor nor the architect shall, without the written consent of the Owner, have authority to vary, alter, amend or change this contract, or any of the Plans herein referred to.

ELEVENTH:—Whenever building permits shall be required by any municipality, or be necessary under any law, ordinance or other regulation, to

the erection, alteration or repair of any building, the same shall be procured by the owner.

TWELFTH:—That the said Contractor shall produce and deliver to the Owner the release of all persons who may then have done work on said building, who may have a lien on such building and the land whereon the same is erected, releasing their lien on said building and the land whereon the same is erected, with an affidavit by said Contractor thereto annexed, that no person or persons other than those named in said release have any lien upon such building or land for work done for the erection thereof according to the statute in such case made and provided.

In witness whereof the party of the first part has caused these presents to be signed by its president and its corporate seal to be hereto affixed and attested by its secretary.

CAPITOL CONSTRUCTION COMPANY

Seal:

HYMAN SILVERMAN
President.

JOSEPH MACHETTO.

Attest:
JACOB STARR
Secretary.

And in witness whereof the party of the second part has caused his hand and seal to be set hereto.

Exhibit 102.

Contract for Additional Work.

Jersey City, N. J., May 9, 1927.

In consideration of Twenty-Five Hundred ($2500.) Dollars, which the Capital Construction Company, Inc. a Corporation of New Jersey agrees to pay to Joseph Machetto, Joseph Machetto agrees to furnish only the necessary labor to erect and finish all the brick walls (which were originally to be made of concrete) in the basement of the new building to be erected at Riverside Avenue, Cranford, New Jersey, upon the property of the Capital Construction Company and to furnish the labor for setting the limestone and the labor for erecting the stucco panel in the rear of the building. This contract is for additional work, not agreed upon in the original contract between these same parties dated May 2nd, 1927, which was a contract for the furnishing of other labor in the same building. Payments on this contract are to be made not later than six months after the completion of the work.

CAPITAL CONSTRUCTION COMPANY, INC.,

HYMAN SILVERMAN

Pres.

Attest:

JACOB STARR

Secty.

JOSEPH MACHETTO

VENANGO STONE COMPANY.

Exhibit 103.

Contract.

This Agreement made and entered into this day of April 19th 1927, by and between Capital Construction Co Inc, a corporation of the State of New Jersey, parties of the first, and Ralph Cianfrone and Ciro Castellano, partners, trading as the Venango Stone Co of the City of Jersey City, County of Hudson and State of New Jersey, party of the second part, for the consideration hereinafter mentioned hereby agrees to the following.

The said Venango Stone Co, agrees to furnish and deliver all Blue and Lime stone as per following, such as all blue stone sill for the common brick walls 3x7″., all main entrances, as marked Lime stone, all ashlar both plain and rockfaced, all sills and sill course to front less gabled bays, all quoins, main cornice as shown, roof coping 4x10″ horizontal pieces only, and ornaments as shown on plans, for the three story Apt. building to be erected at Cranford New Jersey. Nathan Welitoff Archt. of Jersey City N. J. and as hereinafter more specifically set forth for the sum of $4700.00, omitting all Blue Stone steps., to be paid as hereinafter described.

2. The said party of the first part agrees to pay to the party of the second part in consideration of the said materials to be furnished as herein mentioned, the sum of $4700.00 and to make payments on account thereof as follows:

1st payment—when 2nd tier of beams is set....	$2000.00
2nd payment—when 3rd tier of beams is set....	$1000.00
3rd payment—when roof is covered.....	$1000.00
final payment 60 days after completion of cut stone work.....	$700.00

In witness whereof the parties hereto have hereunto set their hands and seal the day and year first above written.

CAPITAL CONSTRUCTION CO INC,
HYMAN SILVERMAN Pres.
JACOB STARR
HARRY STARR Trs.

Signed in the presence of

ARTHUR CASTELLANO
Witness.

Exhibit 104.

Lien Claim, Filed April 5th, 1928.

UNION COUNTY CLERK'S OFFICE.

RALPH CIANFRONE and CIRO CASTELLANO, partners trading as VENANGO STONE COMPANY,
Claimant,
vs,.
CAPITAL CONSTRUCTION COMPANY, INC. and IRA R. CROUSE and BENJAMIN HEYMAN, Receivers of CAPITAL CONSTRUCTION COMPANY, INC.,
Builders and Owners.
} Lien Claim.

BE IT KNOWN, that Ralph Cianfrone and Ciro Castellano, partners trading as Venango Stone

Exhibit 104—Venango Stone Company.

Company of the City of Jersey City in the county of Hudson and State of New Jersey files this claim for lien upon the building and lands hereinafter described, under the provisions of "An Act to secure to Mechanics and others payment for their labor and materials in erecting any building." (Revision of 1898), and the supplements thereto and amendments thereof, for a debt contracted and owing to for labor performed and materials furnished for the erection and construction of said building of which claim the following are the details.

I. The Description of the Building and of the lot or curtilage upon which the lien is claimed, is as follows:

The said building is a three story brick building and the same is erected upon that lot of land or curtilage, situated in the Township of Cranford in the County of Union and State of New Jersey, described as follows:

"Beginning at a point formed by the intersection of the northeasterly side of Riverside Drive and the southeasterly side of Prospect Avenue; thence north 47° 36′ east along the said side of Prospect Avenue; 358.31 feet to a point; thence 42° 24′ east 200 feet to a point; thence north 47° 36′ east 13.76 feet to a point; thence south 42° 24′ east 195.98 feet to the northwesterly side of Union Avenue; thence south 49° 16′ west 87.97 feet along said side of Union Avenue to a point; thence still along said side of Union Avenue, south 41° 51′ west 152.34 feet to the said side of Riverside Drive; thence northwesterly along said side of Riverside Drive, its various courses, 443 feet more or less to the point or place of beginning.

Exhibit 104—Venango Stone Company.

ACCORDING to survey made by J. L. Bauer, C. E. and Surveyor, Elizabeth, N. J. June 1911."

II. THE NAME OF THE OWNER of the land and of the estate therein on which the lien is claimed, as follows: CAPITAL CONSTRUCTION COMPANY, INC. and IRA R. CROUSE, and BENJAMIN HEYMAN, Receivers of CAPITAL CONSTRUCTION COMPANY, INC.

III. THE NAME OF THE PERSONS WHO CONTRACTED THE DEBT, and for whom, and at whose request the labor was performed and the materials furnished for which such lien is claimed, who deemed the BUILDER, is as follows: CAPITAL CONSTRUCTION COMPANY, INC.

IV. THE FOLLOWING IS A BILL OF PARTICULARS, exhibiting the amount and kind of labor performed and of materials furnished, and the prices at which and times when the same were performed and furnished, and giving credit for all the payments made thereupon and deductions that ought to be made therefrom, and exhibiting the balance justly due to such claimant, is as follows: the claimants herein peformed a contract, the particulars of which are hereto annexed made part hereof and marked "Schedule "A". The work aforesaid consisted of furnishing materials etc. for the building aforesaid. The contract price for the said work was $4700.00. Extra work done consisted of furnishing materials and supplies, $436.10.

The following are the credits:

Received by check	$1000.00
Received by check	$ 500.00
Received by check	$ 800.00
	$2300.00

Exhibit 104—Venango Stone Company.

Extra labor	$436.10
Amount owed	5136.10
Deduct amount paid	2300.00
Total amount of balance	$2836.10

All the above labor was performed and materials furnished between the 19th day of April 1927, and the 15th day of December 1927 which said last mentioned date is the date of the last work done and materials furnished for which said debt is due.

VENANGO STONE COMPANY

By.....

STATE OF NEW JERSEY, }
COUNTY OF HUDSON } ss.:

of full age, being duly sworn on his oath says that he is a partner of the Venango Stone Company the claimant mentioned in the foregoing claim; that the bill of particulars and statements therein set forth shown in said claim are true; that the same is for labor performed and materials furnished in the ERECTION of the building in such claim described, at the times herein specified; and that the sum of Two thousand eight hundred thirty-six dollars and ten cents ($2836.10), being the amount as therein claimed, is justly due and owing to said claimants from the said Capital Construction Company, Inc., and Ira R. Crouse and Benjamin Heyman, Receivers of Capital Construction Company, Inc.

.....

Subscribed and sworn to before me this day of February A. D. 1928 at Jersey City, N. J.

McCABE BROS. CO.

Exhibit 105.

Lien Claim, Filed January 3rd, 1928.

IN THE OFFICE OF THE CLERK OF THE COUNTY OF UNION

McCable Bros. Co., a corporation of the State of New Jersey
Claimant

vs.

Capitol Construction Co., Inc., a corporation of the State of New Jersey, Builder and Owner, Israel Shilowitz, Jacob Tucker, Louis Schwartz, Junction Milling Co., a corporation, The Trust Company of New Jersey, a corporation, Edward P. Stout, Trustee, Carteret Company, a corporation, and West Bergen Trust Co., a corporation
Mortgagees.

Lien Claim.

County of Hudson: ss:

Be it known, that McCabe Bros. Co., a corporation of the State of New Jersey, of the City of Bayonne, in said County, claims a lien upon the building and lands hereinafter described, pursuant to the provisions of "An Act to secure to mechanics and others, payment for their labor and materials in erecting any building," and the sev-

eral supplements thereto, for a debt contracted and owing to it for labor performed and materials furnished for the erection and construction of said building as hereinafter set forth, to wit:

First: The said building is a brick structure three (3) stories in height, on a lot of land or curtilage, situated in the Township of Cranford, in the County of Union and State of New Jersey, and more particularly described as follows: Beginning at a point formed by the intersection of the northeasterly side of Riverside Drive with the southeasterly side of Prospect Avenue; thence north 47 degrees 36 minutes east along said side of Prospect Avenue 358.31 feet to a point; thence south 42 degrees 24 minutes east 200 feet to a point; thence north 47 degrees 36 minutes east 13.76 feet to a point; thence south 42 degrees 24 minutes east 195.98 feet to the northwesterly side of Union Avenue; thence south 49 degrees 16 minutes west 87.97 feet along said side of Union Avenue to a point; thence still along said side of Union Avenue south 41 degrees 51 minutes west 152.34 feet to the said side of Riverside Drive; thence northwesterly along said side of Riverside Drive, its various courses 443 feet more or less to the point or place of beginning. According to a survey made by J. L. Bauer, C. E. & Surveyor, Elizabeth, New Jersey, June 11, 1927.

Second: The name of the owner of the said land and the estate therein, on which said lien is claimed is Capitol Construction Co., Inc., a corporation of New Jersey, who has an estate in fee simple therein.

Third: The name of the person who contracted the said debt, and for whom and at whose request the said labor was performed, and materials fur-

nished, for which the aforesaid lien is claimed, is the said Capitol Construction Co. Inc., a corporation of New Jersey.

FOURTH: The following is a bill of particulars of the aforesaid labor performed and materials furnished by the said McCabe Bros. Co. a corporation of New Jersey, the amount and kind of labor performed, and of materials furnished, and the prices at which and times when the same are performed and furnished, and giving credit for all the payments thereupon, and deductions that ought to be made therefrom, and exhibiting the balance justly due to him from the said Capitol Construction Co. Inc. a corp. of N. J. viz:

For labor performed and materials furnished in the performance of the excavation of the cellar for the building erected upon the premises described herein, and for the grading of the premises, and for the back filling of the walls, which work was started on April 11th, 1927, and completed October 28th, 1927, at the agreed price of $1950.00, no part of which was paid	$1950.00

5. Israel Shilowitz and Jacob Tucker, are made defendants, because they hold a mortgage of record upon said lands, dated the 29th day of July, 1927, and recorded in the Union County Register's office in Book 878 of Mortgages for said County on page 347, to secure the sum of $20,000.00; which is subject to the plaintiff's lien, and which will be cut off by a sale under the said plaintiff's lien.

6. Louis Schwartz, is made a defendant, because he holds a mortgage of record upon said

lands, dated the 22nd day of August, 1927, and recorded in the Union County Register's office in Book 884 of Mortgages, for said County on page 127, to secure the sum of $5150.00; which is subject to the plaintiff's lien, and which will be cut off by a sale under the said plaintiff's lien.

7. Junction Milling Co., a corporation, is made a defendant, because it holds a mortgage of record upon said lands, dated the 16th day of September, 1927, and recorded in the Union County Register's office in Book 886 of Mortgages for said County on page 390, to secure the sum of $11,619.34; which is subject to the plaintiff's lien, and which will be cut off by a sale under the said plaintiff's lien.

8. Carteret Company, a corporation, is made a defendant, because it holds a mortgage of record upon said lands, dated the 14th day of October, 1927, and recorded in the Union County Register's office in Book 892 of Mortgages for said County on page 89, to secure the sum of $35,000.00; which is subject to the plaintiff's lien, and which will be cut off by a sale under the said plaintiff's lien.

9. West Bergen Trust Co. a corporation, is made a defendant, because it holds a mortgage of record upon said lands, dated the 25th day of October, 1927, and recorded in the Union County Register's office in Book 895 of Mortgages for said County, on page 38, to secure the sum of $6,000.00; which is subject to the plaintiff's lien, and which will be cut off by a sale under the said plaintiff's lien.

10. The Trust Company of New Jersey, a corporation is made a defendant, because it holds a mortgage of record upon said lands, dated the

28th of October, 1927, and recorded in the Union County Register's office of Mortgage #60283, to secure the sum of $16,000.00; which is subject to the plaintiff's lien, and which will be cut off by a sale under the said plaintiff's lien.

11. Edward P. Stout, Trustee, is made a defendant, because he holds a mortgage of record upon said lands, dated the 1st day of November, 1927, and recorded in the Union County Register's office as Mortgage No. 60515 to secure the sum of $7500.00; which is subject to the plaintiff's lien, and which will be cut off by a sale under the said plaintiff's lien.

All the above labor was performed and materials furnished between the 11th day of April, 1927 and the 28th day of October, 1927.

McCabe Bros. Co.

By James McCabe, Pres.
Claimant.

State of New Jersey }
County of Hudson } ss.

James McCabe of full age being duly sworn, on his oath, saith, that he is the President of the McCabe Bros. Co. a corporation of New Jersey, claimant named in the foregoing claim; that the within bill of particulars and statements therein set forth are true; that the same is for labor performed and materials furnished by the claimant in the erection of the building in the said claim described, at the times therein specified, and that the amount, as claimed therein, is justly due and owing from the said Capitol Construction Co. Inc. a corp. of N. J. to the claimant.

James McCabe

Sworn and subscribed before me, this }
30th day of December, 1927. }

Anna Rubenstein
A Notary Public of New Jersey.

Exhibit 105—McCabe Bros. Co.

STATE OF NEW JERSEY

UNION COUNTY, SS.:

I, WILLIAM B. MARTIN, Clerk of the County of Union, aforesaid, and also Clerk of the Circuit Court and Court of Common Pleas, holden therein,

DO HEREBY CERTIFY, That the foregoing is a true and correct copy of a certain Lien Claim, McCable Bros. Co. *vs.* Capitol Construction Co. Inc. *et als* as the same is taken from and compared with the original on file as of Jan. 3, 1928 in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Courts and County, at Elizabeth, this 2nd day of October 1928.

(Seal)

W. B. MARTIN Clerk.

ENDORSEMENT

RECEIVED
UNION COUNTY
CLERK'S OFFICE
Jan 3, -10-16 A. M. 1928
ELIZABETH, N. J.

WILLIAM B. MARTIN, Clerk.

UNION COUNTY, NEW JERSEY

Summons signed sealed and issued the 20th day of Feby. 1928, at 12:00 M.

WM. B. MARTIN,
County Clerk.

Exhibit 106.

(No exhibit marked 106 in testimony.)

JUNCTION MILLING COMPANY.

Exhibit 107.

Mortgage of Capitol Construction Co., Inc., to Junction Milling Co., Dated September 16th, 1927—Recorded October 6th, 1927.

THIS INDENTURE, Made the 16th day of September in the year of our Lord One Thousand Nine Hundred and Twenty-seven,

BETWEEN Capitol Construction Co., Inc., a corporation of the State of New Jersey party of the first part;

AND Junction Milling Co., a corporation of the State of New Jersey, party of the second part;

WHEREAS, the said Capitol Construction Co., Inc. is justly indebted to the said party of the second part, in the sum of Eleven thousand six hundred nineteen dollars and thirty-four cents ($11,619.34) lawful money of the United States of America, secured to be paid by its certain bond or obligation, bearing even date with these presents, in the penal sum of Twenty-three thousand two hundred thirty-eight dollars and sixty-eight cents ($23,238.68) lawful money as aforesaid conditioned for the payment of the said first mentioned sum of Eleven thousand six hundred nineteen dollars and thirty-four cents ($11,619.34) lawful money as aforesaid, to the said party of the second part, its successors or assigns on the 16th day of March which will be in the year One Thousand Nine Hundred and twenty-eight and interest thereon, to be computed from January 16th 1928 at and after the rate of six per cent. per annum and to be paid at maturity. Payments of

principal shall be made as follows: The sum of $2,000 in one month from the date hereof; the sum of $1,000 in two months from the date hereof; and the sum of $1,000 in four months from the date hereof.

The mortgagor shall have the privilege of repaying the principal of this mortgage at any time before maturity.

AND IT IS THEREBY EXPRESSLY AGREED that should any default be made in the payment of the said interest or installment or of any part thereof, on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage, and become due and payable, and should the said interest or installment or any part thereof remain unpaid and in arrear for the space of thirty days, or said tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien, or any or either of them remain unpaid and in arrear for the space of ninety days, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods as the case may be, the aforesaid principal sum of Eleven thousand six hundred nineteen dollars and thirty-four cents ($11,619.34) with all arrearage of interest thereon, shall, at the option of the said party of the second part, its successors or assigns, become and be due and payable immediately thereafter although the period above limited for the payment thereof may not then have expired, anything therein before contained to the contrary thereof in anywise notwithstanding: and the said Mortgagee may at its option, pay such

tax, assessment or water rent in arrear, and the amount so paid shall be added to and become part of the principal sum secured by the said bond and this mortgage, and shall be payable on demand with interest at six per centum per annum, as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear.

NOW THIS INDENTURE WITNESSETH, that the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar, to it in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged has granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents does grant, bargain, sell, alien, release, convey and confirm unto the said party of the second part, and to its successors and assigns forever,

ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Cranford in the County of Union and State of New Jersey,

FIRST TRACT:—BEGINNING at a point formed by the intersection of the Northeast side of Riverside Drive with the Southeast side of Prospect Avenue; thence running (1) North 47 degrees 36 minutes East, Three hundred fifty-eight and thirty hundredths (358.30) feet to a point; thence (2) South 42 degrees 24 minutes East, Ninety-four (94) feet to a point; thence (3) South 47 degrees

36 minutes West, Three hundred seventy-one and ninety-three hundredths (371.93) feet to a point in the Northeasterly side of Riverside Drive; and thence (4) North 34 degrees 9 minutes West, One hundred one and four hundredths (101.04) feet to the point or place of beginning.

SECOND TRACT:—BEGINNING at the corner formed by the intersection of the Northeasterly side of Riverside Drive and the Northwesterly side of Union Avenue; thence running (1) along the said side of Union Avenue, 41 degrees 51 minutes East, One hundred fifty-two and thirty-four hundredths (152.34) feet to an angle; thence (2) North 49 degress 16 minutes East, Eighty-seven and ninety-seven hundredths (87.97) feet to a point; thence (3) North 42 degrees 24 minutes West, One hundred ninety-five and ninety-eight hundredths (195.98) feet to a point; thence (4) South 47 degrees 36 minutes West, One hundred ninety-nine and sixty-five hundredths (199.65) feet to an angle; thence (5) South 22 degrees 9 minutes West, Ninety-six and fifty-seven hundredths (96.57) feet to a point in the Northeasterly side of Riverside Drive; thence (6) South 72 degrees 39 minutes East, Ninety-four (94) feet to the point or place of beginning.

This mortgage shall be subject and subordinate to a first mortgage of $27,000 at all times and the holder of this mortgage agrees that upon a proper subordination agreement being submitted to it, or them, it or they will execute such agreement for the purpose of enabling the owner of the premises to replace such mortgage of $27,000.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the re-

version and reversions, and remainder and remainders, rents, issues and profits thereof. AND ALSO, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances: TO HAVE AND TO HOLD the above granted and described premises, with the appurtenances, unto the said party of the second part, its successors or assigns, to its own proper use, benefit and behoof forever.

PROVIDED ALWAYS, and these presents are upon this express condition, that if the said party of the first part, or its successors shall well and truly pay unto the said party of the second part, its successors or assigns, the said sum of money mentioned in the condition of said bond or obligation, and the interest thereon, at the time and times, and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine and be void.

AND the said party of the first part for itself and its successors does covenant and agree to pay unto the said party of the second part, its successors or assigns, the said sum of money and interest, as mentioned above and expressed in the conditions of the said bond.

AND IT IS ALSO AGREED, by and between the parties to these presents, that the said party of the first part, its successors and assigns shall and will keep the buildings erected, and to be erected, upon the lands above conveyed, insured against loss or damage by fire, by insurers, and in an amount approved by the said party of the second part, its successors or assigns, and assign the policy and

certificates thereof to the said party of the second part; and in default thereof, it shall be lawful for the said party of the second part to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents, payable on demand, with interest at the rate of six per cent. per annum, from the time of payment of such premium or premiums.

AND THE SAID party of the first part, the owner of the lands above described, for itself, its successors and assigns, does further covenant and agree to and with the said party of the second part, its successors and assigns, that it will pay in full, all taxes levied, or to be levied upon the lands embraced in this mortgage, and will not claim any credit on, or make any deduction from the interest or principal hereby secured by reason of the payment of any taxes so levied, or to be levied, during the continuance of the lien of this mortgage, and upon the breach of this covenant or any part thereof, this mortgage may become and be due and payable immediately, at the option of the said party of the second part hereto. AND the said mortgagor does covenant with the mortgagee that it is seized of an indefeasible estate in fee simple in said premises, and will warrant and forever defend the title thereof unto the mortgagee, its successors and assigns, against all lawful claims whatsoever.

All of the covenants and conditions hereinabove contained shall be for the benefit of and shall apply to and bind the said parties hereto and their respective heirs, executors, administrators, successors and assigns.

Exhibit 107—Junction Milling Company.

In Witness Whereof, the said party of the first part hath caused its corporate Seal to be hereto affixed and attested by its Secretary, and these presents to be signed by its President, the day and year first above written.

Capitol Construction Co., Inc.,

By Hyman Silverman,
President.

(Corporate Seal)

Signed, Sealed and Delivered in the Presence of

Attest:

Jacob Starr,
Secretary.

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

Be it Remembered, that on this 26th day of September in the year of our Lord One Thousand Nine Hundred and twenty-seven before me the subscriber, a Master in Chancery of New Jersey personally appeared Jacob Starr who, being by me duly sworn on his oath, says that he is the Secretary of the Capitol Construction Co., Inc. the mortgagor named in the within instrument; that Hyman Silverman is the President of said corporation; that deponent well knows the corporate seal of said corporation; and the seal affixed to said Instrument is such corporate seal and was thereto affixed, and said Instrument signed and delivered by said President, as and for his voluntary act and deed and as and for the voluntary act and

deed of said corporation, in presence of deponent, who thereupon subscribed his name thereto as witness.

JACOB STARR.

Sworn and subscribed before me, at Bayonne, N. J. the date aforesaid.

ALEXANDER SECLOW,
Master in Chancery of New Jersey.

RECEIVED in the Registers Office of the County of Union N. J., on the 6 day of Oct. A. D., 1927, at 9:46 o'clock, in the forenoon, and Recorded in Book 886 of Mortgages for said County, on page 390 &c.

EDWARD BAUER,
Register.

Exhibit 108.

Agreement as to Payment of Mortgage.

AGREEMENT made September 16th 1927, between Junction Milling Co., a corporation of New Jersey, party of the first part, and Capitol Construction Co., Inc., a corporation of New Jersey, party of the second part.

The party of the second part is erecting an apartment house in the Township of Cranford, New Jersey, and the party of the first part is furnishing sash and trim at the agreed price of Eighty-eight hundred ($8,800) Dollars, in addition to which there is due to the party of the first part from the party of the second part, Twenty five hundred and fifty dollars and thirty-two cents ($2,550.32) upon a note and Two hundred sixty-

nine dollars and two cents ($269.02) upon a check making a total of Eleven thousand six hundred nineteen dollars and thirty-four cents ($11,619.34). A mortgage is being executed upon vacant lands of the party of the second part adjoining the apartment house, to be subject to a prior mortgage of Twenty-seven thousand ($27,000) Dollars. Although the mortgage requires a first payment within thirty days to the amount of Two thousand ($2,000) Dollars, the parties agree that the first payment shall be made when the standing trim is completed, and the second payment of One thousand ($1,000) Dollars when the dressers and doors are delivered, and the third payment of One thousand ($1,000) Dollars to be made when the second mortgage is placed. All payments are to be credited upon the principal amount of the said mortgage and interest to commence on any unpaid principal of the mortgage on January 16th, 1928.

The party of the first part agrees to subordinate to the first mortgage of One hundred and sixty thousand ($160,000) Dollars at any time a subordination agreement is presented to it and agrees to subordinate to the second mortgage when it receives the third payment heretofore mentioned, viz: One thousand ($1,000) Dollars. When the party of the first part receives the third payment mentioned in said mortgage, it shall also release from mechanics liens the apartment house and plot upon which it is erected, which plot is the remaining plot in the block with the exception of the two plots mentioned in the said mortgage this day executed to the party of the First Part. The mortgaged premises are now encumbered by mortgages aggregating One hundred and thirty thousand ($130,000) Dollars, but as soon as the

first mortgage is placed on the apartment house, it is agreed that there shall be but Twenty seven thousand ($27,000) Dollars against the land covered by the mortgage of the party of the first part.

In Witness Whereof the parties hereto have signed, sealed and delivered the same, the day and year first above written.

Junction Milling Co.
By Abraham Lenkowsky
President.

Capitol Construction Co., Inc.
By Hyman Silverman
President.

(Corporate Seal)

Signed, sealed and delivered
in the presence of

Alexander Seclow

ALFRED W. BOOTH & BRO.

Exhibit 109.

Lien Claim, Filed February 25th, 1928.

UNION COUNTY CLERK'S OFFICE

ALFRED W. BOOTH & BRO., a corporation,
Claimants,

vs.

CAPITOL CONSTRUCTION CO. INC., and IRA R. CROUSE and BENJAMIN HEYMAN, Receivers of Capitol Construction Co. Inc. Builders and Owners.

Lien Claim.

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

FIRST: The said building is a 3-story apartment house, brick building, on a lot or curtilage upon which this lien is claimed, and which is situated in Cranford, Union County, New Jersey, and is more particularly described as follows: viz.,

BEGINNING at a point formed by the intersection of the northeasterly side of Riverside Drive with the southeasterly side of Prospect Avenue; thence north 47 degrees 36 minutes east along said side of Prospect Avenue 358.31 feet to a point; thence south 42 degrees 24 minutes east 200 feet to a point; thence

north 47 degrees 36 minutes east 13.76 feet to a point; thence 42 degrees 24 minutes east 195.98 feet to the northwesterly side of Union Avenue; thence south 49 degrees 16 minutes west 87.97 feet along said side of Union Avenue to a point; thence still along said side of Union Avenue south 41 degrees 51 minutes west 152.34 feet to said side of Riverside Drive; thence northwesterly along said side of Riverside Drive, its various courses 443 feet more or less to the point or place of BEGINNING. According to a survey made by J. L. Bauer, C. E. & Surveyor, Elizabeth, New Jersey, June 11th 1927.

SECOND: The name of the owner of the land and of the estate therein on which the lien is claimed, at the time that the materials were furnished and delivered as hereinafter described, was the Capitol Construction Co. Inc., a corporation of New Jersey, against which said company a suit was brought in the Court of Chancery of New Jersey, on or about December 21st 1927, in a cause wherein Ralph Cianfrone and Ciro Castellano partners trading as Venango Stone Company are complainants, and said Capitol Construction Co. Inc. is defendant, on the grounds of insolvency of said company, and, by order of said Court of chancery dated January 9th 1928, said company was adjudged insolvent and Ira R. Crouse and Benjamin Heyman were appointed Receivers of said Capitol Construction Co. Inc., and, by virtue of their said appointment, became vested with the title to said land and of the estate therein on which the lien is claimed.

THIRD: By order of said Court of Chancery dated February 20th 1928, said Alfred W. Booth & Bro., a corporation, Claimant, was given leave to file a lien claim for the debt contracted and owing to it by said Capitol Construction Co. Inc., for the materials furnished and delivered by Claimant for the erection and construction of said building.

FOURTH: The name of the person who contracted the debt and for whom and at whose request said materials were furnished and delivered, for which such lien is claimed, is said Capitol Construction Co. Inc.

FIFTH: The following is a bill of particulars exhibiting the amount and kind of materials furnished and delivered, the price at which, and times when, the same were furnished and delivered, giving credit for payment made thereupon and deduction that ought to be made therefrom, and exhibiting the balance justly due and owing to said Alfred W. Booth & Bro., Claimant, from said Capitol Construction Co. Inc., and said Receivers, viz.:

Bayonne City, N. J., Dec. 31 1927

The Capital Construction Co.

BOUGHT OF

ALFRED W. BOOTH & BRO.

Terms Cash

Cranford Job

1927					
May 24	160 bdls. Balsam Wool	40000′	53.	2120.00	
July 15	859 " 4" Spruce Lath		8.50	722.50	
25	480—2 x 3—16 Spruce rgh	3840′	48.	184.32	
26	735—2 x 3—18 Fir D4S	6615′	50.	330.75	
Aug. 3	150—1 x 2—16 Spruce	2400 linft.	1.	24.00	
	6—1¼ x 10—14 W. P.	88′	.13	11.44	
	48 Linft. 1 x 6 W. P. D4S	24′	.09	2.16	
	12—2 x 8—12 W. P. D4S	192′	.12	23.04	
	25—1 x 6—14 Fir Clg.	175′	.085	14.88	
	1700 Linft. 1¼ x 6 W. P. D4S	1063′	.08	85.04	
6	75,000 Spruce Lath		8.50	637.50	
9	20—1 x 4—8 W. P.	54′	.09	4.86	
	16—1¼ x 4—12 W. P.				
	4—1¼ x 5—14 "	109′	.10	10.90	
10	30—2 x 3—18 Fir	270′	50.	13.50	
	50—1 x 2—16 Spruce	800 linft.	1.	8.00	
Sept. 12	6—1¼ x 10—16 W. P.	100′	150.	15.00	
	175 linft. 1½ x 2 W. W. Cap. Mo.	58′	4.50	7.88	
Dec. 9	250 sq. ft. 1 x 6 N. C. rgh.	250′	40.	10.00	
	25—2 x 3—18 Fir	225′	50.	11.25	4237.02
Oct. 24	Cash			81.63	
26	Credit Memo. 36 bdls. Balsam Wool			441.25	522.88
	BALANCE JUSTLY DUE CLAIMANT				$3714.14

THIRTY-SEVEN HUNDRED FOURTEEN DOLLARS AND FOURTEEN CENTS, as per agreement.

Exhibit 109—Alfred W. Booth & Bro.

All of the above materials were furnished and delivered between the 24th day of May 1927 and the 9th day of December 1927, which said last mentioned date is the date of the last materials furnished and delivered, for which such debt is due.

ALFRED W. BOOTH & BRO. a corporation,
By ALLAN H. CHURCH
Secretary
Claimant.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

ALLAN H. CHURCH, being duly sworn according to law, upon his oath, deposes and says that he is the Secretary of Alfred W. Booth & Bro., a corporation of New Jersey, claimant in the foregoing lien claim; that the bill of particulars and statements therein set forth, shown in said claim, are true; that the same is for materials furnished and delivered and used in and for the erection and construction of the building in such claim described, at the times therein specified; and that the amount as claimed therein is justly due and owing from said Capitol Construction Co. Inc., and said Receivers to said Claimant.

ALLAN H. CHURCH

Subscribed and sworn to before me, at Jersey City, N. J., this 20th day of February, 1928.

HELEN E. RECTOR
Notary Public of New Jersey.

Exhibit 110.

8 Delivery Tickets.

Bought of ALFRED W. BOOTH & BRO. Bayonne, N. J.

NAME: Capitol Cons. Co. ADDRESS: Cranford, N. J.

Ticket Number	*Date*	*Description of Goods Sold*	*Signed by*
81462	June 8th 1927	160 Bdls 33″ x 250 Balsam Wool	H. STARR
82288	July 25th 1927	480—2x3—16 Spruce rgh	J. STARR
82307	July 26th 1927	735—2x3—18 Fir D4S	SILVERMAN
82441	Aug. 3rd 1927	150—1x2—16 Spruce 6—1¼x10—14 W. P. 48 Lin.Ft. 1x6x16 W. P. D4S 12—2x8—12 W. P. D4S 25—1x6—14 Fir Clg. 1700 Lin.Ft. 1¼ x 6 W. P. D4S	J. STARR
82539	Aug. 9th 1927	20—1x4—8 W. P. 16—1¼ x 4—12 W. P. 4—1¼x5—14 W. P.	H. SILVERMAN
82568	Aug. 10th 1927	30—2x3—18 Fir 50—1x2—16 Spruce	H. SILVERMAN
83064	Sept. 12th 1927	6—1¼ x 10—16 W. P. 175 Lin.Ft. 1½ x 2 W. W. Cap. Mo.	
84581	Dec. 9th 1927	250 sq. ft. 1 x 6 N. C. rgh. 25—2x3—18 Fir	J. STARR

ALPHEUS S. VAN WOEART.

Exhibit 111.

Lien Claim, Filed

UNION COUNTY CLERK'S OFFICE

ALPHEUS S. VAN WOEART, Claimant, *vs.* CAPITOL CONSTRUCTION CO. INC., and IRA R. CROUSE and BENJAMIN HEYMAN, Receivers of Capitol Construction Co. Inc. Builders and Owners.	Lien Claim.

Be it known, that ALPHEUS S. VAN WOEART, claims a lien upon the building and lands hereinafter described, pursuant to the statute in such case made and provided, for a debt contracted and owing to him for materials furnished and labor performed for the erection and construction of said building; and, therefore, shows:

FIRST: The said building is a 3-story brick apartment house building, on a lot or curtilage upon which this lien is claimed, and which is situated in Cranford, Union County, New Jersey, and is more particularly described as follows, viz.:

> BEGINNING at a point formed by the intersection of the northeasterly side of Riverside Drive with the southeasterly side of Prospect Avenue; thence north 47 degrees 36 minutes east along said side of Prospect Avenue 358.31 feet to a point; thence south 42 degrees

24 minutes east 200 feet to a point; thence 47 degrees 36 minutes east 13.76 feet to a point; thence south 42 degrees 24 minutes east 195.98 feet to the northwesterly side of Union Avenue; thence south 49 degrees 16 minutes west 87.97 feet along said side of Union Avenue to a point; thence still along said side of Union Avenue south 41 degrees 51 minutes west 152.34 feet to said side of Riverside Drive; thence northwesterly along said side of Riverside Drive, its various courses 443 feet more or less to the point or place of beginning. According to a survey made by J. L. Bauer, C. E. & Surveyor, Elizabeth, New Jersey, June 11th 1927.

SECOND: The name of the owner of the land and of the estate therein on which the lien is claimed, at the time that the materials were furnished and labor performed as hereinafter described, was the Capitol Construction Co. Inc., a corporation of New Jersey, against which said company a bill of complaint was filed in the Court of Chancery of New Jersey in a cause wherein Ralph Cianfrone and Ciro Castellano, partners trading as Venango Stone Company were Complainants, and said Capitol Construction Co. Inc. was Defendant, on the grounds of insolvency of said company, and there was appointed by order of said Court, Ira R. Crouse and Benjamin Heyman, as Receivers of said Capitol Construction Co. Inc., which Receivers, by virtue of their said appointment, are now the owners of the land and of the estate therein on which the lien is claimed.

THIRD: The name of the person who contracted the debt and for whom and at whose request the labor was performed, and the materials furnished, for which such lien is claimed, is said Capitol Construction Co. Inc.

Exhibit 111—Alpheus S. Van Woeart.

FOURTH: The following is a bill of particulars exhibiting the amount and kind of materials furnished and labor performed and the price at which, and times when, the same was furnished and performed, giving credit for payment made thereupon and deduction that ought to be made therefrom and exhibiting the balance justly due to said Alpheus S. Van Woeart from said Capitol Construction Co. Inc. and said Receivers, viz.:

CAPITOL CONSTRUCTION CO. INC. and IRA R. CROUSE and BENJAMIN HEYMAN, Receivers of said Capitol Construction Co. Inc.

to

ALPHEUS S. VAN WOEART, Dr.

To amount due under agreement made Mar. 1st 1927 between Capitol Construction Co. Inc. and Alpheus S. Van Woeart, for the furnishing and installing of the heating system and equipment in the erection and construction of the building at Cranford, N. J., above-mentioned $10,000.00

Under which agreement Claimant did furnish materials and perform labor from on or about July 1st 1927 to January 4th 1928

CR.

1927			
Aug. 5th	Capitol Construction Co. Inc. paid on account thereof	$ 500.00	
Nov. 15th	Capitol Construction Co. Inc. paid on account thereof	1,000.00	1,500.00
			$8,500.00

Exhibit 111—Alpheus S. Van Woeart.

Amount agreed to be paid to said Alpheus S. Van Woeart by said Receivers, for completion of said work by Claimant, in accordance with his original contract with said Capitol Construction Co. Inc.....	5,982.00
BALANCE JUSTLY DUE CLAIMANT....	$2,518.00

TWENTY-FIVE HUNDRED EIGHTEEN DOLLARS, as per agreement.

All of the above materials were furnished and the labor performed from about July 1st, 1927, to the 4th day of January, 1928, which said last mentioned date is the date of the last work done and materials furnished for which such debt is due.

ALPHEUS S. VAN WOEART
Claimant

STATE OF NEW JERSEY }
COUNTY OF HUDSON } ss:

ALPHEUS S. VAN WOEART, being duly sworn according to law, upon his oath, deposes and says that he is the claimant named in the foregoing claim; that the bill of particulars and statements therein set forth, shown in said claim, are true; that the same is for labor done and materials furnished in the installation of the heating system and equipment for the building in such claim described, at the times therein specified; and that the amount as claimed therein is justly due and owing from said Capitol Construction Co. Inc. and said Receivers to said Claimant.

ALPHEUS S. VAN WOEART

Subscribed and sworn to before me, }
this 6th day of February, 1928. }

HELEN E. RECTOR
Notary Public of New Jersey

Exhibit 112—Alpheus S. Van Woeart.

Exhibit 112.

Acceptance by Receivers of Van Woeart Estimate.

January 9, 1928.

A. S. Van Woert
88 West 42nd Street
Bayonne N. J.

Gentlemen:

This is to notify you that your estimate of $5,982.00 for balance of work to be done at Cranford Apartment House has been accepted by the Receivers of the Capitol Construction Co., and you will be notified when to start work.

Yours very truly,

Ira R. Crouse.
Benjamin Heyman, Receivers.
By Ira R. Crouse

ECR.

LIPSCHITZ PARQUET FLOOR CO.

Exhibit 113.

Lien Claim, Filed

UNION COUNTY CLERK'S OFFICE

MORRIS PORTNOW and ABRAHAM LIPSCHITZ, Partners, trading as LIPSCHITZ PARQUET FLOOR CO., Claimants, *vs.* IRA R. CROUSE and BENJAMIN HEYMAN, RECEIVERS FOR CAPITOL CONSTRUCTION CO., INC., a corporation of New Jersey, Builder and Owner, RIVERSIDE APARTMENT CORPORATION, a corporation of New Jersey, ISRAEL SHILOWITZ and JACOB TUCKER, LOUIS SCHWARTZ, JUNCTION MILLING CO., a corporation of New Jersey, CARTERET COMPANY, a corporation of New Jersey, WEST BERGEN TRUST COMPANY, a corporation of New Jersey, THE TRUST COMPANY OF NEW JERSEY, a corporation of New Jersey, EDWARD P. STOUT, TRUSTEE, Mortgagees, Defendants.	Lien Claim.

County of Union) ss:

Be it known, that Morris Portnow and Abraham Lipshitz, Partners, trading as LIPSCHITZ PARQUET FLOOR CO. of the City of Jersey City, County of Hudson and State of New Jersey, claims a lien upon the building and loans hereinafter described, pursuant to the provisions of "An Act

to secure the mechanics and others, payment for their labor and materials in erecting any building," and the several supplements thereto, for a debt contracted and owing to them for labor performed and materials furnished for the erection and construction of said building as hereinafter set forth; and therefore shows:

1. The said building is a three story apartment house on a lot of land or curtilage, situated in the Township of Cranford, County of Union and State of New Jersey, and more particularly described as follows:

> Beginning at a point formed by the intersection of the northerly side of Riverside Drive with the southeasterly side of Prospect Avenue, thence North forty seven (47) degrees, thirty six (36) minutes East along said side of Prospect Avenue, three hundred fifty eight feet and thirty one hundredths of a foot (358.31′) to a point; thence South forty two (42) degrees twenty four (24) minutes East two hundred (200) feet to a point; thence North forty seven (47) degrees, thirty six (36) minutes East thirteen feet and seventy six hundredths of a foot (13.76′) to a point; thence South forty two (42°) degrees, twenty-four (24) minutes East one hundred ninety five feet and ninety eight hundredths of a foot (195.98′) to the northwesterly side of Union Avenue; thence South forty nine (49) degrees sixteen (16) minutes West eighty seven feet and ninety seven hundredths of a foot (87.97′) along said side of Union Avenue to a point; thence still along said side of Union Avenue; South forty one (41) degrees, fifty one (51) minutes West one hundred fifty two feet and thirty four hundredths of a foot (152.34′) to the said side of Riverside Drive; thence northwesterly along said side of Riverside Drive, its various courses four hundred forty three (443)

feet; more or less to the point or place of BEGINNING; According to survey made by J. L. Bauer, Civil Engineer and Surveyor, Elizabeth, New Jersey, June, 1911.

Being the same premises conveyed to the Capitol Construction Co., Inc. a corporation of New Jersey, by deed of Jacob Starr, *et. ux.* and Hyman Silverman, *et. ux,* bearing date May 25th, 1927 and recorded in Book 1121 on page 328 in the Register's Office of Union County.

2. The name of the owner of the said land and estate therein on which said lien is claimed, is the Capitol Construction Co., Inc., a corporation of New Jersey.

3. The name of the person who contracted the said debt, and for whom and at whose request the said labor was performed, and materials furnished, for which the aforesaid lien is claimed, is the said Capitol Construction Co., Inc.

4. The following is a bill of particulars of the aforesaid materials furnished by the said Lipschitz Parquet Floor Co., and the amount and kind of materials furnished, and the prices at which and times when the same were furnished and giving credit for all the payments thereupon, and deductions that ought to be made therefrom, and exhibiting the balance justly due to them from the said Capitol Construction Co., Inc., viz.:

Supplied all materials necessary and laid floors.

Contract price		$6400.00
Value extra work		100.00
		$6500.00
Received on account	$2500.00	
Value of unfinished work	300.00	2800.00
Balance justly due		$3700.00

Exhibit 113—Lipschitz Parquet Floor Co.

All of the above labor was performed and materials furnished between October 1st, 1928 and December 15th, 1928, which last mentioned date is the date of the last materials furnished for which such debt is due.

LIPSCHITZ PARQUET FLOOR CO.
By MORRIS PORTNOW &
ABRAHAM LIPSCHITZ.

AARON KAUFMAN
Attorney

STATE OF NEW JERSEY }
COUNTY OF UNION } ss:

Abraham Lipschitz, of full age, being duly sworn according to law upon his oath, deposes and says that he is one of the partners in the firm of Lipschitz Parquet Floor Co., the claimant named in the foregoing claim; that the same are for laying floors and supplying materials for the said work by the claimant in the erection of the building in the said claim described, at the times therein specified, and that the amount, as claimed therein, is justly due and owing from the said Capitol Construction Company, a corporation of New Jersey, to the claimant.

ABRAHAM LIPSCHITZ (L. S.)

Sworn and subscribed to before me }
this 10th day of January, 1928 }

EDITH RUBIN
A NOTARY PUBLIC OF N. J.

JOHN NICARETTA.

Exhibit 114.

Lien Claim, Filed January 3rd, 1928.

IN THE OFFICE OF THE CLERK OF THE COUNTY OF UNION:

JOHN NICARETTA, Claimant, *vs.* CAPITOL CONSTRUCTION CO. INC. Owner & Builder, *and* LOUIS SCHWARTZ, JUNCTION MILLING CO., a corporation, CARTERET COMPANY, a corporation, WEST BERGEN TRUST COMPANY, TRUST COMPANY OF NEW JERSEY, EDWARD P. STOUT, Trustee, Mortgagees.	Lien Claim.

COUNTY OF UNION, ss.

BE IT KNOWN, that John Nicaretta of the City of Bayonne, in said County of Hudson, claims a lien upon the building and lands hereinafter described, pursuant to the provisions of "An Act to secure to mechanics and others, payment for their labor and materials in erecting any building," and the several supplements thereto, for a

debt contracted and owing to for labor performed and materials furnished for the erection and construction of said building as hereinafter set forth, to wit:

FIRST.—The said building is a twenty-eight (28) family three story brick apartment house, erected on a lot of land or curtilage, situated in the Township of Cranford, in the County of Union and State of New Jersey, and more particularly described as follows: BEGINNING at a point formed by the intersection of the Northeasterly side of Riverside Drive with the southeasterly side of Prospect Avenue; thence north 47 degrees 36 minutes East along said side of Prospect Avenue, Three hundred fifty-eight and thirty hundredths (358.30) feet to a point; thence South 42 degrees 24 minutes East Two hundred (200) feet to a point; thence North 47 degrees 36 minutes, East Thirteen and seventy-six hundredths (13.76) feet to a point; thence South 42 degrees 24 minutes East, One hundred ninety-five and ninety-eight hundredths (195.98) feet to the Northwesterly side of Union Avenue; thence South 49 degrees 16 minutes West, Eighty-seven feet and ninety-seven hundredths (87.97) feet along said side of Union Avenue, to a point; thence still along said side of Union Avenue, South 41 degrees 51 minutes West One hundred fifty-two and thirty-four hundredths (152.34) feet to the said side of Riverside Drive; thence Northwesterly along said side of Riverside Drive, its various courses, Four hundred forty-three (443) feet more or less to the point or place of beginning. The foregoing description is according to survey made by J. L. Bauer, Civil Engineer and Surveyor, Elizabeth, N. J. June 1911.

SECOND.—The name of the Owner of the said land and the estate therein, on which said lien is claimed, is Capitol Construction Co., Inc. who has an estate in fee simple therein.

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

FOURTH.—The following is a bill of particulars of the aforesaid labor performed and materials furnished by the said John Nicaretta, the amount and kind of labor performed, and of materials furnished, and the prices at which and times when the same were performed and furnished, and giving credit for all the payments thereupon, and deductions that ought to be made therefrom, and exhibiting the balance justly due to him from the said Capitol Construction Co., Inc. viz: On or about July 8th 1927 the claimant entered into a contract with the Capitol Construction Co. Inc. the owner and builder to perform all the labor required for the concrete work upon the building mentioned in this lien claim for the sum of Forty-six hundred twenty-five ($4625) Dollars, upon which he received on account since the making of the contract the sum of Twenty-four hundred and fifty ($2450) Dollars, leaving a balance still due of $2175.....$2175.00

FIFTH: This lien claim is entitled to priority over the following mortgages:—

a. Mortgage made by Capitol Construction Co. Inc. to Louis Schwartz, dated August 22nd 1927

for $5150 recorded in the Union County Register's Office in Liber 884 of Mortgages on page 127.

b. Mortgage made by Capitol Construction Co. Inc. to Junction Milling Co., a corporation, in the sum of $11,619.34 dated September 16th 1927 and recorded in the Union County Register's Office in Liber 886 of Mortgages on page 390.

c. Mortgage made by Capitol Construction Co. Inc. to Carteret Company, a corporation for $35,000 dated October 14th 1927 and recorded in the Union County Register's Office in Liber 892 of Mortgages on page 89.

d. Mortgage made by Capitol Construction Co. Inc. to West Bergen Trust Company, a corporation dated October 25th 1927 and recorded in the Union County Register's Office in Liber 895 of Mortgages on page 38.

e. Mortgage made by Capitol Construction Co. Inc. to the Trust Company of New Jersey for $16,000 dated October 28th 1927 and recorded in the Union County Register's Office on November 9th 1927.

The claimants says that the lien of his claim is prior and paramount to any of the foregoing mortgages.

f. Mortgage made by Capitol Construction Co. Inc. to Edward P. Stout, Trustee for $7500 dated November 1st 1927 and recorded in the Union County Register's Office under serial No. 60515.

The claimant says that the lien of this claim is prior and paramount to the aforementioned mortgage.

Exhibit 114—John Nicaretta.

All the above labor was performed and materials furnished between the 18th day of July 1927, and the 26th day of November 1927.

JOHN NICARETTA (L. S.)

STATE OF NEW JERSEY }
COUNTY OF HUDSON } ss:

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

JOHN NICARETTA

Sworn and subscribed before me this }
31st day of December 1927 }

VICTOR SAMUEL
Atty at Law of N. J.

Exhibit 114—John Nicaretta.

STATE OF NEW JERSEY

UNION COUNTY, SS:

I, WILLIAM B. MARTIN, Clerk of the County of Union, aforesaid, and also Clerk of the Circuit Court and Court of Common Pleas, holden therein,

DO HEREBY CERTIFY, That the foregoing is a true and correct copy of a certain Lien Claim, John Nicaretta *vs.* Capitol Construction Co. Inc. *et als.*, as the same is taken from and compared with the original on file as of Jan. 3, 1928 in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal (Seal) of said Courts and County, at Elizabeth, this 21st day of June 1929.

WM. B. MARTIN
Clerk.

ENDORSEMENT

UNION COUNTY NEW JERSEY

Summons signed sealed and issued the 3rd day of January 1928, at 3:00 P. M.

WM. B. MARTIN
County Clerk

RECEIVED

UNION COUNTY CLERK'S OFFICE
Jan. 3 2:55 PM 1928
ELIZABETH, N. J.
WILLIAM B. MARTIN, Clerk.

RODERICK M. CROCKET & CO.

Exhibit 115.

Lien Claim, Filed January 5th, 1928.

UNION COUNTY CLERK'S OFFICE.

RODERICK M. CROCKET & Co., a New Jersey Corporation, Claimant, *vs.* CAPITAL CONSTRUCTION CO., INC., a New Jersey Corporation, Builder and Owner.	Lien Claim.

BE IT KNOWN, that Roderick M. Crocket & Co., a New Jersey Corporation, of the Township of Cranford, County of Union and State of New Jersey, claims a lien on the building and lands hereinafter described pursuant to the statute in such case made and provided, for a debt contracted and owing to it for labor performed and materials furnished for the erection and construction of said building; and therefore shows:

1. The said building is a three story brick, tile and stone apartment house building on a lot or curtilage upon which this lien is claimed, and which is situated in the Township of Cranford, County of Union and State of New Jersey and is more particularly described as follows:

Beginning at a point formed by the intersection of the northeasterly side of Riverside Drive with the southeasterly side of Prospect Avenue; thence

north forty-seven degrees, thirty-six minutes east along said side of Prospect Avenue, three hundred fifty-eight and thirty hundredths (358.30) feet to a point; thence south forty-two degrees, twenty-four minutes east two hundred (200) feet to a point; thence north forty-seven degrees, thirty-six minutes east thirteen and seventy-six hundredths (13.76) feet to a point; thence south forty-two degrees twenty-four minutes east one hundred ninety-five and ninety-eight hundredths (195.98) feet to the northwesterly side of Union Avenue; thence south forty-nine degrees, sixteen minutes west eighty-seven and ninety-seven hundredths (87.97) feet along said side of Union Avenue to a point; thence still along said side of Union Avenue south forty-one degrees, fifty-one minutes west one hundred fifty-two and thirty-four hundredths (152.34) feet to said side of Riverside Drive, its various course four hundred forty-three (443) feet more or less to the point or place of Beginning. The foregoing description is according to survey made by J. L. Bauer, C. E., and Surveyor, Elizabeth, N. J., June, 1911.

2. The name of the owner of the land and of the estate therein on which the lien is claimed is the Capital Construction Co., Inc.

3. The name of the person who contracted the debt and for whom and at whose request the labor was performed and the materials furnished, for which said lien is claimed, is the said Capital Construction Co., Inc.

4. The following is a bill of particulars exhibiting the amount and kind of labor performed and of materials furnished and the price at which and times when the same was performed and furnished and giving credit for all the payments

made thereupon and deductions that ought to be made therefrom and exhibiting the balance justly due to the said Roderick M. Crocket & Co., Inc., claimant, from the said Capital Construction Co., Inc., viz:

Sept. 6, 1927 to	Concrete walks, drive, aprons, etc.	$ 622.00
Dec. 8, 1927	Grading and removing stumps	377.00
30 tons crystal spar stone 3 trucks cinders		179.75
	Labor and material for driveway	220.00
	16 cedars @ $20.00 ($320) 10 cedars @ $12 ($120)	440.00
	36 Rhododendrons $7 ($252) 32 Rhododendrons $4 ($128)	380.00
	12 Mountain-Laurel $3.00	36.00
	34 Junipers $5.00	170.00
	6 Junipers Stricta	21.00
	150 flowering shrubs (bought but unplanted)	188.00
	Removing 6 large trees, trimming rest	350.00
	Preparing beds, hauling and planting and supervising	250.00
	Balance justly due claimant	$3,233.75

Add interest from Dec. 8, 1927 until paid.

All the above labor was performed and materials furnished between the sixth day of September, 1927 and the eighth day of December, 1927, which said last mentioned date is the date of the last work done and materials furnished for which said debt is due.

RODERICK M. CROCKET & CO.,
By RODERICK M. CROCKET,
President.

Exhibit 115—Roderick M. Crocket & Co.

STATE OF NEW JERSEY,
COUNTY OF UNION, } ss.:

RODERICK M. CROCKET of full age being duly sworn on his oath says that he is the President of Roderick M. Crocket & Co., a New Jersey Corporation, the claimant named in the foregoing claim; that the bill of particulars and the statements therein and in said claim set forth and shown are true; that the same is for labor done and materials furnished in the erection of the building in such claim described, at the time therein specified; and that the amount as claimed therein is justly due and owing from the said Capital Construction Co., Inc., to said claimant.

RODERICK M. CROCKET.

Sworn and subscribed to before me this fourth day of January, A. D. 1928.

ALICE M. FINLEY,
Notary Public of New Jersey.

(Seal)

Exhibit 115—Roderick M. Crocket & Co.

STATE OF NEW JERSEY.

UNION COUNTY, SS.:

I, WILLIAM B. MARTIN, Clerk of the County of Union, aforesaid, and also Clerk of the Circuit Court and Court of Common Pleas, holden therein,

DO HEREBY CERTIFY, That the foregoing is a true and correct copy of a certain Lien Claim, in the Case of: Roderick M. Crocket & Co., a New Jersey Corporation, Claimant vs. Capital Construction Co., Inc., a New Jersey Corporation, Builder and Owner, as the same is taken from and compared with the original on file as of January 5th, 1928, and recorded in Mechanics' Lien Book #8, page 378, in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Courts and County, at Elizabeth, this 11th day of June 1929.

WM. B. MARTIN,
Clerk.

(Seal)

RECEIVED Union County Clerks Office Jan. 5, 12:45 P. M. 1928, Elizabeth, N. J.

WILLIAM B. MARTIN,
Clerk.

MEYER & RUH CO.

Exhibit 1—7/10/29.

Book Account.

Sheet No. 18 Account No. 58

Name Messrs. J. Star & Silverman
Address #41 Neptune Avenue
Jersey City, N. J.

Date	Items	Folio	Debits	Credits	Folios	Items	Date
1926 Mar. 16	1 Leveling Transit & Target		120.00				
				120.00			
May 13	2500—Wd Lath	950	23.75				
14	2500 " "		19.00				
	15 lbs. Lath Nails		1.20	43.95			
1927 Jan. 3	*Balance Due*			*163.95*			
					Feb. 9	Check #	163.95
May 12	1 # 10 x 12 Clean Out Door		2.75				
	1 pr 10" Nettleton Nipples		2.50				
	100 lb. #9 B A Wire		6.00				
24	2—32 x 10 Nep. Boards		2.40				
	1—4 x 10 Galv. Pump		10.50				
	1 pr. Jams for 10" Nettleton Nipples		1.50				
	1 pr. 14" x 30"—⅛" Galv. Mesh		.32	25.97			
June 18	1 pr.—#0 Paters Bolt Clippers		3.75	3.75			
				29.72			
July 14	1—H. S. Frame		.50				
	6—10" Blades		.50				
	Wire		.25				
15	1 Stone—#16 B. A. Wire		1.50				
	1—#0 Porters Bolt Cutter		6.75				
16	2—6 # Beksmith Cross Press Ham		2.20				
	2—24" M. H. Hdles.		.60				
23	2 carboys—Mur. Acid		22.00				
	6—Acid Pails		3.00				
	12—#227 Acid Brushes		6.00				
25	1 Keg—5" Cut Spikes		4.25				
26	4 carboys—Muriatic Acid		44.00				
28	6—#207—7" W. W. Brushes		3.00				
	2—#1611 Wire Brushes		.70	95.25			
				124.97	forward		

Exhibit 1—7/10/29—Meyer & Ruh Co.

Account No. 58

Sheet No. 18

Name Star & Silverman
Address #41 Neptune Avenue
Jersey City, N. J.

Date	*Items*	*Folio*	*Debits*	*Credits*	*Folios*	*Items*	*Date*
1927							
Aug.				124.97			
4	1 Keg—10a Cut Com.		4.45		Aug. 6	6 Mlg. Carboys	30.00
	1 " — 8a " Floor		4.60				
6	2 " — 8a cw. Nails		7.60				
	2 " —10a "		7.40				
	1 " —20a "		3.50				
24	1 Rule		.50				
	1 doz. Pencils		.50	28.55	*Sept. 1*	*Balance Due*	*123.52*
				153.52			153.52
				123.52			
Sept. 1	6—5/16" x 2¼" Dryvin Anchors		.54				
	1—5/16" x 12" Star Drill		.35				
	2—⅝" x 12" " "		1.00				
	12—⅜" x 5½" Lag Screws		.60				
	12—⅜" Ep. Shields		.90				
	12 Washers		.05				
	1 #130 Jack		7.00				
10	17 bags—#16 Stucco } 45.00 T		101.25				
	28 " —White " }						
	40 bbls. P. Paris 3.75		150.00				
15	1 Keg— 8a Fin. Nails		4.10				
	1 " —10a " "		3.95				
	1 " — 6a " "		4.50				
	½ " — 4a " "		2.75				
	28 D. H.—#7 S. Cord 128 #40		51.20				
19	28—3 # Sash wts. }						
	24—3½ # " "						
	204—4 # " "						
	32—4½ # " "						
	28—5 # " " } 6962#						
	24—5½ # " " } @						
	60—6 # " " } 36.00		125.32				
	360—6½ # " "						
	180—7½ # " "						
	168—9 # " "						
21	1 Hank—#7 S Cord Sachram		.90				
	2 Long Hdle. Axes		6.00				
			460.41	123.52	Over		

Exhibit 1—7/10/29—Meyer & Ruh Co.

Account No. 58

Sheet No. 18

Name Star & Silverman
Address #41 Neptune Avenue
Jersey City, N. J.

Date		*Items*	*Folio*	*Debits*	*Credits*	*Folios*	*Items*	*Date*
				460.41	123.52			
1927	Sept.							
	21	1—4½ ft. X Cut Saw		3.83				
		1—6 ft. Rule		.50				
	15	10 gals. Gasoline		2.00				
	26	4 pr.—#844—18″ Gav. Hges.		8.00				
		2 pr.—36″ R. & L. Gav. Hges.		3.50				
		3—18″ Chain Bolts		2.25				
		16—5/16″ x 2½″ M. Bolts		.64				
		3—6″ Chain Bolts		1.35				
		3—#200 Cyl. Gav. Locks		9.00				
		3 pr.—Gav. Dr. Holders		6.75				
	29	2 boxes Staples		.10				
		6 pr.—36 x 39¼ Mesh		4.50				
		2 Batteries		.70				
		1 pr.—8″ Tee Hges		.20				
		1—6″ Safety Hasp		.20				
		12 gals. Gas		2.64	506.57			
					630.09			
	Oct. 4	10 gals. Gas		2.20				
	11	10 gals. Gasoline		2.20				
		2 qts. Oil		.35				
	15	18 pr.—3½ x 3½ O B Butts		3.60				
		115 pr.—2½ x 2 D B Butts		23.00				
		56 pr.—2 x 2 " "		11.20				
	19	20 pr.—2½ x 2 O B Butts		4.00				
	25	100 pr.—3½ x 3½ O B Butts		20.00				
		12 pr. 4 x 4 B O Butts		4.20				
		24 pr. 2½ x 2 O B Butts		4.80				
	28	1—11/32 Bit Stock Drill		.00				
		9—⅜″ x ¾ S. A. E. Cap Screws		.00				
		8—¼ # balls. Mason Line		2.00				
		1—6 ft. Rule		.50				
		6—#2 O P. Shovels		7.50				
		2—#3 Sq. P "		2.50				
		4—8 # R. R. Picks		4.00				
		4—Pick Hdles.		1.40				
				93.45	630.09	Over		

Exhibit 1—7/10/29—Meyer & Ruh Co.

Account No. 58

Sheet No. 18

Name Star & Silverman
Address 41 Neptune Avenue
Jersey City, N. J.

Date		*Items*	*Folio*	*Debits*	*Credits*	*Folios*	*Items*	*Date*
1927								
Oct.								
	28	1 Keg— 8d cw. Nails		93.45	630.09			
		1 " —10d "		3.80				
		1 " —20d "		3.70				
				3.50	104.45			
					734.54			
Nov.	2	100 pr.—3½ x 3½ D B Butts		20.00				
		1 Keg—6d cw. Nails		4.10				
	8	9 sets—Surface Floor Hges.	150	13.50				
		12 pr.—2½ x 2 D. B. Butts		2.40				
		1—Bath Room Lock 1—Corbin M. Lock 1—Mortise Latch	Template	NC				
		1—Rule		.50				
	10	1 pr.—#240—18 Pliers		1.25				
		1 coil—#12 B. A. Wire		6.25				
		1 pr.—Bolt Cutters		2.00				
		1—½" Ship Auger		.95	50.95			
					785.49			
Dec.	1	3 prs.—8" x 11 Tee Hges & Screws		1.35				
		3—Jap. Coil Springs		1.50				
		3—Jap Pulls		.30				
		3—4" Hooks & Eyes		.15				
		12 pr.—2½ x 2 O. B. Butts		2.40	5.70			
					791.19			
1928					*791.19*			
Jan.	*3*	*Balance Due*				1928		
						May 26	Bad Debts J. 96	791.19

Meyer & Ruh Company Exhibit.

Exhibit 2—7/10/29.

Lien Claim, Filed

UNION COUNTY CLERK'S OFFICE

MEYER & RUH COMPANY, a corporation of New Jersey,
Claimant,

vs.

IRA R. CROUSE and BENJAMIN HEYMAN, RECEIVERS FOR CAPITOL CONSTRUCTION CO., INC., a corporation of New Jersey, Builder and Owner, RIVERSIDE APARTMENT CORPORATION, a corporation of New Jersey, ISRAEL SHILOWITZ and JACOB TUCKER, LOUIS SCHWARTZ, JUNCTION MILLING Co., a corp. of New Jersey, CARTERET COMPANY, a corp. of New New Jersey, WEST BERGEN TRUST COMPANY, a corporation of New Jersey, THE TRUST COMPANY OF NEW JERSEY (a corp. of New Jersey), EDWARD P. STOUT, TRUSTEE, MORTGAGEES,
Defendants.

Lien Claim.

COUNTY OF UNION, SS:

Be it known, that Meyer & Ruh Company, a corporation of the State of New Jersey, with principal offices in the City of Bayonne, County of Hudson and State of New Jersey, claims a lien upon the building and lands hereinafter described, pursuant to the provisions of "An Act to secure to mechanics and others, payment for their labor and materials in erecting any building," and the several supplements thereto, for a

debt contracted and owing to them for labor performed and materials furnished for the erection and construction of said building as hereinafter set forth; and therefore shows:

1. The said building is a three story apartment house on a lot of land or curtilage, situated in the township of Cranford, County of Union of State of New Jersey, and more particularly described as follows:

BEGINNING at a point formed by the intersection of the northeasterly side of Riverside Drive, with the southeasterly side of Prospect Avenue; thence North forty seven (47) degrees, thirty six (36) minutes East along said side of Prospect Avenue three hundred fifty eight feet and thirty one hundredths of a foot (358.31′) to a point; thence South forty two (42) degrees, twenty four (24) minutes East two hundred (200) feet to a point; thence North forty seven (47) degrees, thirty six (36) feet East 13.76 feet (thirteen feet and seventy six hundredths of a foot) to a point; thence South forty two (42) degrees twenty four (24) minutes East one hundred ninety five feet and ninety eight hundredths of a foot (195.98′) to the northwesterly side of Union Avenue; thence South forty nine (49) degrees sixteen (16) minutes West eighty seven feet and ninety seven hundredths of a foot (87.97′) along said side of Union Avenue to a point; thence still along said side of Union Avenue, South forty one (41) degrees fifty one (51) minutes West one hundred fifty two feet and thirty four hundredths of a foot (152.34′) to the said side of Riverside Drive; thence northwesterly along said side of Riverside Drive its various courses four hundred forty three feet (443′); more or less to the point or place of BEGINNING; According to survey made by J. L. Bauer, Civil Engineer & Surveyor, Elizabeth, N. J., June 1911.

Exhibit 2—7/10/29—Meyer & Ruh Company.

Being the same premises conveyed to the Capitol Construction Co., Inc., a corporation of New Jersey, by deed of Jacob Starr, *et ux,* and Hyman Silverman, *et ux,* bearing date May 25th, 1927 and recorded in Book 1121 on page 328 in the Register's Office of Union County.

2. The name of the owner of the said land and estate therein on which said lien is claimed, is the Capitol Construction Co., Inc., a corporation of New Jersey.

3. The name of the person who contracted the said debt, and for whom and at whose request the said labor was performed, and materials furnished, for which the aforesaid lien is claimed, is the said Capitol Construction Co., Inc.

4. The following is a bill of particulars of the aforesaid materials furnished by the said Meyer & Ruh Company, and the amount and kind of materials furnished, and the prices at which and times when the same were furnished and giving credit for all the payments thereupon, and deductions that ought to be made therefrom, and exhibiting the balance justly due to them from the said Capitol Construction Co., Inc., viz:

See "Schedule A".

Balance justly due and owing..... $791.19

All of the above labor was performed and materials furnished between May 12th, 1927 and December 1st, 1927, which last mentioned date is the date of the last materials furnished for which such debt is due.

MEYER AND RUH COMPANY

by

AARON KAUFMAN

Atty.

Exhibit 2—7/10/29—Meyer & Ruh Company.

MEYER & RUH COMPANY

447 Broadway

Bayonne, N. J.

Telephones: Bayonne 3006-3007

DUPLICATE INVOICE

January 18, 1928.

Messrs. Star Bros. & Silverman,
#41 Neptune Avenue, Jersey City, N. J.

Job—Cranford—N. J.

1927.				
May	12	1—#10 x 12 Clean-out Door	$2.75	
		1 pr.—10″ Nettleton Nippers	2.50	
		100#—#9 BA Wire	6.00	
	24	2—32″ x 10′ 0″ Neponset Boards	2.40	
		1—4″ x 10′ 0″ Galv. Pump	10.50	
		1 pr.—Jaws for 10″ Nettleton Nippers	1.50	
		1 pr.—14″ x 30″ x ⅛″ Galv. Mesh	.32	
				$25.97
June	18	1 pr.—#0 Porter's Bolt Clippers	3.75	3.75
				29.72
July	14	1—H. S. Frame	.50	
		6—10″ Blades	.50	
		Wire	.25	
	15	1 stone—#16 BA Wire	1.50	
		1—#0 Porter's Bolt Cutter	6.75	
	16	2—6# Blacksmith Cross Pien Hammers	2.20	
		2—24″ M. H. Handles	.60	
	23	2 carboys—Muriatic Acid	22.00	
		6—Acid Pails	3.00	
		12—″227 Acid Brushes	6.00	
	25	1 keg—5″ Cut Spikes	4.25	
	26	4 carboys—Muriatic Acid	44.00	
	28	6—#207—7″ White Wash Brushes	3.00	
		2—#1611 Wire Brushes	.70	95.25
				124.97
Aug.	4	1 keg—10d (Common Wire) Nails Cut	4.45	
		1 keg—8d Cut Floor Nails	4.60	
	6	2 kegs— 8d Common Wire Nails	7.60	
		2 kegs—10d Common Wire Nails	7.40	
		1 keg—20d Common Wire Nails	3.50	
	24	1—Rule	.50	
		1 doz.—Pencils	.50	
			28.55	28.55
				153.52
		CREDIT		
	6	6—Mty Carboys	30.00	30.00
				123.52

Exhibit 2—7/10/29—Meyer & Ruh Company.

Sept.	1	6—5/16" x 2¼" Drytin Anchors	.54	
		1—5/16" x 12" Star Drill	.35	
		2—⅝" x 12" " "	1.00	
		12—⅜" x 5½" Lag Screws	.60	
		12—⅜" Expansion Shields	.90	
		12—Washers	.05	
		1—#130 Jack	7.00	
	10	17 bags—#16 Stucco		
		28 bags—White " @ $45.00 per ton	101.25	
		40 bbls.—Plaster Paris	150.00	
	15	1 keg— 8d Finishing Nails	4.10	
		1 keg—10d Finishing Nails	3.95	
		1 keg— 6d Finishing Nails	4.50	
		½ keg—4d Finishing Nails	2.75	
		28 dble hanks—#7 Sash Cord 128# @ 40¢	51.20	
	19	28—3# Sash Wts.		
		24.—3½# "		
		204—4# "		
		Forward	328.19	123.52

DUPLICATE INVOICE—SHEET #2

1927				
Sep.	19	Brot. forward	$328.19	$123.52
		32—4½# Sash wts.		
		28—5# " "		
		24—5½# " "		
		60—6# " "		
		360—6½# " "		
		180—7½# " "		
		168—9# " " 6962# @ $36.00 per ton	125.32	
	21	1 hank—#7 Sash Cord Sashem	.90	
		2—Long Handles Axes	6.00	
		1—4½ ft. X Cut Saw	3.83	
		1—6 ft. Rule	.50	
	15	10 gals.—Gasoline	2.00	
	26	4 pr.—#844—18" Garage Hinges	8.00	
		2 pr.—36" R&L Garage Hinges	3.50	
		3—18# Cain Bolts	2.25	
		16—5/16" x 2½" M. Bolts	.64	
		3—6" Chain Bolts	1.35	
		3—#200 Cylinder Garage Locks	9.00	
		3 pr.—Garage Door Holders	6.75	
	29	2 boxes—Staples	.10	
		6 prs.—36" x 39" x ¼" mesh	4.50	
		2—Batteries	.70	
		1 pr.—8" Tee Hinges	.20	
		1—6" Safety Hasp	.20	
		12 gals.—Gasoline	.264	506.57
				630.09

Exhibit 2—7/10/29—Meyer & Ruh Company.

Oct.	4	10 gals.—Gasoline	2.20	
	11	10 gals.—Gasoline	2.20	
		2 qts.—Oil	.35	
	15	18 pr.—3½" x 3½" OB Butts	3.60	
		115 pr.—2½" x 2" OB Butts	23.00	
		56 pr.—2" x 2" DB Butts	11.20	
	19	20 pr.—2½" x 2" OB Butts	4.00	
	25	100 pr.—3½" x 3½" OB Butts	20.00	
		12 pr.—4" x 4" OB Butts	4.20	
		24 prs.—2½" x 2" OB Butts	4.80	
	28	8—¼# balls Mason Line	2.00	
		1—6 ft. Rule	.50	
		6—#2 pt. Shovels	7.50	
		2—#3 Sq. pt. Shovels	2.50	
		4—8# RR Picks	4.00	
		4—Pick Handles	1.40	
		1 keg—8d Common Wire Nails	3.80	
		1 keg—10d Common Wire Nails	3.70	
		1 keg—20d Common Wire Nails	3.50	104.45
				734.54
Nov.	2	100 pr.—3½" x 3½" DB Butts	20.00	
		1 keg—6d Common Wire Nails	4.10	
	8	9 sets—Surface Floor Hinges	13.50	
		12 pr.—2½" x 2" DB Butts	2.40	
		1—Bath Room Lock		
		1—Corbin M. Lock		
		1—Mortise Lock—Template	No charge	
		1—Rule	.50	
	10	1 pr.—#240—18 Pliers	1.25	
		1 coil—#12 BA Wire	6.25	
		Forward	$48.00	$734.54

DUPLICATE INVOICE—SHEET #3

1927				
Nov.	10	Brot. forward	$48.00	$734.54
		1 pr.—Bolt Cutters	2.00	
		1—½" Ship Auger	.95	50.95
				785.49
Dec.	1	3 pr.—8" XH Tee Hinges & Screws	1.35	
		3—Jap. Coil Springs	1.50	
		3—Jap. Pulls	.30	
		3—.4" Hooks & Eyes	.15	
		12 pr.—2½" x 2" OB Butts	2.40	5.70
				$791.19

No cash has been received on the above job.

Exhibit 2—7/10/29—Meyer & Ruh Company.

STATE OF NEW JERSEY }
COUNTY OF } ss:

Rubin Goldberg, of full age, being duly sworn on his oath according to law, deposes and says that he is the President of the firm of Meyer & Ruh Company, a corporation of New Jersey, the claimant named in the foregoing claim; that the within bill of particulars and statements therein set forth are true, that the same are for materials furnished by the claimant in the erection of the building in the said claim described, at the times therein specified, and that the amount as claimed therein, is justly due and owing from the said Capitol Construction Company, a corporation of New Jersey to the claimant.

RUBIN GOLDBERG.

Sworn and subscribed to before me }
this 20th day of January, 1928 }

H. KLEIN
Notary Public.

Exhibit 3—7/10/29—Meyer & Ruh Company.

Exhibit 3—7/10/29.

Delivery Tickets.

MEYER & RUH CO.

Wholesale and Retail

HARDWARE, PAINTS, MILL & MASONS' SUPPLIES

447 BROADWAY

Yards: 9-11-16-18-20 W. 20th St.,

Bayonne, N. J.

R. GOLDBERG, Pres. Tel. Bayonne 3006-3007

	Order Number	Date
193409	58	11/8/27

Sold to Starr Bro. & Silberman

9 Set Surface Floor Hinges
12 p. 2½ x 2 DB Butts
1 Bath Room Lock } Complete
1 Corbin M. Lock } Complete
1 Master Latch } Complete
1 Rule .50

194613	58	12–1–27

Sold to Starr & Silberman

3 pr 8″ X H Lee Hgs & Screws
3 Jap Coil Springs
3 Jap Pulls
3—4″ Hooks & Eyes
12 pr 2½ x 2 O B Butts

Received by J. Starr

Exhibit 3—7/10/29—Meyer & Ruh Company.

193650 58 11/10/27

Sold to Starr Bro. & Silberman

1 pr #240 18 Pliers
1 Coil #12 B A Wire
1 pr Bolt Cutters 2.00
1—½ Ship Auger 10

Received by Nat Starr

193097 58 11/2/27

Sold to Starr Bro. & Silberman

100 pr 3½ x 3½ DB Butts
Received by J. Starr

193149 58 11/2/27 20

Sold to Starr Bro. & Silberman

1st Job

1 Keg 6a C W Nail

Received by Nat Starr

192878 58 10/28/17

30

Sold to Starr Bro. & Silberman

8—¼" Ball Mason Line
1—6 ft. Rule .50

Received by Harry Starr

40

Exhibit 3—7/10/29—Meyer & Ruh Company.

192875 58 10/28/27

Sold to Starr Bros. & Silverman

Job 1st Jersey City

6 #2 R. P. Shovels
2 #3 Sq. Pt. "
4 8# R. R. Picks
4 Pick Handles
1 keg 8d C. W. Nails
1 keg 10d C. W. Nails
1 keg 20d C. W. Nails

Received by H. Starr

192732 58 10/25/27

Sold to Starr Bros. & Silverman
100 pr. 3½x3½ OB Butts
12 pr. 4x4 OB Butts
24 pr. 2½x2 OB Butts

Received by Nathan Starr

192438 58 10/19/27

Sold to Starr Bros. & Silverman
20 pr. 2½x2 OB Butts

Received by J. Starr

192291 58 10/15/27

Sold to Starr Bros. & Silverman
18 pr. 3½x3½ OB Butts
115 pr. 2½x2 DB Butts
56 pr. 2x2 DB Butts

Received by J. Starr

Exhibit 3—7/10/29—Meyer & Ruh Company.

192019 58 10/11/27

Sold to Starr Bros. & Silverman
10 gal. Gas
2 qt. Oil
Received by J. Starr

10

191767 58 10/4/27

Sold to Starr Bros. & Silverman
10 gal. Gas
Received by J. Starr

191505 58 9/29/27

Sold to Starr Bros. & Silverman
2 boxes Staples .10
6 pr. 36x39—¼ Mesh 20
2 Batteries @ .35
1 pr. 8″ Tee Hinges
1 6″ Safety Hasp
Received by H. Silverman

191555 58 9/29/27

Sold to Starr Bros. & Silverman
12 gal. Gas 2.64
Received by J. Starr 30

191454 58 9/26/27

Sold to Starr & Silverman
4 pr. 844 18″ Garage Hgs.
2 pr. 36″ R & L Garage Hgs.
3 18″ Cain Bolts
16 5/16x2½ M Bolts
3 6″ Chain Bolts
3 #200 Cyl. Garage Locks 40
3 pr. Garage Door Holders
Received by H. Silverman

Exhibit 3—7/10/29—Meyer & Ruh Company.

191184 58 9/21/27

Sold to Starr Bros. & Silverman

1 hank #7 Sashem Sash Cord

Received by J. Starr

191203 58 9/21/27

Sold to Starr & Silverman

2 Long Handle Axes @ 3.00
1—4½ ft. X Cut Saw
1—6 ft. Rule .50

Received by H. Silverman

191090 58 9/19/27

Sold to Starr & Silverman

28—3#	Sash Wts.		
24—3½#	"	"	
204—4#	"	"	
32—4½#	"	"	
28—5#	"	"	6962 lbs.
24—5½#	"	"	@36.00 ..... 125.32
60—6#	"	"	
360—6½#	"	"	
180—7½#	"	"	
168—9#	"	"	

Del. by contract on Sept. 15, 1927

190898 58 9/15/27

Sold to Starr & Silverman

1 keg 8d Fin. Nails
1 keg 10d Fin. Nails
1 keg 6d Fin. Nails
½ keg 4d Fin. Nails
28 D. H. #7 Sash Cord—128 lbs.

Received by J. Starr

Exhibit 3—7/10/29—Meyer & Ruh Company.

190656 58 9/10/27

Sold to Starr & Silverman

17 bags #16 Stucco } 45.00
28 bags White Stucco } ton..... 101.25
40 bbls. P. Paris @ 3.75
Del—9/8/27 10

190221 58 9/1/27

Sold to Starr Bros. & Silverman

6—5/16x2¼ Drytin Anchors
1—5/16x12 Star Drill
2—⅝x12 " "
12—⅜x5½ Lag Screws
12—⅜ Exp. Shields (short) 20
12 Washers .05
1 #130 Jack 7.00

Received by H. Silverman

189790 58 8/24/27

Sold to Starr & Silverman

1 Rule .50
1 doz. Pencils 30

Received by J. Starr

188894 58 8/6/27

Sold to Starr & Silverman

2 kegs 8d CW Nails
2 " 10d " "
1 " 20d " "

Received by J. Starr 40

CREDIT
6 M. T. Carboys

Exhibit 3—7/10/29—Meyer & Ruh Company.

190896 58 9/15/27

Sold to J. Starr

10 gal. Gas

Received by J. Starr

188836 58 8/4/27

Sold to Starr & Silverman

1 keg 10d Cut Com.
1 keg 8d Cut Floor

Received by H. Silverman

188477 58 7/28/27

Sold to Starr & Silverman

6 #207—7″ W. W. Brushes
2 #1611 Wire Brushes

Received by H. Silverman

188413 58 7/26/27

4 Carboys Muriatic Acid

Received by H. Silverman

188320 58 7/25/27

Sold to Starr & Silverman

1 keg 5″ Cut Spikes
Jul 25 1927 8:29 AM

Received by H. Silverman

Exhibit 3—7/10/29—Meyer & Ruh Company.

188301 58 7/23/27

Sold to Starr & Silverman

2 Carboys Mur Acid
6 Acid Pails
12 #227 Acid Brushes

Received by Nat Starr

188057 58 7/16/27

Sold to Starr & Silverman

2 6 lb. Blacksmith Cross Pien Hammers
2 24″ M H Handles
Jul 16 1927—12:45 PM

Received by H. Silverman

188023 58 7/15/27

Sold to Starr & Silverman

1 Stone #16 B. A. Wire
1 #0 Porters Bolt Cutter

Received by H. Silverman

187945 58 7/14/27

1 H. S. Frame .50
6 Blades—10″
Wire .25

Received by H. Silverman

Exhibit 3—7/10/29—Meyer & Ruh Company.

186957 58 6/18/27

Sold to Starr & Silverman

1 pr. #0 Poters Bolt Clippers

Received by J. Starr

185928 58 5/24/27

Sold to Starr & Silverman

2 32x10 Neponset Bds.
1 4″x10 ft. Galv. Pump
1 pr. Jaws for 10″ Nettelton Nippers
1 pr. 14″x30″—⅛″ Mesh Galv.

Received by H. Silverman

185447 58 5/12/27

Sold to Starr & Silverman

#41 Neptune Ave.

1	10x12 Clean Out Door	2.75
1	pr. 10″ Nettleton Nippers	2.50
100	lbs. #9 BA Wire	6.00

Received by H. Silverman

TOZZI AND MARCASIANO.

Exhibit 4—7/10/29.

Lien Claim, Filed February 7th, 1928.

UNION COUNTY CLERK'S OFFICE.

MICHAEL TOZZI and JOSEPH MARCASIANO, partners trading as M. TOZZI & J. MARCASIANO, Claimants, *vs.* CAPITOL CONSTRUCTION CO., INC., and IRA R. CROUSE and BENJAMIN HEYMAN, Receivers of Capitol Construction Co., Inc., Builders and Owners.	Lien Claim.

Be it known, that MICHAEL TOZZI and JOSEPH MARCASIANO, partners trading as M. TOZZI & J. MARCASIANO, claim a lien upon the building and lands hereinafter described, pursuant to the statute in such case made and provided, for a debt contracted and owing to them for materials furnished and labor performed for the erection and construction of said building; and, therefore, show:

FIRST: The said building is a 3-story apartment house, brick building, on a lot or curtilage upon which this lien is claimed, and which is situated in Cranford, Union County, New Jersey, and is more particularly described as follows, viz.:

Exhibit 4—7/10/29—Tozzi and Marcasiano.

BEGINNING at a point formed by the intersection of the northeasterly side of Riverside Drive with the southeasterly side of Prospect Avenue; thence north 47 degrees 36 minutes east along said side of Prospect Avenue 358.31 feet to a point; thence south 42 degrees 24 minutes east 200 feet to a point; thence north 47 degrees 36 minutes east 13.76 feet to a point; thence south 42 degrees 24 minutes east 195.98 feet to the northwesterly side of Union Avenue; thence south 49 degrees 16 minutes west 87.97 feet along said side of Union Avenue to a point; thence still along said side of Union Avenue south 41 degrees 51 minutes west 152.34 feet to said side of Riverside Drive; thence northwesterly along said side of Riverside Drive, its various courses 443 feet more or less to the point or place of BEGINNING. According to a survey made by J. L. Bauer, C. E. & Surveyor, Elizabeth, New Jersey, June 11th, 1927.

SECOND: The name of the owner of the land and of the estate therein on which the lien is claimed, at the time that the materials were furnished and labor performed as hereinafter described, was the Capitol Construction Co., Inc., a corporation of New Jersey, against which said company a bill of complaint was filed in the Court of Chancery of New Jersey in a cause wherein Ralph Cianfrone and Ciro Castellano, partners trading as Venango Stone Company were Complainants, and said Capitol Construction Co., Inc. was Defendant, on the grounds of insolvency of said company, and there was appointed by order of said Court, Ira R. Crouse and Benjamin Heyman, as Receivers of said Capitol Construction Co., Inc., which Receivers, by virtue of their said appointment, are now the owners of the land and of the estate therein on which the lien is claimed.

Exhibit 4—7/10/29—Tozzi and Marcasiano.

THIRD: The name of the person who contracted the debt and for whom and at whose request the labor was performed, and the materials furnished, for which such lien is claimed, is said Capitol Construction Co., Inc.

FOURTH: The following is a bill of particulars exhibiting the amount and kind of materials furnished and labor performed and the price at which, and times when, the same was furnished and performed, giving credit for payment made thereupon and deduction that ought to be made therefrom and exhibiting the balance justly due to said Michael Tozzi and Joseph Marcasiano, partners trading as M. Tozzi & J. Marcasiano, Claimant, from said Capitol Construction Co., Inc. and said Receivers, viz.

CAPITOL CONSTRUCTION CO., INC. and IRA R. CROUSE and BENJAMIN HEYMAN Receivers of said Capitol Construction Co., Inc.

to

MICHAEL TOZZI and JOSEPH MARCASIANO, partners trading as M. TOZZI & J. MARCASIANO

To Furnishing and Delivering, from July 19th, 1927 to and including October 18th, 1927, 578 yards of Ashes, at the agreed price of $2.00 per yard, in the erection and construction of the building at Cranford, New Jersey, above-mentioned, in the manner following:

Exhibit 4—7/10/29—Tozzi and Marcasiano.

1927					
July	19th	10	yards of ashes at	$2 per yd.	$20.00
"	19th	58	"	"	116.00
"	21st	30	"	"	60.00
"	22nd	20	"	"	40.00
"	25th	40	"	"	80.00
"	26th	28	"	"	56.00
"	27th	40	"	"	80.00
Aug.	8th	20	"	"	40.00
"	10th	20	"	"	40.00
"	10th	10	"	"	20.00
"	11th	36	"	"	72.00
"	20th	30	"	"	60.00
"	22nd	20	"	"	40.00
"	23rd	28	"	"	56.00
"	24th	10	"	"	20.00
"	25th	20	"	"	40.00
"	27th	30	"	"	60.00
"	27th	30	"	"	60.00
"	30th	8	"	"	16.00
"	31st	20	"	"	40.00
Sept.	2nd	20	"	"	40.00
"	6th	20	"	"	40.00
"	12th	10	"	"	20.00
Oct.	10th	10	"	"	20.00
"	18th	10	"	"	20.00
		578			$1,156.00

C R .

Received on account, August 13th 1927
Check of Capitol Construction Co. Inc. 200.00

BALANCE JUSTLY DUE CLAIMANT.....$ 956.00

NINE HUNDRED FIFTY-SIX DOLLARS, as per agreement

Exhibit 4—7/10/29—Tozzi and Marcasiano.

ALL of the above materials were furnished and the labor performed between the 19th day of July, 1927, and the 18th day of October, 1927, which said last mentioned date is the date of the last work done and materials furnished, for which such debt is due.

MICHAEL TOZZI
JOSEPH MARCASIANO
Partners trading as M. TOZZI and J. MARCASIANO
Claimants

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

MICHAEL TOZZI and JOSEPH MARCASIANO, each being duly sworn according to law, upon their respective oaths, depose and say that they are partners trading as M. TOZZI & J. MARCASIANO and that they are the claimants named in the foregoing claim; that the bill of particulars and statements therein set forth, shown in said claim, are true; that the same is for materials furnished and labor performed and used for the concrete mixture in the erection and finishing of the building in such claim described, at the times therein specified; and the amount as claimed therein is justly due and owing from said Capital Construction Co., Inc., and said Receivers to said Claimant.

MICHAEL TOZZI,
JOSEPH MARCASIANO.

Subscribed and sworn to before me, at Jersey City, this 6th day of Feb. 1928.

HELEN E. RECTOR,
Notary Public of New Jersey.

Exhibit 5—7/10/29.

Delivery Tickets.

Jersey City, N. J., ..., 192.....

To MICHAEL TOZZI, Dr.,
and J. Marcasiano,
General Trucking and Dumping.

Ashes delivered to Capitol Construction Co., Inc., at Cranford, N. J., Job.

1927

July 19th, 10 yards of ashes.
July 19th, 58 yards of ashes.
July 21st, 30 yards of ashes.
July 22nd, 20 yards of ashes.
July 25th, 40 yards of ashes.
July 26th, 28 yards of ashes.
July 27th, 40 yards of ashes.
Aug. 8th, 20 yards of ashes.
Aug. 10th, 20 yards of ashes.
Aug. 10th, 10 yards of ashes.
Aug. 11th, 36 yards of ashes.
Aug. 22nd, 20 yards of ashes.
Aug 23rd, 28 yards of ashes.
Aug. 24th, 10 yards of ashes.
Aug. 25th, 20 yards of ashes.
Aug. 27th, 30 yards of ashes.
Aug. 27th, 30 yards of ashes.
Aug. 30th, 8 yards of ashes.
Aug. 31st, 20 yards of ashes.
Sept. 2nd, 20 yards of ashes.
Sept. 6th, 20 yards of ashes.
Sept. 12th, 10 yards of ashes.
Oct. 10th, 10 yards of ashes.
Oct. 18th, 10 yards of ashes.

ROYAL MARBLE WORKS, INC.

Exhibit 6—7/10/29.

Contract.

ROYAL MARBLE WORKS, INC.

Contract made this day, November 1st, 1927, between, CAPITAL CONSTRUCTION COMPANY of 1020 Boulevard, Bayonne, N. J., Bayonne, New Jersey, party of the first part, and the ROYAL MARBLE WORKS INC., of 610-612 East 16th Street, New York City, party of the second part, who hereby agrees to furnish, deliver and set at:—

Job: *Riverside Drive and Union Avenue, Cranford, New Jersey.*

American Marble Steps 1¼″ thick, set on all Iron Treads from the Main Hall to the Roof.

American 8″ wide Polished Base on Landings and Platforms.

American 6″ wide Polished Base on Iron Stringers from the Main Hall to the Roof.

American Marble Step for Roof Door and Court Door.

Italian 8″ wide Polished Base in the Main Hall.

Italian Marble Wainscoating in Vestibule, set in Panel Form and finished with Cap, to finish 8″ above the top step of Vestibule. Also two (2) Returns finished the same height.

Italian Marble Steps and Risers in the Vestibule. Said Steps to be 12″ wide, 1¼″ thick. Riser ⅞″ thick.

Italian Marble Saddles to Main Hall and to Vestibule Doors.

Italian Marble Step and Riser to each Apartment in the Main Hall.

Plain Italian Marble Casings and Jambs to all apartment doors in the Main Hall.

Exhibit 6—7/10/29—Royal Marble Works, Inc.

Marble in Vestibule for center house to be constructed to form two (2) flower pot stands.

Forty-Two (42) American Marble Saddles to Bathroom Doors.

Twenty-Four (24) American Marble Saddles to Apartment Doors.

The above work to be done in a good workmanlike manner in three (3) houses similar, for the agreed sum of *Three Thousand ~~Eight~~ Hundred Seven*

($3,700.00)— *Dollars*

All cement work to be done by the owner and plaster to be furnished by the owner.

Payments to be made as work progresses.

ACCEPTED:
CAPITAL CONSTRUCTION CO.
By JACOB STARR
Secy.
(Party of the First Part)

ACCEPTED:
ROYAL MARBLE WORKS INC.
By HARRY LEVINE
Pres.
(Party of the Second Part)

Exhibit 7—7/10/29.

Lien Claim, Filed December 15th, 1927.

UNION COUNTY CLERK'S OFFICE.

ROYAL MARBLE WORKS, INC.,
a corporation,
Claimant,

vs.

CAPITOL CONSTRUCTION CO., INC.,
a corporation,
Owner and Builder.

Lien Claim.

BE IT KNOWN that the ROYAL MARBLE WORKS, INC., a corporation, claims a lien upon the building and lands hereinafter described, pursuant to the statute in such cases made and provided, for a debt contracted and owing to it for materials furnished and labor performed for the erection and construction of the said building and therefore shows:—

FIRST: The said building is a brick apartment building, on a lot or curtilage upon which this lien is claimed, and which is situate in the Township of Cranford, in the County of Union and State of New Jersey and more particularly described as follows:

BEGINNING at a point formed by the intersection of the northeasterly side of Riverside Drive with the southeasterly side of Prospect Ave., and running thence (1) north 47° 36′ east along the said side of Prospect Avenue, three hundred

fifty-eight feet and thirty one-hundredths of a foot (358.30′) to a point, thence (2) south 42° 24′ east two hundred feet to a point; thence (3) north 47° 36′ east thirteen feet and seventy-six one-hundredths of a foot (13.76′) to a point; thence (4) south 42° 24′ east, one hundred ninety-five feet and ninety-eight one-hundredths of a foot (195.98′) to the northwesterly side of Union Avenue, thence (5) south 49° 16′ west eighty-seven feet and ninety-seven one-hundredths of a foot (87.96′) along the said side of Union Avenue, to a point, thence (6) still along said side of Union Avenue south 41° 51′ west one hundred fifty-two feet and thirty-four one-hundredths of a foot (152.34′) to the said side of Riverside Drive, thence (7) northwesterly along said side of Riverside Drive and its various courses, four hundred forty-three feet (443′) more or less to the point or place of beginning.

The said description is according to a survey made by J. L. Bauer, C. E. and Surveyor, Elizabeth, N. J. June 1911.

Second: The name of the owner of the said land and of the estate therein on which this lien is claimed is Capitol Construction Co. Inc. a corporation.

Third: The name of the person who contracted the debt and for whom and at whose request the materials were furnished and labor performed for which this lien is claimed is Capitol Construction Co. Inc., a corporation.

Fourth: The following is a bill of particulars exhibiting the amount due for materials furnished and labor performed under a contract between the claimant herein and the Capitol Construction Co. Inc., dated November 1st, 1927, wherein and

Exhibit 7—7/10/29—Royal Marble Works, Inc.

whereby the said Capitol Construction Co. Inc. agreed to pay the said claimant the sum of $3700.00 for the following merchandise to be delivered and set by the claimant.

American Marble steps 1¼″ thick set on all iron stringers from the main hall to the roof.

American 8″ wide polished base on landings and platforms.

American 6″ wide polished base on iron stringers from main hall to roof.

American marble steps for roof door and court door.

Italian 8″ wide polished base in the main hall.

Italian Marble wainscoting in vestibule set in panel form and finished with cap, to finish 8″ above the top steps of vestibule, also two returns to finish the same height.

Italian marble steps and risers in the vestibule. Said steps to be 12″ wide, 1¼″ thick, risers ⅞″ thick.

Italian marble saddles to main hall doors and vestibule doors.

Italian marble steps and risers to each apartment doors in the man hall.

Plain Italian marble casings and jambs to all apartment doors in the main hall.

Marble in vestibule in the center house to be constructed to form two ower pot stands.

42 American marble saddles to bathroom doors.

24 American marble saddles to apartment doors.

At the agreed price of.....$3700.00

The said claimant has performed and tendered to perform its part of the contract aforesaid, but

the Capitol Construction Co. Inc. a corporation, has failed to perform its part of the contract and make its payment according thereto and the full amount due the claimant is Thirty-seven hundred ($3700.00) dollars.

All of said work under the said contract and materials were done, performed and furnished between November 1st, 1927, and December 13th, 1927, which said last mentioned date is the date of the last work performed and materials delivered for which said debt is due.

ROYAL MARBLE WORKS, INC.,
By, THEODORE HARRIS,
Vice President.

(Seal)

STATE OF NEW JERSEY,
COUNTY OF HUDSON, } ss.:

THEODORE HARRIS, of full age, being duly sworn, according to law, upon his oath deposes and says: that he is the Vice-President of the Royal Marble Works, Inc., the claimant named in the foregoing claim and has charge of the accounts of said Company, that the bill of particulars and statements therein set forth as shown in said claim are true, that the same are for materials furnished and labor performed in the erection of the building in such claim described at the times therein specified; that the amount as claimed therein is justly due and owing from the said Capital Construction Co., Inc., a corporation, to the said claimant.

THEODORE HARRIS.

Sworn and subscribed to before me
this 14th day of December, 1927.

ISADOR HABER,
Master in Chancery of New Jersey.

Exhibit 7—7/10/29—Royal Marble Works, Inc.

STATE OF NEW JERSEY, }
UNION COUNTY, } SS.:

I, WILLIAM B. MARTIN, Clerk of the County of Union, aforesaid, and also Clerk of the Circuit Court and Court of Common Pleas, holden therein, DO HEREBY CERTIFY, That the foregoing is a true and correct copy of a certain Lien Claim, Royal Marble Works, Inc. *vs.* Capitol Construction Co., Inc., as the same is taken from and compared with the original on file as of Dec. 15, 1927, in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Courts and County, at Elizabeth, this 5th day of July, 1929.

W. B. MARTIN,
Clerk.

(Seal)

UNION COUNTY, NEW JERSEY

Summons signed, sealed and issued the 7th day of April, 1928, at 11:50 A. M.

WM. B. MARTIN,
County Clerk.

WEST BERGEN TRUST COMPANY.

Exhibit 8—7/10/29.

Bond of Capitol Construction Co., Inc., to West Bergen Trust Company, Dated October 25th, 1927.

KNOW ALL MEN BY THESE PRESENTS: That Capitol Construction Co. Inc. a corporation organized under the laws of the State of New Jersey and having its principal office in the City of Bayonne, in the County of Hudson in the State of New Jersey, is held and firmly bound unto West Bergen Trust Company, a corporation organized under the laws of the State of New Jersey and having its principal office in the City of Jersey City, in the County of Hudson in the State of New Jersey, in the penal sum of Twelve Thousand Dollars ($12,000.00) lawful money of the United States of America, to be paid to the said West Bergen Trust Company, its successors or assigns: FOR WHICH PAYMENT, well and truly to be made, the said obligor binds itself and its successors firmly by these presents. Sealed with the common seal of said obligor Corporation Dated the 25th day of October, One Thousand Nine Hundred and Twenty-Seven.

THE CONDITION of the above obligation is such that if the above bounden Capitol Construction Co., Inc., or its successors, shall well and truly pay or cause to be paid, unto the above named West Bergen Trust Company, its successors or assigns, the just and full sum of Six Thousand Dollars ($6,000.00) on the 25th day of January which will be in the year One Thousand Nine Hundred and Twenty-Eight, and the interest thereon, to be computed from the date hereof at and after the rate of six (6) per cent. per annum, and to be paid Jan. 25th 1928 without any fraud or other delay, then the above obligation to be void, otherwise to remain in full force and virtue.

Exhibit 8—7/10/29—West Bergen Trust Company.

AND IT IS HEREBY EXPRESSLY AGREED, that should any default be made in the payment of the said interest, or of any part thereof, on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond, and become due and payable and should the said interest, or any part thereof remain unpaid and in arrear for the space of thirty (30) days, or said tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien, or any or either of them, remain unpaid and in arrear for the space of thirty (30) days, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of money, or so much thereof as may then remain unpaid, with all arrearage of interest thereon, shall, at the option of the said obligee, or the legal representative of said obligee, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

AND IT IS FURTHER EXPRESSLY AGREED, that the said obligor shall not be entitled to and will not claim any credit on the interest payable on the mortgage securing this bond for taxes which may be levied upon the mortgaged premises, or for any part of said taxes.

CAPITOL CONSTRUCTION CO., INC.,
By HYMAN SILVERMAN
President.

(SEAL)

Attest:
JACOB STARR
Secretary.

Exhibit 9—7/10/29—West Bergen Trust Company.

Exhibit 9—7/10/29.

Mortgage of Capitol Construction Co., Inc., to West Bergen Trust Company, Dated October 25th, 1927, Recorded October 26th, 1927.

THIS INDENTURE, made the 25th day of October, in the year of our Lord One Thousand Nine Hundred and Twenty Seven BETWEEN CAPITOL CONSTRUCTION CO., INC., a corporation organized under the laws of the State of New Jersey and having its principal office in the City of Bayonne, in the County of Hudson in the State of New Jersey, party of the first part; AND WEST BERGEN TRUST COMPANY, a corporation organized under the laws of the State of New Jersey and having its principal office in the City of Jersey City, in the County of Hudson in the State of New Jersey, party of the second part;

WHEREAS, the said party of the first part is justly indebted to the said party of the second part, in the sum of Six Thousand Dollars ($6,000.00) lawful money of the United States of America, secured to be paid by its certain bond or obligation, bearing even date with these presents, in the penal sum of Twelve Thousand Dollars ($12,000.00) lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of Six Thousand Dollars ($6,000.00) lawful money as aforesaid, to the said party of the second part, its successors or assigns, on the 25th day of January which will be in the year One Thousand Nine Hundred and Twenty-Eight and interest thereon, to be computed from the date hereof at and after the rate of six (6) per cent. per annum, and to be paid Jan. 25th 1928

AND IT IS THEREBY EXPRESSLY AGREED that should any default be made in the payment of the said

interest or of any part thereof, on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage, and become due and payable, and should the said interest, or any part thereof remain unpaid and in arrear for the space of thirty (30) days, or said tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien, or any or either of them remain unpaid and in arrear for the space of thirty (30) days, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods as the case may be, the aforesaid principal sum of Six Thousand Dollars ($6,000.00) with all arrearage of interest thereon, shall, at the option of the said party of the second part, or its legal representatives, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything therein before contained to the contrary thereof in anywise notwithstanding: as by the said bond or obligation, and the conditions thereof, reference being thereunto had, may more fully appear.

Now this Indenture Witnesseth, That the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar, to it in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, released, con-

Exhibit 9—7/10/29—West Bergen Trust Company.

veyed and confirmed, and by these presents doth grant, bargain, sell, alien, release, convey and confirm, unto the said party of the second part, and to its successors and assigns forever,

ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Cranford in the County of Union and State of New Jersey.

BEGINNING at a point formed by the intersection of the Northeasterly side of Riverside Drive with the Southeasterly side of Prospect Avenue; thence North Forty-seven (47) degrees, Thirty-Six (36) minutes East along said side of Prospect Avenue, Three Hundred Fifty-Eight and Thirty One-Hundredths (358.30) Feet to a point; thence South Forty-Two (42) degrees, Twenty-Four (24) minutes East, Two Hundred (200) Feet to a point; thence North Forty-seven (47) degrees, Thirty-Six (36) minutes East, Thirteen and Seventy-Six One-Hundredths (13.76) Feet to a point; thence South Forty-two (42) degrees, Twenty-Four (24) minutes East, One Hundred Ninety-Five and Ninety-Eight One Hundredths (195.98) Feet to the Northwesterly side of Union Avenue; thence South Forty-Nine (49) degrees, Sixteen (16) minutes West, Eighty-seven and Ninety-Seven One Hundredths (87.97) Feet along said side of Union Avenue, to a point; thence still along said side of Union Avenue South Forty-one (41) degrees and Fifty-One (51) minutes West, One Hundred Fifty-Two and Thirty-Four One-Hundredths (152.34) Feet to said side of Riverside Drive, its various course, Four Hundred Forty-Three (443) Feet more or less to the point or place of BEGINNING.

The foregoing description is according to survey made by J. L. Bauer, C. E. & Surveyor, Elizabeth, N. J. June 1911.

Exhibit 9—7/10/29—West Bergen Trust Company.

Being the same premises conveyed to said Capitol Construction Co. Inc. by Deed of Jacob Starr and wife, et al, dated May 25th 1927, recorded in the Union County Register's Office in Book 1112 of Deeds for said County on Pages 171 &c.; this Mortgage being subject to five certain Mortgages aggregating $167,000.00.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. AND ALSO, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and every part and parcel thereof, with appurtenances: TO HAVE AND TO HOLD the above granted and described premises, with the appurtenances, unto the said party of the second part, its successors and assigns, to its and their own proper use, benefit and behoof forever, PROVIDED ALWAYS, and these presents are upon this express condition, that if the said party of the first part, or its successors, shall well and truly pay unto the said party of the second part, its successors or assigns, the said sum of money mentioned in the condition of said bond or obligation, and the interest thereon, at the time and times, and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine and be void.

AND the said party of the first part for itself and its successors doth covenant and agree to pay unto the said party of the second part, its successors or assigns, the said sum of money and inter-

est as mentioned above and expressed in the conditions of the said bond.

And it is agreed that neither the mortgagor, nor the successors or assigns of the mortgagor, shall be entitled to any credit on the interest payable on this mortgage for the taxes which may be levied on the mortgaged premises or any part of such taxes.

And it is also agreed by and between the parties to these presents, that the said party of the first part shall and will keep the buildings erected, and to be erected upon the lands above conveyed, insured against loss or damage by fire, in some safe and responsible Insurance Company or Companies, to an amount not less than

Dollars,

and assign the policy and certificate thereof to the said party of the second part as collateral security for the payment of the principal and interest aforesaid; and in default thereof, it shall be lawful for the said party of the second part to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents, and payable on demand with legal interest.

In Witness Whereof, the said party of the first part hath caused its common seal to be herewith affixed and duly attested, and these presents to be signed and delivered by its President, the day and year first above written.

Capitol Construction Co., Inc.,

(seal) By Hyman Silverman,

President.

Attest:

Jacob Starr,

Secretary.

Exhibit 9—7/10/29—West Bergen Trust Company.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

BE IT REMEMBERED, That on this 25th day of October, in the year of our Lord One Thousand Nine Hundred and Twenty-seven, before me the subscriber, a Notary Public of New Jersey, personally appeared Jacob Starr, who being by me duly sworn on his oath says that he is the Secretary and that Hyman Silverman is the President of the Capitol Construction Co., Inc., a corporation, the mortgagor mentioned in the within Indenture, that he well knows the common seal of said corporation; that the seal affixed to the within mortgage is such seal and was thereto affixed and the said mortgage signed and delivered by said President of said corporation, and by due authority thereof, in presence of said deponent who therefore subscribed his name thereto as witness.

JACOB STARR.
(SEAL)

Sworn and subscribed before me, at Jersey City, New Jersey, the date aforesaid.

SAMUEL V. ABRAHAM.
Notary Public of New Jersey.
(SEAL)

RECEIVED in the Register's office of the County of Union, N. J., on the 26 day of October, A. D. 1927, at 9:17 o'clock in the forenoon, and Recorded in Book 895 of Mortgages for said County, on pages 38, etc.

EDWARD BAUER.

Exhibit 10—7/10/29—West Bergen Trust Company.

Exhibit 10—7/10/29.

Summation of Costs of Mortgage.

IN CHANCERY OF NEW JERSEY.

RIVERSIDE APARTMENT CORPORATION, Complainant, *vs.* CAPITOL CONSTRUCTION CO. INC., *et al*, Defendants.	On Bill, &c. Schedule of Advances and Payments Secured by West Bergen Trust Company Mortgage.

In Re: Advance-Money Mortgage of Capitol Construction Co. Inc., to West Bergen Trust Company, dated October 25th 1927, encumbering the Riverside Apartment House property at Cranford, New Jersey.

SCHEDULE showing moneys advanced by said West Bergen Trust Company to said Capitol Construction Co., Inc. to pay laborers and material-men for labor performed and materials furnished in the erection of said Apartment House, and showing payments made by said Capitol Construction Co. Inc. to such laborers and material-men out of the moneys so advanced and secured by said Mortgage.

Exhibit 10—7/10/29—West Bergen Trust Company.

1927				
	Moneys Advanced:			
Sept. 10th	Proceeds of $5,000 Note of Capitol Construction Co. Inc. discounted Sept. 12th 1927	$4,974.17		
24th	Proceeds of $800 Note of Capitol Construction Co. Inc. discounted Sept. 24th 1927	800.00	$5,774.17	
	Payments Made Therefrom by Checks of Capitol Construction Co. Inc.			
1927				
Sept. 10th	Siegel & Levine, plasterers, dated Sept. 9th 1927	2,000.00		
12th	John Nicaretta, labor for concrete work, dated Sept. 10th 1927	150.00		
13th	Max Resnick, carpenter, dated Sept. 10th 1927	48.00		
13th	Louis Starr, carpenter, dated Sept. 10th 1927	42.00		
13th	McCabe Bros., excavation work dated Sept. 10th 1927	1,000.00		
13th	J. Starr, carpenter, dated Sept. 10th 1927	50.00		
14th	H. Silverman, carpenter, dated Sept. 10th 1927	50.00		
14th	H. Starr, carpenter, dated Sept. 10th 1927	50.00		
14th	M. Silverman, carpenter, dated Sept. 8th 1927	26.65		
14th	Bob Kasson, carpenter, dated Sept. 9th 1927	44.80		
15th	Sam Silverman, carpenter, dated Sept. 10th 1927	44.80		
	(Forward)	$3,506.25		

Exhibit 10—7/10/29—West Bergen Trust Company.

		Forward) (Total Moneys Advanced)		$5,774.17
1927		" (Payments Made &c)	$3,506.25	
Sept.	15th	Lafayette Iron Works, iron work materials, dated Sept. 12th 1927	500.00	
	15th	Leo Starr, carpenter, dated Sept. 13th 1927	16.71	
	16th	N. Starr, carpenter, dated Sept. 10th 1927	36.00	
	16th	Siegel & Levine, plasterers, dated Sept. 16th 1927	900.00	
	24th	Cash for $800 dated Sept. 23rd 1927, Pay-Roll	800.00	
				5,758.96
		In addition to:		
		Interest on $4,974.17 from Sept. 12th 1927 to Oct. 25th 1927 (date of Mortgage)	34.82	
		Interest on $800 from Sept. 24th 1927 to Oct. 25th 1927	4.00	38.82
		To Services and Disbursements of Edward P. Stout, as Counsel for West Bergen Trust Company, in negotiating above loans; Examination of title to Cranford property; Drafting necessary papers and closing Mortgage transaction, as agreed		202.22
		Amount of Mortgage		$6,000.00

Exhibit 11—7/10/29—West Bergen Trust Company.

Exhibit 11—7/10/29.

Ratio Account.

ANALYSIS

of account of Capitol Construction Co., Inc., with the West Bergen Trust Company, from the time of the advancement of moneys by the West Bergen Trust Company to the Capitol Construction Co., Inc., to pay laborers and materialmen for labor and materials on the Cranford Apartment House, down to and including the last payment by the Capitol Construction Co., Inc., out of said money so advanced.

1927		Deposits	Checks Drawn
Sept. 9th	General Bank Balance	$ 151.53	
10th	Deposit, Moneys Received by Capitol Construction Co., Inc., on Goldberg job	500.00	
10th	Ck. drawn to Siegel & Levine, plasterers, dated Sept. 9th (Paid out of proceeds of Note of Capitol Construction Co., Inc., dated Sept. 10th, 1927, for $5,000 discounted Sept. 12)		$2,000.00
12th	Deposit, proceeds of above $5,000 Note	4,974.17	
12th	Ck. drawn to Abraham & Co., Inc., dated Sept. 12th (Paid out of above deposit of $500)		500.00
12th	Ck. drawn to West Bergen Trust Co. dated Sept. 12th (Paid out of general balance)		54.73
12th	Ck. drawn to John Nicaretta dated Sept. 10th (Paid out of proceeds of above Note) labor for concrete work		150.00
13th	Ck. drawn to Max Resnick, dated Sept. 10th (Paid out of proceeds of above Note) carpenter		48.00
13th	Ck. drawn to Louis Starr, dated Sept. 10th (Paid out of proceeds of above Note) carpenter		42.00

New Jersey State Library

Exhibit 11—7/10/29—West Bergen Trust Company.

1927		Deposits	Checks Drawn
Sept. 13th	Ck. drawn to J. Starr, dated Sept. 10th (Paid out of proceeds of above Note) General Carpenter — re-imbursement, money advanced		50.00
13th	Ck. drawn to McCabe Bros., dated Sept. 10th (Paid out of proceeds of above Note) excavation work		1,000.00
14th	Ck. drawn to M. Silverman, dated Sept. 8th (Paid out of proceeds of above Note) carpenter		26.65
14th	Ck. drawn to Sam Silverman, dated Sept. 10th (Paid out of proceeds of above Note) carpenter		44.80
14th	Ck. drawn to H. Silverman, dated Sept. 10th (Paid out of proceeds of above Note) Superintendent — re-imbursement of money advanced		50.00
14th	Ck. drawn to H. Starr, dated Sept. 10th (Paid out of proceeds of above Note) General Manager — re-imbursement of money advanced		50.00
14th	Ck. drawn to M. S. Kanengiser, dated Sept. 13th (Paid out of general balance)		63.60
15th	Ck. drawn to Bob Kasson, dated Sept. 9th (Paid out of proceeds of above Note) carpenter		44.80
15th	Ck. drawn to Leo Starr, dated Sept. 13th (Paid out of proceeds of above Note) carpenter		16.71
15th	Ck. drawn to Lafayette Iron Works, dated Sept. 12th (Paid out of proceeds of above Note) iron work materials		500.00

Exhibit 11—7/10/29—West Bergen Trust Company.

1927		Deposits	Checks Drawn
Sept. 15th	Deposit, Moneys Received by Capitol Construction Co., Inc., from West Bergen Trust Co. on account of construction loan, First Street Garage, Jersey City	2,250.00	
16th	Ck. drawn to David Sokol, dated Sept. 12th (Paid out of general balance)		1,000.00
16th	Ck. drawn to Cash, dated Sept. 14th (Paid out of general balance)		37.50
16th	Ck. drawn to N. Starr, dated Sept. 10th (Paid out of proceeds of above Note) carpenter		36.00
16th	Ck. drawn to Moros Silverman, dated Sept. 12th (Paid out of general balance)		100.00
16th	Ck. drawn to Siegel & Levine, dated Sept. 16th (Paid out of proceeds of above Note) plasterers		900.00
17th	Ck. drawn to Capitol Construction Co., Inc., dated Sept. 17th (Paid out of general balance) Pay-Roll		400.00
24th	Deposit, Proceeds of $800 Note of Capitol Construction Co., Inc., dated Sept. 24th, with interest, discounted	800.00	
24th	Ck. drawn to Cash, dated Sept. 23rd (Paid out of above Deposit of $800) Pay-Roll		800.00
		$8,675.70	$6,914.79

MOWRE LAGER.

Exhibit 12—7/10/29.

Lien Claim, Filed February 21st, 1928.

IN THE OFFICE OF THE CLERK OF THE COUNTY OF UNION.

MOWRE LAGER,
Claimant,

vs.

CAPITOL CONSTRUCTION CO., INC., a corporation of the State of New Jersey, Builder and Owner, ISRAEL SHILOWITZ, JACOB TUCKER, LOUIS SCHWARTZ, JUNCTION MILLING CO., a corporation of New Jersey, THE TRUST COMPANY OF NEW JERSEY, a corporation, EDWARD P. STOUT, Trustee, CARTERET COMPANY, a corp., WEST BERGEN TRUST CO., a corp., MORTGAGES, IRA R. CROUSE and BENJAMIN HEYMAN, Receivers.

Lien Claim.

COUNTY OF HUDSON, ss.

BE IT KNOWN, that MOWRE LAGER of the City of Jersey City, in said County, claims a lien upon the building and lands hereinafter described, pursuant to the provisions of "An Act to secure to mechanics and others, payment for their labor and materials in erecting any building," and the several supplements thereto, for a debt contracted

and owing to him for labor performed and materials furnished for the erection and construction of said building as hereinafter set forth, to wit:

FIRST:—The said building is a brick structure three (3) stories in height, on a lot of land or curtilage, situated in the Township of Cranford, in the County of Union and State of New Jersey, and more particularly described as follows:

BEGINNING at a point formed by the intersection of the northeasterly side of Riverside Drive with the southeasterly side of Prospect Avenue; thence North 47 degrees 36 minutes East along said side of Prospect Avenue 358.31 feet to a point; thence south 42 degrees 24 minutes East 200 feet to a point; thence north 47 degrees 36 minutes East 13.76 feet to a point; thence South 42 degrees 24 minutes East 195.98 feet to the northwesterly side of Union Avenue; thence South 49 degrees 16 minutes West 87.97 feet along said side of Union Avenue to a point; thence still along said side of Union Avenue South 41 degrees 51 minutes West 152.34 feet to the said side of Riverside Drive; thence northwesterly along said side of Riverside Drive, its various courses 443 feet more or less to the point or place of beginning. According to a survey made by J. L. BAUER, Civil Engineer & Surveyor, Elizabeth, New Jersey, June 11, 1927.

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

THIRD:—The name of the person who contracted the said debt, and for whom and at whose request the said labor was performed, and materials fur-

nished, for which the aforesaid lien is claimed, is the said Capitol Construction Co. Inc., a corporation of New Jersey.

FOURTH:—The following is a bill of particulars of the aforesaid labor performed and materials furnished by the said Mowre Lager, the amount and kind of labor performed, and of materials furnished, and the prices at which and times when the same were performed and furnished, and given credit for all the payments thereupon, and deductions that ought to be made therefrom, and exhibiting the balance justly due to him from the said Capitol Construction Co. Inc., a corp. of N. J. viz:

From August 3rd, 1927 to December 9th, 1927.

Agreed price for painting only, entire house except main halls, payments to be made as work progresses....		$5500.00
Allowance for work not performed	$1000.00	
Paid on account.....	1500.00	
Balance justly due the claimant	3000.00	
		$5500.00

5. Israel Shilowitz and Jacob Tucker, are made defendants, because they hold a mortgage of record upon said lands, dated the 29th day of July, 1927, and recorded in the Union County Register's Office in Book 878 of Mortgages for said County on page 347, to secure the sum of $20,000.00; which is subject to the plaintiff's lien, and which will be cut off by a sale under the said plaintiff's lien.

6. Louis Schwartz is made a defendant because he holds a mortgage of record upon said lands, dated the 22nd day of August, 1927, and recorded in the Union County Register's Office in Book 884 of Mortgages, for said County on page 127, to secure the sum of $5150.00; which is subject to the plaintiff's lien, and which will be cut off by a sale under the said plaintiff's lien.

7. Junction Milling Co., a corporation, is made a defendant, because it holds a mortgage of record upon said lands, dated the 16th day of September, 1927, and recorded in the Union County Register's Office in Book 886 of Mortgages for said County on page 390, to secure the sum of $11,619.34; which is subject to the plaintiff's lien, and which will be cut off by a sale under the said plaintiff's lien.

8. Carteret Company, a corporation, is made a defendant, because it holds a mortgage of record upon said lands, dated the 14th. day of October, 1927, and recorded in the Union County Register's Office in Book 892 of Mortgages for said County, on page 89, to secure the sum of $35,000.00; which is subject to the plaintiff's lien, and which will be cut off by a sale under the said plaintiff's lien.

9. West Bergen Trust Co. a corporation, is made a defendant, because it holds a mortgage of record upon said lands, dated the 25th day of October, 1927, and recorded in the Union County Register's Office in Book 895 of Mortgages for said County, on page 38, to secure the sum of $6,000.00; which is subject to the plaintiff's lien, and which will be cut off by a sale under the said plaintiff's lien.

10. The Trust Company of New Jersey, a corporation is made a defendant, because it holds a

mortgage of record upon said lands, dated the 28th. day of October, 1927, and recorded in the Union County Register's Office of Mortgages #60283, to secure the sum of $16,000.00; which is subject to the plaintiff's lien, and which will be cut off by a sale under the said plaintiff's lien.

11. Edward P. Stout, Trustee, is made a defendant, because he holds a mortgage of record upon said lands, dated the 1st day of November, 1927, and recorded in the Union County Register's Office as Mortgage No. 60515 to secure the sum of $7500.00; which is subject to the plaintiff's lien, and which will be cut off by a sale under the said plaintiff's lien.

12. The Trust Company of New Jersey, a corporation is made a defendant, because it holds a mortgage of record upon said lands dated the 28th day of October, 1927, and recorded in the Union County Register's Office in Book 898 of Mortgages for said County on page 306, to secure the sum of $16,000.00; which is subject to plaintiff's lien, and which will be cut off by a sale under the said plaintiff's lien.

13. Ira R. Crouse and Benjamin Heyman, are made defendants because, that in certain proceedings pending in the Court of Chancery of New Jersey for the adjudication of the said Capitol Construction Co. Inc., a corporation of New Jersey, as insolvent, and pursuance to the statute in such cases made and provided, Ira R. Crouse and Benjamin Heyman were appointed receivers of the assets and property of said Capitol Construction Co. Inc. a corporation of New Jersey, described in the complaint herein, and that thereafter plaintiff obtained leave of the Court of

Exhibit 12—7/10/29—Mowre Lager.

Chancery of New Jersey, wherein said proceedings were pending, to make said Ira R. Crouse and Benjamin Heyman parties to this action.

All the above labor was performed and materials furnished between the third day of August 1927, and the 9th. day of December, 1927.

MOWRE LAGER,
Claimant.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

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

MOWRE LAGER.

Sworn and subscribed before me, }
this 20th. day of February, 1928. }

ANNA RUBENSTEIN,
A Notary Public of New Jersey.

Exhibit 12—7/10/29—Mowre Lager.

STATE OF NEW JERSEY.

UNION COUNTY, SS.:

I, WILLIAM B. MARTIN, Clerk of the County of Union, aforesaid, and also Clerk of the Circuit Court and Court of Common Pleas, holden therein,

DO HEREBY CERTIFY, That the foregoing is a true and correct copy of a certain Lien Claim in the case of:

MOWRE LAGER, Claimant, *vs.* Capitol Construction Co. Inc., a corporation of New Jersey, *et als.*, Defendants,

as the same is taken from and compared with the original on file as of February 21, 1928, in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Courts and County, at Elizabeth, this 2nd. day of October 1928.

[SEAL.]

W. B. MARTIN,
Clerk.

Exhibit 12—7/10/29—Mowre Lager.

Order Amending Lien Claim.

UNION COUNTY CIRCUIT COURT.

MOWRE LAGER, Claimant-Plaintiff, *vs.* CAPITOL CONSTRUCTION CO., INC., *et als.*, Defendants.	On Mechanic's Lien Order.

This matter being opened to the Court upon application of Chas. Rubenstein, Attorney for the plaintiff-claimant herein, and it appearing that due notice of this application has been given to the proper parties in interest in accordance with the provisions of an act entitled "An Act to secure to mechanics and others payment for their labor and materials in erecting any building and in making certain improvements to land;"

And it appearing that the description of the curtilage and of the lands and premises contained in the lien claim heretofore filed in this matter is erroneous in that it contains or includes more curtilage than was intended to be used and occupied with the building for this cost of which the lien is claimed

And it further appearing that the said notice referred to aforesaid provides that application is made to amend or alter the said description heretofore filed so that the same shall read as hereinafter provided;

And it further appearing that final judgment in the above entitled matter has not been entered;

Exhibit 12—7/10/29—Mowre Lager.

And it further appearing that no one appeared to oppose to this application or to set up any good reason to disallow the within application and sufficient reason appearing;

Therefore, it is on this 7th day of September, 1929, ORDERED that the description contained in the lien claim heretofore filed in the above entitled matter, be and the same is hereby altered and amended or to read as follows:—

All that certain lot, tract or parcel of land and premises, situate, lying and being in the Township of Cranford, County of Union and State of New Jersey, and being more particularly described as follows: BEGINNING at a point on the northerly side of Riverside Drive distant southeasterly along the same 94.98 feet from the corner formed by the intersection of the said northerly side of Riverside Drive and the easterly side of Prospect Avenue; thence running (1) north 47° 36′ east and parallel with Prospect Avenue 371.93 feet to a point; thence running (2) south 42° 24″ east 106 feet to a point; thence running (3) north 47° 36″ east and parallel with Prospect Avenue 13.76 feet to a point; thence running (4) south 42° 24′ east 85.98 feet to a point; thence running (5) south 47° 36′ west and parallel with Prospect Avenue 109.65 feet to a point; thence running (6) south 22° 09′ west 96.57 feet to a point in Riverside Drive, which point is 94 feet south, 73° 89′ east from the corner formed by the intersection of the said northerly side of Riverside Drive and the northerly side of Union Avenue; thence running (7) along the several courses and curves of Riverside Drive to the point or place of beginning.

CLARENCE S. CASE,
Justice, Supreme Court.

Exhibits 13, 14—7/10/29—West Bergen Trust Company.

Exhibit 13—7/10/29.

Check.

No. 14

WEST BERGEN TRUST COMPANY

Jersey City N. J. Sept. 9, 1927

Pay to the Order of Siegel & Levine.....$2,000.00
Two thousand Dollars.....Dollars

CAPITOL CONSTRUCTION CO., INC.
HARRY STARR
Treasurer
JACOB STARR
Secretary

Endorsement:—H. Siegal I. Levin

Exhibit 14—7/10/29.

Check.

No. 17

CAPITOL CONSTRUCTION CO. INC.

Jersey City, N. J. Sept. 10, 1927

Pay to the
Order of Jan Necorrito.....$150.00
One Hundred Fifty Dollars.....Dollars
To WEST BERGEN TRUST COMPANY
Jersey

HYMAN SILVERMAN
President
HARRY STARR
Treasurer

Endorsement:—John Nicaretta
JACOB STARR
Secretary

Exhibit 15—7/10/29.

Check.

CAPITOL CONSTRUCTION CO. INC.

No. 23

Jersey City, N. J. Sep. 10 1927

Pay to the
Order of Mex Reznek.....$48.00
Forty Eight Dollars.....Dollars
To WEST BERGEN TRUST COMPANY
Jersey City, N. J.

HYMAN SILVERMAN
President
HARRY STARR
Treasurer

Endorsement:—Mex Reznek
JACOB STARR
Secretary

Exhibit 16—7/10/29.

Check.

No 21

CAPITOL CONSTRUCTION CO. INC.
Jersey City N. J. Sep 10 1927

Pay to the
Order of L. Star.....$42.00
Forty Two Dollars.....Dollars
To WEST BERGEN TRUST COMPANY
Jersey City, N. J.

HYMAN SILVERMAN
President
HARRY STARR
Treasurer

Endorsement:—L. Star
A. Levinson
JACOB STARR
Secretary

Exhibit 17—7/10/29.

Check.

No. 18

CAPITOL CONSTRUCTION CO. INC.
Jersey City N. J. Sep. 10, 1927

Pay to the
Order of McCabe Bros.....$1000.00
One Thousand.....Dollars
To WEST BERGEN TRUST COMPANY
Jersey City, N. J.

HYMAN SILVERMAN
President
HARRY STARR
Treasurer

Endorsement:—McCabe Bros
James McCabe

JACOB STARR
Secretary

Exhibit 18—7/10/29.

Check.

No. 24

CAPITOL CONSTRUCTION CO. INC.
Jersey City N. J. Sep. 10 1927

Pay to the
Order of H. Silverman.....$50.00
Fifty Dollars.....Dollars
To WEST BERGEN TRUST COMPANY
Jersey City, N. J.

HYMAN SILVERMAN
President
HARRY STARR
Treasurer

Endorsement:—H. Silverman
M. Abranowitz

JACOB STARR
Secretary

Exhibit 19—7/10/29.

Check.

No. 25

CAPITOL CONSTRUCTION CO. INC.
Jersey City N. J. Sep. 10, 1927

Pay to the
Order of H. Starr.....$50
Fifty Dollars.....Dollars
To WEST BERGEN TRUST COMPANY
Jersey City, N. J.

HYMAN SILVERMAN
President
HARRY STARR
Treasurer

Endorsement:—Harry Starr
Osofsky
JACOB STARR
Secretary

Exhibit 20—7/10/29.

Check.

No. 22

CAPITOL CONSTRUCTION CO. INC.
Jersey City N. J. Sep. 10 1927

Pay to the
Order of J. Starr.....$50.00
Fifty Dollars.....Dollars
To WEST BERGEN TRUST COMPANY
Jersey City, N. J.

HYMAN SILVERMAN
President
HARRY STARR
Treasurer

Endorsement:—Jacob Starr
Camillo Crannillo
JACOB STARR
Secretary

Exhibit 21—7/10/29.

Check.

No. 19

CAPITOL CONSTRUCTION CO. INC.
Jersey City N. J. Sep. 10 1927

Pay to the
Order of Sem Silverman.....$44.80
Forty Four Dollars Eighty Cents.....Dollars
To WEST BERGEN TRUST COMPANY
Jersey City, N. J.

HYMAN SILVERMAN
President
HARRY STARR
Treasurer

Endorsement:—Sam Silverman
L. Lenn

JACOB STARR
Secretary

Exhibit 22—7/10/29.

Check.

No.

WEST BERGEN TRUST COMPANY
Jersey City N. J. Sep. 8 1927

Pay to the
Order of M. Silverman.....$26.65
Twenty Six 65/00.....Dollars
CAPITOL CONSTRUCTION COMPANY INC.

HYMAN SILVERMAN
HARRY STARR
Treasurer
JACOB STARR
Secretary

Endorsement:—M. Silverman
S. Diamond

Exhibit 23—7/10/29.

Check.

No 18

WEST BERGEN TRUST COMPANY
Jersey City N. J. Sep. 9, 1927

Pay to the
Order of Bob Kasson.....$44.80
Forty Four Dollars Eighty Cents.....Dollars

CAPITOL CONSTRUCTION COMPANY INC.
HYMAN SILVERMAN
President
HARRY STARR
Treasurer
JACOB STARR
Secretary

Endorsement:—Bob Kasson

Exhibit 24—7/10/29.

Check.

No. 28

CAPITOL CONSTRUCTION CO. INC.
Jersey City N. J. 12 1927

Pay to the
Order of Lafayette Iron Works.....$500.00
Five Hundred 00/00.....Dollars
To WEST BERGEN TRUST COMPANY
Jersey City, N. J.

HYMAN SILVERMAN
President
HARRY STARR
Treasurer

Endorsement—Credit Account of
Lafayette Iron Works
The Bank of Lafayette
Jersey City N. J.
J. Hollingshead Teller

JACOB STARR
Secretary

Exhibit 25—7/10/29.

Check.

No 31

CAPITOL CONSTRUCTION CO. INC.
Jersey City N. J. Sept. 13, 1927

Pay to the
Order of Leo Starr.....$16.71
Sixteen 71/00.....Dollars
To WEST BERGEN TRUST COMPANY
Jersey City, N. J.

HYMAN SILVERMAN
President

HARRY STARR
Treasurer

Endorsement:—Leo Starr
M. Starr

JACOB STARR
Secretary

Exhibit 26—7/10/29.

Check.

No. 20

CAPITOL CONSTRUCTION CO. INC.
Jersey City N. J. 10, 1927

Pay to the
Order of N. Star.....$36.00
Thirty Dollars.....Dollars
To WEST BERGEN TRUST COMPANY
Jersey City, N. J.

HYMAN SILVERMAN
President

HARRY STARR
Treasurer

Endorsement:—Nat. Starr
Osofsky
Nathan B. Taub.

JACOB STARR
Secretary

Exhibit 27—7/10/29.

Check.

No. 38

CAPITOL CONSTRUCTION CO. INC.
Jersey City N. J. Sep. 16 1927

Pay to the
Order of Sigel & Levin.....$900.00
Nine Hundred.....Dollars
To WEST BERGEN TRUST COMPANY
Jersey City, N. J.

HYMAN SILVERMAN
President
HARRY STARR
Treasurer

Endorsement:—Siegel Levine
Hyman Silverman o. k.

JACOB STARR
Secretary

Exhibit 28—7/10/29.

Check.

No 53

CAPITOL CONSTRUCTION COMPANY INC.
Jersey City N. J. Sep. 23 1927

Pay to the
Order of Cash.....$800.00
Eight Hundred and 00/00.....Dollars
To WEST BERGEN TRUST COMPANY
Jersey City, N. J.

HYMAN SILVERMAN
President
HARRY STARR
Treasurer

Endorsement:—Hyman Silverman
Harry Starr

JACOB STARR
Secretary

Exhibit 29—7/10/29.

DEPOSITED BY
CAPITOL CONSTRUCTION CO.
WITH
WEST BERGEN TRUST COMPANY
Jersey City, N. J.
Sep. 10 1927

		Dollars Cents
Check	500 00	500 00
From Goldberg for Garage on Union Avenue		
Discounted a note of 5,000 on book		4974 17

DEPOSITED BY
CAPITOL CONSTRUCTION CO.
WITH
WEST BERGEN TRUST COMPANY
Jersey City, N. J.
Sep. 15 1927

	Dollars Cents
A payment of the bank on garage	2250 00

DEPOSITED BY
CAPITOL CONSTRUCTION CO.
WITH
WEST BERGEN TRUST COMPANY
Jersey City, N. J.
Sep. 21 1927

	Dollars Cents
Rent on Fuller Avenue	50 00

Pay THE TRUST COMPANY OF NEW JERSEY
B. & L. Branch or Order
CAPITOL CONSTRUCTION CO., INC.
HARRY STARR, *Treasurer*

Sep. 26

Deposit from Nadek	25 00/100
From Goldberg discounted a note for	400 00/100

DEPOSITED FOR ACCOUNT OF
CAPITOL CONSTRUCTION CO.
IN
THE TRUST COMPANY OF NEW JERSEY
Bergen and Lafayette Branch
Jersey City, N. J. Sep. 30 1927

	Dollars Cents
Borrowed from Abraham	50 00
Discounted a note in the bank	400 00

Exhibit 1—7/12/29.

Card of West Bergen Trust Company as to Capitol Construction Co., Inc., Loan

DIRECT

DIRECT LIABILITY ON UNSECURED TIME NOTES.

Name: CAPITOL CONSTRUCTION CO. Address: 211 Fowler Avenue

Date	No.	Maker or Endorser				Due	Own Paper	Other Paper	Amount Paid	Balance
9/12/27	8549	H. Silverman, J. Starr, H. Starr			.....	10/10/27	$5,000.00			$5,000.00
9/26/27	8666	"	"	"			12.13			
10/18/27	8856	"	"	"	and Abraham.....	12/23/27	800.00			5,812.13
	8549	"	"	"	.....	10/24/27	5,000.00			
11/ 7/27	9025	"	"	"	.....				$5,000.00	5,812.13
11/14/27	8856	"	"	"	.....	11/21/27	1,000.00			6,812.13
11/21/27	9025	"	"	"	.....				5,000.00	1,812.13
12/23/27	9500	"	"	"	.....				1,000.00	812.13
	8666	"	"	"	and Frager	3/23/28	2,030.33			2,842.46
3/26/28	9500	"	"	"	and Abraham.....				812.13	2,030.33
					and Frager				2,030.33	

Exhibit 2—7/12/29.

Card of West Bergen Trust Company as to Capitol Construction Co., Inc., Loan

DEMAND

DIRECT LIABILITY ON UNSECURED DEMAND NOTES.

Name: CAPITOL CONSTRUCTION CO. Address: 211 Fowler Avenue

Additionally Secured by Mtge. of $6,000 on Cranford Property.

Date	No.	Endorser				Rate	Debit	Credit	Balance	Interest Date to	Interest Amount	Interest Date Paid
11/14/27	9074	H. Silverman, H. Starr, J. Starr.....			6	$1,000.00				12/10/27	$ 6.55	12/10/27
	9075	"	"	"	.....	6	5,000.00		$6,000.00	1/ 1/28	40.24	3/ 5/28
12/ 5/27	9303	"	"	"	.....	6	1,250.00		7,250.00	3/ 5/28	61.87	3/ 5/28
12/10/27	9074	"	"	"	.....			$1,000.00				
	9303	"	"	"	.....			1,250.00	5,000.00			
12/23/27	9492	"	"	"	.....	6	800.00		5,800.00			
3/ 5/28	9492	"	"	"	.....			800.00				
	9075	"	"	"	.....			5,000.00				

40 30 20 10

Exhibit 3—7/12/29.

Card of West Bergen Trust Company as to Capitol Construction Co., Inc., Loan

DIRECT

DIRECT LIABILITY ON UNSECURED TIME NOTES.

Name: H. SILVERMAN, J. STARR and H. STARR. Address: 211 Fowler Ave.

Date	*No.*	*Maker or Endorser*	*Due*	*Own Paper*	*Other Paper*	*Amount Paid*	*Balance*
3/ 5/28	10129	H. Frager (Assig. of Mtge.)	6/ 5/28	$5,990.41			$5,990.47
3/26/28	10341	"	6/25/28	1,828.20			7,818.67
6/13/28	10129	"				5,990.47	1,828.20
	11100	H. Silverman, J. Starr and H. Starr	7/ 5/28	5,929.50			7,757.70
6/28/28	11233	" " "	7/25/28	1,809.00			
	10341	" " "				1,828.20	7,738.50
7/17/28	11100	" " "				5,929.50	1,809.00
	11398	" " "	8/ 6/28	5,931.47			7,740.47
7/26/28	11516	" " "	8/27/28	1,809.00			
	11233	" " "				1,809.00	7,740.47
8/ 8/28	11639	" " "	9/ 6/28	5,930.48			
	11398	" " "				5,931.47	7,739.48
9/ 4/28	11840	" " "	9/27/28	1,809.30			
	11516	" " "				1,809.00	7,739.78
9/10/28	11887	" " "	12/ 6/28	5,989.48			
	11639	" " "				5,930.48	7,798.78
10/ 1/28	12074	" " "	1/ 2/29	1,827.60			9,626.38
	11840	" " "				1,809.30	7,817.08
12/28/28	11887	To Past Due Paper				5,989.48	1,827.60
1/22/29	12074	" " " "				1,827.60	
5/23/29	14150	H. Frager	7/24/29	1,246.99			1,246.99
9/11/29	14150	To Past Due Paper—O.K.				1,246.99	

40 30 20 10

Exhibit 4—7/12/29.

Note of Capitol Construction Co., Inc.

September 23, 1927.

$800.00.

Three months after date we promise to pay to the order of Our Selves Eight hundred and no hundredths Dollars, without 6%, at West Bergen Trust Co., Jersey City.

CAPITOL CONSTRUCTION CO.,
HYMAN SILVERMAN, Pres.,
HARRY STARR, Treas.,
JACOB STARR, Sec.

Value received

No. . Due, Dec. 23.

CAPITOL CONSTRUCTION CO.,
HYMAN SILVERMAN, PRES.,
JACOB STARR, SEC.,
HARRY STARR, Treas.
JACOB STARR,
HYMAN SILVERMAN,
HARRY STARR,
SAMUEL V. ABRAHAM.

Exhibit 5—7/12/29.

Marked P-11 for Identification—7/10/29.

Ledger of Capitol Construction Co., Inc., Account with West Bergen Trust Company.

CAPITOL CONSTRUCTION CO., INC.

(3 sign.):
HYMAN SILVERMAN, Pres.,
HARRY STARR, Treas.,
JACOB STARR, Secy.,
211 Fowler Avenue.

Exhibit 5—7/12/29—West Bergen Trust Co.

Date	*Deposits*	*Date*	*Checks in Detail*	*Date*	*Balance*
1927 Aug. 25th	$1,000.00			Aug. 25th	$1,000.00
27th	50.00			27th	1,050.00
		Aug. 31st	$ 101.97		
		"	25.00	31st	923.03
		"	109.00	"	814.03
		Sep. 1st	28.65		
		"	25.00		
		"	314.38	Sep. 1st	446.00
		2nd	25.00		
		"	50.00	2nd	371.00
				"	779.75
Sep. 2nd	408.75			3rd	379.75
		3rd	400.00		
		6th	190.00		
		"	28.22	6th	161.53
		9th	10.00	9th	151.53
				10th	651.53
10th	500.00			"	1,348.47 O. D.
		10th	2,000.00		
		12th	500.00		
		"	54.73		
12th N. P.	4,974.17	"	150.00	12th	2,920.97
		13th	48.00		
		"	42.00		
		"	50.00		
		"	1,000.00	13th	1,780.97
		14th	26.65		
		"	44.80	14th	1,709.52
		"	50.00		
		"	50.00	14th	1,609.52
		"	63.60	"	1,545.92
		15th	44.80		
		"	16.71		
		"	500.00	15th	984.41
15th	2,250.00			"	3,234.41
		16th	1,000.00		
		"	37.50		
		"	36.00		
		"	100.00	16th	2,060.91
		"	900.00	"	1,160. 91
		17th	400.00	17th	760.91
		"	17.97		
		"	15.00		
		"	25.00	"	702.94
		"	505.00	"	197.94
		19th	114.20		
		"	200.00	19th	83.74
19th R. T.	200.00	20th	25.00	20th	58.74
		21st	9.00		
		"	25.00	21st	24.74
				"	74.74
21st	50.00				
		22nd	28.28		
		"	36.00	22nd	10.46
24th N. P.	800.00	24th	800.00	24th	10.46
		Oct. 18th	10.45	Oct. 18th	.01
Oct. 24th	2,000.00	24th	871.30		
		"	26.00	24th	1,102.71

N. P.—Note Purchased.
R. T.—Returned Item.
O. D.—Overdraft.

34 OCT.T.1931
35 OCT.T.1931
36 OCT.T.1931

New Jersey Court of Errors and Appeals

RIVERSIDE APARTMENT CORPORATION, a corporation, *Complainant,* *v.* CAPITOL CONSTRUCTION CO., INC., *et al.,* *Defendants.*	On Appeal from Court of Chancery.

Answering Brief of Respondent Carteret Company to Appeals of West Bergen Trust Company, of Junction Milling Company, and of Mowre Lager and Max Platt.

Introductory Statement of Facts.

The facts below have been set forth fully in the various briefs in this cause and it is unnecessary here to repeat them, except to say that the bill of complaint was the usual one to foreclose a mortgage, and in said suit the real estate was ordered sold *pendente lite* and the proceeds ordered paid into court; the complainant's claim being undisputed was paid in full, and the dispute below was between the various defendants as to whom the fund should be paid, same being insufficient to pay all in full. Three appeals were filed, one by West Bergen Trust Company, one by Junction Milling Company, and one by Mowre Lager and Max Platt, and will be taken up in this brief in that order, following the points as made therein.

It will be noted that some of the points raised and argued in these appeals do not affect this

respondent; only those points affecting this respondent's claim will be argued.

This respondent's claim is based on a mortgage placed on the premises after the erection of the building was commenced and commonly known as an advance money mortgage.

ARGUMENT.

APPEAL OF WEST BERGEN TRUST COMPANY.

There is no quarrel between this appellant and respondent, both claims are based on what are commonly known as advance money mortgages, and respondent's mortgage was made and recorded prior to appellant's, and appellant in open court at the trial below admitted the priority of this respondent's claim over appellant's claim. (See State of Case, pp. 553 and 554.) And again in appellant's brief it is again conceded that Carteret Company's claim has priority. (See Appellant's Brief, p. 29.)

The only argument in this appellant's brief which at all affects this respondent's claim is Point 1 thereof, which objects to the form of decree.

POINT 1.

This appellant (as well as all other appellants) objects to the form of the decree, in that it did not adjudge the amount due the various parties for principal and interest and the priorities. Bearing in mind that the dispute was as to which of the contending claimants and in what amount, should be paid the fund in court, the decree is a proper adjudication of the matter; the recitals are ample and the decree disposes of the matter before the

Court; to adjudge that out of a certain fund, certain amounts be paid to certain parties in the order designated, is tantamount to adjudging that it is due to them. *Beall* v. *N. Y. & N. J. Water Co.*, 87 N. J. E. 390, cited by appellant, does not support their contention, but rather agrees with the decision in *Bull* v. *Int. Power Co.*, 84 N. J. E. 209 (affirmed 85 N. J. E. 206), in holding that while it may in some cases be good practice to put full recitals in the recital part of the decree, it is not necessary to do so, and is not fatal if omitted, and in the decretal part of the decree only so much is required as is necessary to dispose of the matter before the Court. Appellant's main complaint is that no adjudication was made as to its claim; but the answer to this is, there was nothing left to adjudicate as the fund was exhausted by payment to claimants held to be prior.

But, regardless of this, this appellant as well as the others have no right here to attack the decree for these reasons: The decree was either settled upon notice or without notice. If with notice, then objection should have been made when the decree was signed; none was made and so appellants have waived any objection thereto; if without notice, then appellants are barred under Rule 133 of the Chancery Court, which is as follows: "Every party who may be affected by any order or decree, not settled by the Chancellor, Vice-Chancellor, or Advisory Master, upon application, shall be held to have waived all objection to the form thereof, unless he shall file his objection thereto in ten days from the time of filing such order or decree. The objection shall specify the part or parts of the order or decree to which he objects, and state what the form ought to be; provided that nothing herein contained shall be held to prevent or preclude an application to the Chancellor, Vice-Chancellor

or Advisory Master, to settle the form of the order or decree at any time." From the "order continuing settlement of final decree" (State of Case, p. 279), and the recital of notice in the decree itself (State of Case, p. 281), it seems that the decree was settled on notice.

But, aside from that, if the decree is defective in form, it is not necessary to set the decree aside on appeal to correct the defect; it may be amended to confirm with the opinion even after enrollment of the decree, or even after appeal taken.

Bull v. *International Power Co.*, 84 N. J. E. 209.

Points 2, 3, 4 and 5 in this appellant's brief do not affect this respondent's claim.

APPEAL OF JUNCTION MILLING COMPANY.

POINT 1.

This point has already been discussed above under Point 1 of Appeal of West Bergen Trust Company.

POINT 2.

This point does not affect this respondent's claim.

POINT 3.

What was the proper curtilage to go with the building under the Mechanic's Lien Act?

This appellant claims the curtilage is not the whole tract, but rather a strip out of the middle of the whole tract, as shown on Exhibit 82 (State of Case, p. 753).

This appellant starts his argument in the brief by stating "the large tract was divided, considered and treated by the owner, the defendant Capitol Construction Co., Inc., as three separate parcels before the commencement of the erection of the apartment, &c., &c.," but in this, the State of Case does not support him. The diagram or survey shows on its face it was made September 8, 1927, and it also shows the building on the diagram so it must have been then erected; also Mr. Rubenstein, counsel for this appellant, produced a witness McCabe at the trial who testified that he did the excavating for the building and commenced work around April 11th, 1927 (State of Case, p. 455).

It is true, as set forth in this appellant's brief, that a witness Starr did say when asked, "When you applied for permission to build did you give a description of the building; did you file this survey? Ans: In the building department, yes, sir." But it is very apparent he did not for this survey showed the building erected, also the survey is marked at the top "Location survey, &c.," indicating it was made to locate the building on the land which had been previously surveyed by the same surveyor; undoubtedly, from a reading of all the testimony, what happened was this: The same surveyor made the original survey of the whole plot (which was the one the witness referred to as filed for the building permit), later when the building was erected the surveyor located the building on the same original survey from which the blue-print in evidence was made; it will be noted the survey offered was not an original but a blue-print of one. The fact that the location survey was made September 8th, 1927, and this appellant's mortgage was made or dated September 16th, 1927, would indicate that the

survey was made to make up a description for appellant's mortgage. By this time the building was well on toward completion and the owner no doubt in his own mind was beginning to plan ahead for the placing of a permanent mortgage and other matters of the future after completion of the building; the owner, however, never reached that point because it failed before the building was completed; but in determining the curtilage we are not concerned with these future plans conceived privately in the owner's mind, but rather how the premises appeared on the ground and was treated by all the parties, owners and contractors and materialmen when the building contracts were made and the work done and materials furnished when the building was in its early stages of construction, or before it was commenced; a glance at the evidence will show that the whole plot was treated as the curtilage by every one concerned, including owner, mortgagees, contractors and materialmen as is evidenced by the descriptions in the mortgages and lien claims, and even this appellant filed a lien claim describing the whole plot as the curtilage (see his Answer and Counterclaim, State of Case, p. 62, lines 12-23); in fact it was not until the eleventh hour that appellant's counsel, conceiving it to be to his advantage so to do, claimed for the first time that the curtilage was other than the whole plot. Even this respondent's mortgage which was made October 14th, 1927 (after this appellant's mortgage) described the plot as a whole (State of Case, p. 703), as did also the mortgage to West Bergen Trust Company, made October 25th, 1927 (State of Case, p. 874); upon the premises there were no fences, nothing to indicate any division of the plot, but on the contrary the usual building material and refuse was scattered over the whole tract (State of Case, p. 429).

Appellant relies on Section 21 of the Mechanic's Lien Act, and especially that part which says, when the curtilage is not surrounded by an enclosure, &c., then the lot shall be such tract as in the place of its location is usually known as a building lot and bounded by lines laid down on any map, &c., on file in any public office; claiming this location survey was such a file map because the witness Starr said he filed it in the building department; this answer as pointed out could not be true, but if it was, such filing was not that required by the Act; the Act undoubtedly meant a public office provided for by law for filing of maps permanently, such as the Register or Clerk of the County where the public might always have access to it to ascertain the layout; certainly a building department is not such a public office as was meant by the statute; the map or plan there filed is merely for the information and convenience of the building department in deciding whether or not to grant a permit, there is no legal requirement to keep it there permanently, and no doubt in many cases after serving the purpose of the building department such plans are disposed of. Appellant also relies on that part of said Section 21 which says, in no case shall the curtilage exceed one-half acre, and yet the plot which it claims is the curtilage is about 1¼ acres. Its position is inconsistent. Clearly the provisions of Section 21 do not apply to the present situation, for just the land actually covered by the building with the land in front to the street to afford access, would exceed half an acre. Our Courts have frequently held the proper curtilage to be more than half an acre.

See:

Gerard v. *Birch,* 28 N. J. E. 317;
James v. *Van Horn,* 39 N. J. L. 353;

American Brick & Tile v. *Drunkhouse,* 59 N. J. L. 462;
Federal Trust v. *Guigues,* 76 N. J. E. 495;
Raab v. *Ellison,* 89 N. J. L. 416.

But regardless of whether the whole or a part of the plot is the proper curtilage, this appellant is not in a position to assert, at least as against this respondent, that the whole is not the curtilage, because as an inducement to this respondent to advance money on its mortgage, this appellant signed a subordination agreement which alleged, among other things, that the Capitol Construction Co., Inc., is the owner of and is erecting or has erected a building upon a certain plot of land in the Township of Cranford, &c. (describing the whole plot). (See State of Case, p. 721, lines 10 to 334; p. 723, line 30.)

POINTS 4, 5 6 and 7.

These points can conveniently be argued together. All are dependent on the soundness of appellant's contention under Point 3, that the curtilage is not the whole plot; if the curtilage is the whole plot, then the argument under Points 4, 5, 6 and 7 fail. The argument under Point 6 is directed to the mortgage of West Bergen Trust Company, in which this respondent is not interested, but it is similar to Point 5, which is directed to the mortgage of this respondent.

Appellant's complaint seems to be against the result reached in the court below rather than against the logic of the Court's reasoning in reaching that result.

The court below has been very liberal with Junction Milling Company. In *Meister* v. *Meister,* 103 N. J. E. 78, Vice-Chancellor Berry in dealing with a similar situation, where a materialman had

attempted to get a preference by taking a mortgage, denied to the materialman any participation in the fund either under the mortgage or as one entitled to a lien claim, on the ground that it was an attempt to obtain a preference over the others supplying material and labor in clear violation of the Mechanic's Lien Act. But notwithstanding this, and the fact that Junction Milling Company attempted to stand both on its mortgage and a mechanic's lien on the property for the same debt (the mortgage including some other indebtedness additional) up to the very day of the trial when it finally abandoned the mechanic's lien (which lien by the way was filed against the whole tract as mortgaged to the complainant below) (see its Answer and Counterclaim, Case, p. 62, lines 21, 22, 23) and the fact that appellant signed a subordination agreement whereby it released the Carteret Company and said building and lot or curtilage from *ALL CLAIMS, DEMANDS* and any liens, etc., etc. (Case, p. 722, lines 17 to 22), which might well be construed to include its claim upon the mortgage, yet the court below gave full effect to appellant's claim under its mortgage and priority over this respondent's mortgage.

Appellant's mortgage admittedly was not an advance money mortgage and was placed on the premises after the building was commenced, and, therefore, clearly under the provisions of the Mechanic's Lien Act was subject to all mechanic's liens. This respondent's mortgage was an advance money mortgage and to the extent of moneys advanced and applied to the erection of the building is entitled under Sections 15 and 28 of the Mechanic's Lien Act to priority over all mechanic's liens; admittedly as found by the court below only $2,744.30 of the amount advanced was not so applied, but the only lien claimant who

could challenge respondent's mortgage even to the extent of the $2,744.30 not so applied was Geo. F. Perry & Sons, Inc., one of the respondents, because the other lien claimants entitled to so challenge had signed subordination agreements agreeing that Carteret Company's mortgage was prior to their liens (Case, pp. 721 and 724).

We therefore have a situation where Carteret Company's mortgage is prior to all mechanic's liens (except Perry to the extent aforesaid), and all mechanic's liens are prior to the mortgage of Junction Milling Company, and Junction Milling Company's mortgage (covering only part of the whole tract) was recorded prior to Carteret Company's mortgage.

Ordinarily the priority of record would give Junction Milling Company's mortgage priority over the Carteret Company's mortgage, but where a new building is being erected on the premises the Mechanic's Lien Law provides a different rule; for then it provides the mechanic's lien is prior to Junction Milling Company's mortgage but subsequent to the Carteret Company's mortgage, and it would seem to follow that Carteret Company's mortgage is therefore prior to Junction Milling Company's mortgage.

The court below however gave Junction Milling Company priority over Carteret Company's mortgage because it was recorded first. This respondent's claim is paid by the decree below, and it has therefore taken no appeal, and therefore has no right to argue the point; this same question however is raised by the appeal of West Bergen Trust Company and is argued in its brief under Point 3; and if this point made by West Bergen Trust Company should be upheld, it would necessarily place the lien of Junction Milling Company's mortgage after that of Carteret Company's mort-

gage (at least to the extent that advances were applied to the building) as well as after the West Bergen Trust Company's mortgage.

Because the Junction Milling Company's mortgage covered only a part of the whole plot, the court below divided the fund to set apart to the Junction Milling Company's mortgage its proportionate share in accordance with the valuation of the premises covered by its mortgage by the real estate expert Heins (Case, pp. 502, &c., and 509). Here again the Junction Milling Company received favorable consideration from the court below for instead of dividing the fund then in court in dispute, the entire purchase price was divided, although complainant's mortgage covering the entire plot had been paid long before out of the proceeds of sale by court order on notice to Junction Milling Company and the other parties, and without objection by Junction Milling Company.

That Junction Milling Company did not actually receive this share so set apart for it is due to the fact that mechanic's liens have a prior lien on it and it is therefore divided first among the lien claimants; that there is not sufficient to pay lien claims and the mortgage of Junction Milling Company is due to the fact that the property did not bring sufficient at the Sheriff's sale.

The funds are properly marshalled by the court below in accordance with the decisions in

Hoag v. *Sayre,* 33 N. J. E. 552;
Albert & Kernahan v. *Franklin,* 146 Atl. 213; 104 N. J. E. 446;
Thirteenth Ward B. & L. v. *Kanter,* 147 Atl. 809; 105 N. J. E. 339.

APPEAL OF MOWRE LAGER AND MAX PLATT.

The only points here directed to the claim of this respondent are: **POINT 1**—"The final decree is erroneous because it does not adjudicate the rights of the parties," and **POINT 3**—"The final decree is erroneous in that it fails to adjudge that the curtilage upon which the building was erected was limited to the middle tract"; both of these points have already been argued by this respondent.

In Point 6 of their brief, these appellants seem to concede the priority of this respondent's claim.

But dispositive of any claims of priority either of these appellants may make against this respondent is the fact that they both signed the subordination agreement releasing the whole plot from any lien they might have as against respondent's mortgage (Case, p. 721—signatures p. 722, line 39, and p. 723, line 13) relying on which, this respondent made the advances on its mortgage.

In conclusion this respondent submits the decree below should be affirmed.

Respectfully submitted,

JAMES E. PYLE,
Of Counsel with Defendant-Respondent Carteret Company.

34 OCT.T.1931
35 OCT.T.1931
36 OCT.T.1931

New Jersey Court of Errors and Appeals

RIVERSIDE APARTMENT CORPORATION, a corporation,
Complainant,
v.
CAPITOL CONSTRUCTION CO., INC., *et al.*,
Defendants.

On Appeal from Court of Chancery.

Answering Brief of Respondents Shilowitz and Tucker, to Appeals of West Bergen Trust Company, Junction Milling Company, Mowre Lager and Max Platt. Brief of Respondents Shilowitz and Tucker, on Their Application to Dismiss the Above Appeals.

Preliminary Statement.

There was a foreclosure of an underlying mortgage, and the premises, consisting of an apartment house erected on a plot in Cranford, were sold by the sheriff as one parcel *pendente lite* under Section 62 of the Chancery Act (1 C. S. 433; Case, pp. 193-199-200).

The matter then proceeded as a surplus money proceeding. The respondents Shilowitz and Tucker held an advance money mortgage which antedated both as to execution and recording the

mortgages of the appellants Junction Milling Co. and West Bergen Trust Company. The complainant in the foreclosure suit was paid from the fund. The Master, in settling the priorities, accorded first place in the fund to Shilowitz and Tucker. The final decree split the amount allotted to Shilowitz and Tucker so that portions of the Perry and Reid lien claims were wedged in. However, as a practical situation, the ultimate result to Shilowitz and Tucker was unchanged. Even if all the lien claimants who had not stipulated the priority of this mortgage or conceded its priority before the Master had been given priority for the full amounts claimed by them, there were sufficient moneys in the fund to pay the Shilowitz and Tucker mortgage, with the accrued interest, in full.

This appeal is by two of the subsequent mortgagees and two lien claimants. A motion to dismiss the appeal was argued before this Court on the opening day of the term, and this motion was continued over until the final argument on the appeals.

ARGUMENT.

POINT I.

The appeal of the West Bergen Trust Company so far as it relates to the decree in favor of Shilowitz and Tucker is frivolous.

1. Not only has the appeal against Shilowitz and Tucker been abandoned by failure to support it by any argument in the brief, but the appellant West Bergen Trust Company frankly concedes the priority of the Shilowitz and Tucker mortgage in its brief (Point V, p. 29).

2. At the hearing before the Master this appellant stipulated as to the priority of the Shilowitz and Tucker mortgage (Case, p. 554).

3. No exceptions were taken by this appellant to the findings of priority by the Master.

4. The respondents' mortgage is dated July 29, 1927, and was recorded August 2, 1927 (Case, pp. 658-669). The appellant's mortgage is dated October 26, 1927, and was recorded October 26, 1927 (Case, pp. 874-879). Although this appellant contends that its mortgage is an advance money mortgage, or a construction mortgage, under Sections 14 and 15 of the Mechanic's Lien Act, it is apparent from a reading of the testimony in relation to the entire transaction, that this mortgage was given to secure a debt due from a customer to a bank. A review of these facts and the law applicable thereto are so ably presented in Point IV of the answering brief filed in this cause by George F. Perry & Sons on the appeal of West Bergen Trust Company that no further discussion by us is necessary on this question.

But even assuming that this appellant's mortgage is what it claims it to be, it is nevertheless a junior mortgage, and the holder of this mortgage has no standing to question the use to which the moneys advanced by the senior mortgagee have been put to, providing they have actually been paid over to the mortgagor, and about this fact there is no dispute. Only a mechanic's lien claimant can benefit by the failure of the construction money mortgagee to prove that the moneys actually went into the building under Section 15 of the Mechanic's Lien Act.

5. The mortgage of the West Bergen Trust Company contains a covenant that it is subject to five mortgages aggregating $167,000 (Case, p. 877).

The respondents' mortgage is one of said mortgages. In

> *Bovit* v. *Mantel,* 153 Atl. 638, 108 N. J. E. 11,

Vice-Chancellor BACKES held that

> "the defendants cannot plead usury as a defense. They took subject to, and assumed payment of, the mortgage, and are estopped."

There is still another ground which would preclude the Trust Company from questioning the respondents' mortgage. The junior mortgage of the Trust Company was a conveyance of the equity of redemption of the mortgagor on the value of the property over and above the prior mortgages.

POINT II.

The appeal of Junction Milling Company so far as it relates to the decree in favor of Shilowitz and Tucker is frivolous.

1. This appellant on page 2 of its brief, referring to the respondents' mortgage, says:

> "This mortgage was given to secure moneys to be advanced for the construction of said apartment house as more fully appears therein. *Said mortgage is not challenged on this appeal.*"

On page 9 of its brief in the statement of the questions involved on the appeal no question is raised as to the respondents' mortgage. On page 30 of its brief this appellant again concedes that the mortgage of the respondents should be first paid.

2. This appellant's mortgage was not an advance money mortgage. It is dated and recorded

a considerable time after the respondents' mortgage (Case, pp. 658-669 and 804). It was not disputed that the mortgagor received the entire consideration for the respondents' mortgage. The mortgage of the respondents is not open to attack by the junior mortgagee.

3. Not only do the exceptions of this appellant fall short of pointing out any specific incorrect determinations, but at least impliedly concede the propriety of the determinations (Case, p. 246). Parenthetically, it is stated in said exceptions that

> "which sum is not admitted to be the true amount"

and there is an intimation that the Master might have allocated to various parts of the plot certain proportions of the amount due upon the mortgage. That this exception is inadequate becomes more evident when it is considered that this appellant did not question the proofs of the advances under the mortgage, and that in the closing paragraphs of the exceptions made no claim of priority as against this mortgage, although such a claim was made as to another mortgage.

POINT III.

The appeal of Mowre Lager so far as it relates to the decree in favor of these respondents is frivolous.

1. The brief of this appellant concedes the priority of the Shilowitz and Tucker mortgage (p. 2).

2. It was expressly stipulated in the record that the appellant Mowre Lager conceded the priority of the mortgage of these respondents (Case, p. 497).

3. The same observations made in paragraph 3 of Point II (*ante*) are pertinent to the exceptions of the appellant (Case, p. 243).

POINT IV.

The appeal of Max Platt so far as it relates to the decree in favor of these respondents is frivolous.

1. The brief of this appellant concedes the priority of the Shilowitz and Tucker mortgage (p. 2).

2. This appellant executed a written postponement, under seal, to the mortgage of these respondents (Case, pp. 670-671-672).

3. The same observations made in paragraph 3 of Point II (*ante*) are pertinent to the exceptions of this appellant (Case, p. 243).

POINT V.

The attack upon the form of decree is without merit.

In the brief of the Carteret Company (Point V) and in the brief of Perry & Sons, the attack upon the form of the decree of the appellants is ably answered. In addition to the arguments presented by said respondents, we feel that the form of decree sufficiently disposes of the subject-matter. At the outset, it should be borne in mind that the entire contest was concerning the disposition of surplus moneys arising from a foreclosure sale. In Point 1 of the brief of the West Bergen Trust Company, it is argued that the final decree is erroneous because it does not adjudge the amount due

to the various parties and the order of priority. Rule 219 of the Court of Chancery reads as follows:

> "Petitions for surplus moneys in foreclosure suits may be presented at any time after the sale, and before the moneys are paid into court; and if any order be made for the payment of such surplus before the delivery of the deed, the sheriff or other officer making the sale shall accept the receipt or order of the person to whom such surplus, or any part of it, may be ordered to be paid, as payment to that extent of the purchase money, or may pay the same to such person."

The purpose of the contest between the lien claimants and mortgagees was to ascertain by judicial action which claimants, if any, were entitled to the fund and in what amounts and in what priorities. If the final order was dispositive of these questions, it accomplished all that was necessary. The decree employs the words "ordered, adjudged and decreed." This alone, of course, is not sufficient if there is no final disposition, as there is no magic in the use of any particular words. No particular form of words is necessary. *33 C. J.* 1192.

Unquestionably, the final decree fully meets every requirement which must be present in the adjudication of the rights of conflicting claimants to surplus moneys. The most important element, of course, is that of priority. The decretal portion of the order (Case, p. 281) states at its very outset, that

> "said Clerk shall pay, in the order below designated, and to the persons hereinbelow designated, the following sums, to wit:"

Secondly, the amounts to be paid to each claimant are set forth with the order of priorities. None of the claimants are left in doubt as to the order

of priorities or the amounts to be distributed to them. The order is as lucid and comprehensive as can be desired.

POINT VI.

The same reasons urged for the dismissal of the appeals are also urged as reasons for the affirmance of the decree of the Court of Chancery.

Respectfully submitted,

SECLOW & NESSANBAUM,
Solicitors for Shilowitz and Tucker,
Defendants-Respondents.

ALEXANDER SECLOW,
Of Counsel.

34 OCT.T.1931

New Jersey Court of Errors and Appeals

RIVERSIDE APARTMENT CORPORATION, a corporation, Complainant, *vs.* CAPITAL CONSTRUCTION CO., INC., *et al.*, Defendants.	On Appeal from Court of Chancery.

BRIEF FOR APPELLANT JUNCTION MILLING COMPANY.

Statement of the Case.

The defendant, Capital Construction Co., Inc., a corporation of New Jersey, was the owner of a large tract of land, two and three-quarters acres, situated in Cranford, New Jersey. Three sides of said tract front on improved streets. The dimensions of the tract are shown on Exhibit 82 (Case, p. 753). Said defendant prior to April 10th, 1927, (the date of commencement of the building) divided the lands aforesaid into three tracts (Case, pp. 391-392) and on or about that date began the erection and construction of an apartment house on the middle tract, reserving the tracts flanking on both sides and which front on improved streets for future development.

After the commencement of the apartment house, and on July 29th, 1927, the Capital Construction Co., Inc., mortgaged the entire tract (including the middle and two corner tracts) to Israel

Shilowitz and Jacob Tucker, to secure the payment of $20,000.00, which mortgage was, on August 2nd, 1927, recorded in the Register's Office of Union County (Case, p. 658). This mortgage was given to secure moneys to be advanced for the construction of said apartment house as more fully appears therein. Said mortgage is not challenged on this appeal.

On September 16th, 1927, the Capital Construction Co., Inc., made and executed a mortgage for $11,619.34 to the Junction Milling Company, a corporation, one of the defendants-appellants, which furnished materials for said apartment house, which mortgage was, on October 6th, 1927, recorded in the office of the Register of Union County in Book 886 of Mortgages, pages 390, &c. (Case, p. 804). *This mortgage covers the two corner tracts, but does not cover the middle tract upon which the apartment house stands.*

On October 14th, 1927, the Capital Construction Co., Inc., mortgaged the entire tract (including the middle and two corner tracts) to the Carteret Company, to secure the payment of $35,000.00, which mortgage was, on October 24th, 1927, recorded in the Register's Office of Union County (Case, p. 703). This mortgage was given to secure moneys to be advanced for the construction of the apartment house on the middle tract; the mortgage taking in the two corner tracts as additional security (Case, pp. 402-403).

On October 25th, 1927, the Capital Construction Co., Inc., mortgaged the entire tract to the West Bergen Trust Company, to secure the payment of $6,000.00, which mortgage was, on October 26th, 1927, recorded in the Register's Office of Union County (Case, p. 874). This mortgage was given to secure moneys already advanced for the construction of the apartment house on the middle tracts (Case, pp. 554-558).

On January 4, 1928, the Court of Chancery made an order in a suit of Ralph Cianfrone and Ciro Castellano, partners trading as *Venango Stone Company* vs. *Capital Construction Co., Inc.*, adjudicating the said defendant corporation insolvent and appointing Receivers therefor (Case, p. 296). Under paragraph 6 of the said order, the creditors of the defendant corporation were *restrained from bringing any action or proceedings at law or otherwise against the corporation, and from taking any further proceedings in any action or proceedings theretofore commenced.* On January 5th, 1928, copies of the order appointing Receivers and containing such restraint were served upon all creditors of the insolvent corporation (Case, p. 300).

Defendant-respondent, Geo. F. Perry & Sons, a corporation of New Jersey, furnished materials for the erection of the apartment house on the middle tract. Prior to the receivership, said defendant-respondent filed a mechanics' lien against the apartment house and the entire plot of two and three-quarters acres, for the sum of $5,792.25 (Case, p. 688). Thereafter, said defendant-respondent instituted suit in the Union County Circuit Court to enforce its lien claim, asserting that its claim was entitled to priority over several mortgages including that of the Junction Milling Company above referred to. In direct violation of the injunctive order of the Court of Chancery above mentioned, the Perry company on January 13th, 1928, entered judgment against the Capital Construction Co. Inc., as builder and owner, and it was adjudged therein that the lien of the judgment was prior to the lien of several mortgages including that of the Junction Milling Company (Case, p. 696).

The status and conduct of the defendant-respondent, A. S. Reid & Company, is similar to

that of the Perry Company, except that the Reid Company entered final judgment on its lien claim in the Union County Circuit Court on July 7th, 1928 (Case, p. 755). The other defendants-respondents (lien-claimants) likewise filed lien claims not only against the apartment house and its proper curtilage, but also upon the two corner tracts for the amounts respectively due to them (Case, pp. 777-867), but took no further action thereon in obedience to the injunctive order of the Court of Chancery.

On March 3rd, 1928, the complainant Riverside Apartment Corporation, a corporation of New Jersey (having obtained permission from the Court of Chancery so to do), filed a bill of complaint to foreclose mortgages held by it covering the entire premises (all three tracts) shown on Exhibit 82 aforesaid. All of the subsequent mortgagees, including the Junction Milling Company, and all mechanics' lienors were made parties-defendants to the foreclosure action. There was a dispute as to priorities among the several defendants. However, the priority of the complainant's mortgages was undisputed and upon due application the Court of Chancery made an order directing the mortgaged premises to be sold *pendente lite,* reserving the equities of all parties in interest (Case, p. 193).

On May 23rd, 1928, the Sheriff of Union County sold the mortgaged premises in said foreclosure proceedings for the sum of $142,500.00, subject only to Receivers' Certificates, taxes and prior mortgages, not involved in this appeal. The proceeds were paid into the Court of Chancery (Case, p. 203). Out of this fund there was paid under order of the Court of Chancery to the complainant the sum of $58,230.85, being the amount of the decree plus interest, costs and counsel fees; to the Receivers and their Counsel the sum of $11,367.72

for their fees and allowances; to the complainant's Solicitor in the insolvency proceeding the sum of $333.84, and to other Counsel in the insolvency case the sum of $250.00, making a total of $70,182.41, and leaving a surplus in the Court of $70,347.21 (Case, pp. 212-218).

On Surplus Money Proceedings the matter was referred to Aloysius McMahon, Esq., Special Master, to ascertain and report the amounts due the several defendants according to their equities and priorities (Case, p. 216). The Master, on October 15th, 1930, filed his report dated July 29th, 1930. There are no reasons stated in the Master's Report for his conclusions (Case, p. 219).

The Master reported the amount (Case, p. 224) and order of priority of the claims as follows:

First: To Shilowitz & Tucker for principal and interest on their mortgage	$23,482.00
Second: To Carteret Company for principal and interest on its mortgage	37,365.48
Third: To West Bergen Trust Company for principal and interest on its mortgage	6,874.00
Fourth: To 17 Mechanics' Lien Claimants, to be shared ratably and concurrently, after payment of above (besides interest)	54,810.74
Fifth: To Junction Milling Company on its mortgage	7,973.00

The defendant-appellant, Junction Milling Company, filed exceptions to the report (Case, p. 248) as follows:

1. It excepted to the finding that the mortgage of the Carteret Company was prior to the mortgage of the Junction Milling Company.

2. It excepted to the finding that the mortgage of the West Bergen Trust Company was prior to the Mortgage of the Junction Milling Company.

3. It excepted to the finding that the mechanics lien claims were prior to the mortgage of the Junction Milling Company.

4. It excepted to the finding that the lien claimants should share in the entire surplus fund, whereas he should have reported that the lien claimants were entitled to their statutory liens only upon the fund realized from the sale of the apartment house and the tract on which it stands, and had no rights prior to the Junction Milling Company's mortgage in the other two tracts.

5. It excepted to the finding of the Master that the surplus money was a common fund to be divided among all claimants, mortgagees and mechanics lienors, whereas he should have divided the claimants into three groups as follows:

(a) Those whose claims were limited to the apartment house and the middle tract upon which it stands (all lien claimants).

(b) Those whose claims were limited to an interest in the two adjacent corner plots only (Junction Milling Company).

(c) Those whose claims were against the entire tract (all other mortgagees, except the Junction Milling Company).

6. It excepted to the Master's failure to find that the value of the entire parcel including the apartment house, and including the two corner plots was $250,000.00, and that the value of the two corner plots alone was $20,000.00.

7. It excepted to the failure of the Master to apportion the surplus moneys into two funds, one fund representing the value of the apartment house and the middle tract

upon which it stands and the other representing the value of the two adjacent corner tracts.

8. It excepted to the failure of the Master to report that both funds should be applied proportionately to payment of the mortgage of Shilowitz & Tucker, according to the value of the respective tracts, and that the residue of the fund realized from the sale of the two corner plots should be applied to the Junction Milling Company's mortgage.

Exceptions 1, 2, 6, 7 and 8 were sustained. Exception 3 was sustained in part, and exceptions 4 and 5 were disallowed.

Vice Chancellor Bigelow concluded that the proceeds of the sale should be divided into two funds—one of $131,100.00 to be allocated to the middle tract upon which the apartment house stands and the other of $11,400.00 to be allocated to the two corner tracts, it having been testified that the value of the two corner tracts was 8% of the whole (Case, p. 267), and further concluded that the fund of $131,100.00 should be applied to the satisfaction of liens against the middle tract and the fund of $11,400.00 should be applied to the satisfaction of the liens against the two corner tracts; that the money paid to the complainant, the money paid to the Receivers for Receivers' Certificates, fees and allowances, and other counsel fees in the insolvency proceedings, totalling $70,182.41 be charged against the larger fund; that the costs be charged against the larger fund; that the Shilowitz & Tucker mortgage and the Carteret mortgage be paid out of the larger fund; that the Perry and Reid lien claims were entitled to priority over other lien claimants, because the others had signed postponements to the mortgages; and that the mortgage of the Junction Milling Company was entitled to pay-

ment in full out of the smaller fund (Case, p. 268, l. 6). He also concluded that all the mechanics' liens, except the liens of the appellants Max Platt and Mowre Lager, were liens against all three tracts and were prior to the lien of the Junction Milling Company's mortgage (Case, p. 275, ll. 20-30).

It was thereupon decreed (Case, p. 280) that the Shilowitz & Tucker mortgage be paid in full; that the Carteret Company mortgage be paid in full; that the two mechanics-lienors, Geo. F. Perry & Sons and A. S. Reid & Company be paid, in part ahead of all other claimants, and that all other lien claimants, including Geo. Perry & Sons and A. S. Reid & Company, share *pro rata* in the sum of $7,973.00 (the amount the Master reported as due on the Junction Milling Company mortgage), except lien claimants-appellants Mowre Lager and Max Platt who are excluded entirely; and the balance, if any, be paid to Geo. F. Perry & Sons (because of its judgment above referred to); the appellant, Junction Milling Company, being excluded entirely.

The appellant, Junction Milling Company, appeals from this decree on the ground:

> (a) that it failed to adjudge the amounts due the several parties on their respective encumbrances, the order of priority thereof, and the portion of the premises encumbered thereby;
>
> (b) that it is erroneous in directing the payment of the Carteret Company's mortgage and of the mechanics' lien claims before the appellant's mortgage was paid, and in adjudging in effect that the entire tract of 2¾ acres was the curtilage upon which the apartment house was erected; and that the Court erred in failing to adjudge that the Junction Milling Company's mortgage was prior to all other liens on the two corner tracts;

(c) that the Court erred in sustaining the judgments of Geo. F. Perry & Sons and A. S. Reid & Company entered after the injunctive order was served upon them;

(d) that the Court erred in failing to direct the payment of the appellant's mortgage out of the proceeds of the sale which should have been allocated (and in the opinion was allocated) to the two corner tracts before payment of the Carteret Company's mortgage and the mechanics' lien claims.

The Questions Involved Are:

First: Is the decree of the Court of Chancery deficient in failing to adjudge the amounts due to the several parties on their respective encumbrances, the order of priority thereof and the portion or portions of the premises encumbered thereby?

Second: Were the judgments of Geo. F. Perry & Sons and A. S. Reid & Company entered after these creditors were served with an order of the Court of Chancery restraining further proceedings on these suits valid and are they conclusive upon all parties in the foreclosure suit *sub judice?*

Third: Is the curtilage upon which the apartment house was erected the *middle tract* as shown on map Exhibit 82 (Case, p. 753), or does it include the entire tract of 2¾ acres?

Fourth: Are the mechanics' lien claims, the Carteret mortgage and the West Bergen Trust Company mortgage entitled to priority of payment over the mortgage of the Junction Milling Company?

Fifth: How should this fund be distributed?

ARGUMENT.

POINT I.

The final decree is erroneous because it does not adjudicate the rights of the appellant Junction Milling Company and the other parties.

The final decree (Case, p. 280) did not adjudicate the amounts due to the several parties for principal and interest upon their mortgages, lien claims, &c., nor did it adjudge the order of priority, and whether they embraced or affected the entire mortgaged premises (all three tracts), or part thereof, nor did it allocate the surplus moneys to the three tracts.

The decree only adjudicated that out of the surplus moneys there be paid by the Clerk of the Court of Chancery in the order designated and to the persons named, the sums of money therein stated. No adjudication whatever is made of the rights of the appellant Junction Milling Company under its mortgage which only covers the two corner tracts.

It is settled law in this State that a final decree in the Court of Chancery must adjudicate the rights of the parties; and as the final decree herein does not adjudicate the amounts due to the several parties for principal and interest upon their mortgages, lien claims, &c., and the order of priority, and whether the encumbrances embrace or affect the entire mortgaged premises (all three tracts) or part thereof, nor does it allocate the surplus moneys to the three tracts, manifestly the decree is erroneous and must be reversed. *Beall* v. *New York & New Jersey Water Company,* 87 N. J. E. 390, 101 Atl. 576.

POINT II.

The final decree is erroneous because it failed to adjudge that the judgments of Geo. F. Perry & Sons and A. S. Reid & Co. entered after these creditors were enjoined from proceeding were not conclusive on the Junction Milling Company and the other parties.

The lien claimants Geo. F. Perry & Sons and A. S. Reid & Co. entered mechanics' lien judgments against the three tracts by default *after they were enjoined* from taking any further proceedings in their actions by an injunctive order of the Court of Chancery in the insolvency proceedings against the owner, Capital Construction Co., Inc., and in such judgments it was adjudged that the liens of said claimants were prior to the liens of the mortgages of Junction Milling Company and West Bergen Trust Company.

Although the Court in its opinion makes no direct finding as to the effect of said judgments in connection with the Junction Milling Company's mortgage, it does so indirectly in dealing with the West Bergen Trust Company's mortgage. The learned Vice Chancellor said: "The judgment was entered by default. Prior to the entry of the judgment, the Capital Construction Co., Inc., had been adjudged insolvent. The Trust Company apparently assumed that the action in the Circuit Court would not be pressed since a receiver had been appointed and therefore interposed no defense. I do not think it inequitable to give this judgment its ordinary effect. If the Trust Company desired to avoid it, it should have applied to the Circuit Court to vacate the judgment" (Case, p. 270, lines 26-36).

It should be borne in mind that *after the insolvency of the owner* these two lien claimants were

not obliged to proceed to judgments in order to preserve their statutory rights. *Ennis* v. *Eden Mills Paper Co.* (Ct. Err. App.), 65 N. J. L. 577, 48 Atl. 610, *Dotty* v. *Auditorium Pier Co.*, 56 Atl. 720, affirmed 56 Atl. 1132.

As a matter of law there was no owner to proceed against after the receiver was appointed, and the lien claimants could not proceed against the receiver without the consent of the Court of Chancery. The Court of Chancery had complete jurisdiction to adjudicate upon all the rights of all the parties concerned. *Kaplowitz* v. *Trugman,* 105 N. J. E. 38, 146 Atl. 663; *Dotty* v. *Auditorium Pier Co.,* 56 Atl. 720, affirmed 65 N. J. E. 768, 56 Atl. 1132.

The Junction Milling Company was justified in assuming that in obedience to the injunctive order of the Court of Chancery (Case, p. 296), the mechanics' lienors, Geo. F. Perry & Sons, and A. S. Reid & Company, would not proceed with their mechanics lien suits. The injunctive order restrained all parties "from taking any further proceeding in any action or proceeding theretofore commenced". This order restrained the Junction Milling Company from defending these actions and should be equally efficacious in preventing these two lien claimants from obtaining any advantage by proceeding in defiance of the injunction. Such proceeding in direct violation of the injunctive order was a fraud upon the Court and upon all the parties concerned. The Court of Chancery should not have sent the defendants who were thus taken advantage of back to the law Court to have the judgments vacated, but had the power, and should have exercised it, to declare the judgments null and void and of no effect.

The Court of Chancery had ordered these claimants not to proceed with their suits at law. In disregard of such order they had proceeded

in the action at law and taken judgment. They then came back to the Court of Chancery with the judgments and asked the Court of Chancery to give them the benefit of the advantage so obtained. It seems too obvious for argument that the only proper course for the Court of Chancery to pursue under such circumstances, if it did not punish these parties for contempt of Court, was at least to disregard the judgments and treat these claims as though no judgments had been entered thereon. There might even be a question whether the law court would feel itself bound to vacate the judgments under these circumstances as the law Court was not restrained, and the law Court undoubtedly had jurisdiction. The law Court might very well have refused to vacate the judgments. The defendants who were thus victimized might therefore find themselves without a remedy if the Court of Equity whose order had been flouted, likewise refused to grant relief.

It should be observed that in the case of *Crane* v. *Brighton Mills,* 98 N. J. E. 308, 120 Atl. 677, wherein the *general contractor was adjudged insolvent during the pendency of the mechanics' lien suit, the Court permitted the action to be prosecuted to judgment against both contractor and owner so that the lien claimant would not be deprived of his statutory right against the owner.* The facts in the case *sub judice* do not come within the rule of that case, but do come within the rule enunciated in the case of *Ennis* v. *Eden Mills Paper Co., supra.*

To permit Geo. F. Perry & Sons and A. S. Reid & Co. to benefit by their fraudulent conduct in flagrantly violating the injunctive order in proceeding further in their actions and entering judgment therein, would be to confer upon them an inequitable advantage. A right obtained through fraudulent means is never protected; and

a judgment so obtained is not conclusive on a court of equity.

Furthermore, irrespective of the fact that the judgments were entered in violation of an injunctive order, and therefore should be given no effect, these judgments should be given no conclusive effect against the mortgagees and other mechanics' lien claimants because on the face of the proceedings the mechanics' liens upon which the judgments were entered were defective and void and no valid judgments could be predicated upon them.

The mechanics' liens of these two lienors did not confine themselves to the curtilage upon which the building was erected but took in the two adjacent tracts, covering an acreage of 2¾ acres in violation of Section 21 of the Mechanics' Lien Law which provides:

> "When the curtilage or lot on which the building is erected shall not be surrounded by an enclosure separating it from adjoining lands of the same owner,
>
> then the lot on which the building lien shall extend,
>
> shall be such tract as in the place of its location is usually known and designated as a building lot, and bounded by the lines laid down for its boundaries on any map made for the sale of it or on file in any public office, to lay out in lots the tract including it,
>
> and in cases where no such map exists, such lot may be designated by the claimant in the lien claim,
>
> but in no case shall the same exceed half an acre, or include any building not used and occupied with, or intended to be used and occupied with, the buildings for this cost of which the lien is claimed. 1863 p 275."

In a case exactly parallel it was held that where a lien claim failed to apportion the amount claimed between several buildings and the cur-

tilages upon which the buildings were erected in violation of Section 22 of the Mechanics' Lien Law, the lien claim was absolutely void and that the judgment entered thereon gave it no priority in payment or advantage over other liens. *Morris County Bank* v. *Rockaway Mfg. Co.*, 16 N. J. E. 150. In this case the attack on the lien was made in a foreclosure suit.

The Court of Chancery therefore should have treated the Geo. F. Perry & Son and A. S. Reid & Co. claims as though no judgments had been entered thereon and the decree is erroneous in giving effect to these judgments.

POINT III.

The final decree is erroneous in that it fails to adjudge that the curtilage upon which the building was erected was limited to the middle tract.

The large tract of land was divided, considered and treated by the owner, the defendant Capital Construction Co., Inc., as three separate parcels before the commencement of the erection of the apartment house upon the middle tract. One corner tract fronting on Prospect Avenue is 358 feet by 94 feet; the other corner tract fronting on Union Avenue is 240 feet by 110 feet; and the middle tract upon which the apartment house now stands is 200 feet wide with an average depth of 300 feet. That such a division was made by the defendant Capital Construction Co., Inc., is clearly established by the uncontradicted testimony of Harry Starr, an officer of said defendant corporation, who testified as follows:

> "Q. Mr. Starr, had you had this survey or blueprint of a survey made of the property

of the Capital Construction Company? A. Yes, sir.

* * * * * *

Blueprint marked Exhibit 82.

Q. Was it actually divided? A. It was actually divided on the plot, because we figured to build on the two corners and this corner (indicating) we figured to build a separate apartment house; so this is what we did figure.

Q. The new apartment that has now been built is this one shown on the center tract? A. Exactly.

Q. The three-story brick apartment? A. Exactly.

Q. You, as a matter of fact, never got to the point where you did build a separate apartment on each of the two outside tracts; you never did start any apartment on it? A. No, sir.

Q. The company failed before you got to that point? A. Yes, sir.

Q. But it was your intention and the intention of the company to develop the property in that way? A. Exactly.

Q. The way it is divided on this survey?

Mr. Pyle: I offer the survey in evidence.

* * * * * *

By the Master:

Q. Was this survey filed in any public office? A. It was in Cranford.

By Mr. Kanter:

Q. What office? A. In the Building Department.

By the Master:

Q. When you applied for permission to build did you give a description of the building; did you file this survey? A. In the Building Department; yes, sir.

By Mr. Rubenstein:

Q. Did you have a plot plan attached to the plans and specifications that you filed in the Township of Cranford? A. A plot plan, yes" (Case, pp. 390-391-392).

On cross-examination Mr. Starr further testified as follows:

"Q. There was nothing to show that you intended to reserve any part of it for future operations? A. There was to show.

Q. What? A. We had made by the surveyor before, when the engineer was down there they drove stakes down there.

Q. Was there anything; if you came up on the land and looked at the building while it was in course of construction looked at the building or at the land, was there anything to show that you did not intend to use the entire plot for that building? A. Yes; we had our lines down there; we had laid out the building; that was for the building, and then the two corners were separated."

* * * * * *

"Q. Was there any physical separation between one plot and the other? A. Yes.

Q. What was it? A. It was made out stakes the way we are laying it out, it was stakes like driven in the ground, then there was a plot like, it is three or four inches around, then you could see the difference" (Case, p. 394).

* * * * * *

"Q. Before the company failed you attempted to procure a permanent mortgage upon this improvement, didn't you? A. Yes" (Case, p. 401, ll. 38-41).

"Q. What property did you apply for a mortgage on in that application? A. On that building.

Q. On that building, on what ground; on the tract, or the whole thing, or the two wings? A. No, not the whole thing; only the building alone.

Q. Then the central tract? A. Yes, sir.

Q. Did you try in one place or several places for a permanent loan? A. We applied in several places.

Q. In each place you applied for a loan on the central tract? A. On the central tract.

Q. This survey that we offered in evidence here, that is a copy of the survey which you had made before the building was erected, and that divided it up in these same three tracts? A. Yes'' (Case, p. 402, ll. 1-21).

It is clearly apparent from the foregoing testimony that the contractors furnishing labor or materials, or both, in the erection and construction of the apartment house upon the middle tract had actual notice or were put on inquiry that the apartment house and its curtilage comprised the middle tract only. It is further shown by the testimony of Mr. James E. Pyle, Counsel for the Carteret Company, that the middle tract was separate and distinct from the two corner tracts (Case, pp. 402-404).

The apportionment of the surplus fund in the opinion of Vice-Chancellor Bigelow (Case, p. 267) is a recognition by the Court that the two corner tracts are independent and unconnected with the apartment house development and the land whereon it stands; otherwise there cannot be any reason for such apportionment on part of the Court.

The Vice Chancellor in his opinion says:

''The premises were sold in this cause as a whole and not in parcels. But the undisputed evidence of experts is that the part of the entire tract covered by the Milling Company mortgage is in value 8 per cent of the whole. If, from the fund still in court, $70,347.21 there be deducted the amount due on the Shilowitz and Tucker mortgage, $23,482 and costs, there will remain about

> $43,750, of which 8 per cent is $3,500, or only half the sum due on the Junction Milling Company mortgage. But the whole amount received by the Sheriff, $142,500, may be considered as two funds—8 per cent of it, $11,400, as the proceeds of the tract covered by the Milling Company mortgage, and $131,100, the proceeds of the balance of the tract."

Section 1 of the Mechanics' Lien Act reads as follows:

> "Every building hereafter erected or built within this State shall be liable for the payment of any debt contracted and owing to any person for labor performed or materials furnished for the erection and construction thereof, which debt shall be a lien on such building and *on the land whereon it stands, including the lot or curtilage whereon the same is erected.*"

This section of the Mechanics' Lien Act limits the rights of the defendant-respondents' mechanics' lien claimants to the apartment house and *the middle tract upon which it stands.*

Section 21 of the Mechanics' Lien Act reads as follows:

> "When the curtilage or lot on which the building is erected shall not be surrounded by an enclosure separating it from adjoining lands of the same owner, then the lot on which the building lien shall extend, shall be such tract as in the place of its location is usually known and designated as a building lot, and bounded by the lines laid down for the boundaries on any map made for the sale of it or on file in any public office, to lay out in lots the tract including it, and in cases where no such map exists, such lot may be designated by the claimant in the lien claim, *but in no case shall the same exceed half an acre,* or include any building not used and occupied with, the buildings for this cost of which the lien is claimed" (1863, p. 275).

The above section limits the curtilage when not otherwise fixed by enclosure to the usual building lot, when there is a map; and to half an acre, where there is no description of the curtilage by the owner, and when the means of designation by map do not exist. *Gerard* v. *Birsh,* 28 N. J. E. 317.

It has been previously pointed out that the owner divided its land into three separate tracts, designating the middle tract as the curtilage of the apartment house; and that the contractors furnishing labor and materials in the erection and construction of the apartment house on the middle tract had actual knowledge or were put on inquiry that the curtilage of the apartment house was the middle tract.

All the lien claims of the defendants-respondents except the claims of Mowre Lager and Max Platt cover the three tracts. The middle tract alone covers more than half an acre (Case, p. 273). There was no enclosure surrounding the middle tract or the adjacent two corner tracts. However, the owner designated the curtilage of the apartment house by filing a copy of a map, Exhibit 82, in the Office of the Building Department of Cranford, a public office, showing a division of the tract into three tracts when it filed the plans and specifications for the building and before the commencement of the building operations (Case, pp. 391-392). Furthermore, before the filing of any mechanics' lien claims the owner had described the two corner tracts as separate and distinct from the middle tract in the mortgage to the Junction Milling Company which was recorded on *October 6, 1927,* in the Union County Register's Office, several months before any lien claims were filed (Case, p. 804) so that these lien claimants knew then that the plot had been subdivided for development.

The case of *Board* v. *Freedman*, 99 N. J. E. 351, 131 Atl. 913, is exactly in point: In that case one Miller bought a single plot 45 x 150. He proceeded to build 10 buildings upon this plot. While the buildings were in the course of construction he executed 10 mortgages, each of which embraced a portion of the premises. Subsequent to the recording of these 10 mortgages, lien claims were filed covering the whole of the mortgaged premises. Upon the foreclosure of a prior purchase money mortgage the Master reported that the mechanics' liens were subordinate to the 10 mortgages because there had been no apportionment by the mechanics-lienors of their respective claims among the 10 buildings. The report was confirmed by the Chancellor, and on appeal to the Court of Errors and Appeals Mr. Chief Justice Gummere, speaking for that Court, said:

> "The argument in support of the appeal is that no such apportionment is required by the statute where the buildings are upon a single lot of land. This contention seems to us to be based upon false premises. The fact that when Miller purchased this property it was a single tract was no bar to his right as owner to divide it into as many separate parcels as he saw fit and to erect a building upon each of said separate parcels. He made such a division by executing ten separate mortgages, each of them covering so much of the original plot as was occupied by one of the ten buildings then being erected thereon. The provisions of section 22 of the Mechanics' Lien Law, which requires that when a materialman has furnished to the owner materials to be used in two or more buildings to be constructed by the same person or persons (that is, by the contractor), he shall divide and apportion his lien among the said buildings in proportion to the value of the materials furnished to each of them, and file with his lien a statement of the amount so

apportioned to each building, is mandatory (Culver *v.* Lieberman, 69 N. J. Law 341, 55 A. 812), and is applicable to the present case. The purpose of the statute, as is pointed out in the cited case, is to inform all persons who have varied interests in any of such buildings and the curtilage upon which it is (or is being) erected as to the extent to which each of said buildings and curtilages is claimed to be liable to the lien of the materialmen—that is, what portion of the whole amount of the contractor's debt has been legally apportioned to each of such buildings and curtilages.

* * * * * *

Each one of the appellants having failed to apportion its claim as required by Section 22 of the Mechanics' Lien Law (3 Comp. St. 1910, p. 3307), the master was right in subordinating their liens to those of the mortgages. In doing so he followed the rule laid down in the case of Morris County Bank *v.* Rockaway Mfg. Co., 16 N. J. Eq. 150, 161; viz., that a claim filed upon separate buildings and upon distinct lots of land, without apportioning the claim and designating specifically the amount claimed upon each, must be postponed to the claim of other incumbrances. The soundness of this rule, so far as our examination discloses, has never been criticized in later decisions, and meets with our approval."

Assuming that there was no designation by the owner and the means of designation did not exist by map, the designation of the curtilage by the lien claimants should not exceed half an acre. But in view of the designation by the owner of the middle tract as the curtilage of the apartment which in itself is more than half an acre, only the middle tract could rightfully be subjected to the lien claim for work done or materials furnished for the apartment house and not the two adjacent corner tracts.

Prior to the enactment of the section referred to above it was decided in the case of *Derrickson* v. *Edwards,* 29 N. J. L. 268, that the curtilage, intended by the act to be subject to the lien, was so much land as might be necessary for the convenient and beneficial enjoyment of the building, on which the work was done; and that, therefore, its proper extent, in each case, would be a question of fact.

The enactment of said section abrogated the rule enunciated in the case of *Derrickson* v. *Edwards, supra.* In *Harrington's Sons Co.* v. *Jersey City,* 78 N. J. L. 610, it is said that when the legislature frames a new and general rule, all earlier and different rules touching the same matter are discarded in favor of such latter rule.

The Vice Chancellor in his opinion says, "During construction work, it (meaning the entire tract) was all used indiscriminately for the handling of material. The whole adds to the convenient and beneficial use of the apartment house and doubtless enables higher rentals to be had than could otherwise be obtained. I find that the entire tract is the curtilage subject to the liens describing it". The learned Vice Chancellor erroneously applied the rule enunciated in the earlier cases, instead of applying Section 21 of the Mechanics' Lien Act, which limits the curtilage to the designation by the owner or when the curtilage is designated by the lien claimants that in no case shall the same exceed half an acre.

The fact that the three tracts were used indiscriminately for storing building materials is in no way an indication that all were to be considered as the curtilage. It is natural and reasonable that adjoining tracts should be used to store building materials, rather than clutter up the streets and highways.

As noted above, the Vice Chancellor in his opinion says that if the unimproved two corner tracts were considered as part of the curtilage of the apartment house erected on the middle tract, it would doubtless enable higher rentals to be had for the apartments than could otherwise be obtained. This may be so, if the two corner tracts were landscaped and used as a garden to beautify the apartment house, but there is no evidence of any such intention; on the contrary the testimony shows that the owner set aside the two corner tracts for future development and did not intend them to be adjuncts of the apartment house.

It is unreasonable to say that the Capital Construction Co., Inc., intended that the two large tracts and middle tract should constitute the curtilage of the apartment house. The corner tract flanking on the south side of the middle tract is a tract of land 358 feet by 95 feet, with a frontage of 358 feet on Prospect Avenue; the other corner tract flanking on the north of the middle tract is a tract of land 94 feet fronting on Riverside Drive and with a frontage of 240.31 feet on Union Avenue. It seems far-fetched to assert that the Capital Construction Co., Inc., intended such valuable frontage to be part of the curtilage of the apartment house erected upon the middle tract, which in itself occupied a large tract of land over half an acre in area in this speculative building era.

Even conceding for the sake of argument that Section 21 does not apply in the case *sub judice* the learned Vice Chancellor erred in his finding that the entire tract is subject to the liens claim describing it, because the facts in the case at bar manifestly indicate that the two corner tracts are not necessary to the convenient and beneficial enjoyment of the apartment house on which the claimants' work or materials were bestowed; therefore, the curtilage should be restricted t

the middle tract alone. *Federal Trust Co.* v. *Guiges,* 76 N. J. E. 495, 74 Atl. 652; *Derrickson* v. *Edwards, supra.*

The final decree therefore should have adjudged that the curtilage upon which the apartment house was erected was the middle tract and not all three tracts and for that reason it is erroneous and should be reversed.

POINT IV.

The final decree is erroneous in adjudging that the mechanics' liens are prior to the mortgage of the Junction Milling Company.

The mortgage of the Junction Milling Company covers only the two corner tracts. It does not cover the middle tract on which the apartment house stands.

The mechanics' liens are either entirely void because the lienors attempted to include more land than is properly appurtenant to the apartment house site (Point III); (*this of course does not apply to the liens of Mowre Lager and Max Platt who limited their liens to the middle tract above*). *Culver* v. *Lieberman,* 69 N. J. L. 341; 55 Atl. 812, or else the effect of these liens must be limited to the actual curtilage upon which the building is erected, *Federal Trust Co.* v. *Guigues,* 76 N. J. E. 495, 74 Atl. 652, in either of which events the two corner tracts would be freed from the claims of the mechanics' lienors and these tracts would be subject only to the liens of the mortgages of the appellant, Junction Milling Company, the Carteret Company, and the West Bergen Trust Company, *or* the mechanics' liens must be postponed to the liens of the mortgages. *Board* v. *Freedman, supra.*

The Court of Chancery, however, decreed that the mechanics' liens were properly filed and were entitled to priority of payment over the mortgage of the Junction Milling Company, although the mechanics' liens were filed long after the mortgage was recorded, with the result that the Junction Milling Company was excluded entirely and got nothing on its mortgage.

In the opinion of the Vice Chancellor the surplus money is divided into two funds; one fund representing the apartment house and the middle tract upon which it stands, and the other fund representing the two corner tracts. And in the words of the Vice Chancellor these two funds are marshalled "So as to leave enough in the smaller fund on which alone the Milling Company has a lien, to permit the payment of the amount due on that mortgage in full" (Case, pp. 267-268). Notwithstanding this, the sum of $7,973.00 so found to be due on the Milling Company's mortgage was erroneously decreed to be paid to the mechanics' lien claimants on the apartment house (Case, p. 275, ll. 24-28).

In the case of *Meister* v. *Meister,* 142 Atl. 312, 103 N. J. E. 78, the Court held that a materialman cannot secure a preference over others who furnished labor and materials after the commencement of the building, by taking a mortgage. The mortgage in that case covered the same property or curtilage which was subject to lien claims. However, the facts in instant case, are distinguishable from the Meister case, in that the mortgage of the Junction Milling Company covered lands *other than those* upon which the building was erected for which the materials were furnished.

That the defendant-appellant Junction Milling Company took a mortgage on *other lands* in the ordinary course of business in satisfaction of its claim for materials furnished to the apartment

house in no wise affects the mortgage. The mechanics' lien claimants cannot challenge said mortgage under the Mechanics' Lien Act, because their rights are limited therein to the apartment house and the tract upon which it stands. In other words, the rights of the mechanics' lien claimants were not disturbed by the mortgage of the Junction Milling Company. Hence, the mortgage of the Junction Milling Company is valid in law and in equity, and the fund allocated by the Court of Chancery to the two corner tracts should be paid to the Junction Milling Company, which is rightfully entitled to the same under its mortgage, and not to the lien claimants for labor performed and materials furnished on the apartment house. *Federal Trust Co.* v. *Guigues.*

Such adjudication was therefore erroneous and the decree should be reversed for that reason.

POINT V.

The final decree is erroneous in adjudging that the Carteret Co. was entitled to payment of its mortgage to the exclusion of the Junction Milling Co.

The mortgage of the Junction Milling Company covering only the two corner tracts, was recorded October 6th, 1927. The mortgage of the Carteret Company covering the entire tract was recorded October 24th, 1927. Ordinarily, the dates of recording would determine the order of priority. *Fidelity Union Title Co.* v. *Magnifico,* 106 N. J. E. 559; 151 Atl. 499; 2 Comp. St. 1552, Sec. 53.

The learned Vice Chancellor, however, ordered payment of the Carteret mortgage in full to the exclusion of the Junction Milling Co. mortgage.

The Junction Milling Company's mortgage having been recorded first and the mechanics' liens being ineffective against the corner tracts for the reasons stated above, the Junction Milling Company's mortgage should have been ordered paid out of the fund allocated to the two corner tracts, and for the failure to so direct the decree should be reversed.

POINT VI.

The final decree is erroneous in failing to adjudge that the mortgage of the Junction Milling Co. is prior to the mortgage of the West Bergen Trust Co.

The Junction Milling Company's mortgage was recorded on October 6th, 1927. The West Bergen Trust Company's mortgage was recorded on October 26th, 1927. This mortgage like the Carteret Company's mortgage covered the entire tract.

The same argument advanced under Point V applies with equal force to the mortgage of the West Bergen Trust Co. The two corner tracts covered by the Junction Milling Company's mortgage not being part of the curtilage upon which the building was erected, but being separate and distinct therefrom, the mechanics' liens were improperly filed against these two corner tracts and are not valid liens thereon. As the West Bergen Trust Company's mortgage could only get priority over the Junction Milling Company's mortgage on the theory that said mortgage (West Bergen Trust Co.) was prior to the mechanics' liens and that the mechanics' liens are prior to the Junction Milling Company's mortgage the syllogism must fail, if the major premise, namely

that the mechanics' liens are prior to the Junction Milling Company's mortgage, fails.

The mechanics' liens against the two corner tracts being invalid and nugatory, the West Bergen Trust Company's mortgage must fall into the order of payment in which it is placed by the fact of its recording, namely after the Junction Milling Company's mortgage, and the decree should have so adjudged. For its failure so to do it should be reversed.

POINT VII.

The final decree is erroneous in failing to direct payment of the mortgage of the Junction Milling Co.

The decree should have allocated the fund to the three tracts, part to the middle tract upon which the building was erected, and part to the two corner tracts separate and distinct therefrom, even though the entire property was sold as one parcel under an order to sell *pendente lite* in the proceedings to foreclose a prior mortgage upon the entire tract (Case, p. 197). *Vandine* v. *Vanness,* 5 N. J. E. 485.

The learned Vice Chancellor in his conclusions mentioned an allocation of the fund, indicating that in his mind there were three distinct tracts. Yet he upheld the mechanics' liens filed upon all three tracts as one parcel, and ordered payment of the mechanics' liens and of the Carteret mortgage to the entire exclusion of the Junction Milling Company's mortgage.

The decree should have adjudicated a proper allocation of the fund, one portion to the middle tract upon which the apartment house was erected and the other to the two corner tracts which are

separate and distinct therefrom. From the former, payment should have been decreed in the following order:

First: The Shilowitz and Tucker mortgage;

Second: The Carteret Company's mortgage;

Third: All valid mechanics' liens *pro rata;*

Fourth: The West Bergen Trust Company's mortgage.

Out of the other portion (that allocated to the undeveloped land) payment should have been decreed in the following order:

First: The Junction Milling Company's mortgage;

Second: The West Bergen Trust Company's mortgage.

For its failure so to do the final decree should be reversed.

Respectfully submitted,

Chas. Rubenstein,
Solicitor for Appellant, Junction Milling Company.

Louis Rubenstein,
Of Counsel.

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New Jersey Court of Errors and Appeals

Riverside Apartment Corporation, a corporation, Complainant, *vs.* Capital Construction Co., Inc., a corporation, *et als.*, Defendants.	On Appeal of Junction Milling Company.

ANSWERING BRIEF OF IRA R. CROUSE, LOUIS MOORE, MORRIS PORTNOW AND ABRAHAM LIPSCHITZ, PARTNERS, TRADING AS LIPSCHITZ PARQUET FLOOR CO., AND MEYER & RUH COMPANY.

Aaron Kaufman, of counsel with Ira R. Crouse; Louis Moore; Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co.; and Meyer & Ruh Company.

Statement of the Case.

The Capital Construction Co., Inc., a corporation of New Jersey, was the owner of a tract of land in Cranford, New Jersey, upon which an apartment house was erected. During the construction of the building, the Capital Construction Co., Inc., gave a mortgage to Israel Shilowitz and Jacob Tucker to secure moneys to be advanced in the construction of the building, which mortgage was dated July 29, 1927, and recorded August 2, 1927.

Thereafter, on September 16, 1927, the Capital Construction Co., Inc., gave a mortgage to the Junction Milling Company, which mortgage was recorded on October 6, 1927, to secure materials which were furnished and which were to be furnished for the said apartment house, and this mortgage covered the outside wings of the property and did not cover the apartment building itself.

Subsequently, and on October 14, 1927, the Capital Construction Co., Inc., gave a mortgage to the Carteret Company, which mortgage was recorded on October 24, 1927, and which mortgage was given for moneys to be advanced in the construction of the apartment house.

On October 25, 1927, the Capital Construction Co., Inc., gave to the West Bergen Trust Company a mortgage, which mortgage was recorded on October 26, 1927, and which was given presumably for moneys to be advanced in the construction of the building.

On January 4, 1928, the Court of Chancery declared the Capital Construction Co., Inc., insolvent.

On January 12, 1928, Ira R. Crouse; Louis Moore; Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co.; and Meyer & Ruh Company each filed in the Union County Clerk's Office a lien claim for material and/or labor furnished in the construction of the apartment house.

On March 3, 1928, the Riverside Apartment Corporation, a corporation of the State of New Jersey, who held a mortgage in the sum of Thirty Thousand ($30,000.00) Dollars undisputedly prior in lien to all the mortgages and liens involved in this appeal, filed a bill to foreclose its mortgage.

Ira R. Crouse; Louis Moore; Morris Portnow and Abraham Lipschitz, partners trading as Lip-

schitz Parquet Floor Co.; and Meyer & Ruh Company, filed counterclaims against, among others, the Junction Milling Company. On July 30, 1928, it was ORDERED, ADJUDGED and DECREED that the said counterclaims be taken as confessed against the Capital Construction Co., Inc., and among others, the Junction Milling Company (pages 115-138-160-181, State of Case). These decrees are still open of record against the Junction Milling Company, and no attempt has been made to have them vacated.

On April 5, 1928, order for sale of the property *pendente lite* was made and the property was sold by the Sheriff of Union County for the sum of One Hundred Forty-two Thousand Five hundred ($142,500.00) Dollars. After the payment of the moneys due to the Riverside Apartment Corporation, and deductions made for costs connected with a Receivership and other expenses allowed by the Court of Chancery, there remained in the hands of the Clerk in Chancery the sum of Seventy Thousand Three Hundred Forty-seven Dollars and Twenty-one ($70,347.21) Cents. The question of the distribution of this fund was referred to Aloysius McMahon, Esq., one of the Special Masters of the Court of Chancery on July 13, 1929.

The Master's report was filed on October 15, 1930 (page 219, State of Case), and exceptions were filed by Ira R. Crouse; Louis Moore; Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co.; and Meyer & Ruh Company (page 241, State of Case), in which these defendants excepted to report that the mortgage of the defendant, West Bergen Trust Company was prior to their lien claims. The final decree entered was entered January 23, 1931 (page 280, State of Case).

There are only three questions which arise as a result of the appeal of the Junction Milling Company, namely:

1. Did the Junction Milling Company have a valid mortgage which was prior in lien to the mechanics' liens?

2. Would the decrees *pro confesso* obtained in the Court of Chancery by the defendant-appellees adjudicate the lien claims prior to the Junction Milling Company mortgage?

3. Can a mechanic's lien be filed upon a tract of land of more than one-half an acre?

POINT I.

The Junction Milling Company has a valid mortgage which is subsequent in lien to mechanics' liens.

The Junction Milling Company mortgage is a valid lien against the premises but by reason of Section 15 of the Mechanic's Lien Act it is subsequent to valid mechanics' liens. At the time this mortgage was given, the firm of Starr & Silverman was indebted to the Milling Company for Two Thousand Nine Hundred Nineteen Dollars and Thirty-four ($2,919.34) Cents, for material sold and used in construction work not connected with the apartment building. The Milling Company on that date also had a contract with Capitol Construction Company to furnish trim on the Cranford job for the contract price of Eight Thousand Eight Hundred ($8,800.00) Dollars and had already delivered the greater part of the material. The mortgage was given by the Capitol Construction Company to secure payment of its own debt as well as the debt of Starr & Silverman.

The Master reported that there was due on

this mortgage for principal and interest the sum of Seven Thousand Nine Hundred Seventy-three ($7,973.00) Dollars (page 265, State of Case).

The Courts in this State have held:

> "Where a materialman accepts a mortgage to secure his materials, he thereby waives his right to a mechanic's lien". (*Weaver* v. *Demoth,* 40 N. J. L. 238; *Meister* v. *Meister,* 142 Atl. 312; *Thirteenth Ward Building & Loan Association* v. *Kantor, et al.,* 147 Atl. 809; *Feinberg* v. *Building Construction Co., et al.,* 154 Atl. 821.)

The Milling Company placed itself in the same position as any mortgagee whose money was not used in the construction of the building. Section 15 of the Mechanic's Lien Act states, "Every mortgage given or to be given upon lands of this State shall have priority over any claim that may be filed in pursuance of this Act to the extent of the money actually advanced and paid by the mortgagee and applied to the erection of any new building upon the mortgaged lands or any alterations, erections, repairs, or additions to any building on said lands, provided such mortgage be registered or recorded before the filing of any such claim". The Act divides into two classes those who lend credit to aid in the erection of the building, namely, those who advance funds and those who perform and furnish material. Those who advance funds are secured by a mortgage and those who perform labor and furnish material are secured by lien claims. There is no question, therefore, that the mechanics' lien claimants are prior in lien and take the place of the Junction Milling Company mortgage in the scheme of priorities.

POINT II.

A decree *pro confesso* obtained by a defendant-appellee in the Court of Chancery which has not been vacated is *res adjudicata* and will not be disturbed by the Court of Errors and Appeals.

This Court has laid down the rule that no appeal will lie to the Court of Errors and Appeals from a decree of the Court of Chancery made upon a bill which has been legally taken as confessed against the appealing defendant for want of answer. In the case of *Sharff et als.* v. *Tosti,* 154 Atl. 824 this principal has been followed, also in the cases of *New Jersey Building, Loan & Investment Co.* v. *Lord,* 66 N. J. Eq. 344, 58 A. 185; *Rockhill* v. *Herr,* 89 N. J. Eq. 583, 105 A. 188; *Walter* v. *Keuthe,* 98 N. J. Law, 823, 121 A. 624.

In the case at bar decrees *pro confesso* were legally entered against the Junction Milling Company which were never vacated and, therefore, the priority of these defendant-appellees over the Junction Milling Company has been definitely adjudicated.

POINT III.

A mechanic's lien can be filed upon a tract of land of more than one-half an acre.

The Junction Milling Company stresses the point that it was intended that the land of the Capitol Construction Company was divided into three plots; a center tract upon which was built the apartment house and two wings. All the mortgages, the purchase money and advanced money, which were recorded before the Junction Milling

Company mortgage, cover the entire premises. The tract of land upon which the apartment house was erected fronts on Riverside Drive and is bounded on one side by Prospect Avenue and the other side by Union Avenue. The distance between these two streets is about Four Hundred (400′) Feet. The average depth of the lot is Three Hundred (300′) Feet so that it contains two and three-quarters acres more or less. The apartment house is a large structure with an extreme frontage of One Hundred Ninety-five (195′) Feet and a depth of One Hundred (100′) Feet. It is Forty (40′) Feet from Riverside Drive and midway between the side streets. One lot fronting on Prospect Avenue is Three Hundred Fifty-eight (358′) Feet by Ninety-four (94′) Feet; another on Union Avenue, Two Hundred Forty (240′) Feet by One Hundred Ten (110′) Feet; and the third, the central lot on which the apartment house stands, with an average depth of Three Hundred (300′) Feet and a width of Two Hundred (200′) Feet. The line of one side lot was drawn within Seven and Twenty-five Hundredths (7.25′) Feet of the building and the line of the other side lot, Ten (10′) Feet from the building. The mortgage of the Junction Milling Company covers the two side lots and not the central part of the tract on which is the apartment house. The building in question without any surrounding land at all has an area of more than one-fourth of an acre. If one includes with it a lot extending from the street to the rear line of the premises as described before, namely Two Hundred (200′) Feet in width by Three Hundred (300′) Feet in average depth, practically an acre of land is to be regarded as a curtilage.

From the facts and circumstances in this case, the contention of the Junction Milling Company lacks foundation since

1. The premises were purchased as one tract;

2. The mortgages that were placed on the premises for the construction of the building covered the entire tract;

3. The mechanics' lien filed by the Junction Milling Company covered the entire tract;

4. The tract which this appellant maintains should be the curtilage is more than one-half an acre.

In *Gerard* v. *Burch,* 28 N. J. Eq. 317, Chancellor Runyon held that a lot Five Hundred (500′) Feet front by Four Hundred Fifty (450′) Feet deep was a proper curtilage. The cases of *James* v. *Van Horn,* 39 N. J. L. 353; *American Brick & Tile Co.* v. *Drinkhouse,* 59 N. J. L. 462; *Federal Trust Co.* v. *Guigues,* 76 N. J. E. 495, and *Raab* v. *W. P. Ellison Inc.,* 89 N. J. L. 416, all uphold the contention that a lien claim can be filed where the curtilage is more than one-half an acre.

Conclusion.

These defendants-appellees submit that the final decree of the Court below is correct in every detail and should not be set aside, disturbed or modified and properly adjudicates the relationship of mortgages and mechanics' liens and places them in their correct positions as a matter of law.

Respectfully submitted,

Aaron Kaufman,
Counsel for Ira Crouse, Louis Moore, Morris Portnow and Abraham Lipschitz, partners, trading as Lipschitz Parquet Floor Co. and Meyer & Ruh Company.

34 OCT.T.1931

New Jersey Court of Errors and Appeals

Between: RIVERSIDE APARTMENT CORPORATION, a corporation, Complainant, and CAPITAL CONSTRUCTION CO., INC., et al., Defendants.	On Appeal of Junction Milling Company.

ANSWERING BRIEF OF A. S. REID & CO.

Facts.

On or about March 3, 1928, after having obtained leave of the Court of Chancery, the complainant filed its bill in the Court of Chancery, for the foreclosure of two mortgages encumbering certain premises situated in the Township of Cranford, County of Union and State of New Jersey. Prior to the filing of the bill of complaint, receivers had been appointed for the defendant, Capital Construction Co., Inc., and permission to join the receivers as defendants in the foreclosure suit had been given by the aforementioned order. The premises in question were also encumbered by several additional mortgages, as well as with mechanics' liens and judgments, and all such mortgagees, mechanics' lien creditors and judgment

creditors were made defendants in the foreclosure suit.

On petition of the complainant, filed March 27, 1928 (Case, p. 185), the Court of Chancery ordered a sale of the mortgaged premises, pendente lite (Case, pp. 193-197). The premises were sold by the Sheriff of Union County on May 23, 1928 (Case, pp. 200-201), the sale was confirmed by the Chancellor on June 4, 1928 (Case, p. 202), and the Sheriff paid to the Clerk of the Court the sum of $140,777, being the amount of the bid, together with interest, less sheriff's fees (Case, pp. 203-204).

After issue had been joined and upon due notice, the cause was referred on June 5, 1928, to the late Honorable John Bentley, Vice Chancellor, for hearing and determination (Case, p. 205). The late Vice Chancellor designated July 12, 1928, as the time for the hearing of said cause and on said date an order was made (Case, p. 212), directing the Clerk of the Court of Chancery to pay complainant's decree, costs and counsel fee amounting to $57,957.75, leaving on deposit with the Clerk of said Court, a balance of $82,819.25, with accrued interest. On May 14, 1929, by order of that date (Case, p. 215), the cause was referred to John Milton, Esq., as Special Master, and after said Special Master had decided that he was unwilling to act because of his prior knowledge of the case, an order was made, on June 13, 1929 (Case, p. 216), substituting Aloysius McMahon, Esq., as Special Master in the place and stead of John Milton, Esq. On November 25, 1929 (Case, p. 218), by order of that date, the Clerk of the Court of Chancery was directed to pay out of the funds in his hands the expenses and disbursements of the Receivers of Capital Construction Co., Inc.,

the fees of the receivers, and of counsel for complainant and defendant in the insolvency proceedings, amounting to $11,876.72, leaving a balance in the hands of said Clerk of $70,951.53, with accrued interest.

On June 13, 1929, Special Master McMahon, by Master's Summons bearing that date (Case, p. 217), ordered the defendants to appear before him on June 25, 1929, at which time he would proceed to ascertain and report the amount due the various parties defendant. After several continuations of this hearing, the Master filed his report on October 15, 1930 (Case, pp. 219-225).

Several defendants having filed exceptions to the Master's Report and an order having been made referring the cause to Honorable John Bigelow, Vice Chancellor (Case, p. 252), the cause came on for hearing before Vice Chancellor Bigelow on exceptions to the Master's Report on December 4, 1930, and on December 26, 1930, the Vice Chancellor filed his opinion overruling and setting aside a portion of the Master's Report (Case, pp. 255-278). On January 23, 1931, a final decree was advised by Vice Chancellor Bigelow (Case, pp. 280-284), from the whole and every part of which the appellant, Junction Milling Company, has appealed, alleging in its brief filed with this Court that said decree is erroneous for the following reasons:

1. The final decree is erroneous because it does not adjudicate the rights of the appellant, Junction Milling Company, and the other parties.

2. The final decree is erroneous because it fails to adjudge that the judgments of Geo. F. Perry & Sons, Inc., and A. S. Reid & Co., were not con-

clusive on the Junction Milling Company and the other parties.

3. The final decree is erroneous in that it fails to adjudge that the curtilage upon which the building was erected was limited to the middle tract.

4. The final decree is erroneous in adjudging that the mechanics' liens are prior to the mortgage of the Junction Milling Company.

5. The final decree is erroneous in adjudging that the Cartaret Company was entitled to payment of its mortgage to the exclusion of the Junction Milling Company.

6. The final decree is erroneous in failing to adjudge that the mortgage of the Junction Milling Company is prior to the mortgage of West Bergen Trust Company.

7. The final decree is erroneous in failing to direct payment of the mortgage of Junction Milling Company.

Junction Milling Company is one of four defendants who have appealed from the decree of the Court below. The four appellants have joined in printing one State of the Case, but they have filed three separate briefs, and this respondent, A. S. Reid & Co., deems it advisable to file a separate brief in answer to the three briefs filed by the four appellants.

POINT I.

The final decree is not erroneous by reason of its failure to adjudicate the rights of the appellant, Junction Milling Company, and the other parties.

It has already been shown that the premises were sold by the Sheriff of Union County, pendente lite (Case, pp. 119-202), and the fund paid to the Clerk of the Court of Chancery was substituted for the premises. The several defendants, whether mortgagees, judgment creditors or mechanics' lien creditors looked to this fund as a source for the payment of their respective claims. The fund had been depleted by payments ordered by the Court of Chancery and at the time of the entry of the final decree, it amounted to approximately $40,000.00. This sum was entirely inadequate for the payment of the claims of the several creditors and it became necessary for the Vice Chancellor, in passing upon the correctness of the report of the Special Master, to determine the amounts due to the various parties and the order of priority of their claims. It is evident from an examination of the opinion of the Vice Chancellor (Case, pp. 255-278), that the order of distribution advised by the Vice Chancellor (Case, p. 278) could not have been arrived at without a determination of the amounts due and the order of priority.

The appellant, Junction Milling Company, is, therefore, merely raising a technical objection to the language of the decree and certainly is not attacking and cannot attack the reasons which prompted the Court below in reaching the conclusions embraced in its opinion. It is fundamental

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law that this Court will not reverse the Court below where the reasoning of the Court was correct, even if the language of the order or decree which is the embodiment of that reasoning may be improperly framed. See *Chauinger* v. *Apter,* 96 N. J. E. 302, in which this Court modified the decree of the Court below because the reasons for the decree were proper. This Court said: "The Court will examine the opinion of the Court below, filed pursuant to the requirement of our State Constitution (Article 6, Section 2, paragraph 5), that 'when an appeal from an order or decree shall be heard, the Chancellor shall inform the Court, in writing, of the reasons for his order or decree,' and such opinion will be examined even though it was filed after the appeal was taken."

The same conclusion was reached by this Court in the case of *McMichael* v. *Horay,* 90 N. J. L. 142, also *Meisel* v. *Merchant's National Bank of Newark,* 85 N. J. L. 253, *Delker* v. *Board,* 90 N. J. L. 473, *Beach* v. *Palisade Realty & Amusement Co.,* 86 N. J. L. 238, *McCarty* v. *Town of West Hoboken,* 93 N. J. L. 247 and *Kleinert* v. *Hutchinson,* 98 N. J. L. 831. In the case of *Delker* v. *Board, supra,* this Court held that if the judgment of the lower Court varies from its decision, the cause may be remanded to the lower Court, so that the judgment may be corrected by amendment in that Court. In *McCarty* v. *Town of West Hoboken, supra,* the Court held that the propriety of the judicial action of the Court below and the soundness of the reason which prompted it, is the cause for determination upon review in an Appellate Court, and that if the Court below reached a right conclusion, even if upon a wrong reason, the judgment should not be disturbed.

Counsel for the appellant cites *Beall* v. *New*

York and New Jersey Water Co., 87 N. J. Eq. 390, in support of his contention that the decree below should have adjudicated the amounts due to the various parties. This case does not support appellant's contention, but, on the contrary, is authority for the proposition that "there should be an adjudication in a decree of the rights to which a party or parties are entitled." It is perfectly obvious that since none of the creditors had a lien on real estate but, due to its sale by the Sheriff, could merely hope to participate in the fund in the Court of Chancery, that it was useless and superfluous for the Vice Chancellor to determine the order and priority of the several encumbrances. By determining the order of distribution of the fund, a similar result was reached. The order of distribution could not have been arrived at without determining the order in which the several creditors were entitled to share in the fund.

Even though it be a fact that the final decree of the Court of Chancery did not specifically contain a reference as to the amount due to the various parties for principal and interest and the order and priority of their several encumbrances, the failure of the Court to include such provisions was not error resulting in harm to this appellant, if it be a fact (which this respondent denies) that failure to include such matters in the decree results in error. This respondent most respectfully urges that this Court has ample jurisdiction and the necessary power to order a modification of the decree and that such error does not and should not result in a reversal of the decree, it being evident that the Court below came to the correct conclusion as to the distribution of the fund out of which the claims of the several defendants are to be paid.

POINT II.

The final decree is not erroneous because it failed to adjudge that the judgments of Geo. F. Perry & Sons, Inc., and A. S. Reid & Co., were not conclusive on the Junction Milling Company and the other parties.

Appellant, under Point II of its brief, attempts to assail the validity of the Perry and Reid judgments by collateral attack. It has been firmly established by the decisions of the Courts of this State through a long period of years that a judgment of a Court of general jurisdiction, having jurisdiction of the subject matter and person of the defendant, is invincible against collateral attack. *Diehl* v. *Page,* 3 N. J. Eq. 143; *National Docks, etc. R. Co.* v. *Pennsylvania R. Co.,* 52 N. J. Eq. 58; *Inskeep* v. *Lecony,* 1 N. J. L. 111; *Vandyke* v. *Bastedo,* 15 N. J. L. 224, *Podesta* v. *Binns,* 69 N. J. Eq. 387; *Palmer* v. *Board,* 77 N. J. L. 143; *Crawford* v. *Lees,* 84 N. J. Eq. 324. It cannot be denied that the Union County Circuit Court had jurisdiction of both the subject matter and person of the defendant in the mechanics' lien action instituted therein by A. S. Reid & Co. The Mechanics' Lien Act confers jurisdiction upon Circuit Courts (Section 23).

Appellant emphasizes the fact that the Perry and Reid judgments were entered after the entry of an order for the appointment of receivers of Capital Construction Co., Inc., and after the creditors of said corporation were restrained by said order from proceeding with the enforcement of their claims. That the Reid Company was within its rights in pursuing its mechanics' lien suit to

judgment has been established by the Supreme Court in the case of *Crane* v. *Brighton Mills,* 98 N. J. L. 308. It is true, as appellant alleges, that in the Crane case, the contractor, and not the owner, was adjudged to be insolvent. This fact cannot alter the principle of law enunciated by the present Chief Justice, speaking for the Supreme Court, in the Crane case. The principle of law clearly laid down in this decision is that notwithstanding the provisions of Section 2 of the Supplement of 1919 to the Corporation Act (p. 455), the purpose of the Mechanics' Lien Law is to permit the materialman or laborer to recover judgment, "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."

Aside from the intention of the Courts to give efficacy to both the Mechanics' Lien Law and the Corporation Act, as expressed in the decision in the Crane case, it has been held by this Court in the case of *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." The Taylor case was cited with approval in the Crane case and the portion herein quoted was quoted by Chief Justice Gummere in the decision of the Supreme Court in the Crane case.

Appellant also alleges in its brief that it was prevented by the order of the Court of Chancery, appointing receivers for Capital Construction Co., Inc., from defending the Perry and Reid suits in the Union County Circuit Court. Assuming, but

not admitting, that Reid was restrained by said order from prosecuting its suit to judgment, there was no provision in the restraining order denying to creditors of Capital Construction Co., Inc., the right to defend any actions in which said creditors were interested. Such a provision would have been most unusual and beyond the scope of the order appointing receivers and restraining creditors. In addition, there is no ample proof before this Court, nor was there before the Court below, that Reid was actually restrained from prosecuting its suit. The only proof that Reid had knowledge of the existence of such a restraining order was contained in an affidavit filed in the Insolvency Proceedings (Case, p. 300), in which it is alleged that an employee of the office of the firm of Milberg and Milberg "caused a copy of the attached order appointing receiver, to be sent to the creditors of the above named defendant corporation by placing the said order appointing receiver in an envelope properly addressed with the postage prepaid thereon, and deposited same in the United States Mail Box No. 1, Exchange Place, Jersey City, N. J." The affidavit does not contain the names of the creditors to whom the order was mailed, nor does the deponent make oath to the effect that she personally mailed the order. She merely claims that she "caused a copy to be sent." It is submitted that the affidavit of mailing is insufficient to prove that Reid was served with or had knowledge of an order of the Court of Chancery restraining the prosecution of its suit, even if service with and knowledge of said order were sufficient to prevent the entry of a judgment on the mechanics' lien suit.

The State of the Case as printed by the four appellants is confusing in that there are included

a number of pleadings and orders of the Court of Chancery in the suit entitled: Ralph Cianfrone, et al., trading as *Venango Stone Company* v. *Capital Construction Co., Inc.* This suit was instituted by a creditor of the Capital Company for the purpose of procuring an adjudication of the insolvency of the Capital Company and the appointment of receivers. The present action, from a decision in which appeals have been taken to this Court, is entirely foreign to the bill filed in the Cianfrone case. The pleadings in the latter case were not offered in evidence and do not rightfully belong in the State of the Case. It is also to be noted that the receivers of the Capital Construction Co., Inc., have not in this action nor in any other suit, objected to the entry of the Reid judgment, nor have they claimed that the creditors or stockholders of the insolvent corporation have been prejudiced or injured by the entry of said judgment.

Moreover, the judgment of the Law Court is res adjudicata in the foreclosure suit. *People's Building & Loan Association of Ridgefield Park* v. *Vaniewsky,* 85 N. J. Eq. 551, is in support of this view. In the case cited, the Law Court held that the lien claim of a mechanics' lien claimant was not prior to the mortgage which was also a lien on the premises. The Court of Chancery, in determining the respective priorities of the mechanics' lien and mortgage, considered itself bound by the adjudication of the Law Court. In addition to the fact that Reid's judgment cannot be attacked in these proceedings because such an attack is collateral in nature, the entire controversy is now res adjudicata, the Circuit Court having adjudged that the judgment was prior to appellant's mortgage. *People's Building & Loan Association of Ridgefield Park* v. *Vaniewsky.* 85 N. J. Eq. 551.

Appellant also argues that the judgments of Perry and Reid were not entitled to priority because the lien claims upon which they were based were absolutely void and cites *Morris County Bank* v. *Rockaway Manufacturing Co.,* 16 N. J. Eq. 150, to support the argument. The case cited cannot be used in support of appellant's argument, because the facts in the two cases are entirely dissimilar. In the Rockaway Manufacturing Co. case, there was more than one building and the lienor filed a single lien claim, failing to apportion among the buildings the several claims arising out of the furnishing of materials to each. In the case at bar, there was a single building covering a curtilage which the Court below found to be the same as the curtilage described in the lien claims of Perry, Reid and the other lien claimants, with the exception of the defendants, Mowre Lager and Max Platt, who have also filed appeals in this cause. Reid did not furnish materials to any building except the apartment house which was being constructed by Capital Construction Co., Inc., and it was not only impossible, but unnecessary, to attempt to apportion its claim. Its failure to do so, therefore, cannot render its claim void and result in the lack of priority which the Court below found had been obtained over the mortgage of this appellant.

Neither *Ennis* v. *Eden Mills Paper Co.,* 65 N. J. Law 577, nor *Doty* v. *Auditorium Pier Co.,* 56 At. 720, affirmed 56 At. 1132, holds that a lien claimant is prevented from entering judgment on his lien claim as a result of the appointment of a receiver for an insolvent corporation. In *Ennis* v. *Eden Mills Paper Co., supra,* it was held "that while the appointment of a receiver did not per se stay the plaintiff's suit, yet such an appoint-

ment does operate practically to stay suits which are in progress." The Ennis case merely supports the view that nothing could be gained by the entry of judgment except an ascertainment of the amount of the claim, which, in that case, was not disputed, but was admitted by the Receiver. In the case at bar, the receiver had not admitted the validity of the claim of Reid & Co., and there had been no evidence of the intention of the receiver to allow it. The decision in *Doty* v. *Auditorium Pier Co., supra,* was to the effect that a lien claim filed within the statutory period should be given preference but did not hold that the lien claimant was not permitted to pursue the remedies allowed by the Mechanics' Lien Act and proceed to judgment.

The appellant did not attempt to overcome the effect of the Reid judgment, except by argument, and no evidence was offered which could in any way controvert or successfully assail that judgment. The appellant was at liberty at all times to apply to the Circuit Court for the vacation of the judgment, but no such action was ever taken. A certified copy of the lien claim and of the judgment were offered in evidence at the hearing conducted by the Special Master, and are printed as a part of the State of the Case (Case, pp. 755-762).

It is respectfully submitted that neither the law nor the facts in this case would have justified the Vice Chancellor in advising a decree adjudging the mortgage of the appellant to be prior in lien to the lien and judgment of the defendant, Reid, and that failure to so adjudge does not constitute ground for the reversal of the final decree.

POINT III.

The final decree is not erroneous because it failed to limit the curtilage to the middle tract.

Counsel for the appellant has argued at length to the effect that the Court below erred in considering the entire tract as the curtilage upon which the apartment house was erected. This argument is chiefly based upon the assumption that "the large tract of land was divided, considered and treated by the owner, the defendant, Capital Construction Co., Inc., as three separate parcels before the commencement of the erection of the apartment house upon the middle tract." (The quoted portion is from p. 15 of Appellant's Brief.)

It is submitted that the evidence in the case did not show that the tract was divided into three separate parcels and that the Vice Chancellor was correct in finding, as his opinion shows (Case, p. 275), that the whole tract was treated as one parcel and not as three parcels. The following is taken from the portion of the Court's opinion dealing with the curtilage:

> "The whole tract was treated by the owner as one parcel until the Junction Milling Company demanded a mortgage on the side pieces. This was several months after the erection of the building had commenced. Up to the time of the sale of the property in this suit, there were no fences or other physical signs of a division of the tract. During construction work, it was all used indiscriminately for the handling of material. The whole adds to the convenient and beneficial use of the apartment house and doubtless enables higher

> rentals to be had than could otherwise be obtained. I find that the entire tract is the curtilage subject to the liens describing it."

It is evident that the Vice Chancellor's decision as to the size of the curtilage is based upon the use to which the premises had been put by the owners prior to and after the commencement of the building. It had been purchased as a single tract by Capital Construction Co., Inc., from Starr & Silverman, who incidentally comprised Capital Construction Co., Inc. (Case, p. 96); the entire premises were encumbered by two mortgages held by Riverside Apartment Corporation (Case, pp. 24-26); the entire premises were mortgaged to Shilowitz & Tucker (Case, p. 27) and to West Bergen Trust Company (Case, p. 28). The testimony of Louis Moore, the plumbing contractor, showed that there was no physical separation of the tract into separate divisions and nothing on the ground to show any division into separate tracts (Case, p. 429). The testimony of John W. Heins, a realtor, showed that there was nothing of a physical nature to indicate a separation into three parts (Case, p. 522). In addition, Mr. Harry Starr, one of the officers of the Capital Company, testified that as late as September, 1927, the plot had not been separated and that no division into parcels had been made, and no fence surrounding or dividing the separate parcels had been erected (Case, p. 394). There was no denial of the fact that the survey, recited in the deed to Capital Construction Co., Inc., referred to a single description (Case, p. 398).

Counsel for the appellant also argues that the apportionment of the surplus fund by the Vice Chancellor is a recognition by the Court that the

two corner tracts were independent and unconnected with the apartment house development. The language of the Vice Chancellor does not support this view, because he plainly states, in his opinion, that he considers the entire tract as the curtilage. The reason for the apportionment of the surplus fund was the fact that the mortgage of the appellant covered the two corner tracts, while the other liens, with the exception of the lien claims of Mowre Lager and Max Platt, covered the entire curtilage. It was impossible to determine the priority of the several defendants in a general fund without apportioning that fund, in view of the fact that not all defendants had a lien on the entire amount which was held by the Court.

This respondent also stresses the point that the curtilage had been fixed and determined by the Union County Circuit Court, prior to the hearings before the Special Master and before the Vice Chancellor. The fixing of the curtilage was res adjudicata just as much as the determination of the amount due Reid & Co., upon its lien claim. It was, therefore, impossible for the appellant to assail the judgment of Reid, and the curtilage upon which its judgment became a lien, by collateral attack in the Court of Chancery, and it is now impossible for it to do so before this Court.

Counsel for the appellant has also lost sight of the fact that the premises were sold as one parcel by the Sheriff of Union County, pursuant to the order of the Court of Chancery (Case, pp. 193-197). No objection was entered by the appellant to this method of sale and no appeal from the entry of the order for sale was made by the appellant. The effect of the argument advanced by counsel for the appellant would be to have this

Court modify the order for sale, pendente lite, which directed that the liens should attach to the funds in the same manner as they attached to the mortgaged premises at the time of the sale. The time for appealing from the orders for sale had long since expired at the time of the final hearing, and it is now too late for the appellant to file an appeal on this ground. See *Nash* v. *Leiderman and Nash Building Co.,* 103 N. J. Eq. 287.

Counsel for the appellant has also used considerable space in his brief to emphasize the fact that Section 21 of the Mechanics' Lien Act renders invalid a lien claim on a tract of land of more than one-half acre. It seems almost unnecessary to review the decisions of the Courts of this State dealing with the inapplicability of Section 21 to large buildings, such as the apartment house in the case under consideration. At the time of the passage of the Act (1863), large buildings were constructed less frequently than at present, and it was then the unusual, rather than the usual thing, for a building and its immediate curtilage to consist of more than one-half acre. This Court will, no doubt, take judicial notice of the fact that it is a common occurrence for the foundation of a building to cover more than one-half acre in these days of construction of large buildings. Our Courts have held on several occasions, that the limitation to a half acre does not apply to a situation such as is presented here.

In the case of *Gerard* v. *Birch,* 28 N. J. Eq. 317 Chancellor Runyon, in an opinion by the Court of Chancery, held that a lien on a tract fronting on three streets, the dimensions being 500′ x 450′, was not invalid. Counsel for the appellant cites this case to substantiate his argument that the curtilage cannot consist of more than a half acre,

although the case cited is not authority for this view.

In *James* v. *Van Horn,* 39 N. J. L. 353, the Supreme Court upheld a lien on a tract of fifty (50) acres, and, although the judgment of the Court below was reversed, the reversal was not based upon the alleged error of allowing a lien upon a tract of this size. *American Brick & Tile Co.* v. *Drinkhouse,* 59 N. J. L. 462, a decision of this Court, apparently approved of a curtilage of more than half an acre and held that the extent of the curtilage was a question of fact to be settled by the trial Court. Vice Chancellor Howell, in rendering a decision for the Court of Chancery, in *Federal Trust Co.* v. *Guigues,* 76 Eq. 495, apparently approved of the curtilage of more than half an acre, because he held that Section 21 of the Act "does not apply in this case."

Counsel for the appellant also cites the case of *Board* v. *Freedman,* 99 N. J. Eq. 351, as being exactly in point and in so doing, entirely misconceived the law laid down in that case. In the *Freedman* case, the Court held that a lien claim against several buildings must apportion the claim, pursuant to Section 22 of the Mechanics' Lien Act, in proportion to the value of the materials going into each of the buildings. The *Freedman* case has nothing in common with the case at bar since only one building was erected upon the plot of ground which the Vice Chancellor fixed as the curtilage.

It is submitted that the size of the curtilage as determined by the Court below, was not error and should not result in a reversal of the decree, because the evidence plainly shows that the entire tract was treated as the curtilage by the owner, because the question of the curtilage was res

adjudicata by the judgment of the Circuit Court and cannot be assailed in collateral proceedings, because the order for sale, pendente lite, directed the sale of the entire tract as a single parcel and said order has never been modified or reversed, because the decisions of our Courts firmly establish the fact that a valid lien can exist on a tract of land consisting of more than a half acre and because the cases which hold that an apportionment of the debt must be made among the several buildings for which materials have been furnished, does not apply in the case at bar, where a single building was erected.

POINT IV.

The final decree is not erroneous because it adjudged that the Mechanics' Lien claims were prior to the mortgage of the Junction Milling Company.

The act of the appellant, in filing a Mechanics' Lien claim and obtaining a mortgage as security for the materials furnished for the erection of the apartment house, affords an excellent example of an attempt to obtain an inequitable preference over other lien claimants. The mortgage was secured first. The president of the appellant company specifically testified at the hearing, that his company had filed a lien claim on this job and that the lien claim was filed after the mortgage was secured (Case, p. 471).

It also appears from the pleadings and evidence that the appellant filed a claim, as a lien claimant, because it filed an answer and counterclaim to the foreclosure bill, asserting its lien (Case, pp. 58-67). It was not until the hearing before

the Special Master that counsel for the appellant decided to waive any rights which might exist under the lien claim and rely solely on the mortgage as security for the materials furnished. A statement to that effect by counsel reads as follows:

> "We are waiving our lien now of Junction Milling Company. I am relying on the mortgage" (Case, p. 474).

It is submitted that the Court was entirely correct in deciding that the effort of the appellant to doubly secure itself in the manner above mentioned was fatal and that under the doctrine enunciated by Vice Chancellor Berry in *Meister* v. *J. Meister, Inc.,* 103 N. J. Eq. 78, "the result of these attempts to obtain an unlawful preference is that these claimants have postponed their claims to all mechanics' liens."

Having acted unwisely in filing a lien claim and accepting a mortgage, appellant now attempts to convince this Court that all lien claimants were in error in assuming that the entire tract constituted the curtilage and in thus falling in error they have invalidated their liens, the result of which is to give to the appellant the position which it would have occupied had there been no attempt at an unlawful preference. The fallacy of this argument is discussed under Point III of this brief and will not be repeated here. The curtilage was correctly determined by the Vice Chancellor, so that the argument advanced under Point IV of appellant's brief, as to the size of the curtilage, is based upon a false assumption.

Appellant attempts to distinguish its position as a lienor from the position of the lienors in the *Meister* case, by showing that its mortgage was a

lien upon lands other than the curtilage. This argument is also based upon the false assumption that the curtilage consisted of the middle tract and not of the entire tract.

It is evident that no error was made by the Court below in determining that the mortgage of this appellant was postponed to all mechanics' liens, the doctrine of *Meister* v. *Meister* being strictly applicable to this case. The decree should not be reversed on this ground.

POINT V.

The final decree is not erroneous in failing to direct payment of the mortgage of the Junction Milling Company.

In arguing that its mortgage should be paid, appellant contends that since its mortgage was recorded prior to the mortgages of the Carteret Co. and West Bergen Trust Co., it should have received priority over these mortgagees in the distribution of the fund. Under ordinary circumstances this would probably be true, the order of recording being the determining factor in directing payment. Counsel again overlooks the fact, however, that the effort of the appellant to secure a preference, postpones its mortgage and relegates it to a position where payment will be made after the satisfaction of other liens. There being insufficient money for the payment of all liens in full, it is obvious that there were no funds left with which to pay the appellant.

Under Point VII of appellant's brief, appellant admits that an allocation of the fund to the three tracts was proper. The only argument against the result of the allocation is that mechanics'

liens filed against the entire curtilage were held to be valid. This was entirely in keeping with the evidence and facts and appellant cannot complain of the method of allocation because the ratio of 92% and 8% was consented to by the appellant during the entire proceedings. Had it not been for the allocation, mechanics' lien claimants would have received nothing under the plan of distribution followed by the Vice Chancellor. It was only out of the funds allocated to the corner tracts that lien claimants received the small percentage which was available for them. This was made possible by the fact that this appellant had lost its lien by its attempt to gain an inequitable preference.

This respondent, A. S. Reid & Co., also wishes to make plain that it does not abandon its claim to a position of priority over other lien claimants, with the exception of Geo. F. Perry & Sons. It maintained a unique position in that it did not, like other lien claimants, agree to postpone its lien to the several mortgages, with the exception of the Carteret Company mortgage. It insists, therefore, that the Court of Chancery was correct in finding that it was entitled to participate in that portion of the funds which could not be traced into the building by Shilowitz and Tucker and West Bergen Trust Company, in view of its refusal to subordinate to their mortgages. A. S. Reid & Co., is not to be relegated to the inferior position of those lien claimants who, by voluntary act, postponed their lien claims in favor of mortgages, but is rather to be accorded the superior position to which it is entitled, as a matter of law, and which it has not heretofore surrendered and which it does not surrender by any argument which may have been advanced in this

brief. It was due to the unique position occupied by Reid and Perry that the Court of Chancery was required to differentiate in determining priorities. The Court undoubtedly had in mind that the other lien claimants received a consideration for the postponement of their liens, while Reid received nothing, except in the case of the Carteret Company postponement.

In conclusion, A. S. Reid & Co., respectfully submits that none of the Points argued in appellant's brief are sufficient to justify this Court in reversing the decree of the Court of Chancery.

Respectfully submitted,

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FAYETTE N. TALLEY,
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PRESS OF FREMONT PAYNE, 80 Washington Street, New York City.

[7611]

New Jersey Court of Errors and Appeals

RIVERSIDE APARTMENT CORPORATION, a corporation, *Complainant,* *vs.* CAPITAL CONSTRUCTION CO. INC., a corporation, *et als.*, *Defendants.*	*On Appeal of Junction Milling Company.*

ANSWERING BRIEF OF GEO. F. PERRY & SONS INC.

Kanter & Kanter, of counsel with Geo. F. Perry & Sons Inc. Elias A. Kanter, of counsel.

(All italics, except when otherwise noted, are ours.)

Introductory Statement of Facts.

1. As this Court will observe, from the state of the case, there are four appellants and about twenty respondents. We represent only one of such respondents, to wit, Geo. F. Perry & Sons Inc. and we consider it proper, therefore, to discuss only those questions which affect that respondent. *This brief is confined solely to the interests of that respondent as raised by the appeal of Junction Milling Company;* separate briefs are being used by us in respect to each of the several appellants. Clarity of statement and discussion will best be served, we think, by a separate consideration of the questions particularly affecting the appellant with which we are now concerned, that is, Junction Milling Company.

2. Counsel for Junction Milling Company (bottom of page 29 and top of page 30 of his brief) claims that the fund derived from the sale of the mortgaged premises *as one parcel* should have been divided into two funds, and that from one of such two funds, the mortgage of Junction Milling should have been paid. Counsel for Junction Milling, like some of the other appellants, ignored, in his "Statement of the Case," any reference to the counter-claim filed by Geo. F. Perry & Sons Inc., and to which counter-claim Junction Milling Company was a party defendant. Such counter-claim cannot be ignored, because, by an appropriate statement of facts, *it showed that the lien claim and judgment of Perry were prior to the mortgage of Junction Milling.*

3. The bill of complaint which was filed by Riverside Apartment Corporation, the holder of the paramount mortgage, merely alleged that all other liens were inferior to that mortgage. The defendant, Geo. F. Perry & Sons Inc., *filed an answer and counter-claim,* TO WHICH COUNTER-CLAIM THE JUNCTION MILLING COMPANY WAS MADE A PARTY DEFENDANT (state of case, pages 78-89). By that counter-claim, which was "duly served" (state of case, page 78, line 5), Geo. F. Perry & Sons Inc. alleged the furnishing of its materials to the building between May 24th, 1927 and July 14th, 1927 (state of case, page 81, lines 20-40), the filing of its lien claim on November 12, 1927 (state of case, page 82, lines 1-11), and the institution of the suit in the Union County Circuit Court, in which suit Junction Milling Company was among the party defendants (state of case, page 82, lines 11-30). The counter-claim of Geo. F. Perry & Sons Inc. further alleged the recovery of a judgment, in the

mechanic's lien suit at law (state of case, page 82, lines 30-40), which judgment was made part of the counter-claim by reference. A copy of that judgment, so annexed to the counter-claim (state of case, pages 86-88), shows that that judgment entered on January 13th, 1928, finally adjudged the following:

(a) That judgment final be (and thereby was) entered in favor of the plaintiff, Geo. F. Perry & Sons Inc., a corporation, *generally* against the defendant, Capital Construction Co. Inc. (which was the builder and owner) for $6,965.00, damages, and costs of suit (taxed at $63.37); see state of case, page 86, lines 30-40.

(b) That said judgment be *specially* against the lands and building described in the lien claim and complaint. In this judgment, a complete metes and bounds description is specifically set forth, and *such description is identical with the mortgaged premises, and, of course, identical, with the premises ordered to be sold,* and subsequently, actually sold, *pendente lite;* see state of case, page 87. (Of course, the fund in court is now the substitute for the land and building.)

(c) "IT IS FURTHER ORDERED AND ADJUDGED THAT THE LIEN CLAIM OF SAID PLAINTIFF, AND THE LIEN OF THIS JUDGMENT, ARE PRIOR AND PARAMOUNT TO THE LIEN OF THE MORTGAGE DATED SEPTEMBER 16TH, 1927, ACKNOWLEDGED SEPTEMBER 26TH, 1927, AND RECORDED ON OCTOBER 6TH, 1927, IN THE OFFICE OF THE REGISTER OF UNION COUNTY IN BOOK 886 OF MORTGAGES FOR SAID

COUNTY, AT PAGE 390, MADE OR GIVEN BY SAID CAPITAL CONSTRUCTION CO. INC., A CORPORATION, TO THE DEFENDANT, JUNCTION MILLING CO., A CORPORATION'' (see state of case, page 88, lines 10-20).

A certified copy of the judgment is printed at pages 696-700 of the state of the case; a certified copy of the lien claim is printed at page 688-695 of the state of the case.

4. Counsel for Junction Milling Company (page 1, line 7 of his brief) admits that *the building was commenced prior to April 10th, 1927.* The lien claim of Geo. F. Perry & Sons Inc. shows that *all its materials were furnished between May 24th, 1927 and July 14th, 1927* (state of case, pages 690-693), and as already above indicated, it was upon this lien claim that Geo. F. Perry & Sons Inc. recovered a judgment, including an adjudication of priority against Junction Milling in the Union County Circuit Court. The mortgage of Junction Milling Company was not given until *September 16, 1927,* and was not recorded until *October 6th, 1927* (brief of Junction Milling Company, page 2, lines 9 *et seq.*); it is thus clearly seen that the Junction Milling Company mortgage was not only *subsequent to the date of the commencement of the building,* but was also subsequent to the time when Perry's materials had all been furnished Counsel for Junction Milling does not point out, in his statement of the facts, *why* Junction Milling Company received that mortgage, but the fact is (as we will presently more fully show by references to the testimony) that Junction Milling Company's mortgage was not a mortgage commonly called an ''advance money'' mortgage. Junction Milling was not entitled to any priority under the

Mechanic's Lien Law, as the evidence clearly demonstrated. The president of Junction Milling testified that he held this mortgage as *security both "for materials furnished on this job" and also for "some other jobs"* (state of case, page 471, lines 10-12). That president also testified that his firm, Junction Milling Company, had filed a lien claim "on this Cranford job," and that the lien claim was filed before the mortgage had been secured (state of case, page 471, lines 15-25). He also testified that a bond was given (top of page 472 of the state of the case), but failed to introduce such bond in evidence.

5. The final decree distributed the fund, giving part thereof to Perry. Obviously, the fund was not great enough to allow of payment to all the parties, for, if the fund had been large enough, there would be no appeals. We intend to demonstrate that Junction Milling was not injured by the award made to Perry, and that the decree below, as between Perry and Junction Milling, should be sustained, because it is correct in result regardless of the *reasons* for the action below. Certainly, our argument will demonstrate that Junction Milling has no cause to complain against the award made to Perry.

POINT I.

The Final Decree is not erroneous because the basis of the separate awards was not therein set forth.

Counsel for Junction Milling, as his Point I, says that the decree below is erroneous because it did not adjudge the amounts due to the various parties, and the order of priority thereof. In effect, this is an argument attacking the reasons assigned by the court below for making the order

of distribution. The fund in court was highly insufficient to make payment in full. It was, therefore, unnecessary for the court to make a specific finding as to the amount due to each of the claimants, but such finding was, in effect, made, and actually computed by the court below because there is awarded to each claimant a certain and specific sum, and in each case, the sum so awarded is less than the amount due to the specific claimant. The objection of Junction Milling goes to the *form* and not to the *substance* of the order.

The decree of distribution (printed at page 280, *et seq.* of the state of the case) directs specific payment, in the order from No. 1 to No. 26, of the sum of $41,559.59. The decree was made on January 23, 1931. At that time, the balance in the hands of the clerk was $39,943.53 (we have taken this figure from West Bergen's brief, page 11, line 14). The amount due to the lien claimants alone was $74,810.74 (state of case, page 261, line 21). Clearly, what the Chancellor did, was to order the distribution, in accordance with his opinion, with the amount to be paid to each separate claimant, separately computed, instead of having the clerk make the computation.

It is the well-established rule of this Court that not the reasons of the action, but the action itself, of the court below, which gives an appellant a basis for claiming error.

The fact that no reasons were assigned in the court below for the action taken, or the fact that wrong reasons were assigned by the court below, is not ground for reversal. See *McMichael* v. *Horay,* 90 N. J. L. 142, a decision of this Court, *Meisel* v. *Merchants' National Bank of Newark,* 85 N. J. L. 253, also a decision of this Court,

Beach v. *Palisade Realty & Amusement Co.*, 86 N. J. L. 238, also a decision of this Court, *Shauinger* v. *Apter*, 95 N. J. E. 70, also a decision of this Court, the last-named case being on an appeal from the Court of Chancery.

Junction Milling, in arguing Point I in its brief, does not attempt to show that the action taken by the court below is incorrect, and hence fails to show any legal error, if error was committed (which we deny) in failing to make specific adjudications of the amounts due to each of the claimants, when, as a matter of fact, the distribution was calculated upon such amounts, and the order of distribution was specifically given. In view of the insufficiency of the fund, it would have been a futile gesture for the court below to have adjudicated the amounts due to each of the parties severally. The decree represents the Court's action, taken after calculation, and the basis of the calculation is not necessary for the efficacy of the decree.

Counsel for Junction Milling (on page 10 of his brief) cites *Beall* v. *New York & New Jersey Water Co.*, 87 N. J. E. 390, in support of his contention that the decree below should have adjudicated the amounts due to the various parties. As a matter of fact, the Beall case contains no such intimation, but, on the contrary, the Chancellor there said, in part:

> "In a decree in chancery there need not be, in the ordering or mandatory part, an adjudication of the existence of facts warranting such decree, although they may be stated in the recital preceding the decretal paragraph, or may be omitted entirely (Bull *v.* International Power Co., 84 N. J. Eq. 14, 92 Atl. 796); but there should be an adjudi-

> cation in a decree of the rights to which a party or parties are entitled."
>
> *Beall* v. *New York & New Jersey Water Co.*, 87 N. J. E. 390.

In the case at bar, the decree followed the quoted language, because it gave the parties distribution of certain specific sums, those being the rights to which they were entitled.

In *McCarty* v. *Town of West Hoboken*, 93 N. J. L. 247, it was also said:

> "The question to be determined upon review in an appellate court is always as to the propriety of the judicial action of the court below, and not the soundness of the reason which prompted it. * * * It must be perfectly obvious that, if the court below reached a right conclusion, even if upon a wrong reason, the judgment should not be disturbed; and therefore it is that errors may be assigned upon matters in the record only, and not upon the reasoning which induced the rendering of the judgment under review."
>
> *McCarty* v. *Town of West Hoboken*, 93 N. J. L. 247.

The case of *Kleinert* v. *Hutchinson*, 98 N. J. L. 831, and the case of *Birtwistle* v. *Public Service Railway Company*, 94 N. J. L. 407, reaffirm the principle of the McCarty case, cited *supra*, and are authority against Junction Milling.

In the light of these principles, we will now demonstrate that the decree of distribution, to the extent that it was in favor of Geo. F. Perry & Sons Inc., was not to the legal prejudice of Junction Milling.

POINT II.

The judgment at law recovered by Geo. F. Perry & Sons Inc., was res adjudicata against Junction Milling.

We have already (in paragraph 3 of our introductory statement of facts) pointed out the character and scope of the judgment recovered by Geo. F. Perry & Sons Inc. in the Union County Circuit Court, in the suit where Junction Milling Company was a party defendant, and which adjudged, among other things, that Junction Milling Company's mortgage was *inferior* to the lien claim and judgment of Geo. F. Perry & Sons Inc.

A certified copy of the lien claim was received in evidence (state of case, top of page 364); a certified copy thereof is now printed in the state of the case, at pages 688-695). That lien claim shows an account of the materials sold and delivered, in the customary form, properly verified and with the statutory endorsements.

A certified copy of the judgment of Geo. F. Perry & Sons Inc. was received in evidence (state of case, top of page 364); a certified copy thereof is now printed in the state of the case, at pages 696-700.

NO EVIDENCE WAS OFFERED TO OVERCOME THE EFFECT OF THE JUDGMENT OF GEO. F. PERRY & SONS INC. NOR DID JUNCTION MILLING EVEN ATTEMPT TO CONTROVERT OR ASSAIL THAT JUDGMENT.

This Court has already ruled that a judgment in a lawsuit, in a mechanic's lien action, is *res adjudicata* on the issues decided by the judgment at law, and that the issues so decided can-

not again be litigated in a foreclosure suit in the Court of Chancery. Thus, it appeared, in *People's Building & Loan Association of Ridgefield Park* v. *Vaniewsky, et ux.*, 85 E. 551, that one of the defendants in the action was a lien claimant, who had filed a lien against the mortgaged premises, had recovered a judgment generally against the builder and owner and specially against the lands and building, but "subject to the lien of the mortgages." When the foreclosure suit was instituted by the complainant in that cause, the lien claimant again tried to litigate the question of priorities as between him and the mortgagees. In reversing the action of the Chancery Court permitting such a course of conduct, this Court said:

> "This court held in Culvert *v.* Lieberman, 69 N. J. L. 341, 55 Atl. 812, that the purpose of this statute was to settle in a single suit the liens of all persons who have any interest in the property, and to determine, among other matters, 'What mortgage incumbrance is upon each piece of property, and the priorities between the mortgagees and the plaintiffs' special judgment.' * * * Upon these conditions the presumption must be that when the judgment was entered in the suit brought by the lien claimant, the defendant in this cause, adjudging that such judgment is subject to the lien of complainant's mortgage, that the trial court found that it was subject to the entire sum for which the mortgage was given. * * * Upon these circumstances, the judgment plaintiff is estopped from now denying the force and effect of the judgment entered by him * * *."
>
> *People's Building & Loan Ass'n of Ridgefield Park* v. *Vaniewsky, et ux.*, 85 E. 551.

Of course, whatever way the law judgment be, that is whether in favor of, or against the lien

claimant, it is *res adjudicata*. In the cited case, the law judgment was against the lien claimant and was held to be *res adjudicata* in the subsequent foreclosure case; in the case at bar the law judgment is in favor of the lien claimant, and is likewise *res adjudicata* in the subsequent foreclosure case, which is the case at bar.

We do not find that the case just cited has in any way been overruled, criticized or in any way modified. We do find that it has been cited by this Court in *Bergenfield Printing Co.* v. *Intertype Corporation*, 7 A. R. 366, 144 Atl. 730, not yet officially reported.

It will be observed that JUNCTION MILLING DID NOT DENY THE ALLEGATIONS OF PERRY'S COUNTER-CLAIM, WHICH ASSERTED PRIORITY OVER THE MORTGAGE OF JUNCTION MILLING. It will also be observed that Junction Milling did not, by any appropriate pleading or counter-claim, claim priority over the lien claim and judgment of Perry. Junction Milling Company contented itself merely with a notice to have its mortgage reported on (state of case, top of page 57).

In the light of the foregoing, the Court of Chancery was bound to give Perry's lien claim and judgment full faith and credit against the asserted mortgage of Junction Milling Company. The Court of Chancery was bound to ignore Junction Milling's claim for priority, *which was asserted only by way of argument.*

We therefore respectfully contend that the decision of the Court of Chancery in the case at bar upholding the priority of the lien claim and judgment of Geo. F. Perry & Sons Inc. over the mortgage of Junction Milling Company was proper, because the Court of Chancery was bound to

respect, as *res adjudicata,* the decision of the law court, in Perry's favor against Junction Milling, which stood in its full force and vigor. It is, therefore, actually unnecessary to examine the evidence concerning the alleged advancements of Junction Milling Company.

POINT III.

Geo. F. Perry & Sons Inc. had the right to proceed with its lien claim action notwithstanding the insolvency of Capital Construction Co. Inc. and the appointment of a receiver for it.

At pages 286-302 of the state of the case, a number of documents have been printed, *as if they were part of the record of this case,* and as if they had been filed in this case; such documents are not headed as exhibits. To prevent any misunderstanding, we call this Court's attention to the fact that THOSE DOCUMENTS ARE NOT PART OF THE RECORD IN THE CASE AT BAR; all of such documents relate to the case of Ralph Cianfrone, *et al.,* trading as Venango Stone Company *vs.* Capital Construction Co., that heading being printed at the top of page 286 of the state of the case, and THOSE DOCUMENTS WERE NOT OFFERED IN EVIDENCE, NOR RECEIVED IN EVIDENCE IN THE CASE AT BAR. In the index to the state of the case (on page IX thereof) some of these papers are referred to as if they had been offered in evidence in behalf of Geo. F. Perry & Sons, *but such is not the fact.* Strictly speaking, therefore, the argument made by Junction Milling Company (middle of page 12 of its counsel's brief) based on some of those papers, is improper.

However, to prevent any misapprehension on this subject, we will proceed to examine the argument of Junction Milling Company as if the papers upon which its argument is based were before the Court.

Counsel for Junction Milling says that on January 4, 1928, the Court of Chancery in the Cianfrone receivership suit made an order appointing receivers for the Capital Company and restrained all persons from taking any further proceedings in actions theretofore commenced against it. THERE IS NO PROOF THAT GEO. F. PERRY & SONS INC. EVER HAD KNOWLEDGE OF THAT ORDER. On page 300 of the state of the case, there is printed a copy of an affidavit *which was filed in the Cianfrone case* wherein the young lady affiant said that she "*caused* a copy of the attached order appointing receiver *to be sent to the creditors* of the above-named defendant corporation, etc." Assuming that this affidavit was offered and received in evidence in the case at bar, such offer and receipt WERE NOT EVIDENCE OF THE FACT STATED IN THE AFFIDAVIT. Furthermore, that affidavit does NOT show that the affiant mailed the notices, nor does it show that a copy was mailed to Geo. F. Perry & Sons, as the affiant merely contents herself with saying that it was mailed "to the creditors," *without identifying them and without any showing that she knew who all the creditors were.* It is thus seen that the affidavit is not competent nor does it prove the facts therein sworn to.

At page 301 of the state of the case, the appellant prints an "Order Continuing Receivers" which was filed in the Cianfrone case, as if it were part of the record or an exhibit in this case; neither of the last-mentioned conditions

is the fact. Assuming again, however, that this order continuing the appointment of the receivers was part of the record of the case at bar, *there is not a word in the record showing that Geo. F. Perry & Sons Inc. had knowledge of the entry of that order when the judgment was entered in the Union County Circuit Court.* But even assuming that Geo. F. Perry & Sons Inc. was in contempt of the Court of Chancery for proceeding with its law action notwithstanding the restraining orders of the Court of Chancery (and there is no proof that it was in such contempt, and the contrary is the fact) the appellant cannot take advantage of such alleged contempt in order to assail the judgment of Geo. F. Perry & Sons, WHICH WAS REGULARLY ENTERED AGAINST THE APPELLANT-MORTGAGEE, AS THERE WAS NO RESTRAINT AGAINST GEO. F. PERRY & SONS FROM PROCEEDING AGAINST THAT MORTGAGEE, NOW THE APPELLANT. It is significant to observe that neither the insolvent corporation nor its receivers are before this Court as claiming any irregularity.

However, as a matter of law, and notwithstanding the restraining order of the Court of Chancery, *Geo. F. Perry & Sons Inc. had a right to proceed with the action at law which it had instituted prior to the filing of the receivership bill against the Capital Construction Co.* Perry's suit was started on November 12, 1927 (see endorsement on lien claim, state of case page 695, line 30). The Cianfrone bill for the appointment of a receiver was filed on December 21, 1927 (see state of case, page 286, line 2). We also stress that the Capital Construction Company was never *adjudged* an insolvent corporation. The present foreclosure bill, which is the case at bar,

was filed on March 3, 1928 (see state of case, page 24, line 2).

At page 12 of his brief, counsel for the Junction Milling Company says that it could not have *defended* the lawsuit brought by Perry when Perry was restrained from prosecuting the lawsuit. This conclusion is plainly erroneous. There was nothing to prevent the Junction Milling Company from defending the law action, and it was not enjoined from defending that suit. There was nothing that prevented the Junction Milling Company from appearing in the Union County Circuit Court and there is nothing in the injunctive order which leads to any such inference.

The question whether a mechanic's lien claimant has a right to proceed with a lien claim suit, notwithstanding insolvency proceedings against the builder, has definitely, and with an admirable opinion by the present Chief Justice, been settled, *in favor of such right to proceed,* in *Crane* v. ***Brighton Mills***, 98 N. J. L. 308. On this precise question, it was there written:

> "The other ground upon which the motion to non-suit 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 contractor. The contention that no general judgment was recoverable against the Berridge Company is based upon section 2 of the supplement of 1919 of our Corporation Act (page 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. 612, 44 Atl. 668, that—

> *'A pending action against a corporation may regularly proceed, notwithstanding an adjudication of insolvency and the appointment of a receiver to wind up its affairs and distribute its assets among creditors and stockholders.'*

"This judicial declaration seems to us dispositive of the question we are now considering. But, in the absence of any such precedent, we would have no doubt that the motion to non-suit upon the ground secondly stated was properly refused. The purpose of the Mechanic's Lien Law, as stated in its title is to secure to mechanics and materialmen for their labor and 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 materialman or laborer, when seeking to enforce by suit his claim against the building, to join the owner and contractor as codefendants; and, for the purpose of demonstrating his right to a lien and its amount, to prove not only that the labor was done 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 Mechanic's Lien Law (3 Comp. St. 1910, page 3290, *et seq.*), 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 materialman 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 non-suit upon this latter ground, and we have no doubt of its soundness.

"The judgment under review will be affirmed."

Crane v. *Brighton Mills,* 98 N. J. L. 308.

The procedure in the case at bar in the law action had for its purpose the establishing of the facts, to substantiate the lien claim, and there is no suggestion, at least in the record before the Court, that Geo. F. Perry & Sons Inc. attempted to sell the property or interfered with the receivers. The judgment was properly prosecuted, and in view of the provisions of a mechanic's lien act, requiring prompt prosecution, it was the only safe course for the lien claimant to follow.

POINT IV.

Independently of the law adjudication in Perry's favor, the facts established in the case at bar show the inferiority of the mortgage of Junction Milling Company.

We have already, under POINT II of this brief, indicated why, as a matter of law, because of the judgment recovered by Perry against Junction Milling, the Court of Chancery was bound to accord the priority thus adjudicated in the present foreclosure suit. However, in view of the argument made by counsel for Junction Milling, and the possibility that this Court may go into the facts, as adduced at the trial of this case, we think it proper to refer to the evidence showing why the decree does no injury.

The primary fact is that the mortgage of Junction Milling was recorded subsequent to the commencement of the building, and hence its mortgage must be viewed with regard to Section 15 of the Mechanic's Lien Act. It is established, as a matter of record, that the building was commenced prior to May 24, 1927 (*that was the charge* of paragraph 19 of Perry's counter-claim).

It is not necessary to refer to the evidence establishing such fact that the building had been commenced long before the mortgage of Junction Milling had been given, because counsel for Junction Milling Company (page 1, line 7 of his brief) admits that *the building was commenced prior to April 10th, 1927.* The lien claim of Geo. F. Perry & Sons Inc. shows that *all its materials were furnished between May 24th, 1927, and July 14th, 1927* (state of case, pages 690-693). The mortgage of Junction Milling Company was not given *until September 16th, 1927,* and was not recorded until *October 6th, 1927* (brief of Junction Milling

Company, page 2, lines 9 *et seq.*) ; it is thus clearly seen that the Junction Milling Company mortgage was not only *subsequent to the date of the commencement of the building,* but was *also subsequent to the time when Perry's materials had all been furnished.* The evidence is clear and convincing that Junction Milling Company advanced no money on this mortgage, for as its President testified, Junction Milling held this mortgage as *security both "for materials furnished on this job" and also for "some other jobs"* (state of case, page 471, lines 10-12).

However, it also clearly appears that before Junction Milling obtained this mortgage, it had filed a lien claim against the premises. The President of Junction Milling specifically testified that his firm, Junction Milling Company, had filed a lien claim "on this Cranford job," and that the lien claim was filed before the mortgage had been secured (state of case, page 471, lines 15-25).

In the case at bar, however, it appeared that Junction Milling also put in its formal claim, *as a lien claimant,* because it filed an answer and counter-claim asserting such lien (state of case, page 58). Counsel now appearing for Junction Milling Company in this Court, and arguing to support its position as a mortgagee, *by his formal proceedings in the Court below,* took the position that Junction Milling Company was entitled as a lien claimant; a few of the instances where such position was taken are as follows:

A. He filed, and signed, an answer and counter-claim for Junction Milling Company, as lien claimant (state of case, pages 58-67).

B. He alleged that Junction Milling filed a lien claim on March 9, 1928, against "the said mortgaged premises" (state of case, page 62, lines 12-23).

C. He alleged that Junction Milling Company "on the said date aforesaid" commenced an action in the Union County Circuit Court on the lien claim (state of case, page 62, lines 23-37).

D. He alleged that the Capital Construction Company, between May 24, 1927 and November 19, 1927, was erecting an apartment house "upon the mortgaged premises" (state of case, page 63, lines 13-16).

E. He alleged that Junction Milling Company's lien claim was prior to the mortgage of Shilowitz and Tucker (state of case, page 63, line 38), that it was also prior to the mortgage of Carteret Company (state of case, page 64, line 20), that it was prior to the mortgage of Louis Schwartz (state of case, page 64, line 38, that it was prior to the mortgage of West Bergen Trust Company (state of case, page 65, line 18), that it was prior to the mortgage of Edward P. Stout (state of case), page 65, line 35), and that it was prior to the mortgage of Trust Company of New Jersey (state of case, page 66, line 16).

Notwithstanding this unequivocal position, in assertion of its status as a lien claimant, which at least indicated a waiver of a mortgage, it was rather startling to find that, *at the hearing,* counsel for Junction Milling Company waived the lien claim and relied on the mortgage, the records showing the following:

> "MR. RUBENSTEIN: We are waiving our lien now of Junction Milling Company. I am relying on the mortgage" (state of the case, page 474, lines 1-6).

It is thus apparent on the record that this Junction Milling Company was attempting to

"blow both hot and cold" in this very case, but, at length, relied, as it does in this Court, on its mortgage.

The conduct of Junction Milling Company shows a bold attempt to take advantage of whatever situation might prove to its best advantage. While enjoying the status of a lien claimant, and actually filing a lien, it also attempted to get an inequitable preference over other lien claimants by taking a mortgage to secure the indebtedness due, or to grow due, to it. It is unnecessary to decide what its rights may be, because, whatever its right may be, such rights are clearly subsequent to the rights of a lien claimant which is Perry's position. Speaking of such a situation, where a person who furnished materials to a building attempted to hold a mortgage, *and was thereby deprived of both rights,* Vice-Chancellor Berry in *Meister* v. *J. Meister, Inc.,* 103 N. J. E. 78, with citation of authority from this Court, recently said:

> "Clearly it was the intention of these mortgagee claimants to substitute a mortgage for their mechanics' liens, which they thereby waived. Weaver *v.* Demuth, 40 N. J. L. 238. * * * THE RESULT OF THESE ATTEMPTS TO OBTAIN AN UNLAWFUL PREFERENCE IS THAT THESE CLAIMANTS HAVE POSTPONED THEIR CLAIMS TO ALL MECHANICS' LIENS * * *."
>
> *Meister* v. *J. Meister, Inc.,* 103 N. J. E. 78.

As the mortgage of Junction Milling was not a mortgage within the purview of either Sections 14 or 15 of the Mechanic's Lien Act, and as Junction Milling attempted to obtain an unlawful preference, its rights, whatever they may be, are postponed to the mechanic's lien claim of Perry, and Junction Milling Company has

not, therefore, been prejudiced by an adjudication distributing a fund which was not sufficient to accord full payment to the encumbrancers prior to the illegal mortgage.

POINT V.

The Decree below is correct in not limiting the curtilage to the so-called "Middle" Tract.

Commencing at page 15 of his brief, under POINT III thereof, counsel for Junction Milling Company, takes up an elaborate discussion that the Chancellor should have allocated the premises into separate divisions, and should have restricted the lien claimants to the so-called "middle" tract. Such argument proceeds on the Junction Milling counsel's *mistaken assumption* that "the large tract of land was divided, considered and treated by the owner, the defendant Capital Construction Co., Inc., as three separate parcels before the commencement of the erection of the apartment house upon the middle tract." On this question, after reviewing the evidence, the Court of Chancery, in the case at bar, said:

> "The whole tract was treated by the owner as one parcel until the Junction Milling Company demanded a mortgage on the side pieces. This was several months after the erection of the building had commenced. Up to the time of the sale of the property in this suit, there were no fences or other physical signs of a division of the tract. During construction work, it was all used indiscriminately for the handling of material. The whole adds to the convenient and beneficial use of the apartment house and doubtless enables higher rentals to be had than could otherwise be obtained. I find that the entire tract is the curtilage subject to the liens describing it."

That this conclusion of the Court of Chancery is correct is plain from a consideration of the following appearing in the state of the case:

A. Capital Construction Co. bought the mortgaged premises, as one tract, on May 25, 1927 (state of case, page 26, lines 30-38).

B. The mortgaged premises, as one tract, were subject to a $21,000.00 mortgage, held by Riverside Apartment Corporation (state of case, pages 24-25).

C. The mortgaged premises, as one tract, were subject to a $30,000.00 mortgage held by Riverside Apartment Corporation (state of case, bottom of page 25, top of page 26).

D. The construction of the building was commenced prior to April 10, 1927 (brief of Junction Milling Company, page 1, line 7).

E. The mortgaged premises, as one tract, were further mortgaged to Shilowitz & Tucker on July 9, 1927 (state of case, page 27, lines 15-25; also that mortgage as an exhibit, state of case, page 658, *et seq.*).

F. The mortgaged premises, as one tract, were further mortgaged to West Bergen Trust Company on October 25, 1927 (state of case, page 28, lines 25-35; also that mortgage as an exhibit, state of case, page 874, *et seq.*).

G. Louis Moore, the plumbing contractor, who worked on the building from the start to the completion of the building, says that there was no physical separation of the tract into separate divisions, that it appeared that the building lot was just the one tract as an entirety, that there was nothing on the ground to show any division into separate tracts, and that the materials were all over the entire tract (state of case, page 429).

H. John W. Heins, a relator, not otherwise interested in the case, testified that there was nothing to indicate that there were three separate building parcels (state of case, page 522, lines 15-20).

I. Harry Starr, one of the officers of Capital Construction Company, testified that the building was started in May 1927 (state of case, page 393, line 15), that in September 1927 the building was up to, or beyond, the roof (state of case, page 319, line 23), that the plot had not been fenced in, and that there was no physical separation between one plot and another (state of case, page 394, lines 20-25), that building material was strewn all over the land (state of case, top of page 394), that no division into parcels was ever called to the attention of any materialmen (state of case, page 394, line 35), and that IT IS UNDENIED THAT THE SURVEY OF JUNE 11, 1927, CALLED FOR ONLY ONE PLOT (state of case, page 398, line 15).

J. JUNCTION MILLING COMPANY FILED A LIEN AGAINST THE ENTIRE MORTGAGED PREMISES, AND NOT MERELY THE MIDDLE PORTION, IN MARCH 1928 (state of case, page 62, lines 12-23).

In the light of this testimony, there was no room logically to hold otherwise than that the "curtilage" was equivalent to the entire mortgaged premises and not some undivided portion thereof. It is, of course, true that counsel for Junction Milling refers to Exhibit 82, printed opposite page 752 of the state of the case, but that survey was made on SEPTEMBER 8, 1927, which was, of course, long after the build-

ing was commenced and our materials had been furnished. Furthermore there is no proof that such plan was ever filed, and, if so, when or where it was filed; necessarily, of course, if at all filed, it was filed long after the right to the lien had attached. On the facts of the case, therefore, there was no justification for any attempt to limit the curtilage whereon the lien claim was to attach to some undivided portion of the entire tract.

Counsel for Junction Milling Company apparently loses sight of the fact that as between Perry and Junction Milling Company the question of the curtilage also is *res adjudicata* by reason of the judgment recovered by Perry in the Union County Circuit Court in the lien claim suit where Junction Milling Company was a party defendant. The court will find, by referring to the certified copy of that judgment, that the curtilage to which the *lien of the judgment* attaches is SPECIFICALLY AND BY ACTUAL DESCRIPTION, the entire mortgaged premises and not some undivided portion thereof (see particularly state of the case, page 697). That judgment is *res adjudicata,* as we have heretofore pointed out, against Junction Milling, and no collateral attack can be made by Junction Milling Company against any fact found by that judgment.

Counsel for Junction Milling Company, in taking the position that the premises should be divided into three tracts, also loses sight of the fact, that *in this very case,* the mortgaged premises were sold *as one parcel,* and there is not one word in the record indicating that such method of sale was objected to by Junction Milling Company (see orders on pages 193 and 198 of the state of the case). Those orders were made in

April 1928, *and were not appealed from.* Counsel for Junction Milling Company would now have the Court of Chancery, in effect, change the orders for sale *pendente lite,* which directed that the liens shall attach to the funds in the same manner as was the mortgaged property at the time of the sale, notwithstanding that the time for appealing from the orders directing sale, etc., has long expired, and had long expired at the time of the hearing and decree in the case at bar. This Court, in *Nash* v. *Leiderman & Nash Building Co.,* 103 N. J. E. 287, speaking by the late Justice Katzenbach, ruled that the Court of Chancery had no power, after the time for appeal has expired, to modify an earlier order protecting the rights of a lien claimant, and accordingly reversed an order of the Court of Chancery which attempted such a modification. In that case, this Court, speaking by Justice Katzenbach, said:

> "This court has frequently held that to procure a reversal, alteration, or explanation of a decree in a former suit, it must be by a bill of review where the decree has been signed and enrolled. This applies equally to an order settling rights of those who are parties to the litigation. Although there is no express statutory limitation as to the filing of bills of review, the analogous limitation of the right of appeal governs, except in case of new or newly discovered matter."
> *Nash* v. *Leiderman & Nash Building Co.,* 103 N. J. E. 287.

Of course, these principles are applicable to the case at bar. The orders for sale *pendente lite* made in April 1928 directed the sale of *one parcel* (state of case, page 195), and further directed that the proceeds of such sale should be "subject to the same liens and equities of all parties in

interest, as were the said mortgaged lands and premises'' (state of case, page 197, lines 15-20). In April 1928, when those orders were made, Perry had a lien claim and lien judgment against those lands and premises, as one tract and not some special section thereof. No appeal was filed from those orders, which definitely settled the rights of the parties to the litigation (exactly as had been done by the earlier order in the Nash case, cited *supra*), and yet Junction Milling Company's counsel at this late date (or even as of the date of the hearing or the order of distribution below), all subsequent to one year after April 1928, seeks an order or decree *unsettling the prior order*. Such course of procedure was reversed by this Court in the Nash case where it had been actually done by the Court of Chancery, and should not be countenanced in this case, where Junction Milling Company urges that it be done.

Counsel for Junction Milling has devoted considerable space in elaboration of his contention that a lien cannot be had on a tract of more than half an acre, basing his contention on a forced construction of Section 21 of the Mechanic's Lien Act. Passing for the moment the propriety of Junction Milling Company assailing Perry on this score, in the face of the law adjudication in favor of Perry against Junction Milling Company, we will proceed to show that this statutory limitation (as to area) has no application to the facts at bar.

The present Section 21 of the Mechanic's Lien Act has been in effect since 1863. The original enactment was Section 3 of Chapter 144 P. L. 1863, page 275. Ever since such enactment, our Courts have held that the ''half acre'' limitation does not apply to a situation similar to the case

at bar. Only a few of the decisions, however, will be quoted, *and we stress the fact that all decisions which we quote, or refer to, have been decided since the statute has been in force.*

Gerard v. *Birch,* 28 N. J. E. 317, a decision of the Court of Chancery, with the opinion by Chancellor Runyon, upholding a lien on a tract, fronting on three streets, the lot dimensions being 500′ x 450′, obviously more than half an acre. Counsel for Junction Milling has cited this case, at the top of page 20 of his brief, in the mistaken assumption that it was authority for his view. This is not so, because the injunction allowed to the complainant in the cited case against the defendant, Birch, the lien claimant, was to prevent the latter from selling property in addition to that which the Court found to be the proper curtilage. As we have indicated, Chancellor Runyon approved a curtilage of approximately two hundred and five thousand (205,000) square feet; in the case at bar, the area of the land is less. In the case at bar, the building itself has a ground area of one-quarter acre. If Exhibit 82 is considered, in the light of the fact that the building erected upon the plot is a fashionable apartment house, requiring driveways, play space and the breathing space afforded by a suburban community, with intended high-rental value, it can hardly be said that the entire plot is not a proper "curtilage"; certainly, the Vice-Chancellor's finding of fact, on that score, should not be disturbed.

James v. *Van Horn,* 39 N. J. L. 353, a decision of the Supreme Court, with the opinion by Justice Reed, upholding a lien on a tract, *of fifty acres;* while there was a reversal of the judgment below, in that case, it was *not* based upon the alleged error of allowing a lien against the tract of fifty acres.

American Brick & Tile Co. v. *Drinkhouse,* 59 N. J. L. 462, a decision of this Court, with the opinion by Justice Dixon, apparently approving a curtilage of more than half an acre, and further holding that the extent of the curtilage was a matter of fact to be settled by the trial court.

Federal Trust Co. v. *Guigues,* 76 N. J. E. 495, a decision of the Court of Chancery, with the opinion by Vice-Chancellor Howell, where, even after excluding a dock which he did not consider to be appurtenant to the dwelling house, nevertheless, apparently approved a curtilage of over half an acre because he held that Section 21 "does not apply to the case." The size of the lot does not definitely appear in the opinion, but from the language of the Court, the plot must have exceeded one-half acre, being bounded by three streets.

In *Raab* v. *W. P. Ellison Inc.,* 89 N. J. L. 416, a lien claim was filed against the grand stand, club house and baseball park of the Newark Baseball Club. Obviously, and as we think the states of the case in this Court will show the area was several acres in extent. The Supreme Court, with the opinion by Justice Trenchard, allowed the lien, *sub silentio,* approving the extent of the area involved. This Court affirmed the Supreme Court decision; the affirming opinion is reported in 90 N. J. L. 716.

We do not find anything in the brief of Junction Milling Company which indicates that the decisions above quoted are in any way incorrect. Our own examination indicates that they have neither been modified nor overruled, and we submit that they are dispositive of the law on the subject, and that in our favor.

Counsel for Junction Milling (it seems clear to us) has entirely misconceived the ruling in the case of *Board* v. *Freedman,* 99 N. J. E. 351, 131 Atl. 913, referred to at the top of page 21 of his brief, and quoted from by him. In that cited case, this Court held that a lien claim against *several buildings* must apportion the claim, pursuant to Section 22 of the Mechanic's Lien Law, in proportion to the value of the materials going into each of the buildings; that case had nothing to do with the question of the area of the curtilage to be embraced by a lien claim. We, therefore, contend that the cited case (and the cases therein cited) affords no authority to Junction Milling.

Summing up our argument under this point of our brief, we contend that the decree below is correct in not limiting the curtilage to the so-called "middle" tract, because

A. The mortgaged premises were always treated by the owner, the mortgagees and the lien claimants, as one single parcel all of which was necessary to the reasonable enjoyment of the one building thereon erected;

B. As between Perry and Junction Milling, the law judgment of Perry was *res adjudicata* on the area embraced by the lien, and Junction Milling cannot collaterally assail that judgment;

C. The order of the Court of Chancery, in the case at bar, directed the sale of the premises as one parcel, and as such order was made in April 1928, and never modified or reversed, the Court of Chancery has no power, more than one year after the entry of that order, to modify it, or otherwise "unsettle" the rights settled by the previous order;

D. The adjudications of our Court establish the right to a lien on an area of more than one-half acre, and a finding of fact that the "curtilage" embraces more than one-half acre will not be disturbed;

E. The adjudications requiring an "apportionment" of the debt of a lien claim apply only in a case when more than one building is erected upon the lands of the owner and have no application to the case at bar where there was but one building erected upon the curtilage.

POINT VI.

The Final Decree, in upholding the priority of Perry's lien over Junction Milling's mortgage, is correct.

Counsel for Junction Milling, as POINT IV in his brief, attempts to argue that the decree is erroneous in adjudging that the lien claims are prior to the mortgage of Junction Milling Company. We do not represent any other lien claimant excepting Perry, and we are not concerned in establishing the validity of such other liens as against Junction Milling. However, *what we have heretofore said in this brief fully establishes that Perry's lien claim and judgment are prior to the mortgage of Junction Milling, and the argument in support of this position will, therefore, not be repeated.*

As a matter of fact, the decree below does not give to Perry the full priority to which it is entitled, but that is a matter which is not the subject of complaint by Junction Milling. The Court of Chancery was obliged to marshal the liens in accordance with the principles laid down in *Hoag* v. *Sayre,* 33 N. J. E. 552, decided by this Court in

1881, and never reversed but recently approved, by this Court, in *Albert & Kernahan Inc.* v. *Franklin Arms Inc.*, 7 A. R. 717, 146 Atl. 215, not yet officially reported. The Court below was properly obliged to follow the reasoning and logic of *Meister* v. *J. Meister Inc.*, 103 N. J. E. 78, the opinion being by Vice-Chancellor Berry. In the case at bar, the marshalling of the liens made the complicated distribution necessary, because, the lien claim and judgment of Geo. F. Perry & Sons Inc. are entitled to a priority, different from that to be accorded to the other lien claimants, because all the others had, by voluntary act, changed their ordinary priorities, but Geo. F. Perry & Sons Inc. did not.

We also observe that the opinion in the case below has been cited by this Court in *Feinberg* v. *Building Construction Company,* case No. 99, at October Term, 1930, not yet reported.

Junction Milling's argument also overlooks the essential outstanding fact that PERRY WAS ENTITLED TO SECURE THE PRIORITY ACCORDED TO IT BY ITS JUDGMENT, and that no other lien claimant, as far as we know, established such priority. There is, however, an even more significant fact why Perry should not be relegated to the position of other lien claimants, if they are to be subordinated, and that fact is that PERRY ALONE NEVER POSTPONED ITS LIEN IN FAVOR OF ANY MORTGAGES WHILE THE OTHER LIEN CLAIMANTS DID IN FACT EXECUTE SUCH POSTPONEMENTS, OR ADMITTED THEIR INFERIORITY. The following is a recapitulation where such subordination is to be found:

Junction Milling Co. (state of case, page 723, line 30).

Mowre Lager (state of case, page 497, lines 20-32).

Max Platt (state of case, page 422, lines 18-20; also page 723, line 13).

Ira R. Crouse (state of case, page 423, lines 25-30).

Louis Moore (state of case, page 725, line 33; also page 424, line 29).

Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co. (state of case, page 723, line 11; also page 529, line 12).

A. S. Reid & Co. (state of case, page 422, line 22; also page 723, line 25).

Joseph Machetto (state of case, page 722, line 40).

E. W. Booth & Bro. (state of case, p. 723, line 18).

Alpheus S. VanWoeart (state of case, page 723, line 1).

Venango Stone Company (state of case, page 723, line 3).

Roderick M. Crockett (state of case, page 723, line 6).

John Nicaretta (state of case, page 722, line 35).

In this case, therefore, with the other lien claimants by voluntary stipulation postponing their lien claims in favor of mortgages, we find that *Geo. F. Perry & Sons Inc. did not do so.* PERRY IS NOT TO BE RELEGATED TO THE INFERIOR POSITION OF SUCH LIEN CLAIMANTS, BUT IS RATHER TO BE ACCORDED THE SUPERIOR POSITION TO WHICH IT IS ENTITLED, AS A MATTER OF LAW, AND WHICH IT NEVER SURRENDERED. It is for this reason that the Chancellor had to differentiate in the priorities allowed to Geo. F.

Perry & Sons Inc., from the priorities allowed to the other, but voluntarily-subordinating, lien claimants. To place Perry in the same position with the other lien claimants, who received consideration for their subordinations, would manifestly be unjust to Perry. In any event, Junction Milling, not being in the position of a lien claimant, cannot argue as if it were a lien claimant.

At all events, and irrespective of the positions of the mortgagees or other alleged lien claimants, or of their priorities, Perry's lien claim and judgment are prior to the mortgage of Junction Milling.

On page 25 of its brief, Junction Milling concedes the validity of the lien claims of Mowre Lager and Max Platt. Such concession, it seems to us, is due to the fact that counsel for Junction Milling Company was counsel for Mowre Lager and Max Platt in the court below (see signature of Charles Rubenstein, at the bottom of page 77 of the state of the case, to the answer and counter-claim filed by him in behalf of Max Platt and Mowre Lager; see also examination of Max Platt, commenced at page 420 of the state of the case, with Mr. Rubenstein conducting the direct examination of that party; see also testimony for Mowre Lager, commenced at page 496 of the state of the case, with Mr. Rubenstein calling Jacob Starr as a witness for Mowre Lager). We intend to submit separate briefs, showing the invalidity of the alleged liens of Mowre Lager and Max Platt, but are now calling this Court's attention to our position so that sanction for the concession of Junction Milling Company (as made in its brief) may not appear to arise from our silence.

CONCLUSION.

It is our opinion that the decree below should be affirmed.

We recognize that other lien claimants (who may not appear before this Court), and lien claimants who do not enjoy the same status as our client (particularly because of failure of proof and because of their voluntary subordinations of lien), may not justify the decree as to them. If this Court should modify the decree below, as to other parties, such modification ought to include the provision that Geo. F. Perry & Sons Inc. is to receive payment of the entire judgment and interest, and counsel fees, due it, before Junction Milling Company shall be entitled to the payment of any part of the fund, if at all entitled, because clearly Perry's lien and judgment are prior to the alleged encumbrance of the appellant, Junction Milling Company.

Respectfully submitted,

KANTER & KANTER,
Counsel of Geo. F. Perry & Sons Inc.,
Defendant-Appellee.

ELIAS A. KANTER,
Of Counsel.

34 OCT.T.1931

New Jersey Court of Errors and Appeals

RIVERSIDE APARTMENT CORPORATION, a corporation, Complainant, *vs.* CAPITAL CONSTRUCTION CO., INC., a corporation, *et als.*, Defendants.	On Appeal from Court of Chancery.

REPLY BRIEF OF THE JUNCTION MILLING COMPANY.

Answering briefs to the brief of the appellant Junction Milling Company have been filed by the following respondents: Carteret Company; Ira R. Crouse, Louis Moore, Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co., Meyer & Ruh Company, who joined in one brief; George F. Perry & Sons, Inc.; A. S. Reid & Co.; Israel Shilowitz and Jacob Tucker (one brief).

A reply will be made to such points raised in the answering briefs as are not covered in the appellant's main brief. Each of the answering briefs will be treated separately.

Brief of Respondent, Carteret Company.

Counsel for the respondent Carteret Company (p. 9) asserts that the subordination agreement executed by the Junction Milling Company (Case, p. 721) postponing its *Mechanics' Lien Right* for

materials furnished, in the erection of the apartment house upon the central tract, to the Carteret Company mortgage, "might" be construed as a subordination of the Junction Milling Company *Mortgage* covering the two corner tracts, to the Carteret Company mortgage. This contention is not supported by the facts, reason or authority.

The above mentioned subordination agreement is entitled "Agreement Subordinating Mechanics' Liens to Carteret Company Mortgage, Dated October 13th, 1927" (Case, p. 721) and said agreement releases the mortgagee, Carteret Company, and the apartment house building, from any and all liens by reason of labor performed or materials furnished in the erection, construction and completion of said building. This *Mechanics' Lien Release* cannot by any stretch of the imagination be converted into a subordination of the Junction Milling Company *Mortgage* covering the two corner tracts. The effect of the mechanics' lien release signed by the Junction Milling Company was to postpone its statutory right under the Mechanics' Lien Law to the mortgage of the Carteret Company and, obviously, in no wise affected the rights of the Junction Milling Company under its mortgage covering the two corner independent tracts. *Otis Elevator Co.* v. *Stafford,* 95 N. J. L. 79, 111 At. 695; *Shoemaker* v. *Maloney,* 102 N. J. L. 363, 132 At. 606.

That the Junction Milling Company did not subordinate its mortgage (covering only the two corner tracts) to the mortgage of the Carteret Company (covering the central and two corner tracts) and that the Junction Milling Company mortgage is prior to the Carteret Company mortgage as to the two corner tracts is further borne out by the testimony of Mr. Pyle, counsel for the Carteret Company, as (Case, pp. 402-404) follows:

"James E. Pyle, recalled:

A. When the Capitol Construction Company came to me for this mortgage loan of the Carteret Company, they first wanted to put this mortgage only upon the central tract; and I first tried to get Mr. Lenkowsky to cancel his mortgage entirely on the whole tract.

The Master: Who is Lenkowsky?

A. The Junction Milling Company, I should say. He didn't want to do that. He insisted that he would release the property that was being developed but he would not release the undeveloped tracts, because, as he claimed, they would probably want to sell those separately, and then he would be in a position to get his money; he agreed to release only the central tract; and I then insisted that—for the Carteret Company—if they had some other property there, that it should also be included in the mortgage; while I did not think the security behind somebody else was worth very much, it ought to be included for whatever it was worth; in other words, that they ought to give whatever they had; *that was the reason the mortgage was placed in that way on the central tract ahead of the Junction Milling Company mortgage, and as to the wings, so-called, behind the Junction Milling Company mortgage.*

Cross-examination by Mr. Kanter:

Q. Mr. Pyle, the mortgage given by the Capitol Construction Company to the Junction Milling Company in the sum of $11,619 recorded in Book 886 of Mortgages for Union County on page 390, did not cover the central tract at all, did it? A. My recollection of it is that the descriptions were in such shape that they each overlapped on the central tract, or you couldn't tell whether they did nor not, and they were drawn in such a way that there were questions as to whether they would not lap over it. I tried to get them to wipe the whole thing out, but they wouldn't do it; they

insisted on retaining it, so we got that release.

Q. But his mortgage didn't cover the central tract at all; there were no three descriptions in his mortgage at all; the Junction Milling Company? A. I couldn't tell you that; but my recollection is that there were discrepancies in his description, where they lapped over onto the central tract."

It should be pointed out that the release mentioned in this testimony is not the mechanics' lien release referred to earlier herein, but is the instrument executed by the Junction Milling Company at the request of Mr. Pyle to correct an alleged over-lapping of the descriptions of the two corner tracts covered by the Junction Milling Company mortgage, on the central tract which is not included in that mortgage. This release appears on page 712 of the State of Case as Exhibit 38 and ONLY COVERS THE CENTRAL TRACT. It amounts to nothing more than a quit claim to whatever interest, if any, of the Junction Milling Company in the central tract which may have arisen by reason of the alleged over-lapping as stated aforesaid.

It is apparent from the foregoing that the Junction Milling Company mortgage is prior and paramount to that of the Carteret Company in so far as to the two corner tracts are concerned and accordingly, the Junction Milling Company is entitled to priority of payment ahead of the Carteret Company out of the fund allocated to the two corner tracts.

Brief of the Respondents, Ira R. Crouse, Louis Moore, Morris Portnow and Abraham Lipschitz, Partners Trading as Lipschitz Parquet Floor Co., and Meyer & Ruh Company.

The bill of complaint in this cause (Case, p. 24) sets up the mortgage of the Junction Milling Company in paragraph *15*. The lien claims of the respondents Ira R. Crouse, Louis Moore, Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co. and Meyer & Ruh Company are mentioned in paragraphs, *34, 35, 36 and 39*. The appellant's mortgage is stated in the bill of complaint, to be ahead of the respondents' lien claims. The appellant, not disputing the order and priority of encumbrances, duly filed a Notice in Lieu of Answer (Case, p. 57) to have its mortgage reported upon. These respondents filed answers and counterclaims (Case, pp. 104, 126, 149, 170). The Junction Milling Company resting upon its Notice in Lieu of Answer and the prescribed practice in foreclosure suits did not file any pleading to the counterclaims aforementioned.

Counsel for said respondents (p. 6) contends that a final decree made upon a decree *pro confesso* so entered cannot be disturbed by this Court, and in support of his argument cites the case of *Sharff* v. *Tosti*, 108 N. J. E. 270, 154 At. 824, and several cases therein cited. These cases hold that WHERE THE DEFENDANT FAILED TO ENTER AN APPEARANCE a final decree made on a decree *pro confesso* REGULARLY ENTERED would not be disturbed on appeal.

The case *sub judice* does not come within the rule enunciated in these cases, first, because the appellant Junction Milling Company entered an appearance in this cause; secondly, because the decrees *pro confesso* were improvidently entered

against the Junction Milling Company, contrary to the prescribed procedure in foreclosure suits.

The Junction Milling Company duly entered an appearance in this cause by the filing of its Notice in Lieu of Answer, to have its mortgage reported upon. A counterclaim is a part of and depends upon the main suit and is so tied up with it that if either the bill or counterclaim is separately set for hearing, the effect is to set the whole suit for a hearing; and on appeal the appellate Court will examine both bill and counterclaim as one proceeding. 10 R. C. L. 490.

There is a distinction between a decree *pro confesso* entered for want of appearance and a decree *pro confesso* for failure to plead. This distinction is recognized in 21 *C. J.* 797, wherein it is said, "generally, a defendant who has appeared but is in default for want of pleading is entitled to notice of the application for a final decree, and to be heard upon the form and extent of the decree, and upon such other questions as can be presented upon plaintiff's pleadings and proofs; but he is not entitled where his default is for want of appearance, or where he is in contempt of court".

The appellant having filed a Notice to Prove Encumbrance was entitled to be heard on the form of the decree and in this particular instance with respect to the extent of the curtilage properly covered by the respondents' lien claims, and is entitled to appeal from a decree which improperly describes such curtilage.

The decrees *pro confesso* were improvidently entered against the Junction Milling Company in violation of Chancery Rule 187. They were based on counterclaims that sought no affirmative relief against appellant Junction Milling Company but merely disputed the priority of the mortgage of the Junction Milling Company. A dispute con-

cerning priorities of encumbrances by one defendant encumbrancer against another defendant encumbrancer in a foreclosure suit is not the proper subject of a counterclaim under existing practice (Chancery Rules 187). A dispute over priorities under the Chancery Rules is determined on surplus money proceedings. The pleadings filed by said respondents and designated by them as "counterclaims" have no greater force than and are tantamount to answers filed to the bill of complaint disputing the priorities of the encumbrances as set forth in the bill of complaint. In other words, the effect of the so-called counterclaims was simply to raise an issue as to the priority of the Junction Milling Company mortgage, an issue which should be determined in surplus money proceedings. Accordingly, the failure of the Junction Milling Company to file pleadings to the so-called counterclaims did not preclude a determination of the issue as to the priority of the Junction Milling Company mortgage in the surplus money proceedings.

It should be further observed that whatever effect, if any, the decrees *pro confesso* had were rendered nugatory by the Order of Reference and Order of Re-Reference made in this cause (Case, pp. 215-216). The pertinent provisions of said orders are as follows: "and that said Special Master further report the order of priorities of the various mortgages, lien claims, judgments, demands and other claims, and whether they all embrace the premises mentioned in the bill of complaint". It is manifest that whatever force, if any, the decrees *pro confesso* may have had was overcome by the foregoing orders. *The respondents were parties to the proceedings and submitted their claims to the Special Master.*

Furthermore, the Junction Milling Company at the hearing of this cause proved its encumbrance

and its right to priority without any objection being raised by the said respondents. It follows therefrom that the respondents waived any objection that might have been raised by reason of the entry of decrees *pro confesso,* and the objection is now raised for the first time before this Court.

In view of the foregoing, it is manifest that the decrees *pro confesso* were not *res adjudicata* against the Junction Milling Company and did not preclude a determination of the priority of the Junction Milling Company mortgage in the surplus money proceedings and thus do not affect the standing of the Junction Milling Company before this Court.

Brief of Respondent George F. Perry & Sons.

Counsel for George F. Perry & Sons (p. 9) makes the assertion that "no evidence was offered to overcome the effect of the judgment of Geo. F. Perry & Sons, Inc., nor did Junction Milling Company ever attempt to controvert or assail the judgment". That this assertion is unwarranted and contrary to the testimony is evidenced by the objection made to the offer of the judgment in evidence which appears on pages 468 and 469 of the State of the Case. The argument against the validity of this judgment is fully set forth in the main brief filed by the appellant Junction Milling Company (pages 11-25).

To support his argument that the judgment cannot be attacked in this proceeding he cites (p. 10) the case of *People's Building & Loan Ass'n of Ridgefield Park* v. *Vaniewsky,* 85 E. 551. In the *Vaniewsky* case there was no injunctive order restraining the plaintiff from proceeding to judgment as in the case at bar. The Perry Co. having

violated the restraint cannot invoke its judgment illegally obtained as a bar to the rights of the Junction Milling Company. To accord full force to the Perry judgment would be to sanction flagrant defiance of the Court's prerogatives and would render the administration of JUSTICE uncertain and precarious. The rule enunciated in the *Vaniewsky* case should not be extended to govern cases such as the case at bar. A court of equity has power to look into the judgments of other courts and relieve against them, where the judgment has been procured by artifice or concealment, which may be regarded as tantamount to fraud, and a court of equity will prevent the party committing such fraud from using the judgment to the injury of his adversary. *Tomkins* v. *Tomkins,* 11 N. J. E. 512.

It is further contended that Geo. F. Perry & Sons is entitled to priority over the Junction Milling Company because "Junction Milling did not deny the allegations of Perry's counterclaim, which asserted priority over the mortgage of Junction Milling Company." The effect of the counterclaim has been discussed in the reply to "Brief of Ira R. Crouse, Louis Moore, Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co., and Meyer & Ruh Company." Complainant's bill of complaint set up the mortgage of the Junction Milling Company ahead of the claim of Perry Company (Case, pp. 28-29). The Junction Milling Company's Notice in Lieu of Answer, filed in this cause, is a denial of the allegations of Perry's irregular "counterclaim" which is nothing but a re-statement of the answer. The attention of the Court is directed to the fact that the bill alleges that the Perry lien claim covers only *part* of the premises (Case, p. 29) and Perry's answer (Case, p. 80, ll. 16-17) admits this allegation. The appel-

lant had a right to rely on this admission. This was virtually an admission that the Perry lien covered only the tract (the central tract) upon which the building was erected. As the Junction Milling Company's mortgage did not cover the central tract but only the two outside tracts, and the Junction Milling Company was not interested in the central tract, it was content with this admission (which must be most strictly construed against the pleader) and was not obliged to specifically plead its priority in answer to the respondent's answer and counterclaim.

Furthermore the respondent never entered a decree *pro confesso* for this alleged failure on the part of the appellant to plead to the counterclaim. No order to plead was ever entered and the respondent cannot now take advantage of this alleged failure to plead on the part of the appellant.

No decree *pro confesso* having even been entered and no order to plead having ever been taken, the counterclaim has no standing before the Court. The effect of the Order of Reference and Order of Re-Reference made in this cause has been previously pointed out herein in the reply to "Brief of Ira R. Crouse, Louis Moore, Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co., and Meyer & Ruh Company."

Counsel for respondent Geo. F. Perry & Sons (p. 12) makes the assertion that "at pages 286-302 of the State of Case, a number of documents have been printed * * * those documents are not part of the record in the case at bar." A perusal of the testimony in the case (Case, pp. 362, 469), clearly indicates that this assertion is a misstatement of the testimony.

Counsel for Perry & Co. further contends (p. 19) that the Junction Milling Company mortgage

is void as against the Perry lien claim because the mortgage attempts to give the Junction Milling Company an unlawful preference. The answer to that is that it attempts no such thing—the mortgage covers only the two corner tracts and not the apartment house tract, while the lien claim, which the Junction Milling Company abandoned, covered all three. In that respect this case differs altogether from the *Weaver* case cited by counsel for Perry. The Junction Milling Company abandoned its lien upon the curtilage upon which the building was erected and took in lieu thereof a mortgage upon other lands (see also main brief on this point, p. 26).

Counsel for Perry also makes a point that the Junction Milling Company did not object to the sale of the lands as one tract in the foreclosure proceedings and did not appeal from the order directing such sale. The answer to that is that the complainant mortgagee whose mortgage covered all three tracts was entitled to have them all sold together as they were described in its mortgage. If the proceeds of the sale were not sufficient to pay the mortgage it would never have been necessary to go into the question of the extent of the curtilage. The sale having resulted in a surplus it was time enough then to raise the question. *Vandyne* v. *Vanness,* 5 N. J. E. 485.

Furthermore, the orders for sale directed that the proceeds of the sale should be held subject "to the same liens and equities of all parties in interest as were the said mortgaged lands and premises" (Case, p. 197). These proceedings under review on this appeal were taken to carry out that order. The *Nash* case cited by counsel has no application.

On the question as to the size of a tract of land which is lienable under Section 21 of the Mechanics' Lien Act, the cases cited by counsel are not

analogous, but are distinguishable. In all these cases, the extent of the tract was clearly indicated by enclosures, maps or otherwise, by the owner, in accordance with Section 21. In the *Federal Trust Co.* v. *Guigues* case, it was held that Section 21 did not apply. In the present case Section 21 clearly applies. This is more fully discussed on pages 23, 24 and 25 of the main brief.

Brief of Respondent, A. S. Reid & Co.

What has been said above in reply to the Perry brief applies to the brief filed on behalf of A. S. Reid & Co.

Respectfully submitted,

CHAS. RUBENSTEIN,
Solicitor of Appellant
Junction Milling Company.

LOUIS RUBENSTEIN,
Of Counsel.

35 OCT.T.1931

New Jersey Court of Errors and Appeals

RIVERSIDE APARTMENT CORPORATION, a corporation, Complainant, *vs.* CAPITAL CONSTRUCTION CO., INC., *et al.*, Defendants.	On Appeal from Court of Chancery.

BRIEF FOR APPELLANTS MOWRE LAGER AND MAX PLATT.

Statement of the Case.

The defendant, Capital Construction Co., Inc., a corporation of New Jersey, was the owner of a large tract of land, two and three quarter acres, situated in Cranford, New Jersey. Three sides of said tract front on improved streets. The dimensions of the tract are shown on Exhibit 82 (Case, p. 753). Said defendant prior to April 10th, 1927 (the date of commencement of the building), divided the lands aforesaid into three tracts (Case, pp. 391-392) and on or about that date began the erection and construction of an apartment house on the middle tract, reserving the tracts flanking on both sides and which front on improved streets for future development.

After the commencement of the apartment house, and on July 29th, 1927, the Capital Construction Co., Inc., mortgaged the entire tract (including the middle and two corner tracts) to

Israel Shilowitz and Jacob Tucker, to secure the payment of $20,000.00, which mortgage was, on August 2nd, 1927, recorded in the Register's Office of Union County (Case, p. 658). This mortgage was given to secure moneys to be advanced for the construction of said apartment house as more fully appears therein. Said mortgage is not challenged on this appeal.

On September 16th, 1927, the Capital Construction Co., Inc., made and executed a mortgage for $11,619.34 to the Junction Milling Company, a corporation, one of the defendants-appellants, which furnished materials for said apartment house, which mortgage was, on October 6th, 1927, recorded in the office of the Register of Union County in Book 886 of Mortgages, pages 390, &c. (Case, p. 804). This mortgage covers the two corner tracts, but does not cover the middle tract upon which the apartment house stands.

On October 14th, 1927, the Capital Construction Co., Inc., mortgaged the entire tract (including the middle and two corner tracts) to the Carteret Company, to secure the payment of $35,000.00, which mortgage was, on October 24th, 1927, recorded in the Register's Office of Union County (Case, p. 703). This mortgage was given to secure moneys to be advanced for the construction of the apartment house on the middle tract, the mortgage taking in the two corner tracts as additional security (Case, pp. 402-403).

On October 25th, 1927, the Capital Construction Co., Inc., mortgaged the entire tract to the West Bergen Trust Company, to secure the payment of $6,000.00, which mortgage was, on October 26th, 1927, recorded in the Register's Office of Union County (Case, p. 874). This mortgage was given to secure moneys alleged to have been already advanced for the construction of the apartment house on the middle tract (Case, pp. 554-558).

On January 4, 1928, the Court of Chancery made an order in a suit of *Ralph Cianfrone and Ciro Castellano, partners trading as Venango Stone Company* vs. *Capital Construction Co., Inc.,* adjudicating the said defendant corporation insolvent and appointing Receivers therefor (Case, p. 296). Under paragraph 6 of the said order, the creditors of the defendant corporation were *restrained from bringing any action or proceedings at law or otherwise against the corporation, and from taking any further proceedings in any action or proceedings theretofore commenced.* On January 5th, 1928, copies of the order appointing Receivers and containing such restraint were served upon all creditors of the insolvent corporation (Case, p. 300).

Defendant-respondent, Geo. F. Perry & Sons, a corporation of New Jersey, furnished materials for the erection of the apartment house on the middle tract. Prior to the receivership, said defendant-respondent filed a mechanic's lien against the apartment house and the entire plot of two and three-quarters acres, for the sum of $5,792.25 (Case, p. 688). Thereafter, said defendant-respondent instituted suit in the Union County Circuit Court to enforce its lien claim, asserting that its claim was entitled to priority over several mortgages including that of the Junction Milling Company above referred to. In direct violation of the injunctive order of the Court of Chancery above mentioned, the Perry Company on January 13th, 1928, entered judgment against the Capital Construction Co., Inc., as builder and owner, and it was adjudged therein that the lien of the judgment was prior to the lien of several mortgages including that of the Junction Milling Company (Case, p. 696).

The status and conduct of the defendant-respondent, A. S. Reid & Company, is similar to

that of the Perry Company, except that the Reid Company entered final judgment on its lien claim in the Union County Circuit Court on July 7th, 1928 (Case, p. 755). The other defendants-respondents (lien-claimants) likewise filed lien claims not only against the apartment house and its proper curtilage, but also upon the two corner tracts for the amounts respectively due to them (Case, pp. 777-867), but took no further action thereon in obedience to the injunctive order of the Court of Chancery.

The *defendant-appellant, Mowre Lager,* furnished labor and materials for the erection and construction of said apartment house; and on February 21st, 1928, he filed a mechanic's lien against said building and the entire tract for the sum of $3000.00 (Case, p. 886). Subsequently, and on September 7th, 1929, the lien claim was amended so as to *eliminate the two corner tracts and confine the lien to the middle tract only* (Case, p. 893). It was conceded that $3000.00 was the amount due this appellant (Case, p. 580).

The *defendant-appellant, Max Platt,* furnished labor and materials for the erection and construction of said apartment house; and on January 3rd, 1928, he filed a mechanic's lien against said building and the entire tract for the sum of $3950.00 (Case, p. 768). This lien claim was likewise amended (Case, p. 775) to eliminate the two corner tracts and *confine the lien to the middle tract only.* It was testified that the amount due on this lien claim was the aforesaid amount of $3950.00 (Case, p. 420).

On March 3rd, 1928, the complainant Riverside Apartment Corporation, a corporation of New Jersey (having obtained permission from the Court of Chancery so to do), filed a bill of complaint to foreclose mortgages held by it covering the entire premises (all three tracts) shown on

Exhibit 82 aforesaid. All of the subsequent mortgagees, and all mechanic's lienors were made parties-defendants to the foreclosure action. There was a dispute as to priorities among the several defendants. However, the priority of the complainant's mortgages was undisputed and upon due application the Court of Chancery made an order directing the mortgaged premises to be sold *pendente lite,* reserving the equities of all parties in interest (Case, p. 193).

On May 23rd, 1928, the Sheriff of Union County sold the mortgaged premises in said foreclosure proceedings for the sum of $142,500.00, subject only to Receiver's Certificates, taxes and prior mortgages, not involved in this appeal. The proceeds were paid into the Court of Chancery (Case, p. 203). Out of this fund there was paid under order of the Court of Chancery to the complainant the sum of $58,230.85, being the amount of the decree plus interest, costs and counsel fees; to the Receivers and their counsel the sum of $11,367.72 for their fees and allowances; to the complainant's solicitors in the insolvency proceeding the sum of $333.84, and to other counsel in the insolvency case the sum of $250.00, making a total of $70,182.41, and leaving a surplus in the court of $70,347.21 (Case, pp. 212-218).

On surplus money proceedings the matter was referred to Aloysius McMahon, Esq., Special Master, to ascertain and report the amount due the several defendants according to their equities and priorities (Case, p. 216). The Master, on October 15, 1930, filed his report dated July 29th, 1930. There are no reasons stated in the Master's Report for his conclusions (Case, p. 219).

The Master reported the amount and order of priority of the claims (Case, p. 224) as follows:

First: To Shilowitz & Tucker for principal and interest on their mortgage	$23,482.00

SECOND: To Carteret Company for principal and interest on its mortgage	$37,365.48
THIRD: To West Bergen Trust Company for principal and interest on its mortgage	6,874.00
FOURTH: To 17 Mechanic's Lien Claimants, *including lien claim of Max Platt for $3950.00 and lien claim of Mowre Lager for $3000.00,* to be shared ratably and concurrently after payment of above (besides interest)	54,810.74
FIFTH: To Junction Milling Company on its mortgage	7,973.00

There were no exceptions filed to the allowance of the claims of *appellants Mowre Lager and Max Platt* except by Geo. F. Perry & Sons and A. S. Reid & Co., whose exceptions were overruled by the Vice-Chancellor for the reason that they were too general (Case, pp. 275-276). Notwithstanding this opinion on the character of the exceptions, the final decree excludes *Max Platt* and *Mowre Lager* entirely.

The *defendants - appellants Max Platt* and *Mowre Lager* filed exceptions to the Master's report (Case, p. 242) as follows:

> 1. Because the Master failed to apportion the fund into two portions and to allocate one to the tract upon which the building was erected and the other to the undeveloped land.
>
> 2. Because the Master gave priority to the West Bergen Trust Company's mortgage over the lien of the appellants.

Vice Chancellor Bigelow concludes that the proceeds of the sale should be divided into two funds—one of $131,100.00 to be allocated to the middle tract upon which the apartment house

stands and the other of $11,400.00 to be allocated to the two corner tracts, it having been testified that the value of the two corner tracts was 8% of the whole (Case, p. 267), and further concluded that the fund of $131,100.00 should be applied to the satisfaction of liens against the middle tract and the fund of $11,400.00 should be applied to the satisfaction of the liens against the two corner tracts; that the money paid to the complainant, the money paid to the Receivers for Receivers' Certificates, fees and allowances, and other counsel fees in the insolvency proceedings, totalling $70,182.41 be charged against the larger fund; that the costs herein be charged against the larger fund; that the Shilowitz & Tucker mortgage and the Carteret mortgage be paid out of the larger fund; that the *Perry and Reid lien claims were entitled to priority over other lien claimants,* because the others had signed postponements to the mortgages; and that the mortgage of the Junction Milling Company was entitled to payment in full out of the smaller fund (Case, p. 268, l. 6). He also concluded that all the mechanics' liens, except the liens of the appellants Max Platt and Mowre Lager, were liens against all three tracts and were prior to the lien of the Junction Milling Company's mortgage (Case, p. 275, ll. 20-30).

It was thereupon decreed (Case, p. 280) that the Shilowitz and Tucker mortgage be paid in full; that the Carteret Company mortgage be paid in full; that the two mechanic's-lienors, Geo. F. Perry & Sons and A. S. Reid & Company be paid, in part ahead of all other claimants, and that all other lien claimants, including Geo. Perry & Sons and A. S. Reid & Company, share pro rata in the sum of $7,973.00 (the amount the Master reported as due on the Junction Milling Company mortgage), except lien claimants-appellants Mowre

Lager and Max Platt, who are excluded entirely; and the balance, if any, be paid to Geo. F. Perry & Sons (because of its judgment above referred to); the appellant, Junction Milling Company, being excluded entirely.

The Vice Chancellor further concluded that the Mowre Lager and Max Platt liens being limited to the middle tract were not entitled to any part of the surplus allocated to the two corner tracts, but could only be paid out of the part allocated to the middle tract, which resulted in these two appellants getting nothing, as there was nothing left of this fund after payment of the mortgages of Shilowitz and Tucker and the Carteret Company and the two preferred liens of Geo. F. Perry & Sons and A. S. Reid & Co.

The appellants Mowre Lager and Max Platt, appeal from this decree on the ground that it is erroneous in directing payment of all mechanics' liens, *except the liens of these two appellants,* whereas the decree should have directed payment of the liens of these appellants in full after payment of the mortgages of Shilowitz and Tucker, Carteret Company and Junction Milling Company and before payment of other lien-claims and the mortgage of the West Bergen Trust Co.

The Questions Involved in These Appeals Are:

First: Is the decree of the Court of Chancery deficient in failing to adjudge the amounts due to the several parties on their respective encumbrances, the order of priority thereof, and the portion or portions of the premises encumbered thereby?

Second: Were the judgments of Geo. F. Perry & Sons and A. S. Reid & Company entered after

these creditors were served with an order of the Court of Chancery restraining further proceedings on these suits valid and are they conclusive upon all parties in the foreclosure suit *sub judice?*

THIRD: Is the curtilage upon which the apartment house was erected the *middle tract* as shown on map Exhibit 82 (Case, p. 753), or does it include the entire tract of 2¾ acres?

FOURTH: Are the lien claims of the defendants-respondents lien claimants, Geo. F. Perry & Sons, Inc.; A. S. Reid & Co.; Ira R. Crouse; Louis Moore; Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co.; and Meyer & Ruh Company; Joseph Machetto; A. W. Booth & Bro.; Alpheus S. Van Woeart; Michael Tozzi and Joseph Marcasiano, partners trading as M. Tozzi and J. Marcasiano; Ralph Cianfrone and Ciro Castellano, partners trading as Venango Stone Company; Royal Marble Works, Inc.; Arthur G. Teweles; Roderick M. Crockett and John Nicaretta, invalid by reason of the inclusion of lands other than the curtilage upon which the building was erected?

FIFTH: Is the mortgage of the West Bergen Trust Company entitled to any priority over the mechanic's lien claims, and if so, to what extent?

SIXTH: How should this fund be distributed?

ARGUMENT.

POINT I.

The final decree is erroneous because it does not adjudicate the rights of the parties.

The final decree (Case, p. 280), did not adjudicate the amounts due to the several parties for principal and interest upon their mortgages, lien claims, etc., nor did it adjudge the order of priority, and whether they embraced or affected the entire mortgaged premises (all three tracts), or part thereof, nor did it allocate the surplus moneys to the three tracts.

The decree only adjudicated that out of the surplus moneys there be paid by the Clerk of the Court of Chancery in the order designated and to the persons named, the sums of money therein stated. No adjudication whatever is made of the rights of the *appellants Mowre Lager* and *Max Platt* on their lien claims which were confined to the apartment house and the middle tract upon which it stands.

It is settled law in this State that a final decree in the Court of Chancery must adjudicate the rights of the parties; and as the final decree herein does not adjudicate the amounts due to the several parties for principal and interest upon their mortgages, lien claims, &c., and the order of priority, and whether the encumbrances embrace or affect the entire mortgaged premises (all three tracts) or part thereof, nor does it allocate the surplus moneys to the three tracts, manifestly the decree is erroneous and must be reversed. *Beall* v. *New York & New Jersey Water Company,* 87 N. J. E. 390, 101 Atl. 576.

POINT II.

The final decree is erroneous because it failed to adjudge that the judgments of Geo. F. Perry & Sons and A. S. Reid & Co. entered after these creditors were enjoined from proceeding were not conclusive on the parties.

The lien claimants Geo. F. Perry & Sons and A. S. Reid & Co., entered mechanic's lien judgments against the three tracts by default *after they were enjoined* from taking any further proceedings in their actions by an injunctive order of the Court of Chancery in the insolvency proceedings against the owner, Capital Construction Co., Inc. In such judgments it was adjudged that the liens of said claimants were prior to the liens of the mortgages of Junction Milling Company and West Bergen Trust Company.

Although the Court in its opinion makes no direct finding as to the effect of said judgments upon the lien claims of these two appellants Mowre Lager and Max Platt, which are confined to the apartment and its proper curtilage (the middle tract), it does so *indirectly* in dealing with the West Bergen Trust Company's mortgage. The learned Vice Chancellor said:

> "The judgment was entered by default. Prior to the entry of the judgment, the Capital Construction Co., Inc., had been adjudged insolvent. The Trust Company apparently assumed that the action in the Circuit Court would not be pressed since a receiver had been appointed and therefore interposed no defense. I do not think it inequitable to give this judgment its ordinary effect. If the Trust Company desired to avoid it, it should have applied to the Circuit Court to vacate the judgment" (Case, p. 270, ll. 26-36).

It should be borne in mind that *after insolvency of the owner* these two lien claimants were not obliged to proceed to judgments in order to preserve their statutory rights. *Ennis* v. *Eden Mills Paper Co.* (Ct. Err. App.), 65 N. J. L. 577, 48 Atl. 610; *Doty* v. *Auditorium Pier Co.*, 56 Atl. 720, affirmed, 56 Atl. 1132.

As a matter of law there was no owner to proceed against after the receiver was appointed, and the lien claimants could not proceed against the receiver without the consent of the Court of Chancery. The Court of Chancery had complete jurisdiction to adjudicate upon all the rights of all the parties concerned. *Kaplowitz* v. *Trugman*, 105 N. J. E. 38, 146 Atl. 663; *Doty* v. *Auditorium Pier Co., supra.*

The appellants Mowre Lager and Max Platt and all other parties herein were justified in assuming that in obedience to the injunctive order of the Court of Chancery (Case, p. 296), the mechanic's lienors Geo. F. Perry & Sons and A. S. Reid & Company would not proceed with their mechanic's lien suits. The injunctive order restrained all parties *"from taking any further proceeding in any action or proceeding theretofore commenced"*. This order restrained the defendants in said law actions referred to above from defending the same and should be equally efficacious in preventing these two lien claimants from obtaining any advantage by proceeding in defiance of the injunction. Such proceeding in direct violation of the injunctive order was a fraud upon the Court and upon all the parties concerned. The Court of Chancery should not have sent the defendants who were thus taken advantage of, back to the law court to have the judgments vacated, but had the power, and should have exercised it, to declare the judgments null and void and of no effect.

The Court of Chancery had ordered these claimants not to proceed with their suits at law. In disregard of such order they had proceeded in the action at law and taken judgment. They then came back to the Court of Chancery with the judgments thus improvidently entered and asked the Court of Chancery to give them the benefit of the advantage so obtained. It seems too obvious for argument that the only proper course for the Court of Chancery to pursue under such circumstances, if it did not punish these parties for contempt of court, was at least to disregard the judgments and treat these claims as though no judgments had been entered thereon. There might even be a question whether the law court would feel itself bound to vacate the judgments under these circumstances as the law court was not restrained by the injunctive order and undoubtedly had jurisdiction. The law court might very well have refused to vacate the judgments. The defendants who were thus victimized might therefore find themselves without a remedy if the court of equity whose order had been flouted, likewise refused to grant relief.

It should be observed that in the case of *Crane* v. *Brighton Mills,* 98 N. J. E. 308, 120 Atl. 677, wherein the *general contractor was adjudged insolvent during the pendency of the mechanic's lien suit, the court permitted the action to be prosecuted to judgment against both contractor and owner so that the lien claimant would not be deprived of his statutory right against the owner.* The facts in the case *sub judice* do not come within the rule of that case, but do come within the rule enunicated in the case of *Ennis* v. *Eden Mills Paper Co., supra.*

To permit Geo. F. Perry & Sons and A. S. Reid & Co. to benefit by their fraudulent conduct in flagrantly violating the injunctive order in pro-

ceeding further in their actions and entering judgments therein, would be to confer upon them an inequitable advantage. A right obtained through fraudulent means is never protected; and a judgment so obtained is not conclusive on a court of equity.

Furthermore, irrespective of the fact that the judgments were entered in violation of an injunctive order and therefore should be given no effect, these judgments should be given no conclusive effect against the mortgagees and other mechanic's lien claimants because on the face of the proceedings the mechanics' liens upon which the judgments were entered were defective and void and no valid judgments could be predicated upon them.

The mechanics' liens of these two lienors did not confine themselves to the curtilage upon which the building was erected but took in the two adjacent tracts, covering an acreage of 2¾ acres in violation of Section 21 of the Mechanic's Lien Law which provides:

> "When the curtilage or lot on which the building is erected shall not be surrounded by an enclosure separating it from adjoining lands of the same owner, then the lot on which the building lien shall extend, shall be such tract as in the place of its location is usually known and designated as a building lot, and bounded by the lines laid down for its boundaries on any map made for the sale of it or on file in any public office, to lay out in lots the tract including it, and in cases where no such map exists, such lot may be designated by the claimant in the lien claim, but in no case shall the same exceed half an acre, or include any building not used and occupied with, or intended to be used and occupied with, the buildings for this cost of which the lien is claimed." 1863, p. 275.

In a case exactly parallel it was held that where a lien claim failed to apportion the amount claimed

between several buildings and the curtilage upon which the buildings were erected in violation of Section 22 of the Mechanic's Lien Law, the lien claim was absolutely void and that the judgment entered thereon gave it no priority in payment or advantage over other liens. *Morris County Bank* v. *Rockaway Mfg. Co.,* 16 N. J. E. 150. In that case the attack on the lien was likewise made in a foreclosure suit, just as in the instant case.

It should be further observed that these two *appellants Mowre Lager* and *Max Platt* were not parties in the suits at law of Geo. F. Perry & Sons., Inc. and A. S. Reid & Co. Said judgments in so far as they determine the extent of the curtilage of the apartment house are not conclusive upon these two appellants. In the case of *Jacobus Mutual Benefit Life Insurance Co.,* 27 N. J. E. 604 (Court of Errors & Appeals), it was said:

> "The question is not whether the judgment shall have effect against the parties who were notified of the proceeding, but whether it shall conclude persons who had no notice, either actual or constructive, and who consequently have had no opportunity of defending their rights. It appears to me quite plain that the legislature never intended, in passing these laws, to affect the interest of parties who had no notice, actual or constructive, of the proceedings under them; and I am by no means prepared to say, that if the person claiming the lien chooses to limit his remedy to the defendant and the person in possession of the building, he may not do so. Surely, it would be everywhere, and with one voice, denounced as violative of the plainest principles of justice, that the rights of parties should be concluded by a judgment, when they were not only not summoned to resist it, but where they had not, and were not intended to have notice. * * * it cannot be allowed to conclude the rights of strangers to it * * *.

> The proceedings under the lien law, though in the nature of proceedings *in rem,* are not purely of that character. The suit is *inter partes,* and must be confined to such parties" (at pp. 625-626).

The Court of Chancery therefore should have treated the Geo. F. Perry & Sons and A. S. Reid & Co. claims as though no judgments had been entered thereon, certainly at least in so far as the appellants, Lager and Platt, are concerned, and the decree is erroneous in giving effect to these judgments.

POINT III.

The final decree is erroneous in that it fails to adjudge that the curtilage upon which the building was erected was limited to the middle tract.

The large tract of land was divided, considered and treated by the owner, the defendant Capital Construction Co., Inc., as three separate parcels before the commencement of the erection of the apartment house upon the middle tract. One corner tract fronting on Prospect Avenue is 358 feet by 94 feet; the other corner tract fronting on Union Avenue is 240 feet by 110 feet; and the middle tract upon which the apartment house now stands is 200 feet wide with an average depth of 300 feet. That such a division was made by the defendant Capital Construction Co., Inc., is clearly established by the uncontradicted testimony of Harry Starr, an officer of said defendant corporation, who testified as follows:

> "Q. Mr. Starr, had you had this survey or blueprint of a survey made of the property of the Capital Construction Company? A. Yes, sir.
>
> * * * * * *

Blueprint marked Exhibit 82.

Q. Was it actually divided? A. It was actually divided on the plot, because we figured to build on the two corners and this corner (indicating) we figured to build a separate apartment house; so this is what we did figure.

Q. The new apartment that has now been built is this one shown on the center tract? A. Exactly.

Q. The three-story brick apartment? A. Exactly.

Q. You, as a matter of fact, never got to the point where you did build a separate apartment on each of the two outside tracts; you never did start any apartment on it? A. No, sir.

Q. The company failed before you got to that point? A. Yes, sir.

Q. But it was your intention and the intention of the company to develop the property in that way? A. Exactly.

Q. The way it is divided on this survey?

Mr. Pyle: I offer the survey in evidence.

* * * * * *

By the Master:

Q. Was this survey filed in any public office? A. It was in Cranford.

By Mr. Kanter:

Q. What office? A. In the Building Department.

By the Master:

Q. When you applied for permission to build, did you give a description of the building; did you file this survey? A. In the Building Department; yes, sir.

By Mr. Rubenstein:

Q. Did you have a plot plan attached to the plans and specifications that you filed in the Township of Cranford? A. A plot plan, yes'' (State of Case, pp. 390-391-392).

On cross-examination Mr. Starr further testified as follows:

"Q. There was nothing to show that you intended to reserve any part of it for future operations? A. There was to show.

Q. What? A. We had made by the surveyor before, when the engineer was down there they drove stakes down there.

Q. Was there anything; if you came upon the land and looked at the building while it was in course of construction, looked at the building or at the land, was there anything to show that you did not intend to use the entire plot for that building? A. Yes; we had our lines down there; we had laid out the building; that was for the building, and then the two corners were separated.

* * * * * *

Q. Was there any physical separation between one plot and the other? A. Yes.

Q. What was it? A. It was made out stakes the way we are laying it out, it was stakes like driven on the ground, then there was a plot like, it is three or four inches around, then you could see the difference" (State of Case, p. 394).

* * * * * *

"Q. Before the company failed you attempted to procure a permanent mortgage upon this improvement, didn't you? A. Yes" (State of Case, p. 401, ll. 38-41).

"Q. What property did you apply for a mortgage on in that application? A. On that building.

Q. On that building, on what ground; on the tract, or the whole thing, or the two wings? A. No, not the whole thing; only the building alone.

Q. Then the central tract? A. Yes, sir.

Q. Did you try in one place or several places for a permanent loan? A. We applied in several places.

Q. In each place you applied for a loan on the central tract? A. On the central tract.

> Q. This survey that we offered in evidence here, that is a copy of the survey which you had made before the building was erected, and that divided it up in these same three tracts? A. Yes'' (Case, p. 402, ll. 1-21).

It is clearly apparent from the foregoing testimony that the contractors furnishing labor or materials or both, in the erection and construction of the apartment house upon the middle tract had actual notice or were put on inquiry that the curtilage of the apartment house comprised the middle tract only. It is further shown by the testimony of Mr. James E. Pyle, Counsel for the Carteret Company, that the middle tract was separate and distinct from the two corner tracts (Case, pp. 402-404).

The apportionment of the surplus fund in the opinion of Vice Chancellor Bigelow (Case, p. 267) is a recognition by the court that the two corner tracts are independent and unconnected with the apartment house development and the land whereon it stands; otherwise there cannot be any reason for such apportionment on the part of the court.

The Vice Chancellor in his opinion says:

> ''The premises were sold in this cause as a whole and not in parcels. But the undisputed evidence of experts is that the part of the entire tract covered by the Milling Company mortgage is in value 8 per cent of the whole. If, from the fund still in court, $70,347.21 there be deducted the amount due on the Shilowitz and Tucker mortgage, $23,-482 and costs, there will remain about $43,750, of which 8 per cent is $3,500, or only half the sum due on the Junction Milling Company mortgage. But the whole amount received by the Sheriff, $142,500, may be considered as two funds—8 per cent of it, $11,400, as the proceeds of the tract covered by the Milling

> Company mortgage, and $131,100, the proceeds of the balance of the tract."

Section 1 of the Mechanic's Lien Act reads as follows:

> "Every building hereafter erected or built within this State shall be liable for the payment of any debt contracted and owing to any person for labor performed and materials furnished for the erection and construction thereof, which debt shall be a lien on such building and *on the land whereon it stands, including the lot or curtilage whereon the same is erected.*"

This section of Mechanic's Lien Act limits the rights of the defendant-respondents mechanic's-lien claimants to the apartment house and the *middle tract upon which it stands.*

Section 21 of the Mechanic's Lien Act reads as follows:

> "When the curtilage or lot on which the building is erected shall not be surrounded by an enclosure separating it from adjoining lands of the same owner, then the lot on which the building lien shall extend, shall be such tract as in the place of its location is usually known and designated as a building lot, and bounded by the lines laid down for the boundaries on any map made for the sale of it or on file in any public office, to lay out in lots the tract including it, and in cases where no such map exists, such lot may be designated by the claimant in the lien claim, *but in no case shall the same exceed half an acre,* or include any building not used and occupied with, the buildings for this cost of which the lien is claimed" (1863, p. 275).

The above section limits the curtilage when not otherwise fixed by enclosure to the usual building lot, when there is a map; and to half an acre,

where there is no description of the curtilage by the owner, and when the means of designation by map do not exist. *Gerard* v. *Birsh,* 28 N. J. E. 317.

It has been previously pointed out that the owner divided its land into three separate tracts, designating the middle tract as the curtilage of the apartment house; and that the contractors furnishing labor and materials in the erection and construction of the apartment house on the middle tract had actual knowledge or were put on inquiry that the curtilage of the apartment house was the middle tract.

All the lien claims of the defendants-respondents cover the three tracts. The middle tract alone covers more than half an acre (Case, p. 273). There was no enclosure surrounding the middle tract or the adjacent two-corner tracts. However, the owner designated the curtilage of the apartment house by filing a copy of map Exhibit 82 in the office of the Building Department of Cranford, a public office, showing a division of the tract into three tracts when it filed the plans and specifications for the building and before the commencement of the building operations (Case, pp. 391-392).

Furthermore, *before the filing of any mechanic's lien claims* the owner had described the two-corner tracts as separate and distinct from the middle tract in the mortgage to the Junction Milling Company which was recorded on *October 6, 1927,* in the Union County Register's Office, several months before any lien claims were filed (Case, p. 804), *so that these lien claimants knew then* that the plot had been subdivided for development. The lien claims of these two appellants, Mowre Lager and Max Platt are confined to the middle tract only.

The case of *Board* v. *Freedman,* 99 N. J. E. 351, 131 Atl. 913, is exactly in point. In that case, one

Miller bought a single plot 45 x 150. He proceeded to build 10 buildings upon this plot. While the buildings were in the course of construction he executed 10 mortgages, each of which embraced a portion of the premises. Subsequent to the recording of these 10 mortgages, lien claims were filed covering the whole of the mortgaged premises. Upon the foreclosure of a prior purchase money mortgage the Master reported that the mechanics' liens were subordinate to the 10 mortgages because there had been no apportionment by the mechanic's lienors of their respective claims among the 10 buildings. The report was confirmed by the Chancellor and on appeal to the Court of Errors and Appeals, Mr. Chief Justice Gummere, speaking for that Court said:

> "The argument in support of the appeal is that no such apportionment is required by the statute where the buildings are upon a single lot of land. This contention seems to us to be based upon false premises. The fact that when Miller purchased this property it was a single tract, was no bar to his right as owner to divide it into as many separate parcels as he saw fit and to erect a building upon each of said separate parcels. He made such a division by executing ten separate mortgages, each of them covering so much of the original plot as was occupied by one of the ten buildings then being erected thereon. The provisions of Section 22 of the Mechanic's Lien Law, which requires that when a materialman has furnished to the owner materials to be used in two or more buildings to be constructed by the same person or persons (that is, by the contractor), he shall divide and apportion his lien among the said buildings in proportion to the value of the materials furnished to each of them, and file with his lien a statement of the amount so apportioned to each building, is mandatory (*Culver* v. *Lieberman,* 69 N. J. Law 341, 55 A. 812), and is applicable to the

present case. The purpose of the statute, as is pointed out in the cited case, is to inform all persons who have varied interests in any of such buildings and the curtilage upon which it is (or is being) erected as to the extent to which each of said buildings and curtilages is claimed to be liable to the lien of the materialmen—that is, what proportion of the whole amount of the contractor's debt has been legally apportioned to each of such buildings and curtilages * * *.

Each one of the appellants having failed to apportion its claim as required by Section 22 of the Mechanic's Lien Law (3 Comp. St. 1910, p. 3307), the Master was right in subordinating their liens to those of the mortgages. In doing so he followed the rule laid down in the case of Morris County Bank *v.* Rockaway Mfg. Co., 16 N. J. Eq. 150, 161; viz., that a claim filed upon separate buildings and upon distinct lots of land, without apportioning the claim and designating specifically the amount claimed upon each, must be postponed to the claim of other incumbrances. The soundness of this rule, so far as our examination discloses, has never been criticized in later decisions, and meets with our approval."

Assuming that there was no designation by the owner and the means of designation did not exist by map, the designation of the curtilage by the lien claimants could not exceed half an acre. But in view of the designation by the owner of the middle tract as the curtilage of the apartment which in itself is more than half an acre, only the middle tract could rightfully be subjected to the lien claims for work done or materials furnished for the apartment house and not the two adjacent corner tracts.

Prior to the enactment of the section referred to above it was decided in the case of *Derrickson* v. *Edwards,* 29 N. J. L. 268, that the curtilage,

intended by the act to be subject to the lien, was so much land as might be necessary for the convenient and beneficial enjoyment of the building, on which the work was done; and that, therefore, its proper extent, in each case, would be a question of fact.

The enactment of said section abrogated the rule enunciated in the case of *Derrickson* v. *Edwards, supra.* In *Harrington's Sons Co.* v. *Jersey City,* 78 N. J. L. 610, it is said that when the legislature frames a new and general rule, all earlier and different rules touching the same matter are discarded in favor of such latter rule.

The Vice Chancellor in his opinion says: "During construction work, it (meaning the entire tract) was all used indiscriminately for the handling of material. The whole adds to the convenient and beneficial use of the apartment house and doubtless enables higher rentals to be had than could otherwise be obtained. I find that the entire tract is the curtilage subject to the liens describing it." The learned Vice Chancellor erroneously applied the rule enunicated in the earlier cases, instead of applying Section 21 of the Mechanic's Lien Act, which limits the curtilage to the designation by the owner or when the curtilage is designated by the lien claimants that in no case shall the same exceed half an acre.

The fact that the three tracts were used indiscriminately for storing building materials is in no way an indication that all were to be considered as the curtilage. It is natural and reasonable that adjoining tracts should be used to store building materials, rather than clutter up the streets and highways.

As noted above, the Vice Chancellor in his opinion says that if the unimproved two corner tracts were considered as part of the curtilage of the apartment house erected on the middle tract, it

would doubtless enable higher rentals to be had for the apartments than could otherwise be obtained. This may be so, if the two corner tracts were landscaped and used as a garden to beautify the apartment house, but there is no evidence of any such intention; on the contrary the testimony shows that the owner set aside the two corner tracts for future development and did not intend them to be adjuncts of the apartment house.

It is unreasonable to say that the Capital Construction Co., Inc., intended that the two large tracts and middle tract should constitute the curtilage of the apartment house. The corner tract flanking on the south side of the middle tract is a tract of land 358 feet by 95 feet, with a frontage of 358 feet on Prospect Avenue; the other corner tract flanking on the north of the middle tract is a tract of land 94 feet fronting on Riverside Drive and with a frontage of 240.31 feet on Union Avenue. It seems far-fetched to assert that the Capital Construction Co., Inc., intended such valuable frontages to be part of the curtilage of the apartment house erected upon the middle tract, which in itself is over half an acre in area in this speculative building era.

Even conceding for the sake of argument that Section 21 does not apply in the case *sub judice* the learned Vice Chancellor erred in his finding that the entire tract is subject to the lien claims describing it, because the facts in the case at bar manifestly indicate that the two corner tracts are not necessary to the convenient and beneficial enjoyment of the apartment house on which the claimants' work or materials were bestowed; therefore, the curtilage should be restricted to the middle tract alone. *Federal Trust Co.* v. *Guiges,* 76 N. J. E. 495, 74 Atl. 652; *Derrickson* v. *Edwards, supra.*

The final decree therefore should have adjudged that the curtilage upon which the apartment house was erected was the middle tract and not all three tracts and for that reason it is erroneous and should be reversed.

POINT IV.

The final decree is erroneous in that it fails to adjudge that the lien claims of appellants Mowre Lager and Max Platt are entitled to priority over all other mechanic's lien claims.

The appellant Mowre Lager, who furnished labor and materials for the erection and construction of the apartment house, duly filed a mechanic's lien against said building and the entire tract on February 21st, 1928, for the sum of $3,000 (Case, p. 886). Thereafter and on September 7th, 1929, the lien claim was duly amended confining the lien claim to the apartment house and middle tract upon which the said apartment house is erected (Case, p. 893). There is no dispute that there is due the said appellant the sum of $3,000.00 for his work done on the apartment house (Case, p. 580).

The other appellant, Max Platt, who furnished labor and materials for the erection and construction of the apartment house, duly filed a mechanic's lien against said building and the entire tract on January 3rd, 1928, for the sum of $3950.00 (Case, p. 768). Thereafter and on September 7th, 1929, the lien claim was duly amended confining the lien claim to the apartment house and middle tract upon which the said apartment house is erected (Case, p. 775). The testimony of this appellant stands uncontradicted that there is due him for his work on the apartment house the sum of $3950.00 (Case, p. 420).

The mechanics' liens of the defendants-respondents, Geo. F. Perry & Sons, Inc., A. S. Reid & Co., Ira R. Crouse, Louis Moore, Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co., and Meyer & Ruh Company, Joseph Machetto, A. W. Booth & Bro., Alpheus S. Van Woeart, Michael Tozzi and Joseph Marcasiano, partners trading as M. Tozzi and J. Marcasiano, Ralph Cianfrone and Ciro Castellano, partners trading as Venango Stone Company, Royal Marble Works, Inc., Arthur G. Teweles, Roderick M. Crockett and John Nicaretta included more land than is properly appurtenant to the apartment house site (See Point III, *supra*), and as they were not filed according to section 21 of the Mechanic's Lien Act, *supra,* the said lien claims of the above defendants-respondents are not valid liens upon the premises described therein. *Morris County Bank* v. *Rockaway Mfg. Co.,* 16 N. J. E. 150; *Culver* v. *Lieberman,* 69 N. J. E. 341; 55 Atl. 812; or else the lien claims of said defendants-respondents must be postponed to the valid lien claims of the appellants Mowre Lager and Max Platt, *Broad* v. *Freedman, supra.*

The final decree therefore should have adjudged that the lien claims of these appellants Mowre Lager and Max Platt were entitled to priority over the other lien claimants and for that reason it is erroneous and should be reversed.

POINT V.

The final decree is erroneous because it fails to adjudge that the lien claims of the appellants Mowre Lager and Max Platt are prior to the mortgage of the West Bergen Trust Company as to the apartment house and its curtilage.

The appellant Mowre Lager has a valid lien claim for the sum of $3,000.00; and the other appellant Max Platt has a valid lien claim for the sum of $3,950.00 (Point IV). The West Bergen Trust Company's mortgage covers the three tracts and was recorded on October 26th, 1927 (Case, p. 874). This mortgage was given to secure the sum of $6,000, alleged to have been already advanced for the construction of the apartment house on the middle tract (Case, pp. 554-558). There is no dispute that said mortgage was executed and recorded a long time after the commencement of the said building.

Thus, the mortgage of the West Bergen Trust Company comes within the provisions of Section 15 of the Mechanic's Lien Act, which reads as follows:

> "Every mortgage given or to be given upon lands in this State shall have priority over any claim that may be filed in pursuance of this act to the extent of the money actually advanced and paid by the mortgagee and applied to the erection of any new building upon the mortgaged lands or any alterations, repairs or additions to any building on said lands: provided, such mortgage be registered or recorded before the filing of any such claim (Laws 1898, p. 538)."

This section was construed in the case of *Franklin Society* v. *Thornton* (Ct. Err. App.), 85 N. J.

E. 525, wherein it is said that "Section 15 * * * gives the mortgagee a right he would not otherwise have since his mortgage is not recorded before the commencement of the building, but, in order to have that right he must show that *his advances have been applied to the erection of the new building.*"

The West Bergen Trust Company attempted to show priority upon the theory that said sum of $6,000.00, less the sum of $202.22 deducted for legal fees in connection with the mortgage transaction (Case, p. 559), was actually advanced to the Capital Construction Company and that such advances went into the building.

It was testified that the West Bergen Trust Company loaned and advanced to the Capital Construction Co., Inc., on September 10th, 1927, which was deposited to its credit, on September 12th, 1927, the sum of $4,974.17 (Case, p. 883), and on September 24th, 1927, the West Bergen Trust Company loaned and advanced $800.00 to the Capital Construction Co., which was deposited to its credit on that date (Case, p. 885); that said money was loaned and advanced on notes with an agreement that a mortgage would be given to secure the advancements (Case, p. 555, 558); that on October 25th, 1927, the Capital Construction Co., Inc., by its officers executed the mortgage to the West Bergen Trust Company (Case, p. 588).

The West Bergen Trust Company, in an effort to show that the money so loaned was actually applied to the erection of the apartment house on the middle tract, offered in evidence a series of checks drawn by the Capital Construction Co. on its account in the West Bergen Trust Company between September 9, 1927, and September 28, 1927, aggregated the total sum of $5,758.96 (Case, pp. 895-902). The testimony shows that the check of $2,000 (Case, p. 895) was drawn and paid to

Siegel & Levine several days before the $5,000 loan was credited to the account of the Capital Construction Co. (Case, p. 883). The testimony further shows that the following checks were not applied to the erection of the building:

$ 50 (Case, p. 897, Exh. 18) (Test'y, p. 586)
$ 50 (Case, p. 898, Exh. 20) (Test'y, p. 587)
$800 (Case, p. 902, Exh. 28) (Test'y, p. 594)

Clearly, the checks referred to above, aggregating the sum of $2,900 are not items entitled to priority under Section 15 of the Mechanic's Lien Law. *Franklin Society* v. *Thornton, supra.*

The remaining checks of the Capital Construction Co., aggregating the sum of $2,858.96, and in fact all the checks drawn by the Capital Construction Co. on its account with the West Bergen Trust Company, were drawn, as the record of the bank shows (Case, p. 906) on an account in which the said Capital Construction Co. was depositing funds from other sources in addition to the amounts credited from the proceeds of the two discounted notes referred to herein. It is therefore impossible to state what money was applied to the erection of the building. Manifestly, the proof fails to show that the proceeds of the mortgage loan went into the building, but it does show that the proceeds of the discounted notes and other funds were commingled, and such commingled funds were used in paying all checks drawn by the Capital Construction Co. on the West Bergen Trust Company. None of the checks admitted in evidence are items entitled to priority over mechanic's lien claimants under Section 15 of the Mechanic's Lien Law. *Thirteenth Ward B. & L. Ass'n* v. *Kanter,* 105 N. J. E. 338, 147 Atl. 809.

The final decree therefore should have adjudged that the lien claims of Mowre Lager and Max

Platt are prior to the mortgage of the West Bergen Trust Company and for that reason it is erroneous and should be reversed.

POINT VI.

The final decree is erroneous in failing to direct payment of the lien claims of appellants, Mowre Lager and Max Platt, after payment of the mortgages of Shilowitz and Tucker, Carteret Company and Junction Milling Company and before any other lien-claims were paid.

The lien-claims of the appellants, Mowre Lager and Max Platt are the only lien-claims in which the land upon which the lien is claimed is the middle tract upon which the building was erected. All other lien-claimants claimed a lien upon all three tracts, that upon which the building was erected and the two adjacent corner tracts.

It is respectfully submitted that it has been demonstrated under *Point III, supra,* that these were three separate and distinct tracts and that the proper curtilage of the apartment house was the middle tract alone.

Clearly, therefore, such lien-claims, except those of Mowre Lager and Max Platt, were defective because they attempted to encumber more land than they should have included, and if not altogether void, were only entitled to be considered after valid liens had been provided for (Point IV).

As argued above (Point II) the judgments of Geo. F. Perry & Sons and A. S. Reid & Co. have no conclusive effect as against these appellants Mowre Lager and Max Platt, because Mowre Lager and Max Platt were not made parties-

defendants in those actions. So that so far as these appellants are concerned these two judgment-creditor lienors stand in no better position than other mechanic's-lienors.

These appellants are entitled to priority over the mortgage of the West Bergen Trust Company because that mortgage was recorded after the building was commenced and the mortgagee failed to prove that the proceeds of the mortgage went into the building (Point V).

The final decree, therefore, should have apportioned the fund according to the respective values of the middle tract and the two corner tracts (taken as one) and allocated one portion to the apartment house and its curtilage and the other portion to the two corner tracts.

The Court of Chancery should thereupon have directed:

First: The payment of the Shilowitz and Tucker mortgage proportionately out of the both funds;

Second: The payment of the Carteret Company's mortgage out of the larger fund (allocated to the middle tract);

Third: The payment of the lien-claims of the appellants, Mowre Lager and Max Platt, out of the larger fund;

Fourth: The payment of the West Bergen Trust Company's mortgage;

Fifth: The payment of all other mechanics' liens.

Out of the smaller fund (allocated to the two corner tracts) the Court should have directed payment of:

First: A proportionate part on account of the Shilowitz and Tucker mortgage.

Second: The mortgage of the Junction Milling Company in full.

Third: Any part of the West Bergen Trust Company's mortgage not paid out of the other fund.

Fourth: Balance if any to other mechanic's lien claimants.

For its failure so to do, the final decree should be reversed.

Respectfully submitted,

A. A. Melniker,
Solicitor and of Counsel for Appellants,
Mowre Lager and Max Platt.

New Jersey Court of Errors and Appeals

RIVERSIDE APARTMENT CORPORATION, a corporation, *Complainant,* *vs.* CAPITAL CONSTRUCTION CO. INC., a corporation, *et als.,* *Defendants.*	*On Appeal of Max Platt.*

ANSWERING BRIEF OF GEO. F. PERRY & SONS INC.

Kanter & Kanter, of counsel with Geo. F. Perry & Sons Inc. Elias A. Kanter, of counsel.

(All italics, except when otherwise noted, are ours.)

Introductory Statement of Facts.

1. As this Court will observe, from the state of the case, there are four appellants and about twenty respondents. We represent only one of such respondents, to wit, Geo. F. Perry & Sons Inc. and we consider it proper, therefore, to discuss only those questions which affect that respondent. *This brief is confined solely to the interests of that respondent as raised by the appeal of Max Platt;* separate briefs are being used by us in respect to each of the several appellants. Clarity of statement and discussion will best be served, we think, by a separate consideration of the questions particularly affecting the appellant with which we are now concerned, that is, Max Platt. While counsel for Max Platt filed on appeal, joining Mowre Lager, and has argued the cases of both such appellants together

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in one brief, such appellants are not partners, and as the facts, with respect to each of them, are to a certain extent different, we think it proper to (and accordingly do) furnish separate answering briefs.

2. Counsel for Max Platt (at page 32 of his brief) claims that the fund derived from the sale of the mortgaged premises *as one parcel* should have been divided into two funds, and that from one of such two funds, the alleged lien of Max Platt should have been paid. Counsel for Max Platt, like some of the other appellants, ignored, in his "Statement of the Case," the counter-claim filed by Geo. F. Perry & Sons Inc. Such counter-claim cannot be ignored, because, by an appropriate statement of facts, *it showed the lien claim and judgment of Perry,* **its** priority, and what lands were to be specially subject to the judgment; such lands were the *entire* mortgaged premises and not a limited portion thereof.

3. The bill of complaint which was filed by Riverside Apartment Corporation, the holder of the paramount mortgage, merely alleged that all other liens were inferior to that mortgage. The defendant, Geo. F. Perry & Sons Inc., *filed an answer and counter-claim.* By that counter-claim, which was "duly served" (state of case, page 78, line 5), Geo. F. Perry & Sons Inc. alleged the furnishing of its materials to the building between May 24th, 1927 and July 14th, 1927 (state of case, page 81, lines 20-40), the filing of its lien claim on November 12, 1927 (state of case, page 82, lines 1-11), and the institution of the suit in the Union County Circuit Court (state of case, page 82, ll. 11-30). The counter-claim of Geo. F. Perry & Sons Inc. further alleged the recovery of a judgment, in the mechanic's lien suit at law (state of

case, page 82, lines 30-40), which judgment was made part of the counter-claim by reference. A copy of that judgment, so annexed to the counter-claim (state of case, pages 86-88), shows that that judgment entered on January 13th, 1928, finally adjudged the following:

(a) That judgment final be (and thereby was) entered in favor of the plaintiff, Geo. F. Perry & Sons Inc., a corporation, *generally* against the defendant, Capital Construction Co. Inc. (which was the builder and owner) for $6,965.00, damages, and costs of suit (taxed at $63.37); see state of case, page 86, lines 30-40.

(b) That said judgment be *specially* against the lands and building described in the lien claim and complaint. In this judgment, a complete metes and bounds description is specifically set forth, and *such description is identical with the mortgaged premises, and, of course, identical, with the premises ordered to be sold,* and subsequently, actually sold, *pendente lite;* see state of case, page 87. (Of course, the fund in court is now the substitute for the land and building.)

(c) It was further ordered and adjudged that the lien claim of the plaintiff and the lien of the judgment are prior to the mortgage of Junction Milling Company (state of case, page 88, lines 10-20).

(d) It was further ordered and adjudged that the lien claim of the plaintiff and the lien of the judgment are prior to the mortgage of West Bergen Trust Company (state of case, page 88, lines 20-30).

A certified copy of the judgment is printed at pages 696-700 of the state of the case; a certified

copy of the lien claim is printed at page 688-695 of the state of the case.

4. Counsel for Max Platt (page 1, line 7 of his brief) admits that the *building was commenced prior to April 10th, 1927.* The lien claim of Geo. F. Perry & Sons Inc. shows that *all its materials were furnished between May 24th, 1927 and July 14th, 1927* (state of case, pages 690-693), and as already above indicated, it was upon this lien claim that Geo. F. Perry & Sons Inc. recovered its judgment within the time required by the statute. It should also be observed that Platt filed a lien claim on January 3rd, 1928 against the building and the *entire tract* (state of case, page 768, and his counsel's brief, page 4); he claimed therein that the date of the last work done by him was "on the second day of December 1927," and *there was an endorsement on such lien claim showing the institution of suit thereon on February 20, 1928* (state of case, page 774, line 25); BUT NO JUDGMENT WAS RECOVERED BY ALLEGED CLAIMANT, PLATT, WITHIN ONE YEAR FROM THE FILING OF THE LIEN OR AT ANY OTHER TIME.

5. The final decree distributed the fund, giving part thereof to Perry. Obviously, the fund was not great enough to allow of payment to all the parties, for, if the fund had been large enough, there would be no appeals. We intend to demonstrate that Max Platt was not injured by the award made to Perry, and that the decree below, as between Perry and Max Platt, should be sustained, because it is correct in result regardless of the *reasons* for the action below. Certainly, our argument will demonstrate that Max Platt has no cause to complain against the award made to Perry.

POINT I.

The Final Decree is not erroneous because the basis of the separate awards was not therein set forth.

Counsel for Max Platt, as his Point I, says that the decree below is erroneous because it did not adjudge the amounts due to the various parties, and the order of priority thereof. In effect, this is an argument attacking the reasons assigned by the court below for making the order of distribution. The fund in court was highly insufficient to make payment in full. It was, therefore, unnecessary for the court to make a specific finding as to the amount due to each of the claimants, but such finding was, in effect, made, and actually computed by the court below because there is awarded to each claimant a certain and specific sum, and in each case, the sum so awarded is less than the amount due to the specific claimant. The objection of Max Platt goes to the *form* and not to the *substance* of the order.

The decree of distribution (printed at page 280, *et seq.* of the state of the case) directs specific payment, in the order from No. 1 to No. 26, of the sum of $41,559.59. The decree was made on January 23, 1931. At that time, the balance in the hands of the clerk was $39,943.53 (we have taken this figure from West Bergen's brief, page 11, line 14). The amount due to the lien claimants alone was $74,810.74 (state of case, page 261, line 21). Clearly, what the Chancellor did, was to order the distribution, in accordance with his opinion, with the amount to be paid to each separate claimant, separately computed, instead of having the clerk make the computation.

It is the well-established rule of this Court that not the reasons of the action, but the action itself, of the court below, which gives an appellant a basis for claiming error.

The fact that no reasons were assigned in the court below for the action taken, or the fact that wrong reasons were assigned by the court below, is not ground for reversal. See *McMichael* v. *Horay,* 90 N. J. L. 142, a decision of this Court, *Meisel* v. *Merchants' National Bank of Newark,* 85 N. J. L. 253, also a decision of this Court, *Beach* v. *Palisade Realty & Amusement Co.,* 86 N. J. L. 238, also a decision of this Court, *Shauinger* v. *Apter,* 95 N. J. E. 70, also a decision of this Court, the last-named case being on an appeal from the Court of Chancery.

Max Platt, in arguing Point I in its brief, does not attempt to show that the action taken by the court below is incorrect, and hence fails to show any legal error, if error was committed (which we deny) in failing to make specific adjudications of the amounts due to each of the claimants, when, as a matter of fact, the distribution was calculated upon such amounts, and the order of distribution was specifically given. In view of the insufficiency of the fund, it would have been a futile gesture for the court below to have adjudicated the amounts due to each of the parties severally. The decree represents the Court's action, taken after calculation, and the basis of the calculation is not necessary for the efficacy of the decree.

Counsel for Max Platt (on page 10 of his brief) cites *Beall* v. *New York & New Jersey Water Co.,* 87 N. J. E. 390, in support of his contention that the decree below should have adjudicated the amounts due to the various parties.

As a matter of fact, the Beall case contains no such intimation, but, on the contrary, the Chancellor there said, in part:

> "In a decree in chancery there need not be, in the ordering or mandatory part, an adjudication of the existence of facts warranting such decree, although they may be stated in the recital preceding the decretal paragraph, or may be omitted entirely (Bull *v.* International Power Co., 84 N. J. Eq. 14, 92 Atl. 796); but there should be an adjudication in a decree of the rights to which a party or parties are entitled."
>
> *Beall* v. *New York & New Jersey Water Co.*, 87 N. J. E. 390.

In the case at bar, the decree followed the quoted language, because it gave the parties distribution of certain specific sums, those being the rights to which they were entitled.

In *McCarty* v. *Town of West Hoboken*, 93 N. J. L. 247, it was also said:

> "The question to be determined upon review in an appellate court is always as to the propriety of the judicial action of the court below, and not the soundness of the reason which prompted it. * * * It must be perfectly obvious that, if the court below reached a right conclusion, even if upon a wrong reason, the judgment should not be disturbed; and therefore it is that errors may be assigned upon matters in the record only, and not upon the reasoning which induced the rendering of the judgment under review."
>
> *McCarty* v. *Town of West Hoboken*, 93 N. J. L. 247.

The case of *Kleinert* v. *Hutchinson*, 98 N. J. L. 831, and the case of *Birtwistle* v. *Public Service Railway Company*, 94 N. J. L. 407, reaffirm the principle of the McCarty case, cited *supra*, and are authority against Max Platt.

In the light of these principles, we will now demonstrate that the decree of distribution, to the extent that it was in favor of Geo. F. Perry & Sons Inc., was not to the legal prejudice of Max Platt.

POINT II.

Geo. F. Perry & Sons Inc. had the right to proceed with its lien claim action notwithstanding the insolvency of Capital Construction Co. Inc. and the appointment of a receiver for it.

At pages 286-302 of the state of the case, a number of documents have been printed, *as if they were part of the record of this case,* and as if they had been filed in this case; such documents are not headed as exhibits. To prevent any misunderstanding, we call this Court's attention to the fact that THOSE DOCUMENTS ARE NOT PART OF THE RECORD IN THE CASE AT BAR; all of such documents relate to the case of Ralph Cianfrone, *et al.,* trading as Venango Stone Company *vs.* Capital Construction Co., that heading being printed at the top of page 286 of the state of the case, and THOSE DOCUMENTS WERE NOT OFFERED IN EVIDENCE, NOR RECEIVED IN EVIDENCE IN THE CASE AT BAR. In the index to the state of the case (on page IX thereof) some of these papers are referred to as if they had been offered in evidence in behalf of Geo. F. Perry & Sons, *but such is not the fact.* Strictly speaking, therefore, the argument made by Max Platt (middle of page 12 of its counsel's brief) based on some of those papers, is improper.

However, to prevent any misapprehension on this subject, we will proceed to examine the argu-

ment of Max Platt as if the papers upon which its argument is based were before the Court.

Counsel for Max Platt, in effect, says that on January 4, 1928, the Court of Chancery in the Cianfrone receivership suit made an order appointing receivers for the Capital Company and restrained all persons from taking any further proceedings in actions theretofore commenced against it. THERE IS NO PROOF THAT GEO. F. PERRY & SONS INC. EVER HAD KNOWLEDGE OF THAT ORDER. On page 300 of the state of the case, there is printed a copy of an affidavit *which was filed in the Cianfrone case* wherein the young lady affiant said that she "*caused* a copy of the attached order appointing receiver *to be sent to the creditors* of the above-named defendant corporation, etc." Assuming that this affidavit was offered and received in evidence in the case at bar, such offer and receipt WERE NOT EVIDENCE OF THE FACT STATED IN THE AFFIDAVIT. Furthermore, that affidavit does NOT show that the affiant mailed the notices, nor does it show that a copy was mailed to Geo. F. Perry & Sons, as the affiant merely contents herself with saying that it was mailed "to the creditors," *without identifying them and without any showing that she knew who all the creditors were.* It is thus seen that the affidavit is not competent nor does it prove the facts therein sworn to.

INDEED, IF THE LIEN CLAIMANTS WERE RESTRAINED WHY DID THE PRESENT APPELLANT, PLATT, INSTITUTE SUIT? THAT HE DID SO IS INDICATED BY THE ENDORSEMENT ON HIS LIEN CLAIM (bottom page 774 of state of case).

At page 301 of the state of the case, the appellant prints an "Order Continuing Receivers" which was filed in the Cianfrone case, as if it were part of the record or an exhibit in this case; neither of the last-mentioned conditions is the fact. Assuming again, however, that this order continuing the appointment of the receivers was part of the record of the case at bar, *there is not a word in the record showing that Geo. F. Perry & Sons Inc. had knowledge of the entry of that order when the judgment was entered in the Union County Circuit Court.* But even assuming that Geo. F. Perry & Sons Inc. was in contempt of the Court of Chancery for proceeding with its law action notwithstanding the restraining orders of the Court of Chancery (and there is no proof that it was in such contempt, and the contrary is the fact) the appellant cannot take advantage of such alleged contempt in order to assail the judgment of Geo. F. Perry & Sons, WHICH WAS REGULARLY ENTERED. It is significant to observe that neither the insolvent corporation nor its receivers are before this Court as claiming any irregularity.

It is also significant to observe that Platt, notwithstanding his present argument, started his suit AFTER *the appointment of the receivers* (state of case, bottom page 774).

However, as a matter of law, and notwithstanding the restraining order of the Court of Chancery, *Geo. F. Perry & Sons Inc. had a right to proceed with the action at law which it had instituted prior to the filing of the receivership bill against the Capital Construction Co.* Perry's suit was started on November 12, 1927 (see endorsement on lien claim, state of case, page 695, line 30). The Cianfrone bill for the appointment of a receiver was filed on December 21, 1927 (see

state of case, page 286, line 2). We also stress that the Capital Construction Company was never *adjudged* an insolvent corporation. The present foreclosure bill, which is the case at bar, was filed on March 3, 1928 (see state of case, page 24, line 2).

At page 12 of his brief, counsel for Max Platt says that he could not have *"defended"* the lawsuit brought by Perry when Perry was restrained from prosecuting the lawsuit. This conclusion is plainly erroneous. There was nothing to prevent Max Platt from "defending" the law action, and he was not enjoined from "defending" that suit. There was nothing that prevented Max Platt from appearing in the Union County Circuit Court, in order to file a caveat, if he so desired, and there is nothing in the injunctive order which leads to any such inference.

The question whether a mechanic's lien claimant has a right to proceed with a lien claim suit, notwithstanding insolvency proceedings against the builder, has definitely, and with an admirable opinion by the present Chief Justice, been settled, *in favor of such right to proceed,* in *Crane* v. *Brighton Mills*, 98 N. J. L. 308. On this precise question, it was there written:

> "The other ground upon which the motion to non-suit 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 contractor. The contention that no general judgment was recoverable against the

Berridge Company is based upon section 2 of the supplement of 1919 of our Corporation Act (page 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. 612, 44 Atl. 668, that—

> *'A pending action against a corporation may regularly proceed, notwithstanding an adjudication of insolvency and the appointment of a receiver to wind up its affairs and distribute its assets among creditors and stockholders.'*

"This judicial declaration seems to us dispositive of the question we are now considering. But, in the absence of any such precedent, we would have no doubt that the motion to non-suit upon the ground secondly stated was properly refused. The purpose of the Mechanic's Lien Law, as stated in its title is to secure to mechanics and materialmen for their labor and 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 materialman or laborer, when seeking to enforce by suit his claim against the building, to join the owner and contractor as codefendants; and, for the purpose of demonstrating his right

> to a lien and its amount, to prove not only that the labor was done 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 Mechanic's Lien Law (3 Comp. St. 1910, page 3290, *et seq.*), 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 materialman 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 non-suit upon this latter ground, and we have no doubt of its soundness.
>
> "The judgment under review will be affirmed."
>
> *Crane* v. *Brighton Mills,* 98 N. J. L. 308.

The procedure in the case at bar in the law action had for its purpose the establishing of the facts, to substantiate the lien claim, and there is no suggestion, at least in the record before the Court, that Geo. F. Perry & Sons Inc. attempted to sell the property or interfered with the receivers. The judgment was properly prosecuted, and in view of the provisions of a mechanic's lien act, requiring prompt prosecution, it was the only safe course for the lien claimant to follow.

POINT III.

Appellant, Max Platt, has not been prejudiced by the decree, because that appellant held no valid Mechanic's Lien Claim against the property, because of his failure to prosecute his suit.

The basis of the claim of Max Platt is set forth by his counsel on page 4 of his brief. In substance, that appellant claimed that he filed a mechanic's lien claim on January 3rd, 1928, "against said building and the *entire tract*"; he further claimed that, on *September 7, 1929*, the lien claim was amended so as to eliminate certain portions of the property. From these two statements alone, it is apparent, as a matter of law, that the appellant did not have a *valid* lien claim against the property because there is no proof that judgment was entered within one year on such lien claim in the suit instituted by Max Platt.

It is elementary that for a lien claimant to succeed must show that he has a valid and existing encumbrance against the real estate. Platt had no such encumbrance as we will now proceed to show.

The lien claim of Max Platt is printed on page 768 of the state of the case, and from the statements of such lien claim, it would appear that Max Platt claimed that all of his labor, etc., was performed and furnished between August 15, 1927 and December 2, 1927 (see state of case, page 772, lines 30-38). It is clear, therefore, that the date of the last work done or materials furnished was December 2, 1927, and it, therefore, became incumbent for that lien claimant to institute his suit *within four months* from that date. Counsel for Max Platt apparently recognized such necessity because he instituted suit

on February 20, 1928 (state of case, page 774, lines 30-35).

BUT THE FATAL OBJECTION AGAINST THE CLAIM OF MAX PLATT AS AN ENCUMBRANCER ARISES FROM THE FACT THAT THIS ALLEGED LIEN CLAIMANT DID NOT OBTAIN A JUDGMENT WITHIN ONE YEAR FROM THE DATE OF ISSUING SUMMONS.

We stress this objection because of the implied contention made by counsel for this appellant that it was unnecessary to procure such a judgment. The language of the statute, however, is explicit, and we quote only the salient provisions:

> "No debt shall be a lien * * * unless a lien claim is filed * * * within four (4) months from the date of the last work done or material furnished * * *; * * * *if such claimant shall fail to prosecute his claim diligently within one (1) year from the date issuing such summons, or such further time as the court may by order direct, such lien shall be discharged* * * *." 3 C. S. p. 3305, Sec. 18.

In passing upon this provision of the statute, this Court, speaking by Judge White, in *Buchanan & Smock Lumber Co.* v. *Dougherty,* 88 N. J. L. 356, said:

> "The clause in the Mechanics' Lien Act fixing the one-year period contemplates the reduction of the lien to judgment within that time, if diligent prosecution will accomplish that result. Until prosecuted to judgment, the lien is *ex parte* and arbitrary, and, in view of this extraordinary feature, and of the disadvantage under which the owner naturally labors in defending against a stale, unjust claim, founded upon a contract to the terms of which he is usually an entire stranger, THE ONE-YEAR LIMITATION PRESCRIBED BY THE ACT SHOULD

> BE STRICTLY ENFORCED, unless the claimant is able to set up a most excellent demonstration that it was, not only not because of any fault of his, but in spite of the exercise of at least ordinary diligence on his part, that he failed in that time to reduce his *ex parte* lien to the litigated lien embodied in a judgment. The burden is on the claimant to excuse his failure to get a judgment within one year. If he allows the year to pass without judgment, and without a court extension of time order procured within the year, he does so at his peril."
>
> *Buchanan & Smock Lumber Co.* v. *Dougherty*, 88 N. J. L. 356.

The language just quoted was repeated by this Court in its decision in *Gluck* v. *Ruiz-Urrutia, et al.*, 101 N. J. L. 558, with approval. The foregoing language was even still more recently repeated by this Court in *Hendrickson* v. *Frieland*, 8 A. R. 341, 150 Atl. 326 (not yet officially reported), the opinion being by Justice Parker where the words "should be strictly enforced" were italicized by the Court itself, and where the Court again held that THE FAILURE OF THE LIEN CLAIMANT TO ENTER JUDGMENT WITHIN ONE YEAR EFFECTIVELY DISCHARGED THE LIEN CLAIM.

Counsel for the appellant, Max Platt, at the top of page 12 of his brief, attempts to distinguish the situation of Max Platt because he says that after the insolvency of the owner "the lien claimants were not obliged to proceed to judgments in order to preserve their statutory rights." Counsel for that appellant then cites *Ennis* v. *Eden Mills Paper Co.*, 65 N. J. L. 577, and *Doty* v. *Auditorium Pier Co.*, 56 Atl. 720, and 56 Atl. 732, as authority for his statement, without in any way, quoting from those opinions to show the basis of his contention.

It should be observed that this Court in *Hendrickson* v. *Frieland,* 8 A. R. 341, 150 Atl. 326 (not yet officially reported) has already decided that the Ennis case allows no such distinction to be drawn. We will, however, proceed to examine the cases cited by counsel for Max Platt to show that the cases so cited have no application to the case at bar, and are not authority for any such proposition as relied upon by appellant's counsel.

In *Ennis* v. *Eden Mills Paper Co.,* 65 N. J. L. 577, the fact was that the lien claimant filed his lien, issued his summons and complaint as required by the statute, but neglected to enter a judgment within one year, but obtained an order of the court, extending his time for the entry of judgment, and then entered a judgment on the lien. *These things were not done in the case at bar by the lien claimant, because all that Platt did was to start his suit against the* ENTIRE *tract, and then a year and a half later cut down the "curtilage," but he never prosecuted the suit, diligently or otherwise, and never entered a judgment or procured an order extending his time.* In the Ennis case, but not without eminent dissent on a view of the facts, this Court held (1) that "the appointment of the receiver in this case did not *per se* stay the plaintiff's suit," (2) that as the receiver had *admitted* the correctness of plaintiff's lien claim, and had sold the premises, *subject to that lien claim,* with the purchaser taking with knowledge of that fact, such purchaser could not avail himself of the plaintiff's failure to enter a judgment on the lien claim within the one year, (3) THAT THE PLAINTIFF HAD ACTED WITH "DUE DILIGENCE" IN THE PROSECUTION OF THE LIEN CLAIM, AS THE STATEMENT OF

THE FACTS IN THE PREVAILING OPINION SHOWS, and (4) the order extending the time for entry of judgment might be made after the expiration of the year. The dissenting opinion, written by Justice Dixon, stresses the necessity of the entry of judgment within one year, but questions the view of the prevailing majority of the Court that there had been "due diligence" in the prosecution of the claim during the year. *We stress the fact that nowhere in that opinion is there any expression justifying the view that a lien claimant may, upon the insolvency of the owner, abstain from instituting or prosecuting the case on his lien claim;* this Ennis case, therefore, is no authority for the appellant's contention, because the appellant did not prosecute his suit, diligently or otherwise; the Ennis case does not justify the entire failure to prosecute the suit, because a receiver has been appointed, but in fact, recognizes the necessity of prosecuting the lien suit, notwithstanding the appointment of a receiver. Such ruling is in line with the decisions which we have quoted in POINT II of this brief.

The other case, cited by the appellant, that is *Doty* v. *Auditorium Pier Co.*, 56 Atl. 720, not officially reported, affirmed by this Court in 56 Atl. 1132, not officially reported, is also no authority for the appellant. As the affirming opinion is a *per curiam* opinion, merely affirming for the reasons given in the Court below, we refer particularly to the decision in the Court of Chancery. *In that case, the proceedings were for the distribution of funds in the hands of an insolvency receiver*, arising from the sale of the property subject to the lien. The receiver of the Auditorium Pier Co. was appointed on August 24, 1900. Later, on October 25, 1900, the claim-

ant, Kelly, filed his lien claim in the proper county, properly verified, etc., and the claim was not contested "so far as the execution of the work done or the amount charged," but it was admitted "that the debt to the amount claimed is due Mr. Kelly." *The question was whether Kelly should have priority over other creditors claiming no lien.* The point made against the lien was that Kelly had not taken the requisite steps to perfect his lien by issuing a summons within four months after the lien was filed, and that the claim as presented to the receiver by Kelly was that of a general creditor, and not of a preferred creditor. Vice-Chancellor Bird upheld the claimant's right to priority and excused the absence of prosecution of the suit, saying "as no demand was made upon the claimant to pursue his remedy at law, I think that the power of decision and the duty to decide equitably was not varied by the difference of conditions." Of course, the Doty case is not the case at bar, because *in the case at bar we are not dealing with the question of a receiver's distribution, but we are concerned solely with the encumbrances against the property, this being a foreclosure case where the parties are entitled only because of their encumbrances against the property.*

The present suit is a foreclosure case. It is not a distribution of funds by a receiver of an insolvent company. The determination of the claims in the case at bar is governed by the evidence of valid and existing liens against the property as presented in this foreclosure suit, and as Max Platt had no encumbrance against the property, he cannot have any charge against the fund which is only its substitute.

On this branch of the case we submit that Max Platt has not been prejudiced by the

decree as he had no valid mechanic's lien claim against the property in that

A. He did not obtain a judgment within one year or at any other time;

B. The rules governing distribution of the fund are those applicable to a foreclosure case against the mortgaged premises; and

C. He was not prevented from a prosecution of his suit on his alleged lien claim (as shown by the cases cited in POINT II hereof), and has shown no legal or other excuse for his failure to prosecute a suit on the lien claim.

There seems to be some confusion among members of the bar (and also among some members of the lower bench) as to whether the appointment of a receiver obviates the necessity of prompt prosecution of a lien claim. This case, we think, affords a proper opportunity for this Court to make an authoritative declaration that IT IS THE RIGHT, AND DUTY, OF A MECHANIC'S LIEN CLAIMANT TO FILE HIS CLAIM, INSTITUTE SUIT, AND PROMPTLY PROSECUTE SUCH SUIT, NOTWITHSTANDING THE APPOINTMENT OF A RECEIVER FOR THE BUILDER OR OWNER, AND NOTWITHSTANDING AN ADJUDICATION OF INSOLVENCY AGAINST SUCH BUILDER OR OWNER.

POINT IV.

Appellant, Max Platt, has not been prejudiced by the decree, because that appellant offered no sufficient testimony in support of the alleged lien claim, particularly failing to show performance of his work within four months prior to the filing of the lien claim.

We have, under POINT III, indicated why, as a matter of law, Max Platt had no valid and existing encumbrance against the mortgaged premises, and hence was not prejudiced by the Court's failure to allow him any part of the fund. There is an even more radical objection to Max Platt's claim, which arises from the fact that (assuming for argument's sake, his claim is in all other respects valid), he failed to prove that his last work was done within four months prior to the filing of the lien claim.

The only witness in support of the lien claim was Max Platt himself. His testimony was very brief (state of case, pages 420-422). On the subject of the last work done by him, the *only testimony* was the following:

> Q Do you know the last day you did work on that job? A Well, I got my book here; December 1st.
> Q Was it December 1st or 2nd? A December 1st.
> Q 1928? A 1927.
> State of case, page 420, lines 18-25.

It is observed from the foregoing that he did not answer the question, but referred to some book entry. That book entry, however, was not made by the witness, as is shown by the following testimony under cross examination:

> Q You didn't make that entry? A No.
> State of case, page 421, line 22.

In other words, there was no competent testimony of the date of the last work done. Platt's case was closed, without any testimony being introduced to show that the last work was done by him within four months prior to the filing of the lien, and hence, *there was a failure on his part to show that he was entitled to any lien against the mortgaged premises.* Having no lien against the premises, Platt is not prejudiced by the adjudication for distribution of the proceeds in which he cannot have any legal interest.

It is elementary, of course, that to be entitled as a lien claimant, such claimant must prove that the last work done by him was performed *within four months prior to the filing of the lien claim.* Two of the late cases affirming this well known element are *Warshaw* v. *DeMayo,* 8 Misc. 359, 150 Atl. 214, a decision of the Supreme Court, not yet officially reported, and *Weinberger* v. *Goldstein,* 106 N. J. E. 489, opinion by Vice-Chancellor Lewis, holding (in the third from the last paragraph of the opinion) that a *lien claim is invalid where there has been no satisfactory proof of the performance of labor or the furnishing of material within four months prior to the date of the filing of the lien claim as required by the statute.*

As there was no legal basis for affording to Max Platt any part of the fund involved in the suit, because of the invalidity of his lien due to the absence of proof necessarily required, Max Platt cannot be heard to complain that the decree is erroneous.

POINT V.

The judgment at law recovered by Geo. F. Perry & Sons Inc. was res adjudicata on the matters therein determined, and cannot be collaterally assailed in the foreclosure suit by any lien claimant.

We have already (in paragraph 3 of our introductory statement of facts) pointed out the character and scope of the judgment recovered by Geo. F. Perry & Sons Inc. in the Union County Circuit Court.

A certified copy of the lien claim was received in evidence (state of case, top of page 364); a certified copy thereof is now printed in the state of the case, at pages 688-695). That lien claim shows an account of the materials sold and delivered, in the customary form, properly verified and with the statutory endorsements.

A certified copy of the judgment of Geo. F. Perry & Sons Inc. was received in evidence (state of case, top of page 364); a certified copy thereof is now printed in the state of the case, at pages 696-700.

NO EVIDENCE WAS OFFERED TO OVERCOME THE EFFECT OF THE JUDGMENT OF GEO. F. PERRY & SONS INC. NOR DID MAX PLATT EVEN ATTEMPT TO CONTROVERT OR ASSAIL THAT JUDGMENT.

This Court has already ruled that a judgment in a lawsuit, in a mechanic's lien action, is *res adjudicata* on the issues decided by the judgment at law, and that the issues so decided cannot again be litigated in a foreclosure suit in the Court of Chancery. Thus, it appeared, in *People's Building & Loan Association of Ridgefield Park* v. *Vaniewsky, et ux.*, 85 E. 551, that one of

the defendants in the action was a lien claimant, who had filed a lien against the mortgaged premises, had recovered a judgment generally against the builder and owner and specially against the lands and building, but "subject to the lien of the mortgages." When the foreclosure suit was instituted by the complainant in that cause, the lien claimant again tried to litigate the question of priorities as between him and the mortgagees. In reversing the action of the Chancery Court permitting such a course of conduct, this Court said:

> "This court held in Culvert *v.* Lieberman, 69 N. J. L. 341, 55 Atl. 812, that the purpose of this statute was to settle in a single suit the liens of all persons who have any interest in the property, and to determine, among other matters, 'What mortgage incumbrance is upon each piece of property, and the priorities between the mortgagees and the plaintiffs' special judgment.' * * * Upon these conditions the presumption must be that when the judgment was entered in the suit brought by the lien claimant, the defendant in this cause, adjudging that such judgment is subject to the lien of complainant's mortgage, that the trial court found that it was subject to the entire sum for which the mortgage was given. * * * Upon these circumstances, the judgment plaintiff is estopped from now denying the force and effect of the judgment entered by him * * *."
>
> *People's Building & Loan Ass'n of Ridgefield Park* v. *Vaniewsky, et ux.*, 85 E. 551.

Of course, whatever way the law judgment be, that is whether in favor of, or against the lien claimant, it is *res adjudicata.*

We do find that the case just cited has not been overruled, criticized or in any way modified. We do find that it has been cited by

this Court in *Bergenfield Printing Co.* v. *Intertype Corporation*, 7 A. R. 366, 144 Atl. 730, not yet officially reported.

It will be observed that in the court below, Max Platt filed an answer and counter-claim, jointly with other lien claimants (state of case, page 68, *et seq.*). By that answer, in paragraph 12 thereof (state of case, page 70, line 21), Max Platt stated that he had no knowledge or information as to the allegations of paragraph 20 of the bill of complaint *which set up the lien claim and the judgment recovered by Geo. F. Perry & Sons Inc.;* such answer merely required that proof of such allegations be made; such proof was made as we have already indicated. Furthermore, by that answer, no claim was made by Max Platt that his lien claim was prior to the Perry lien claim, and no claim was made by Max Platt for any special priority as against some smaller portion of the mortgaged premises; that answer and counter-claim were filed on April 21, 1928 (state of case, page 68, line 5), and it is singular to observe that it follows the answer and counter-claim of Geo. F. Perry & Sons Inc., which was filed on April 5, 1928 (state of case, page 78, line 5); in fact, the arrangement and verbiage are strangely similar and indicates that by his formal pleading, Max Platt intended not to question the lien claim and judgment of Geo. F. Perry & Sons Inc.

In the light of the foregoing, the Court of Chancery was bound to give Perry's lien claim and judgment full faith and credit against the asserted lien claim of Max Platt. The Court of Chancery was bound to ignore Max Platt's change of position.

We therefore respectfully contend that the decision of the Court of Chancery in the case at bar upholding the priority of the lien claim and judgment of Geo. F. Perry & Sons Inc. was proper, because the Court of Chancery was bound to respect, as *res adjudicata,* the decision of the law court, in Perry's favor, which stood in its full force and vigor.

We have already indicated why, because of the nature of the answer filed by Max Platt, he was in no legal position to assail the validity of the lien claim and judgment of Geo. F. Perry & Sons Inc. By that answer, Max Platt did not deny the validity of Perry's judgment and lien claim for any reason, and yet, by way of argument, and collaterally, seeks to attack the validity of that judgment, relying on the case of *Morris County Bank* v. *Rockaway Manufacturing Company,* 16 N. J. E. 150, and *Jacobus* v. *Mutual Benefit Life Insurance Company,* 27 N. J. E. 604 (both cited on page 15 of Max Platt's brief) as his authority for doing so.

The Morris County Bank case arose in 1863, at a time when the statute had no provision for a controversy of the matters asserted by the claimant, as the plaintiff, by any person other than the builder and owner. Accordingly, it was held, and properly held, that a mortgagee, in a subsequent foreclosure suit, was not bound by the determination against the builder and owner, *because there was no provision in the then existing Mechanics' Lien Law by which the rights of the third party might be heard.* That situation has been completely altered because a mortgagee's rights can be heard in the lawsuit, his rights determined in such suit, and for that reason, such determination becomes *res adjudicata* against the party who had a right to be

heard; we refer to the change as exemplified particularly by the case of *People's Building & Loan Association of Ridgefield Park* v. *Vaniewsky, et ux.,* 85 N. J. E. 551, from which we have quoted at length above in this point. ANOTHER SIMILAR CHANGE HAS NOW OCCURRED IN THE PRESENT EXISTING MECHANICS' LIEN LAW, AND A LIEN CLAIMANT, DESIRING TO ASSAIL THE VALIDITY OF THE LIEN OF ANOTHER LIEN CLAIMANT, MUST DO SO IN THE MANNER AS NOW PROVIDED BY THE STATUTE. Section 29 of the Mechanics' Lien Law provides:

> "All lien claims * * * shall be concurrent liens * * * and shall be paid pro rata * * *, and for the purpose of distribution, the sheriff or other officer shall pay such proceeds to the clerk of said circuit court, to be by said court distributed among such claims filed, * * * and IF A CAVEAT BE FILED AGAINST SUCH CLAIM by the owner, or BY ANY CLAIMANT or claimants owning together one-third of the lien claims filed against such building, then not until such claim shall have been established by a special judgment thereon; * * *." 3 C. S., page 3311, Section 29.

In other words, machinery and procedure is now afforded, in proceedings at law on the lien itself, whereby one claimant may question the validity of the lien claim of another claimant, and where such an opportunity is afforded, the judgment may not be collaterally assailed by the lien claimant who has failed to take advantage of the statutory method. Under these circumstances, it seems clear that the principle of the Morris County Bank case is no longer applicable.

The Jacobus case also arose prior to the present existing statute. What we have said of the Morris County Bank case, in the preceding para-

graph, is, therefore, necessarily applicable to the Jacobus case and will not be repeated.

The precise question as to the conclusiveness as between lien claimants, of a judgment recovered by one lien claimant was definitely settled, however, in *Hall* v. *Spaulding,* 40 N. J. L. 166, in an opinion by the Supreme Court. In that case, there were several lien claimants, some of whom questioned the right of other lien claimants, who had recovered a judgment, to share in the distribution of the fund resulting from the *fi. fa.* Incidentally, the lien claimants thus attacked, were lien claimants whose liens were defective because the statutory endorsement of the commencement of suit had not been made thereon. Such lien claimants had, however, recovered special judgments, and the question, therefore, squarely was whether the other lien claimants might attack the validity of the recovery of those special judgments, and thus prevent a pro rata distribution to them. The Court held:

> "The judgment of Matthews and Spence, for the purpose of distribution of the fund, is to be taken as conclusive evidence of the amount due to them, and of their right to share in the proceeds of the sale in the statutory proportion.
>
> "*It establishes, by the highest authority, that the claim is a lien upon the lands, and, until set aside, must be enforced according to its legal effect.* OTHER CLAIMANTS CANNOT AVER THAT THE LIEN DOES NOT EXIST AS ADJUDGED."
>
> *Hall* v. *Spaulding,* 40 N. J. L. 166, 168.

In the case of *Naylor* v. *Mettler,* 11 Atl. 859, not officially reported, which arose in the Court of Chancery of our State, a situation is presented strikingly similar to that presented by the at-

tempt of Max Platt in the case at bar. In the Naylor case, suit was brought for the foreclosure of a mortgage. Arneth, one of the judgment creditors had perfected his judgment on a mechanic's lien. Another judgment creditor, Cray, sought "to get rid of the effect of this judgment, under the Mechanics' Lien Law, not by showing that the materials furnished were not furnished prior to the recovery of his judgment, but by insisting that Arneth could not claim any benefit by his judgment by way of priority as against him (Cray) by simply offering the exemplified copy of the judgment," and further by insisting that "it was the duty of Arneth to offer all the proceedings which were required by the statute in order to justify the court in entering the judgment under the statute so as to make it a lien upon the lands in question." In disposing of these contentions, Vice-Chancellor Bird said:

> "The point thus made by the exceptants cannot be sustained. THE JUDGMENT IS CONCLUSIVE, and it need not be sustained by a reproduction of the proof, or any part of the proof, upon which it was originally founded. Since the matter has been so well considered in our courts in the case of Hall *v.* Spaulding, 40 N. J. Law 166, I need not enlarge upon the reasons of giving such efficacy to a judgment of a court of general jurisdiction." (Then follows a quotation from the Hall *v.* Spaulding case which we have already given.) Naylor *v.* Mettler, 11 Atl. 859, not officially reported.

We have searched diligently and do not find any reversal or modification of the principles enunciated in the Hall case and in the Naylor case, and as these decisions have stood for about half a century, it must be concluded that they represent the settled law of this State that *one*

lien claimant cannot attack the judgment recovered by another lien claimant, and that Max Platt cannot, in the case at bar, do so.

POINT VI.

The Decree below is correct in not limiting the curtilage to the so-called "Middle" Tract.

Commencing at page 16 of his brief, under POINT III thereof, counsel for Max Platt, takes up an elaborate discussion that the Chancellor should have allocated the premises into separate divisions, and should have restricted the lien claimants to the so-called "middle" tract. Such argument proceeds on Max Platt's counsel's *mistaken assumption* that "the large tract of land was divided, considered and treated by the owner, the defendant Capital Construction Co., Inc., as three separate parcels before the commencement of the erection of the apartment house upon the middle tract." On this question, after reviewing the evidence, the Court of Chancery, in the case at bar, said:

> "The whole tract was treated by the owner as one parcel until the Junction Milling Company demanded a mortgage on the side pieces. This was several months after the erection of the building had commenced. Up to the time of the sale of the property in this suit, there were no fences or other physical signs of a division of the tract. During construction work, it was all used indiscriminately for the handling of material. The whole adds to the convenient and beneficial use of the apartment house and doubtless enables higher rentals to be had than could otherwise be obtained. I find that the entire tract is the curtilage subject to the liens describing it."

That this conclusion of the Court of Chancery is correct is plain from a consideration of the following appearing in the state of the case:

A. Capital Construction Co. bought the mortgaged premises, as one tract, on May 25, 1927 (state of case, page 26, lines 30-38).

B. The mortgaged premises, as one tract, were subject to a $21,000.00 mortgage, held by Riverside Apartment Corporation (state of case, pages 24-25).

C. The mortgaged premises, as one tract, were subject to a $30,000.00 mortgage held by Riverside Apartment Corporation (state of case, bottom of page 25, top of page 26).

D. The construction of the building was commenced prior to April 10, 1927 (brief of Junction Milling Company, page 1, line 7).

E. The mortgaged premises, as one tract, were further mortgaged to Shilowitz & Tucker on July 9, 1927 (state of case, page 27, lines 15-25; also that mortgage as an exhibit, state of case, page 658, *et seq.*).

F. The mortgaged premises, as one tract, were further mortgaged to West Bergen Trust Company on October 25, 1927 (state of case, page 28, lines 25-35; also that mortgage as an exhibit, state of case, page 874, *et seq.*).

G. Louis Moore, the plumbing contractor, who worked on the building from the start to the completion of the building, says that there was no physical separation of the tract into separate divisions, that it appeared that the building lot was just the one tract as an entirety, that there was nothing on the ground to show any division into separate tracts, and that the materials were all over the entire tract (state of case, page 429).

H. John W. Heins, a relator, not otherwise interested in the case, testified that there was nothing to indicate that there were three separate building parcels (state of case, page 522, lines 15-20).

I. Harry Starr, one of the officers of Capital Construction Company, testified that the building was started in May 1927 (state of case, page 393, line 15), that in September 1927 the building was up to, or beyond, the roof (state of case, page 319, line 23), that the plot had not been fenced in, and that there was no physical separation between one plot and another (state of case, page 394, lines 20-25), that building material was strewn all over the land (state of case, top of page 394), that no division into parcels was ever called to the attention of any materialmen (state of case, page 394, line 35), and that IT IS UNDENIED THAT THE SURVEY OF JUNE 11, 1927, CALLED FOR ONLY ONE PLOT (state of case, page 398, line 15).

J. MAX PLATT, THE PRESENT APPELLANT HIMSELF, FILED A LIEN AGAINST THE ENTIRE MORTGAGED PREMISES, AND NOT MERELY THE MIDDLE PORTION, IN JANUARY 1928 (his counsel's brief, page 4, line 25), AND FILED HIS COUNTER-CLAIM ON SUCH LIEN (state of case, page 68, *et seq.*).

In the light of this testimony, there was no room logically to hold otherwise than that the "curtilage" was equivalent to the entire mortgaged premises and not some undivided portion thereof. It is, of course, true that counsel for Max Platt refers to Exhibit 82, printed opposite page 752 of the state of the case, but

that survey was made on SEPTEMBER 8, 1927, which was, of course, long after the building was commenced and our materials had been furnished. Furthermore there is no proof that such plan was ever filed, and, if so, when or where it was filed; necessarily, of course, if at all filed, it was filed long after the right to the lien had attached. On the facts of the case, therefore, there was no justification for any attempt to limit the curtilage whereon the lien claim was to attach to some undivided portion of the entire tract.

Counsel for Max Platt apparently loses sight of the fact that as to Perry the question of the curtilage also is *res adjudicata* by reason of the judgment recovered by Perry in the Union County Circuit Court in the lien claim suit. The court will find, by referring to the certified copy of that judgment, that the curtilage to which the *lien of the judgment* attaches is SPECIFICALLY AND BY ACTUAL DESCRIPTION, the entire mortgaged premises and not some undivided portion thereof (see particularly state of the case, page 697). That judgment is *res adjudicata,* as we have heretofore pointed out, and no collateral attack can be made by Max Platt against any fact found by that judgment.

Counsel for Max Platt, in taking the position that the premises should be divided into three tracts, also loses sight of the fact, that *in this very case,* the mortgaged premises were sold *as one parcel,* and there is not one word in the record indicating that such method of sale was objected to by Max Platt (see orders on pages 193 and 198 of the state of the case). Those orders were made in April 1928, *and were not appealed from.* Counsel for appellant

Max Platt, would now have the Court of Chancery, in effect, change the orders for sale *pendente lite,* which directed that the liens shall attach to the funds in the same manner as was the mortgaged property at the time of the sale, notwithstanding that the time for appealing from the orders directing sale, etc., has long expired, and had long expired at the time of the hearing and decree in the case at bar. This Court, in *Nash* v. *Leiderman & Nash Building Co.,* 103 N. J. E. 287, speaking by the late Justice Katzenbach, ruled that the Court of Chancery had no power, after the time for appeal has expired, to modify an earlier order protecting the rights of a lien claimant, and accordingly reversed an order of the Court of Chancery which attempted such a modification. In that case, this Court, speaking by Justice Katzenbach, said:

> "This court has frequently held that to procure a reversal, alteration, or explanation of a decree in a former suit, it must be by a bill of review where the decree has been signed and enrolled. This applies equally to an order settling rights of those who are parties to the litigation. Although there is no express statutory limitation as to the filing of bills of review, the analogous limitation of the right of appeal governs, except in case of new or newly discovered matter."
> *Nash* v. *Leiderman & Nash Building Co.,* 103 N. J. E. 287.

Of course, these principles are applicable to the case at bar. The orders for sale *pendente lite* made in April 1928 directed the sale of *one parcel* (state of case, page 195), and further directed that the proceeds of such sale should be "subject to the same liens and equities of all parties in interest, as were the said mortgaged lands and premises" (state of case, page 197, lines 15-20).

In April 1928, when those orders were made, Perry had a lien claim and lien judgment against those lands and premises, as one tract and not some special section thereof. No appeal was filed from those orders, which definitely settled the rights of the parties to the litigation (exactly as had been done by the earlier order in the Nash case, cited *supra*), and yet Max Platt's counsel at this late date (or even as of the date of the hearing or the order of distribution below), all subsequent to one year after April 1928, seeks an order or decree *unsettling the prior order.* Such course of procedure was reversed by this Court in the Nash case where it had been actually done by the Court of Chancery, and should not be countenanced in this case, where Max Platt urges that it be done.

Counsel for Max Platt has devoted considerable space in elaboration of his contention that a lien cannot be had on a tract of more than half an acre, basing his contention on a forced construction of Section 21 of the Mechanic's Lien Act. Passing for the moment the propriety of Max Platt assailing Perry on this score, *in spite of the fact that Platt himself filed his lien against the very same tract as covered by the Perry lien,* and in face of the law adjudication in favor of Perry, we will proceed to show that this statutory limitation (as to area) has no application to the facts at bar.

The present Section 21 of the Mechanic's Lien Act has been in effect since 1863. The original enactment was Section 3 of Chapter 144 P. L. 1863, page 275. Ever since such enactment, our Courts have held that the "half acre" limitation does not apply to a situation similar to the case at bar. Only a few of the decisions, however,

will be quoted, *and we stress the fact that all decisions which we quote, or refer to, have been decided since the statute has been in force.*

Gerard v. *Birch,* 28 N. J. E. 317, a decision of the Court of Chancery, with the opinion by Chancellor Runyon, upholding a lien on a tract, fronting on three streets, the lot dimensions being 500′ x 450′, obviously more than half an acre. Counsel for Max Platt has cited this case, at the top of page 21 of his brief, in the mistaken assumption that it was authority for his view. This is not so, because the injunction allowed to the complainant in the cited case against the defendant, Birch, the lien claimant, was to prevent the latter from selling property in addition to that which the Court found to be the proper curtilage. As we have indicated, Chancellor Runyon approved a curtilage of approximately two hundred and five thousand (205,000) square feet; in the case at bar, the area of the land is less. In the case at bar, the building itself has a ground area of one-quarter acre. If Exhibit 82 is considered, in the light of the fact that the building erected upon the plot is a fashionable apartment house, requiring driveways, play space and the breathing space afforded by a suburban community, with intended high-rental value, it can hardly be said that the entire plot is not a proper "curtilage"; certainly, the Vice-Chancellor's finding of fact, on that score, should not be disturbed.

James v. *Van Horn,* 39 N. J. L. 353, a decision of the Supreme Court, with the opinion by Justice Reed, upholding a lien on a tract, *of fifty acres;* while there was a reversal of the judgment below, in that case, it was *not* based upon the alleged error of allowing a lien against the tract of fifty acres.

American Brick & Tile Co. v. *Drinkhouse,* 59 N. J. L. 462, a decision of this Court, with the opinion by Justice Dixon, apparently approving a curtilage of more than half an acre, and further holding that the extent of the curtilage was a matter of fact to be settled by the trial court.

Federal Trust Co. v. *Guigues,* 76 N. J. E. 495, a decision of the Court of Chancery, with the opinion by Vice-Chancellor Howell, where, even after excluding a dock which he did not consider to be appurtenant to the dwelling house, nevertheless, apparently approved a curtilage of over half an acre because he held that Section 21 "does not apply to the case." The size of the lot does not definitely appear in the opinion, but from the language of the Court, the plot must have exceeded one-half acre, being bounded by three streets.

In *Raab* v. *W. P. Ellison Inc.,* 89 N. J. L. 416, a lien claim was filed against the grand stand, club house and baseball park of the Newark Baseball Club. Obviously, and as we think the states of the case in this Court will show the area was several acres in extent. The Supreme Court, with the opinion by Justice Trenchard, allowed the lien, *sub silentio,* approving the extent of the area involved. This Court affirmed the Supreme Court decision; the affirming opinion is reported in 90 N. J. L. 716.

We do not find anything in the brief of Max Platt which indicates that the decisions above quoted as in any way incorrect. Our own examination indicates that they have neither been modified nor overruled, and we submit that they are dispositive of the law on the subject, and that in our favor.

Counsel for Max Platt (it seems clear to us) has entirely misconceived the ruling in the case of *Board* v. *Freedman,* 99 N. J. E. 351, 131 Atl. 913, referred to at the top of page 21 of his brief, and quoted from by him. In that cited case, this Court held that a lien claim against *several buildings* must apportion the claim, pursuant to Section 22 of the Mechanic's Lien Law, in proportion to the value of the materials going into each of the buildings; that case had nothing to do with the question of the area of the curtilage to be embraced by a lien claim. We, therefore, contend that the cited case (and the cases therein cited) affords no authority to Max Platt.

Summing up our argument under this point of our brief, we contend that the decree below is correct in not limiting the curtilage to the so-called "middle" tract, because

A. The mortgaged premises were always treated by the owner, the mortgagees and the lien claimants, as one single parcel all of which was necessary to the reasonable enjoyment of the one building thereon erected;

B. As to Perry, the law judgment of Perry was *res adjudicata* on the area embraced by the lien, and Max Platt cannot collaterally assail that judgment;

C. The order of the Court of Chancery, in the case at bar, directed the sale of the premises as one parcel, and as such order was made in April 1928, and never modified or reversed, the Court of Chancery has no power, more than one year after the entry of that order, to modify it, or otherwise "unsettle" the rights settled by the previous order;

D. The adjudications of our Courts establish the right to a lien on an area of more than one-

half acre, and a finding of fact that the "curtilage" embraces more than one-half acre will not be disturbed;

E. The adjudications requiring an "apportionment" of the debt of a lien claim apply only in a case when more than one building is erected upon the lands of the owner and have no application to the case at bar where there was but one building erected upon the curtilage.

Max Platt's attack upon the curtilage, as established for Perry, is not sincere, as it seems to us. MAX PLATT HIMSELF FILED A LIEN CLAIM AGAINST THE ENTIRE TRACT AND NOT SOME SMALL PORTION THEREOF (state of case, page 768, and particularly at page 769; also his counsel's brief, page 4, line 25). That lien claim was filed on January 3rd, 1928. About a year and a half later, on September 7, 1929, that alleged lien claimant procured an order limiting the curtilage of his alleged lien claim to the so-called "middle" tract (state of case, page 775; his counsel's brief, page 4, line 27). Such change was due to the fact that, in the Court below, counsel for Max Platt was also counsel for Junction Milling Company, and the last named company attempted to procure a mortgage encumbrance on the so-called "middle" tract; the alleged mortgage of Junction Milling Company was dated September 16, 1927 (state of case, page 804). The inference is plain, we think, that counsel acting for Junction Milling Company, and in an attempt to procure a valid mortgage for it, such counsel being also counsel for Max Platt, reduced the amount of the curtilage *originally claimed* by Max Platt, and this was done only in an attempt to help Junction Milling Company.

The dates above given are significant. We think this circumstance also explains the conclusion of the present counsel for Max Platt (at page 33 of his brief), in effect depriving Max Platt of rights which he might otherwise have obtained as a lien claimant, and conceding such rights to the Junction Milling Company.

The position of our client has never changed, and has always been that the curtilage is the entire mortgaged premises and not the so-called "middle" tract.

POINT VII.

The Final Decree, in upholding the priority of Perry's lien is correct.

Counsel for Max Platt, as POINT IV in his brief, attempts to argue that the decree is erroneous in failing to adjudge that his lien claim is prior to the others as well as Perry's. We do not represent any other lien claimant excepting Perry, and we are not concerned in establishing the validity of such other liens as against Max Platt. However, *what we have heretofore said in this brief fully establishes that Perry's lien claim and judgment are prior to the alleged lien of Platt, and the argument in support of this position will, therefore, not be repeated.*

As a matter of fact, the decree below does not give to Perry the full priority to which it is entitled, but that is a matter which is not the subject of complaint by Max Platt. The Court of Chancery was obliged to marshal the liens in accordance with the principles laid down in *Hoag* v. *Sayre,* 33 N. J. E. 552, decided by this Court in 1881, and never reversed but recently approved,

by this Court, in *Albert & Kernahan Inc.* v. *Franklin Arms Inc.*, 7 A. R. 717, 146 Atl. 215, not yet officially reported. The Court below was properly obliged to follow the reasoning and logic of *Meister* v. *J. Meister Inc.*, 103 N. J. E. 78, the opinion being by Vice-Chancellor Berry. In the case at bar, the marshalling of the liens made the complicated distribution necessary, because, the lien claim and judgment of Geo. F. Perry & Sons Inc. are entitled to a priority, different from that to be accorded to the other lien claimants, because all the others had, by voluntary act, changed their ordinary priorities, but Geo. F. Perry & Sons Inc. did not.

We also observe that the opinion in the case below has been cited by this Court in *Feinberg* v. *Building Construction Company,* case No. 99, at October Term, 1930, not yet reported. (8 A.R. 353, 355).

Max Platt's argument also overlooks the essential outstanding fact that PERRY WAS ENTITLED TO SECURE THE PRIORITY ACCORDED TO IT BY ITS JUDGMENT, and that no other lien claimant, as far as we know, established such priority. There is, however, an even more significant fact why Perry should not be relegated to the position of other lien claimants, if they are to be subordinated, and that fact is that PERRY ALONE NEVER POSTPONED ITS LIEN IN FAVOR OF ANY MORTGAGES WHILE THE OTHER LIEN CLAIMANTS DID IN FACT EXECUTE SUCH POSTPONEMENTS, OR ADMITTED THEIR INFERIORITY. The following is a recapitulation where such subordination is to be found:

Junction Milling Co. (state of case, page 723, line 30).

Mowre Lager (state of case, page 497, lines 20-32).

MAX PLATT (STATE OF CASE, PAGE 422, LINES 18-20; ALSO PAGE 723, LINE 13).

Ira R. Crouse (state of case, page 423, lines 25-30).

Louis Moore (state of case, page 725, line 33; also page 424, line 29).

Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co. (state of case, page 723, line 11; also page 529, line 12).

A. S. Reid & Co. (state of case, page 422, line 22; also page 723, line 25).

Joseph Machetto (state of case, page 722, line 40).

E. W. Booth & Bro. (state of case, p. 723, line 18).

Alpheus S. VanWoeart (state of case, page 723, line 1).

Venango Stone Company (state of case, page 723, line 3).

Roderick M. Crockett (state of case, page 723, line 6).

John Nicaretta (state of case, page 722, line 35).

In this case, therefore, with the other lien claimants, AND PARTICULARLY PLATT, by voluntary stipulation postponing their lien claims in favor of mortgages, we find that *Geo. F. Perry & Sons Inc. did not do so.* PERRY IS NOT TO BE RELEGATED TO THE INFERIOR POSITION OF SUCH LIEN CLAIMANTS, BUT IS RATHER TO BE ACCORDED THE SUPERIOR POSITION TO WHICH IT IS ENTITLED, AS A MATTER OF LAW, AND WHICH IT NEVER SURRENDERED. It is for this reason that the Chancellor had to differentiate in the priorities allowed to Geo. F.

Perry & Sons Inc., from the priorities allowed to the other, but voluntarily-subordinating, lien claimants. To place Perry in the same position with the other lien claimants, who received consideration for their subordinations, would manifestly be unjust to Perry. In any event, Max Platt, not being in the position of a valid lien claimant, cannot argue as if he were such.

At all events, and irrespective of the positions of the mortgagees or other alleged lien claimants, or of their priorities, Perry's lien claim and judgment are prior to the alleged lien of Max Platt, as he postponed his lien.

On page 32 of its brief, Max Platt concedes the validity of the lien claim of Mowre Lager. Such concession, it seems to us, is due to the fact that counsel for Max Platt is also counsel for Mowre Lager. We intend to submit a separate brief, showing the invalidity of the alleged lien of Mowre Lager, but are now calling this Court's attention to our position so that sanction for the concession of Max Platt (as made in his brief) may not appear to arise from our silence.

CONCLUSION.

It is our opinion that the decree below should be affirmed.

We recognize that other lien claimants (who may not appear before this Court), and lien claimants who do not enjoy the same status as our client (particularly because of failure of proof and because of their voluntary subordinations of lien), may not justify the decree as to them. If this Court should modify the decree below, as to other parties, such modification

ought to include the provision that Geo. F. Perry & Sons Inc. is to receive payment of the entire judgment and interest, and counsel fees, due it, before Max Platt shall be entitled to the payment of any part of the fund, if at all entitled, because clearly Perry's lien and judgment are prior to the alleged encumbrance of the appellant, Max Platt.

Respectfully submitted,

KANTER & KANTER,
Counsel of Geo. F. Perry & Sons Inc.,
Defendant-Appellee.

ELIAS A. KANTER,
Of Counsel.

New Jersey Court of Errors and Appeals

RIVERSIDE APARTMENT CORPORATION, a corporation, *Complainant,* *vs.* CAPITAL CONSTRUCTION CO. INC., a corporation, *et als.,* *Defendants.*	*On Appeal of Mowre Lager.*

ANSWERING BRIEF OF GEO. F. PERRY & SONS INC.

Kanter & Kanter, of counsel with Geo. F. Perry & Sons Inc. Elias A. Kanter, of counsel.

(All italics, except when otherwise noted, are ours.)

Introductory Statement of Facts.

1. As this Court will observe, from the state of the case, there are four appellants and about twenty respondents. We represent only one of such respondents, to wit, Geo. F. Perry & Sons Inc. and we consider it proper, therefore, to discuss only those questions which affect that respondent. *This brief is confined solely to the interests of that respondent as raised by the appeal of Mowre Lager;* separate briefs are being used by us in respect to each of the several appellants. Clarity of statement and discussion will best be served, we think, by a separate consideration of the questions particularly affecting the appellant with which we are now concerned, that is, Mowre Lager. While counsel for Mowre Lager filed an appeal, joining Max Platt, and has argued the cases of both such appellants together

in one brief, such appellants are not partners, and as the facts, with respect to each of them, are to a certain extent different, we think it proper to (and accordingly do) furnish separate answering briefs.

2. Counsel for Mowre Lager (at page 32 of his brief) claims that the fund derived from the sale of the mortgaged premises *as one parcel* should have been divided into two funds, and that from one of such two funds, the alleged lien of Mowre Lager should have been paid. Counsel for Mowre Lager, like some of the other appellants, ignored, in his "Statement of the Case," the counter-claim filed by Geo. F. Perry & Sons Inc. Such counter-claim cannot be ignored, because, by an appropriate statement of facts, *it showed the lien claim and judgment of Perry,* its priority, and what lands were to be specially subject to the judgment; such lands were the *entire* mortgaged premises and not a limited portion thereof.

3. The bill of complaint which was filed by Riverside Apartment Corporation, the holder of the paramount mortgage, merely alleged that all other liens were inferior to that mortgage. The defendant, Geo. F. Perry & Sons Inc., *filed an answer and counter-claim.* By that counter-claim, which was "duly served" (state of case, page 78, line 5), Geo. F. Perry & Sons Inc. alleged the furnishing of its materials to the building between May 24th, 1927 and July 14th, 1927 (state of case, page 81, lines 20-40), the filing of its lien claim on November 12, 1927 (state of case, page 82, lines 1-11), and the institution of the suit in the Union County Circuit Court (state of case, page 82, ll. 11-30). The counter-claim of Geo. F. Perry & Sons Inc. further alleged the recovery of a judgment, in the mechanic's lien suit at law (state of

case, page 82, lines 30-40), which judgment was made part of the counter-claim by reference. A copy of that judgment, so annexed to the counter-claim (state of case, pages 86-88), shows that that judgment entered on January 13th, 1928, finally adjudged the following:

(a) That judgment final be (and thereby was) entered in favor of the plaintiff, Geo. F. Perry & Sons Inc., a corporation, *generally* against the defendant, Capital Construction Co. Inc. (which was the builder and owner) for $6,965.00, damages, and costs of suit (taxed at $63.37); see state of case, page 86, lines 30-40.

(b) That said judgment be *specially* against the lands and building described in the lien claim and complaint. In this judgment, a complete metes and bounds description is specifically set forth, and *such description is identical with the mortgaged premises, and, of course, identical, with the premises ordered to be sold,* and subsequently, actually sold, *pendente lite;* see state of case, page 87. (Of course, the fund in court is now the substitute for the land and building.)

(c) It was further ordered and adjudged that the lien claim of the plaintiff and the lien of the judgment are prior to the mortgage of Junction Milling Company (state of case, page 88, lines 10-20).

(d) It was further ordered and adjudged that the lien claim of the plaintiff and the lien of the judgment are prior to the mortgage of West Bergen Trust Company (state of case, page 88, lines 20-30).

A certified copy of the judgment is printed at pages 696-700 of the state of the case; a certified

copy of the lien claim is printed at page 688-695 of the state of the case.

4. Counsel for Mowre Lager (page 1, line 7 of his brief) admits that the *building was commenced prior to April 10th, 1927.* The lien claim of Geo. F. Perry & Sons Inc. shows that *all its materials were furnished between May 24th, 1927 and July 14th, 1927* (state of case, pages 690-693), and as already above indicated, it was upon this lien claim that Geo. F. Perry & Sons Inc. recovered its judgment within the time required by the statute. It should also be observed that Lager filed a lien claim on February 21st, 1928 against the building and the *entire tract* (state of case, page 886, and his counsel's brief, page 4), and while he claimed therein that the date of the last work done by him was "on the ninth day of December 1927," *there was no endorsement on such lien claim showing the institution of suit thereon within four months from the date of the last work done and materials furnished;* nor was there any judgment recovered by this alleged lien claimant within one year from the filing of the lien or at any other time.

5. The final decree distributed the fund, giving part thereof to Perry. Obviously, the fund was not great enough to allow of payment to all the parties, for, if the fund had been large enough, there would be no appeals. We intend to demonstrate that Mowre Lager was not injured by the award made to Perry, and that the decree below, as between Perry and Mowre Lager, should be sustained, because it is correct in result regardless of the *reasons* for the action below. Certainly, our argument will demonstrate that Mowre Lager has no cause to complain against the award made to Perry.

POINT I.

The Final Decree is not erroneous because the basis of the separate awards was not therein set forth.

Counsel for Mowre Lager, as his Point I, says that the decree below is erroneous because it did not adjudge the amounts due to the various parties, and the order of priority thereof. In effect, this is an argument attacking the reasons assigned by the court below for making the order of distribution. The fund in court was highly insufficient to make payment in full. It was, therefore, unnecessary for the court to make a specific finding as to the amount due to each of the claimants, but such finding was, in effect, made, and actually computed by the court below because there is awarded to each claimant a certain and specific sum, and in each case, the sum so awarded is less than the amount due to the specific claimant. The objection of Mowre Lager goes to the *form* and not to the *substance* of the order.

The decree of distribution (printed at page 280, *et seq.* of the state of the case) directs specific payment, in the order from No. 1 to No. 26, of the sum of $41,559.59. The decree was made on January 23, 1931. At that time, the balance in the hands of the clerk was $39,943.53 (we have taken this figure from West Bergen's brief, page 11, line 14). The amount due to the lien claimants alone was $74,810.74 (state of case, page 261, line 21). Clearly, what the Chancellor did, was to order the distribution, in accordance with his opinion, with the amount to be paid to each separate claimant, separately computed, instead of having the clerk make the computation.

It is the well-established rule of this Court that not the reasons of the action, but the action itself, of the court below, which gives an appellant a basis for claiming error.

The fact that no reasons were assigned in the court below for the action taken, or the fact that wrong reasons were assigned by the court below, is not ground for reversal. See *McMichael* v. *Horay,* 90 N. J. L. 142, a decision of this Court, *Meisel* v. *Merchants' National Bank of Newark,* 85 N. J. L. 253, also a decision of this Court, *Beach* v. *Palisade Realty & Amusement Co.,* 86 N. J. L. 238, also a decision of this Court, *Shauinger* v. *Apter,* 95 N. J. E. 70, also a decision of this Court, the last-named case being on an appeal from the Court of Chancery.

Mowre Lager, in arguing Point I in its brief, does not attempt to show that the action taken by the court below is incorrect, and hence fails to show any legal error, if error was committed (which we deny) in failing to make specific adjudications of the amounts due to each of the claimants, when, as a matter of fact, the distribution was calculated upon such amounts, and the order of distribution was specifically given. In view of the insufficiency of the fund, it would have been a futile gesture for the court below to have adjudicated the amounts due to each of the parties severally. The decree represents the Court's action, taken after calculation, and the basis of the calculation is not necessary for the efficacy of the decree.

Counsel for Mowre Lager (on page 10 of his brief) cites *Beall* v. *New York & New Jersey Water Co.,* 87 N. J. E. 390, in support of his contention that the decree below should have adjudicated the amounts due to the various parties.

As a matter of fact, the Beall case contains no such intimation, but, on the contrary, the Chancellor there said, in part:

> "In a decree in chancery there need not be, in the ordering or mandatory part, an adjudication of the existence of facts warranting such decree, although they may be stated in the recital preceding the decretal paragraph, or may be omitted entirely (Bull *v.* International Power Co., 84 N. J. Eq. 14, 92 Atl. 796); but there should be an adjudication in a decree of the rights to which a party or parties are entitled."
>
> *Beall* v. *New York & New Jersey Water Co.*, 87 N. J. E. 390.

In the case at bar, the decree followed the quoted language, because it gave the parties distribution of certain specific sums, those being the rights to which they were entitled.

In *McCarty* v. *Town of West Hoboken*, 93 N. J. L. 247, it was also said:

> "The question to be determined upon review in an appellate court is always as to the propriety of the judicial action of the court below, and not the soundness of the reason which prompted it. * * * It must be perfectly obvious that, if the court below reached a right conclusion, even if upon a wrong reason, the judgment should not be disturbed; and therefore it is that errors may be assigned upon matters in the record only, and not upon the reasoning which induced the rendering of the judgment under review."
>
> *McCarty* v. *Town of West Hoboken*, 93 N. J. L. 247.

The case of *Kleinert* v. *Hutchinson*, 98 N. J. L. 831, and the case of *Birtwistle* v. *Public Service Railway Company*, 94 N. J. L. 407, reaffirm the principle of the McCarty case, cited *supra*, and are authority against Junction Milling.

In the light of these principles, we will now demonstrate that the decree of distribution, to the extent that it was in favor of Geo. F. Perry & Sons Inc., was not to the legal prejudice of Mowre Lager.

POINT II.

Geo. F. Perry & Sons Inc. had the right to proceed with its lien claim action notwithstanding the insolvency of Capital Construction Co. Inc. and the appointment of a receiver for it.

At pages 286-302 of the state of the case, a number of documents have been printed, *as if they were part of the record of this case,* and as if they had been filed in this case; such documents are not headed as exhibits. To prevent any misunderstanding, we call this Court's attention to the fact that THOSE DOCUMENTS ARE NOT PART OF THE RECORD IN THE CASE AT BAR; all of such documents relate to the case of Ralph Cianfrone, *et al.,* trading as Venango Stone Company *vs.* Capital Construction Co., that heading being printed at the top of page 286 of the state of the case, and THOSE DOCUMENTS WERE NOT OFFERED IN EVIDENCE, NOR RECEIVED IN EVIDENCE IN THE CASE AT BAR. In the index to the state of the case (on page IX thereof) some of these papers are referred to as if they had been offered in evidence in behalf of Geo. F. Perry & Sons, *but such is not the fact.* Strictly speaking, therefore, the argument made by Mowre Lager (middle of page 12 of its counsel's brief) based on some of those papers, is improper.

However, to prevent any misapprehension on this subject, we will proceed to examine the argu-

ment of Mowre Lager as if the papers upon which its argument is based were before the Court.

Counsel for Mowre Lager, in effect, says that on January 4, 1928, the Court of Chancery in the Cianfrone receivership suit made an order appointing receivers for the Capital Company and restrained all persons from taking any further proceedings in actions theretofore commenced against it. THERE IS NO PROOF THAT GEO. F. PERRY & SONS INC. EVER HAD KNOWLEDGE OF THAT ORDER. On page 300 of the state of the case, there is printed a copy of an affidavit *which was filed in the Cianfrone case* wherein the young lady affiant said that she "*caused* a copy of the attached order appointing receiver *to be sent to the creditors* of the above-named defendant corporation, etc." Assuming that this affidavit was offered and received in evidence in the case at bar, such offer and receipt WERE NOT EVIDENCE OF THE FACT STATED IN THE AFFIDAVIT. Furthermore, that affidavit does NOT show that the affiant mailed the notices, nor does it show that a copy was mailed to Geo. F. Perry & Sons, as the affiant merely contents herself with saying that it was mailed "to the creditors," *without identifying them and without any showing that she knew who all the creditors were.* It is thus seen that the affidavit is not competent nor does it prove the facts therein sworn to.

At page 301 of the state of the case, the appellant prints an "Order Continuing Receivers" which was filed in the Cianfrone case, as if it were part of the record or an exhibit in this case; neither of the last-mentioned conditions is the fact. Assuming again, however, that this order continuing the appointment of the receivers was part of the record of the case at bar, *there is*

not a word in the record showing that Geo. F. Perry & Sons Inc. had knowledge of the entry of that order when the judgment was entered in the Union County Circuit Court. But even assuming that Geo. F. Perry & Sons Inc. was in contempt of the Court of Chancery for proceeding with its law action notwithstanding the restraining orders of the Court of Chancery (and there is no proof that it was in such contempt, and the contrary is the fact) the appellant cannot take advantage of such alleged contempt in order to assail the judgment of Geo. F. Perry & Sons, WHICH WAS REGULARLY ENTERED. It is significant to observe that neither the insolvent corporation nor its receivers are before this Court as claiming any irregularity.

However, as a matter of law, and notwithstanding the restraining order of the Court of Chancery, *Geo. F. Perry & Sons Inc. had a right to proceed with the action at law which it had instituted prior to the filing of the receivership bill against the Capital Construction Co.* Perry's suit was started on November 12, 1927 (see endorsement on lien claim, state of case, page 695, line 30). The Cianfrone bill for the appointment of a receiver was filed on December 21, 1927 (see state of case, page 286, line 2). We also stress that the Capital Construction Company was never *adjudged* an insolvent corporation. The present foreclosure bill, which is the case at bar, was filed on March 3, 1928 (see state of case, page 24, line 2).

At page 12 of his brief, counsel for Mowre Lager says that he could not have *"defended"* the lawsuit brought by Perry when Perry was restrained from prosecuting the lawsuit. This conclusion is plainly erroneous. There was nothing to prevent Mowre Lages from "de-

fending'' the law action, and he was not enjoined from ''defending'' that suit. There was nothing that prevented Mowre Lager from appearing in the Union County Circuit Court, in order to file a caveat, if he so desired, and there is nothing in the injunctive order which leads to any such inference.

The question whether a mechanic's lien claimant has a right to proceed with a lien claim suit, notwithstanding insolvency proceedings against the builder, has definitely, and with an admirable opinion by the present Chief Justice, been settled, *in favor of such right to proceed,* in *Crane* v. *Brighton Mills*, 98 N. J. L. 308. On this precise question, it was there written:

> ''The other ground upon which the motion to non-suit 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 contractor. The contention that no general judgment was recoverable against the Berridge Company is based upon section 2 of the supplement of 1919 of our Corporation Act (page 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. 612, 44 Atl. 668, that—

> *'A pending action against a corporation may regularly proceed, notwithstanding an adjudication of insolvency and the appointment of a receiver to wind up its affairs and distribute its assets among creditors and stockholders.'*

"This judicial declaration seems to us dispositive of the question we are now considering. But, in the absence of any such precedent, we would have no doubt that the motion to non-suit upon the ground secondly stated was properly refused. The purpose of the Mechanic's Lien Law, as stated in its title is to secure to mechanics and materialmen for their labor and 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 materialman or laborer, when seeking to enforce by suit his claim against the building, to join the owner and contractor as codefendants; and, for the purpose of demonstrating his right to a lien and its amount, to prove not only that the labor was done 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 Mechanic's Lien Law (3 Comp. St. 1910, page 3290, *et seq.*), 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 materialman 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 non-suit upon this latter ground, and we have no doubt of its soundness.
>
> "The judgment under review will be affirmed."
>
> *Crane* v. *Brighton Mills,* 98 N. J. L. 308.

The procedure in the case at bar in the law action had for its purpose the establishing of the facts, to substantiate the lien claim, and there is no suggestion, at least in the record before the Court, that Geo. F. Perry & Sons Inc. attempted to sell the property or interfered with the receivers. The judgment was properly prosecuted, and in view of the provisions of a mechanic's lien act, requiring prompt prosecution, it was the only safe course for the lien claimant to follow.

POINT III.

Appellant, Mowre Lager, has not been prejudiced by the decree, because that appellant held no valid Mechanic's Lien Claim against the property.

The basis of the claim of Mowre Lager is set forth by his counsel on page 4 of his brief. In substance, that appellant claimed that he filed a mechanic's lien claim on February 21, 1928, "against said building and the *entire tract*"; he further claimed that, on *September 7, 1929*, the lien claim was amended so as to eliminate certain portions of the property. From these two statements alone, it is apparent, as a matter of law,

that the appellant did not have a *valid* lien claim against the property because there is no proof that suit was instituted on the lien claim within four months from the time of the last materials furnished (Mowre Lager's lien claim bears no such endorsement), and because there is no proof that judgment was entered within one year on such lien claim in a suit so instituted.

It is elementary that for a lien claimant to possess an encumbrance against the real estate, the first requisite step is the filing of the lien claim within four months from the date of the last work done and materials furnished. The provision of the statute, and we quote only that portion thereof which is directly applicable, is:

> "No debt shall be a lien by virtue of this act unless a lien claim is filed as hereinbefore provided within four (4) months from the date of the last work done or material furnished for which such debt is due; * * * ." 3 C. S. page 3305, Sec. 18.

Counsel for this appellant apparently recognized the necessity of the foregoing requirement because Mowre Lager filed the lien claim on February 21, 1928.

The lien claim of Mowre Lager is printed on page 892 of the state of the case, and from the statements of such lien claim, it would appear that Mowre Lager claimed that all of his labor, etc., was performed and furnished between August 3, 1927 and December 9, 1927 (see state of case, page 891, lines 7-10). It is clear, therefore, that the date of the last work done or materials furnished was December 9, 1927, and it, therefore, became incumbent for that lien claimant to institute his suit *within four months* from that date. An examination of that lien claim fails to disclose any endorsement thereon that suit was

instituted on such lien claim, and it is, therefore, fair to conclude, as is the fact, that no suit was instituted on that lien claim within the four-month period. *The provisions of the Mechanic's Lien Law requiring the institution of suit within four months is mandatory, and there is no exception, either expressed or implied therein, excusing the failure to institute the suit.* We quote from the salient provision of the statute:

> "No debt shall be a lien * * * unless a lien claim is filed * * * within four (4) months from the date of the last work done or material furnished * * * ; nor shall any lien be enforced by virtue of this act unless the summons in the suit for that purpose shall be issued within four (4) months from the date of the last work done or materials furnished in such claim; and the time of issuing such summons shall be endorsed on the claim by the clerk upon the sealing thereof, and if no such entry be made within four (4) months from such last date * * * , SUCH LIEN SHALL BE DISCHARGED * * *." 3 C. S. page 3305, Sec. 18.

Ever since the decision of this Court in the leading case of *Wheeler* v. *Almond*, 46 N. J. L. 161, which has been cited and approved time without number since its pronouncement, it has been uniformly held that THE REQUIREMENT OF THE STATUTE FOR THE ISSUING OF A SUMMONS AND FOR THE ENDORSEMENT OF THE FACT OF SUCH ISSUANCE IS MANDATORY. Thus, Justice Dixon, speaking in the Wheeler case, for this Court, said:

> "Within the period limited in the notice, summons was issued on the lien claim, but *no entry of the time of issuing such summons was made on the claim until October 11, 1883, when the Circuit Court made an order that it might be so endorsed.* * * * This

ruling is now brought here by exception and writ of error. On turning to the statute touching the point now before us, its language seems to be explicit. * * * THIS LANGUAGE PLAINLY PROVIDES THAT FAILURE TO ENDORSE ON THE CLAIM THE TIME OF ISSUING THE SUMMONS within one year from the date of the last item in the claim, or within thirty days after notice to sue, in case such notice be duly given and affidavit thereof filed, SHALL DISCHARGE THE LIEN AS EFFECTUALLY AS PAYMENT OF THE DEBT TO THE COUNTY CLERK OR TO THE CLAIMANT HIMSELF. Such force must therefore be given to this enactment unless good reason exists for defeating its apparent import. * * * This danger, that the interests of persons who cannot be heard will be prejudiced, is ground enough for refusing to hold this plain requirement of the statute to be only directory. There is also another ground, still more obvious. It is that the legislature has expressly declared what shall be the result of non-compliance with the mandate: the lien shall be thereby discharged. *It is impossible to observe the primary rule of giving effect to all the words of the act, without adjudging that the omission to make the endorsement within the time limited abates the lien.* Among the various refinements in which courts have indulged while endeavoring to state the distinction between directory and imperative statutes, none, I think, can be found that would justify us in preventing the consequence which the legislature has said shall follow upon disobedience to its enactment. * * * In the case before us it will not induce any of these undesirable results to adjudge this provision for endorsement to be mandatory; IT MERELY EXACTS OF THE CLAIMANT SUCH DILIGENCE IN PURSUING HIS PECULIAR REMEDY AS THE STATUTE CREATING IT PRESCRIBES, UNDER THE PENALTY

> WHICH THE STATUTE ITSELF DENOUNCES. (Justice Dixon then points out that such defect was not "amendable.") * * * Hence there was error in the ruling of the Circuit Court on the point presented by this exception, and a special judgment in favor of the lien must therefore be reversed." Wheeler *v.* Almond, 46 N. J. L. 161.

The only difference between the statute of which Justice Dixon was speaking and the statute as it now exists is a reduction in the time within which the suit is to be instituted and the endorsement on the lien claim made, from one year to four months; the reasoning and the logic of the foregoing quotation are still applicable, and we find that such reasoning and logic have been upheld in the following cases:

Drinkhouse v. *American Brick & Tile Company*, 58 N. J. L. 432, particularly page 435, Decision of the Supreme Court with the opinion by Beasley, *C. J.*;

American Brick & Tile Company v. *Drinkhouse*, 59 N. J. L. 463, particularly page 467, Decision of this Court with the opinion by Dixon, *J.*;

J. C. Vreeland Building Company v. *Knickerbocker Sugar Refining Co.*, 75 N. J. L. 556, particularly bottom of page 556, Decision of this Court with the opinion by Pitney, *J.*;

Wilkinson v. *Dodd*, 40 N. J. E. 123, particularly page 149, Decision of the Court of Chancery with the opinion by Bird, *V.-C.*;

Austin v. *Leer*, 101 N. J. L. 53, particularly at top of page 55, Decision of the Supreme Court, by Lloyd, *J.*, decided on the statute with the four months' limitation.

Arlington Realty Company v. *Gluck*, 98 N. J. E. 62, particularly at page 64, Decision

of the Court of Chancery, with opinion by Backes, *V.-C.*, decided on the statute with the four months' limitation.

It follows by force of the decisions, just referred to, that as the appellant, Mowre Lager, had not issued a summons within four months from the date of the last work done by him, and as there is no endorsement of the issuance of such summons upon the lien claim, that his lien claim abated, and was as effectually discharged as if it had been paid; from this, it also follows that the appellant, Mowre Lager, had no lien or encumbrance against the property, and is not therefore legally prejudiced by the entry of the decree which fails to accord him any right as an encumbrancer against the property.

There is still a further fatal objection against the claim of Mowre Lager as an encumbrancer, and such defect arises from the fact that this alleged lien claimant did not obtain a judgment within one year from the date of issuing a summons; obviously, no judgment was recoverable, because of his failure to institute a suit. We mention this objection because of the implied contention made by counsel for this appellant that it was unnecessary to procure such a judgment. The language of the statute, however, is explicit, and we quote only the salient provisions:

> "No debt shall be a lien * * * unless a lien claim is filed * * * within four (4) months from the date of the last work done or material furnished * * *; * * * *if such claimant shall fail to prosecute his claim diligently within one (1) year from the date issuing such summons, or such further time as the court may by order direct, such lien shall be discharged* * * *." 3 C. S. p. 3305, Sec. 18.

In passing upon this provision of the statute, this Court, speaking by Judge White, in *Buchanan & Smock Lumber Co.* v. *Dougherty,* 88 N. J. L. 356, said:

> "The clause in the Mechanics' Lien Act fixing the one-year period contemplates the reduction of the lien to judgment within that time, if diligent prosecution will accomplish that result. Until prosecuted to judgment, the lien is *ex parte* and arbitrary, and, in view of this extraordinary feature, and of the disadvantage under which the owner naturally labors in defending against a stale, unjust claim, founded upon a contract to the terms of which he is usually an entire stranger, THE ONE-YEAR LIMITATION PRESCRIBED BY THE ACT SHOULD BE STRICTLY ENFORCED, unless the claimant is able to set up a most excellent demonstration that it was, not only not because of any fault of his, but in spite of the exercise of at least ordinary diligence on his part, that he failed in that time to reduce his *ex parte* lien to the litigated lien embodied in a judgment. The burden is on the claimant to excuse his failure to get a judgment within one year. If he allows the year to pass without judgment, and without a court extension of time order procured within the year, he does so at his peril."
>
> *Buchanan & Smock Lumber Co.* v. *Dougherty,* 88 N. J. L. 356.

The language just quoted was repeated by this Court in its decision in *Gluck* v. *Ruiz-Urrutia, et al.,* 101 N. J. L. 558, with approval. The foregoing language was even still more recently repeated by this Court in *Hendrickson* v. *Frieland,* 8 A. R. 341, 150 Atl. 326 (not yet officially reported), the opinion being by Justice Parker where the words "should be strictly enforced" were italicized by the Court itself, and where the Court again held that THE FAILURE OF THE

LIEN CLAIMANT TO ENTER JUDGMENT WITHIN ONE YEAR EFFECTIVELY DISCHARGED THE LIEN CLAIM.

Counsel for the appellant, Mowre Lager, at the top of page 12 of his brief, attempts to distinguish the situation of Mowre Lager because he says that after the insolvency of the owner "the lien claimants were not obliged to proceed to judgments in order to preserve their statutory rights." Counsel for that appellant then cites *Ennis* v. *Eden Mills Paper Co.,* 65 N. J. L. 577, and *Doty* v. *Auditorium Pier Co.,* 56 Atl. 720, and 56 Atl. 732, as authority for his statement, without in any way, quoting from those opinions to show the basis of his contention.

It should be observed that this Court in *Hendrickson* v. *Frieland,* 8 A. R. 341, 150 Atl. 326 (not yet officially reported) has already decided that the Ennis case allows no such distinction to be drawn. We will, however, proceed to examine the cases cited by counsel for Mowre Lager to show that the cases so cited have no application to the case at bar, and are not authority for any such proposition as relied upon by appellant's counsel.

In *Ennis* v. *Eden Mills Paper Co.,* 65 N. J. L. 577, the fact was that the lien claimant filed his lien, issued his summons and complaint as required by the statute, but neglected to enter a judgment within one year, but obtained an order of the court, extending his time for the entry of judgment, and then entered a judgment on the lien. *None of these things, excepting the filing of the lien claim, was done in the case at bar by the lien claimant.* In the Ennis case, but not without eminent dissent on a view of the facts, this Court held (1) that "the appointment of the receiver in

this case did not *per se* stay the plaintiff's suit," (2) that as the receiver had *admitted* the correctness of plaintiff's lien claim, and had sold the premises, *subject to that lien claim,* with the purchaser taking with knowledge of that fact, such purchaser could not avail himself of the plaintiff's failure to enter a judgment on the lien claim within the one year, (3) that the plaintiff had acted with "due diligence" in the prosecution of the lien claim, as the statement of the facts in the prevailing opinion shows, and (4) the order extending the time for entry of judgment might be made after the expiration of the year. The dissenting opinion, written by Justice Dixon, stresses the necessity of the entry of judgment within one year, but questions the view of the prevailing majority of the Court that there had been "due diligence" in the prosecution of the claim during the year. *We stress the fact that nowhere in that opinion is there any expression justifying the view that a lien claimant may, upon the insolvency of the owner, abstain from instituting or prosecuting the case on his lien claim;* this Ennis case, therefore, is no authority for the appellant's contention, because the appellant did not even institute his suit, let alone prosecute any suit, diligently or otherwise; the Ennis case does not justify any failure to institute and to prosecute a suit, because a receiver has been appointed, but in fact, recognizes the necessity of prosecuting said suit, notwithstanding the appointment of such receiver. Such ruling is in line with the decisions which we have quoted in POINT II of this brief.

The other case, cited by the appellant, that is *Doty* v. *Auditorium Pier Co.*, 56 Atl. 720, not officially reported, affirmed by this Court in 56 Atl. 1132, not officially reported, is also no au-

thority for the appellant. As the affirming opinion is a *per curiam* opinion, merely affirming for the reasons given in the Court below, we refer particularly to the decision in the Court of Chancery. *In that case, the proceedings were for the distribution of funds in the hands of an insolvency receiver*, arising from the sale of the property subject to the lien. The receiver of the Auditorium Pier Co. was appointed on August 24, 1900. Later, on October 25, 1900, the claimant, Kelly, filed his lien claim in the proper county, properly verified, etc., and the claim was not contested "so far as the execution of the work done or the amount charged," but it was admitted "that the debt to the amount claimed is due Mr. Kelly." *The question was whether Kelly should have priority over other creditors claiming no lien.* The point made against the lien was that Kelly had not taken the requisite steps to perfect his lien by issuing a summons within four months after the lien was filed, and that the claim as presented to the receiver by Kelly was that of a general creditor, and not of a preferred creditor. Vice-Chancellor Bird upheld the claimant's right to priority and excused the absence of prosecution of the suit, saying "as no demand was made upon the claimant to pursue his remedy at law, I think that the power of decision and the duty to decide equitably was not varied by the difference of conditions." Of course, the Doty case is not the case at bar, because *in the case at bar we are not dealing with the question of a receiver's distribution, but we are concerned solely with the encumbrances against the property, this being a foreclosure case where the parties are entitled only because of their encumbrances against the property.*

The present suit is a foreclosure case. It is not a distribution of funds by a receiver of an insolvent company. The determination of the claims in the case at bar is governed by the evidence of valid and existing liens against the property as presented in this foreclosure suit, and as Mowre Lager had no encumbrance against the property, he cannot have any charge against the fund which is only its substitute.

On this branch of the case we submit that Mowre Lager has not been prejudiced by the decree as he had no valid mechanic's lien claim against the property in that

A. He did not institute suit on his lien claim within four (4) months;

B. He did not obtain a judgment within one year or at any other time;

C. The rules governing distribution of the fund are those applicable to a foreclosure case against the mortgaged premises; and

D. He was not prevented from a prosecution of his suit on his alleged lien claim (as shown by the cases cited in POINT II hereof), and has shown no legal or other excuse for his failure to prosecute a suit on the lien claim.

There seems to be some confusion among members of the bar (and also among some members of the lower bench) as to whether the appointment of a receiver obviates the necessity of prompt prosecution of a lien claim. This case, we think, affords a proper opportunity for this Court to make an authoritative declaration that IT IS THE RIGHT, AND DUTY, OF A MECHANIC'S LIEN CLAIMANT TO FILE HIS CLAIM, INSTITUTE SUIT, AND

PROMPTLY PROSECUTE SUCH SUIT, NOTWITHSTANDING THE APPOINTMENT OF A RECEIVER FOR THE BUILDER OR OWNER, AND NOTWITHSTANDING AN ADJUDICATION OF INSOLVENCY AGAINST SUCH BUILDER OR OWNER.

POINT IV.

Appellant, Mowre Lager, has not been prejudiced by the decree, because that appellant offered no sufficient testimony in support of the alleged lien claim.

We have, under POINT III, indicated why, as a matter of law, Mowre Lager had no valid and existing encumbrance against the mortgaged premises, and hence was not prejudiced by the Court's failure to allow him any part of the fund. There is an even more radical objection to Mowre Lager's claim, which arises from the fact that (assuming for argument's sake, his claim is in all other respects valid), he failed to prove that there was $3,000.00 due him, as claimed in the lien claim, or that his last work was done within four months prior to the filing of the lien claim.

The only witness called by Mowre Lager in support of his alleged lien claim was Jacob Starr. Starr's testimony starts at page 496 of the state of the case. That witness testified that Mowre Lager was a painter who was working "on the Cranford job" under an agreement to pay $5,500.00 for the painting work (state of case, bottom of page 496), and that the painting work had not been completed (state of case, page 497, line 13). An attempt was then made to elicit from that witness the reasonable value of the work performed by Lager (state of case, pages

497-502), *but such value was not testified to*, and the witness was withdrawn. What we have here stated, is *all the evidence* in support of Mowre Lager's alleged lien claim.

It is, of course, clear from the recital of the testimony which has just been summarized, and as we say which was all the testimony in the case, that Mowre Lager failed to prove the following essential requirements in order to sustain his status as a lien claimant:

A. That there was $3,000.00 unpaid and due to him.

B. That the last work done by him was within four months prior to the filing of the lien claim.

There was not, therefore, any basis for affording to Mowre Lager any part of the fund involved in this suit, and he cannot be heard to complain that the decree is erroneous in the absence of an affirmative showing on his part that he was entitled to any part of the fund.

Counsel for Mowre Lager (on page 4, line 20 of his brief) says that "It was conceded that $3,000.00 was the amount due this appellant," and refers to page 580 of the state of the case for such concession. This Court will find, by referring to page 580 of the state of the case, that the only evidential stipulation there made was that the lien claim might be offered "as proof of the *value* of the *work* actually *done* and *performed.*" Even with such proof in the case, *the proof is still lacking* that (first) $3,000.00 is due to Mowre Lager, and (second) that the last work done by him was done by him within four months prior to the filing of the lien claim. In the absence of this proof, there was no basis

for any distribution to Mowre Lager, and hence, he is not prejudiced by the decree.

POINT V.

The judgment at law recovered by Geo. F. Perry & Sons Inc. was res adjudicata on the matters therein determined, and cannot be collaterally assailed in the foreclosure suit by any lien claimant.

We have already (in paragraph 3 of our introductory statement of facts) pointed out the character and scope of the judgment recovered by Geo. F. Perry & Sons Inc. in the Union County Circuit Court.

A certified copy of the lien claim was received in evidence (state of case, top of page 364); a certified copy thereof is now printed in the state of the case, at pages 688-695). That lien claim shows an account of the materials sold and delivered, in the customary form, properly verified and with the statutory endorsements.

A certified copy of the judgment of Geo. F. Perry & Sons Inc. was received in evidence (state of case, top of page 364); a certified copy thereof is now printed in the state of the case, at pages 696-700.

NO EVIDENCE WAS OFFERED TO OVERCOME THE EFFECT OF THE JUDGMENT OF GEO. F. PERRY & SONS INC. NOR DID MOWRE LAGER EVEN ATTEMPT TO CONTROVERT OR ASSAIL THAT JUDGMENT.

This Court has already ruled that a judgment in a lawsuit, in a mechanic's lien action, is *res adjudicata* on the issues decided by the judgment at law, and that the issues so decided cannot again be litigated in a foreclosure suit in the

Court of Chancery. Thus, it appeared, in *People's Building & Loan Association of Ridgefield Park* v. *Vaniewsky, et ux.,* 85 E. 551, that one of the defendants in the action was a lien claimant, who had filed a lien against the mortgaged premises, had recovered a judgment generally against the builder and owner and specially against the lands and building, but "subject to the lien of the mortgages." When the foreclosure suit was instituted by the complainant in that cause, the lien claimant again tried to litigate the question of priorities as between him and the mortgagees. In reversing the action of the Chancery Court permitting such a course of conduct, this Court said:

> "This court held in Culvert *v.* Lieberman, 69 N. J. L. 341, 55 Atl. 812, that the purpose of this statute was to settle in a single suit the liens of all persons who have any interest in the property, and to determine, among other matters, 'What mortgage incumbrance is upon each piece of property, and the priorities between the mortgagees and the plaintiffs' special judgment.' * * * Upon these conditions the presumption must be that when the judgment was entered in the suit brought by the lien claimant, the defendant in this cause, adjudging that such judgment is subject to the lien of complainant's mortgage, that the trial court found that it was subject to the entire sum for which the mortgage was given. * * * Upon these circumstances, the judgment plaintiff is estopped from now denying the force and effect of the judgment entered by him * * *."
>
> *People's Building & Loan Ass'n of Ridgefield Park* v. *Vaniewsky, et ux.,* 85 E. 551.

Of course, whatever way the law judgment be, that is whether in favor of, or against the lien claimant, it is *res adjudicata.*

We do not find that the case just cited has in any way been overruled, criticized or in any way modified. We do find that it has been cited by this Court in *Bergenfield Printing Co.* v. *Intertype Corporation*, 7 A. R. 366, 144 Atl. 730, not yet officially reported.

It will be observed that in the court below, Mowre Lager filed an answer and counter-claim, jointly with other lien claimants (state of case, page 68, *et seq.*). By that answer, in paragraph 12 thereof (state of case, page 70, line 21), Mowre Lager stated that he had no knowledge or information as to the allegations of paragraph 20 of the bill of complaint *which set up the lien claim and the judgment recovered by Geo. F. Perry & Sons Inc.;* such answer merely required that proof of such allegations be made; such proof was made as we have already indicated. Furthermore, by that answer, no claim was made by Mowre Lager that his lien claim was prior to the Perry lien claim, and no claim was made by Mowre Lager for any special priority as against some smaller portion of the mortgaged premises; that answer and counter-claim were filed on April 21, 1928 (state of case, page 68, line 5), and it is singular to observe that it follows the answer and counter-claim of Geo. F. Perry & Sons Inc., which was filed on April 5, 1928 (state of case, page 78, line 5); in fact, the arrangement and verbiage are strangely similar and indicates that by his formal pleading, Mowre Lager intended not to question the lien claim and judgment of Geo. F. Perry & Sons Inc.

In the light of the foregoing, the Court of Chancery was bound to give Perry's lien claim and judgment full faith and credit against the asserted lien claim of Mowre Lager. The Court of

Chancery was bound to ignore Mowre Lager's change of position.

We therefore respectfully contend that the decision of the Court of Chancery in the case at bar upholding the priority of the lien claim and judgment of Geo. F. Perry & Sons Inc. was proper, because the Court of Chancery was bound to respect, as *res adjudicata,* the decision of the law court, in Perry's favor, which stood in its full force and vigor.

We have already indicated why, because of the nature of the answer filed by Mowre Lager, he was in no legal position to assail the validity of the lien claim and judgment of Geo. F. Perry & Sons Inc. By that answer, Mowre Lager did not deny the validity of Perry's judgment and lien claim for any reason, and yet, by way of argument, and collaterally, seeks to attack the validity of that judgment, relying on the case of *Morris County Bank* v. *Rockaway Manufacturing Company,* 16 N. J. E. 150, and *Jacobus* v. *Mutual Benefit Life Insurance Company,* 27 N. J. E. 604 (both cited on page 15 of Mowre Lager's brief) as his authority for doing so.

The Morris County Bank case arose in 1863, at a time when the statute had no provision for a controversy of the matters asserted by the claimant, as the plaintiff, by any person other than the builder and owner. Accordingly, it was held, and properly held, that a mortgagee, in a subsequent foreclosure suit, was not bound by the determination against the builder and owner, *because there was no provision in the then existing Mechanics' Lien Law by which the rights of the third party might be heard.* That situation has been completely altered because a mortgagee's rights can be heard in the lawsuit, his

rights determined in such suit, and for that reason, such determination becomes *res adjudicata* against the party who had a right to be heard; we refer to the change as exemplified particularly by the case of *People's Building & Loan Association of Ridgefield Park* v. *Vaniewsky, et ux.,* 85 N. J. E. 551, from which we have quoted at length above in this point. ANOTHER SIMILAR CHANGE HAS NOW OCCURRED IN THE PRESENT EXISTING MECHANICS' LIEN LAW, AND A LIEN CLAIMANT, DESIRING TO ASSAIL THE VALIDITY OF THE LIEN OF ANOTHER LIEN CLAIMANT, MUST DO SO IN THE MANNER AS NOW PROVIDED BY THE STATUTE. Section 29 of the Mechanics' Lien Law provides:

> "All lien claims * * * shall be concurrent liens * * * and shall be paid pro rata * * *, and for the purpose of distribution, the sheriff or other officer shall pay such proceeds to the clerk of said circuit court, to be by said court distributed among such claims filed, * * * and IF A CAVEAT BE FILED AGAINST SUCH CLAIM by the owner, or BY ANY CLAIMANT or claimants owning together one-third of the lien claims filed against such building, then not until such claim shall have been established by a special judgment thereon; * * *." 3 C. S., page 3311, Section 29.

In other words, machinery and procedure is now afforded, in proceedings at law on the lien itself, whereby one claimant may question the validity of the lien claim of another claimant, and where such an opportunity is afforded, the judgment may not be collaterally assailed by the lien claimant who has failed to take advantage of the statutory method. Under these circumstances, it seems clear that the principle of the Morris County Bank case is no longer applicable.

The Jacobus case also arose prior to the present existing statute. What we have said of the Morris County Bank case, in the preceding paragraph, is, therefore, necessarily applicable to the Jacobus case and will not be repeated.

The precise question as to the conclusiveness as between lien claimants, of a judgment recovered by one lien claimant was definitely settled, however, in *Hall* v. *Spaulding,* 40 N. J. L. 166, in an opinion by the Supreme Court. In that case, there were several lien claimants, some of whom questioned the right of other lien claimants, who had recovered a judgment, to share in the distribution of the fund resulting from the *fi. fa.* Incidentally, the lien claimants thus attacked, were lien claimants whose liens were defective because the statutory endorsement of the commencement of suit had not been made thereon. Such lien claimants had, however, recovered special judgments, and the question, therefore, squarely was whether the other lien claimants might attack the validity of the recovery of those special judgments, and thus prevent a pro rata distribution to them. The Court held:

> "The judgment of Matthews and Spence, for the purpose of distribution of the fund, is to be taken as conclusive evidence of the amount due to them, and of their right to share in the proceeds of the sale in the statutory proportion.
>
> "*It establishes, by the highest authority, that the claim is a lien upon the lands, and, until set aside, must be enforced according to its legal effect.* OTHER CLAIMANTS CANNOT AVER THAT THE LIEN DOES NOT EXIST AS ADJUDGED."
>
> *Hall* v. *Spaulding,* 40 N. J. L. 166, 168.

In the case of *Naylor* v. *Mettler,* 11 Atl. 859, not officially reported, which arose in the Court

of Chancery of our State, a situation is presented strikingly similar to that presented by the attempt of Mowre Lager in the case at bar. In the Naylor case, suit was brought for the foreclosure of a mortgage. Arneth, one of the judgment creditors had perfected his judgment on a mechanic's lien. Another judgment creditor, Cray, sought "to get rid of the effect of this judgment, under the Mechanics' Lien Law, not by showing that the materials furnished were not furnished prior to the recovery of his judgment, but by insisting that Arneth could not claim any benefit by his judgment by way of priority as against him (Cray) by simply offering the exemplified copy of the judgment," and further by insisting that "it was the duty of Arneth to offer all the proceedings which were required by the statute in order to justify the court in entering the judgment under the statute so as to make it a lien upon the lands in question." In disposing of these contentions, Vice-Chancellor Bird said:

> "The point thus made by the exceptants cannot be sustained. THE JUDGMENT IS CONCLUSIVE, and it need not be sustained by a reproduction of the proof, or any part of the proof, upon which it was originally founded. Since the matter has been so well considered in our courts in the case of Hall *v.* Spaulding, 40 N. J. Law 166, I need not enlarge upon the reasons of giving such efficacy to a judgment of a court of general jurisdiction." (Then follows a quotation from the Hall *v.* Spaulding case which we have already given.) Naylor *v.* Mettler, 11 Atl. 859, not officially reported.

We have searched diligently and do not find any reversal or modification of the principles enunciated in the Hall case and in the Naylor case, and as these decisions have stood for over

half a century, it must be concluded that they represent the settled law of this State that *one lien claimant cannot attack the judgment recovered by another lien claimant,* and that Mowre Lager cannot, in the case at bar, do so.

POINT VI.

The Decree below is correct in not limiting the curtilage to the so-called "Middle" Tract.

Commencing at page 16 of his brief, under POINT III thereof, counsel for Mowre Lager, takes up an elaborate discussion that the Chancellor should have allocated the premises into separate divisions, and should have restricted the lien claimants to the so-called "middle" tract. Such argument proceeds on Mowre Lager's counsel's *mistaken assumption* that "the large tract of land was divided, considered and treated by the owner, the defendant Capital Construction Co., Inc., as three separate parcels before the commencement of the erection of the apartment house upon the middle tract." On this question, after reviewing the evidence, the Court of Chancery, in the case at bar, said:

> "The whole tract was treated by the owner as one parcel until the Junction Milling Company demanded a mortgage on the side pieces. This was several months after the erection of the building had commenced. Up to the time of the sale of the property in this suit, there were no fences or other physical signs of a division of the tract. During construction work, it was all used indiscriminately for the handling of material. The whole adds to the convenient and beneficial use of the apartment house and doubtless enables higher rentals to be had than could otherwise be obtained. I find that the entire tract is the curtilage subject to the liens describing it."

That this conclusion of the Court of Chancery is correct is plain from a consideration of the following appearing in the state of the case:

A. Capital Construction Co. bought the mortgaged premises, as one tract, on May 25, 1927 (state of case, page 26, lines 30-38).

B. The mortgaged premises, as one tract, were subject to a $21,000.00 mortgage, held by Riverside Apartment Corporation (state of case, pages 24-25).

C. The mortgaged premises, as one tract, were subject to a $30,000.00 mortgage held by Riverside Apartment Corporation (state of case, bottom of page 25, top of page 26).

D. The construction of the building was commenced prior to April 10, 1927 (brief of Junction Milling Company, page 1, line 7).

E. The mortgaged premises, as one tract, were further mortgaged to Shilowitz & Tucker on July 9, 1927 (state of case, page 27, lines 15-25; also that mortgage as an exhibit, state of case, page 658, *et seq.*).

F. The mortgaged premises, as one tract, were further mortgaged to West Bergen Trust Company on October 25, 1927 (state of case, page 28, lines 25-35; also that mortgage as an exhibit, state of case, page 874, *et seq.*).

G. Louis Moore, the plumbing contractor, who worked on the building from the start to the completion of the building, says that there was no physical separation of the tract into separate divisions, that it appeared that the building lot was just the one tract as an entirety, that there was nothing on the ground to show any division into separate tracts, and that the materials were all over the entire tract (state of case, page 429).

H. John W. Heins, a relator, not otherwise interested in the case, testified that there was nothing to indicate that there were three separate building parcels (state of case, page 522, lines 15-20).

I. Harry Starr, one of the officers of Capital Construction Company, testified that the building was started in May 1927 (state of case, page 393, line 15), that in September 1927 the building was up to, or beyond, the roof (state of case, page 319, line 23), that the plot had not been fenced in, and that there was no physical separation between one plot and another (state of case, page 394, lines 20-25), that building material was strewn all over the land (state of case, top of page 394), that no division into parcels was ever called to the attention of any materialmen (state of case, page 394, line 35), and that IT IS UNDENIED THAT THE SURVEY OF JUNE 11, 1927, CALLED FOR ONLY ONE PLOT (state of case, page 398, line 15).

J. MOWRE LAGER, THE PRESENT APPELLANT HIMSELF, FILED A LIEN AGAINST THE ENTIRE MORTGAGED PREMISES, AND NOT MERELY THE MIDDLE PORTION, IN MARCH 1928 (his counsel's brief, page 4, line 16), AND FILED HIS COUNTER-CLAIM ON SUCH LIEN (state of case, page 68, *et seq.*).

In the light of this testimony, there was no room logically to hold otherwise than that the "curtilage" was equivalent to the entire mortgaged premises and not some undivided portion thereof. It is, of course, true that counsel for Mowre Lager refers to Exhibit 82, printed opposite page 752 of the state of the case, but

that survey was made on SEPTEMBER 8, 1927, which was, of course, long after the building was commenced and our materials had been furnished. Furthermore there is no proof that such plan was ever filed, and, if so, when or where it was filed; necessarily, of course, if at all filed, it was filed long after the right to the lien had attached. On the facts of the case, therefore, there was no justification for any attempt to limit the curtilage whereon the lien claim was to attach to some undivided portion of the entire tract.

Counsel for Mowre Lager apparently loses sight of the fact that as to Perry the question of the curtilage also is *res adjudicata* by reason of the judgment recovered by Perry in the Union County Circuit Court in the lien claim suit. The court will find, by referring to the certified copy of that judgment, that the curtilage to which the *lien of the judgment* attaches is SPECIFICALLY AND BY ACTUAL DESCRIPTION, the entire mortgaged premises and not some undivided portion thereof (see particularly state of the case, page 697). That judgment is *res adjudicata,* as we have heretofore pointed out, and no collateral attack can be made by Mowre Lager against any fact found by that judgment.

Counsel for Mowre Lager, in taking the position that the premises should be divided into three tracts, also loses sight of the fact, that *in this very case,* the mortgaged premises were sold *as one parcel,* and there is not one word in the record indicating that such method of sale was objected to by Mowre Lager (see orders on pages 193 and 198 of the state of the case). Those orders were made in April 1928, *and were not appealed from.* Counsel for appellant

Mowre Lager, would now have the Court of Chancery, in effect, change the orders for sale *pendente lite,* which directed that the liens shall attach to the funds in the same manner as was the mortgaged property at the time of the sale, notwithstanding that the time for appealing from the orders directing sale, etc., has long expired, and had long expired at the time of the hearing and decree in the case at bar. This Court, in *Nash* v. *Leiderman & Nash Building Co.,* 103 N. J. E. 287, speaking by the late Justice Katzenbach, ruled that the Court of Chancery had no power, after the time for appeal has expired, to modify an earlier order protecting the rights of a lien claimant, and accordingly reversed an order of the Court of Chancery which attempted such a modification. In that case, this Court, speaking by Justice Katzenbach, said:

> "This court has frequently held that to procure a reversal, alteration, or explanation of a decree in a former suit, it must be by a bill of review where the decree has been signed and enrolled. This applies equally to an order settling rights of those who are parties to the litigation. Although there is no express statutory limitation as to the filing of bills of review, the analogous limitation of the right of appeal governs, except in case of new or newly discovered matter."
>
> *Nash* v. *Leiderman & Nash Building Co.,* 103 N. J. E. 287.

Of course, these principles are applicable to the case at bar. The orders for sale *pendente lite* made in April 1928 directed the sale of *one parcel* (state of case, page 195), and further directed that the proceeds of such sale should be "subject to the same liens and equities of all parties in interest, as were the said mortgaged lands and premises" (state of case, page 197, lines 15-20).

In April 1928, when those orders were made, Perry had a lien claim and lien judgment against those lands and premises, as one tract and not some special section thereof. No appeal was filed from those orders, which definitely settled the rights of the parties to the litigation (exactly as had been done by the earlier order in the Nash case, cited *supra*), and yet Mowre Lager's counsel at this late date (or even as of the date of the hearing or the order of distribution below), all subsequent to one year after April 1928, seeks an order or decree *unsettling the prior order.* Such course of procedure was reversed by this Court in the Nash case where it had been actually done by the Court of Chancery, and should not be countenanced in this case, where Mowre Lager urges that it be done.

Counsel for Mowre Lager has devoted considerable space in elaboration of his contention that a lien cannot be had on a tract of more than half an acre, basing his contention on a forced construction of Section 21 of the Mechanic's Lien Act. Passing for the moment the propriety of Mowre Lager assailing Perry on this score, in the face of the law adjudication in favor of Perry, we will proceed to show that this statutory limitation (as to area) has no application to the facts at bar.

The present Section 21 of the Mechanic's Lien Act has been in effect since 1863. The original enactment was Section 3 of Chapter 144 P. L. 1863, page 275. Ever since such enactment, our Courts have held that the "half acre" limitation does not apply to a situation similar to the case at bar. Only a few of the decisions, however, will be quoted, *and we stress the fact that all decisions which we quote, or refer to, have been decided since the statute has been in force.*

Gerard v. *Birch,* 28 N. J. E. 317, a decision of the Court of Chancery, with the opinion by Chancellor Runyon, upholding a lien on a tract, fronting on three streets, the lot dimensions being 500′ x 450′, obviously more than half an acre. Counsel for Junction Milling has cited this case, at the top of page 20 of his brief, in the mistaken assumption that it was authority for his view. This is not so, because the injunction allowed to the complainant in the cited case against the defendant, Birch, the lien claimant, was to prevent the latter from selling property in addition to that which the Court found to be the proper curtilage. As we have indicated, Chancellor Runyon approved a curtilage of approximately two hundred and five thousand (205,000) square feet; in the case at bar, the area of the land is less. In the case at bar, the building itself has a ground area of one-quarter acre. If Exhibit 82 is considered, in the light of the fact that the building erected upon the plot is a fashionable apartment house, requiring driveways, play space and the breathing space afforded by a suburban community, with intended high-rental value, it can hardly be said that the entire plot is not a proper "curtilage"; certainly, the Vice-Chancellor's finding of fact, on that score, should not be disturbed.

James v. *Van Horn,* 39 N. J. L. 353, a decision of the Supreme Court, with the opinion by Justice Reed, upholding a lien on a tract, *of fifty acres;* while there was a reversal of the judgment below, in that case, it was *not* based upon the alleged error of allowing a lien against the tract of fifty acres.

American Brick & Tile Co. v. *Drinkhouse,* 59 N. J. L. 462, a decision of this Court, with the opinion by Justice Dixon, apparently approving

a curtilage of more than half an acre, and further holding that the extent of the curtilage was a matter of fact to be settled by the trial court.

Federal Trust Co. v. *Guigues,* 76 N. J. E. 495, a decision of the Court of Chancery, with the opinion by Vice-Chancellor Howell, where, even after excluding a dock which he did not consider to be appurtenant to the dwelling house, nevertheless, apparently approved a curtilage of over half an acre because he held that Section 21 "does not apply to the case." The size of the lot does not definitely appear in the opinion, but from the language of the Court, the plot must have exceeded one-half acre, being bounded by three streets.

In *Raab* v. *W. P. Ellison Inc.,* 89 N. J. L. 416, a lien claim was filed against the grand stand, club house and baseball park of the Newark Baseball Club. Obviously, and as we think the states of the case in this Court will show the area was several acres in extent. The Supreme Court, with the opinion by Justice Trenchard, allowed the lien, *sub silentio,* approving the extent of the area involved. This Court affirmed the Supreme Court decision; the affirming opinion is reported in 90 N. J. L. 716.

We do not find anything in the brief of Mowre Lager which indicates that the decisions above quoted as in any way incorrect. Our own examination indicates that they have neither been modified nor overruled, and we submit that they are dispositive of the law on the subject, and that in our favor.

Counsel for Mowre Lager (it seems clear to us) has entirely misconceived the ruling in the case of *Board* v. *Freedman,* 99 N. J. E. 351, 131 Atl. 913, referred to at the top of page 21 of his

brief, and quoted from by him. In that cited case, this Court held that a lien claim against *several buildings* must apportion the claim, pursuant to Section 22 of the Mechanic's Lien Law, in proportion to the value of the materials going into each of the buildings; that case had nothing to do with the question of the area of the curtilage to be embraced by a lien claim. We, therefore, contend that the cited case (and the cases therein cited) affords no authority to Mowre Lager.

Summing up our argument under this point of our brief, we contend that the decree below is correct in not limiting the curtilage to the so-called "middle" tract, because

A. The mortgaged premises were always treated by the owner, the mortgagees and the lien claimants, as one single parcel all of which was necessary to the reasonable enjoyment of the one building thereon erected;

B. As to Perry, the law judgment of Perry was *res adjudicata* on the area embraced by the lien, and Mowre Lager cannot collaterally assail that judgment;

C. The order of the Court of Chancery, in the case at bar, directed the sale of the premises as one parcel, and as such order was made in April 1928, and never modified or reversed, the Court of Chancery has no power, more than one year after the entry of that order, to modify it, or otherwise "unsettle" the rights settled by the previous order;

D. The adjudications of our Court establish the right to a lien on an area of more than one-half acre, and a finding of fact that the "curtilage" embraces more than one-half acre will not be disturbed;

E. The adjudications requiring an "apportionment" of the debt of a lien claim apply only in a case when more than one building is erected upon the lands of the owner and have no application to the case at bar where there was but one building erected upon the curtilage.

Mowre Lager's attack upon the curtilage, as established for Perry, is not sincere, as it seems to us. MOWRE LAGER HIMSELF FILED A LIEN CLAIM AGAINST THE ENTIRE TRACT AND NOT SOME SMALL PORTION THEREOF (state of case, page 886, and particularly at page 887; also his counsel's brief, page 4, line 16). That lien claim was filed on February 21, 1928. About a year and a half later, on September 7, 1929, that alleged lien claimant procured an order limiting the curtilage of his alleged lien claim to the so-called "middle" tract (state of case, page 893; his counsel's brief, page 4, line 18). Such change was due to the fact that, in the Court below, counsel for Mowre Lager was also counsel for Junction Milling Company, and the last named company attempted to procure a mortgage encumbrance on the so-called "middle" tract; the alleged mortgage of Junction Milling Company was dated September 16, 1927 (state of case, page 804). The inference is plain, we think, that counsel acting for Junction Milling Company, and in an attempt to procure a valid mortgage for it, such counsel being also counsel for Mowre Lager, reduced the amount of the curtilage *originally claimed* by Mowre Lager, and this was done only in an attempt to help Junction Milling Company. The dates above given are significant. We think this circumstance also explains the conclusion of the present counsel for Mowre Lager (at page

33 of his brief), in effect depriving Mowre Lager of rights which he might otherwise have obtained as a lien claimant, and conceding such rights to the Junction Milling Company.

The position of our client has never changed, and has always been that the curtilage is the entire mortgaged premises and not the so-called "middle" tract.

POINT VII.

The Final Decree, in upholding the priority of Perry's lien is correct.

Counsel for Mowre Lager, as POINT IV in his brief, attempts to argue that the decree is erroneous in failing to adjudge that his lien claim is prior to the others as well as Perry's. We do not represent any other lien claimant excepting Perry, and we are not concerned in establishing the validity of such other liens as against Mowre Lager. However, *what we have heretofore said in this brief fully establishes that Perry's lien claim and judgment are prior to the alleged lien of Lager, and the argument in support of this position will, therefore, not be repeated.*

As a matter of fact, the decree below does not give to Perry the full priority to which it is entitled, but that is a matter which is not the subject of complaint by Mowre Lager. The Court of Chancery was obliged to marshal the liens in accordance with the principles laid down in *Hoag* v. *Sayre,* 33 N. J. E. 552, decided by this Court in 1881, and never reversed but recently approved, by this Court, in *Albert & Kernahan Inc.* v. *Franklin Arms Inc.*, 7 A. R. 717, 146 Atl. 215, not yet officially reported. The Court below was

properly obliged to follow the reasoning and logic of *Meister* v. *J. Meister Inc.*, 103 N. J. E. 78, the opinion being by Vice-Chancellor Berry. In the case at bar, the marshalling of the liens made the complicated distribution necessary, because, the lien claim and judgment of Geo. F. Perry & Sons Inc. are entitled to a priority, different from that to be accorded to the other lien claimants, because all the others had, by voluntary act, changed their ordinary priorities, but Geo. F. Perry & Sons Inc. did not.

We also observe that the opinion in the case below has been cited by this Court in *Feinberg* v. *Building Construction Company,* case No. 99, at October Term, 1930, not yet reported.

Mowre Lager's argument also overlooks the essential outstanding fact that PERRY WAS ENTITLED TO SECURE THE PRIORITY ACCORDED TO IT BY ITS JUDGMENT, and that no other lien claimant, as far as we know, established such priority. There is, however, an even more significant fact why Perry should not be relegated to the position of other lien claimants, if they are to be subordinated, and that fact is that PERRY ALONE NEVER POSTPONED ITS LIEN IN FAVOR OF ANY MORTGAGES WHILE THE OTHER LIEN CLAIMANTS DID IN FACT EXECUTE SUCH POSTPONEMENTS, OR ADMITTED THEIR INFERIORITY. The following is a recapitulation where such subordination is to be found:

Junction Milling Co. (state of case, page 723, line 30).

MOWRE LAGER (STATE OF CASE, PAGE 497, LINES 20-32).

Max Platt (state of case, page 422, lines 18-20; also page 723, line 13).

Ira R. Crouse (state of case, page 423, lines 25-30).

Louis Moore (state of case, page 725, line 33; also page 424, line 29).

Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co. (state of case, page 723, line 11; also page 529, line 12).

A. S. Reid & Co. (state of case, page 422, line 22; also page 723, line 25).

Joseph Machetto (state of case, page 722, line 40).

E. W. Booth & Bro. (state of case, p. 723, line 18).

Alpheus S. VanWoeart (state of case, page 723, line 1).

Venango Stone Company (state of case, page 723, line 3).

Roderick M. Crockett (state of case, page 723, line 6).

John Nicaretta (state of case, page 722, line 35).

In this case, therefore, with the other lien claimants, AND PARTICULARLY LAGER, by voluntary stipulation postponing their lien claims in favor of mortgages, we find that *Geo. F. Perry & Sons Inc. did not do so.* PERRY IS NOT TO BE RELEGATED TO THE INFERIOR POSITION OF SUCH LIEN CLAIMANTS, BUT IS RATHER TO BE ACCORDED THE SUPERIOR POSITION TO WHICH IT IS ENTITLED, AS A MATTER OF LAW, AND WHICH IT NEVER SURRENDERED. It is for this reason that the Chancellor had to differentiate in the priorities allowed to Geo. F. Perry & Sons Inc., from the priorities allowed to the other, but voluntarily-subordinating, lien claimants. To place Perry in the same position

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with the other lien claimants, who received consideration for their subordinations, would manifestly be unjust to Perry. In any event, Mowre Lager, not being in the position of a valid lien claimant, cannot argue as if he were such.

At all events, and irrespective of the positions of the mortgagees or other alleged lien claimants, or of their priorities, Perry's lien claim and judgment are prior to the alleged lien of Mowre Lager, as he postponed his lien.

On page 32 of its brief, Mowre Lager concedes the validity of the lien claim of Max Platt. Such concession, it seems to us, is due to the fact that counsel for Mowre Lager is also counsel for Max Platt. We intend to submit a separate brief, showing the invalidity of the alleged lien of Max Platt, but are now calling this Court's attention to our position so that sanction for the concession of Mowre Lager (as made in his brief) may not appear to arise from our silence.

CONCLUSION.

It is our opinion that the decree below should be affirmed.

We recognize that other lien claimants (who may not appear before this Court), and lien claimants who do not enjoy the same status as our client (particularly because of failure of proof and because of their voluntary subordinations of lien), may not justify the decree as to them. If this Court should modify the decree below, as to other parties, such modification ought to include the provision that Geo. F. Perry & Sons Inc. is to receive payment of the entire judgment and interest, and counsel fees, due it, before Mowre Lager shall be entitled to the pay-

ment of any part of the fund, if at all entitled, because clearly Perry's lien and judgment are prior to the alleged encumbrance of the appellant, Mowre Lager.

Respectfully submitted,

KANTER & KANTER,
Counsel of Geo. F. Perry & Sons Inc.,
Defendant-Appellee.

ELIAS A. KANTER,
Of Counsel.

35 OCT.T.1931

New Jersey Court of Errors and Appeals

Between: RIVERSIDE APARTMENT CORPORATION, a corporation, Complainant, *and* CAPITAL CONSTRUCTION CO., INC., et al., Defendants.	On Appeal of Mowre Lager and Max Platt

ANSWERING BRIEF OF A. S. REID & CO.

Facts.

On or about March 3, 1928, after having obtained leave of the Court of Chancery, the complainant filed its bill in the Court of Chancery, for the foreclosure of two mortgages encumbering certain premises situated in the Township of Cranford, County of Union and State of New Jersey. Prior to the filing of the bill of complaint, receivers had been appointed for the defendant, Capital Construction Co., Inc., and permission to join the receivers as defendants in the foreclosure suit had been given by the aforementioned order. The premises in question were also encumbered by several additional mortgages, as well as with mechanics' liens and judgments, and all such mortgagees, mechanics' lien creditors and

judgment creditors were made defendants in the foreclosure suit.

On petition of the complainant, filed March 27, 1928 (Case, p. 185), the Court of Chancery ordered a sale of the mortgaged premises, pendente lite (Case, pp. 193-197). The premises were sold by the Sheriff of Union County on May 23, 1928 (Case, pp. 200-201), the sale was confirmed by the Chancellor on June 4, 1928 (Case, p. 202), and the Sheriff paid to the Clerk of the Court the sum of $140,777, being the amount of the bid, together with interest, less Sheriff's Fees (Case, pp. 203-204).

After issue had been joined and upon due notice, the cause was referred on June 5, 1928, to the late Honorable John Bentley, Vice Chancellor, for hearing and determination (Case, p. 205). The late Vice Chancellor designated July 12, 1928, as the time for the hearing of said cause and on said date an order was made (Case, p. 212), directing the Clerk of the Court of Chancery to pay complainant's decree, costs and counsel fee, amounting to $57,957.75, leaving on deposit with the Clerk of said Court, a balance of $82,819.25, with accrued interest. On May 14, 1929, by order of that date (Case, p. 215), the cause was referred to John Milton, Esq., as Special Master, and after said Special Master had decided that he was unwilling to act because of his prior knowledge of the case, an order was made, on June 13, 1929 (Case, p. 216), substituting Aloysius McMahon, Esq., as Special Master in the place and stead of John Milton, Esq. On November 25, 1929 (Case, p. 218), by order of that date, the Clerk of the Court of Chancery was directed to pay out of the funds in his hands the expenses and disbursements of the Receivers of Capital Construction Co., Inc.,

the fees of the receivers, and of counsel for complainant and defendant in the insolvency proceedings, amounting to $11,876.72, leaving a balance in the hands of said Clerk of $70,951.53, with accrued interest.

On June 13, 1929, Special Master McMahon, by Master's Summons bearing that date (Case, p. 217), ordered the defendants to appear before him on June 25, 1929, at which time he would proceed to ascertain and report the amount due the various parties defendant. After several continuations of this hearing, the Master filed his report on October 15, 1930 (Case, pp. 219-225).

Several defendants having filed exceptions to the Master's Report and an order having been made referring the cause to Honorable John Bigelow, Vice Chancellor (Case, p. 252), the cause came on for hearing before Vice Chancellor Bigelow on exceptions to the Master's Report on December 4, 1930, and on December 26, 1930, the Vice Chancellor filed his opinion overruling and setting aside a portion of the Master's Report (Case, pp. 255-278). On January 23, 1931, a final decree was advised by Vice Chancellor Bigelow (Case, pp. 280-284), from the whole and every part of which the appellants, Mowre Lager and Max Platt, have appealed, alleging in their brief filed with this Court that said decree is erroneous for the following reasons:

1. The final decree is erroneous because it does not adjudicate the rights of the parties.

2. The final decree is erroneous because it failed to adjudge that the judgments of George F. Perry & Sons and A. S. Reid & Co., entered after these creditors were enjoined from proceeding, were not conclusive on the parties.

3. The final decree is erroneous in that it fails to adjudge that the curtilage upon which the building was erected was limited to the middle tract.

4. The final decree is erroneous in that it fails to adjudge that the lien claims of appellants, Mowre Lager and Max Platt, are entitled to priority over all other mechanics' lien claims.

5. The final decree is erroneous because it fails to adjudge that the lien claims of the appellants, Mowre Lager and Max Platt, are prior to the mortgage of the West Bergen Trust Company, as to the apartment house and its curtilage.

6. The final decree is erroneous in failing to direct payment of the lien claims of appellants, Mowre Lager and Max Platt after payment of the mortgages of Shilowitz and Tucker, Carteret Company and Junction Milling Company, and before any other lien claims were paid.

Mowre Lager and Max Platt are two of four defendants who have appealed from the decree of the Court below. The four appellants have joined in printing one State of the Case, but have filed three separate briefs, and this respondent, A. S. Reid & Co., deems it advisable to file a separate brief in answer to the three briefs filed by the four appellants.

POINT I.

The final decree is not erroneous by reason of its failure to adjudicate the rights of the parties.

It has already been shown that the premises were sold by the Sheriff of Union County, pendente lite (Case, pp. 119-202), and the fund paid to the Clerk of the Court of Chancery was substituted for the premises. The several defendants, whether mortgagees, judgment creditors or mechanics' lien creditors, looked to this fund as a source for the payment of their respective claims. The fund had been depleted by payments ordered by the Court of Chancery and at the time of the entry of the final decree, it amounted to approximately $40,000.00. This sum was entirely inadequate for the payment of the claims of the several creditors and it became necessary for the Vice Chancellor, in passing upon the correctness of the report of the Special Master, to determine the amounts due to the various parties and the order of priority of their claims. It is evident from an examination of the opinion of the Vice Chancellor (Case, pp. 255-278), that the order of distribution advised by the Vice Chancellor (Case, p. 278), could not have been arrived at without a determination of the amounts due and the order of priority.

The appellants, Mowre Lager and Max Platt, are, therefore, merely raising a technical objection to the language of the decree and certainly are not attacking and cannot attack the reasons which prompted the Court below in reaching the conclusions embraced in its opinion. It is fundamental law that this Court will not reverse the Court below where the reasoning of the Court

was correct, even if the language of the order or decree which is the embodiment of that reasoning may be improperly framed. See *Chauinger* v. *Apter,* 96 N. J. E. 302, in which this Court modified the decree of the Court below because the reasons for the decree were proper. This Court said: "The Court will examine the opinion of the Court below, filed pursuant to the requirement of our State Constitution (Article 6, Section 2, paragraph 5), that 'when an appeal from an order or decree shall be heard, the Chancellor shall inform the Court, in writing, of the reasons for his order or decree,' and such opinion will be examined even though it was filed after the appeal was taken."

The same conclusion was reached by this Court in the case of *McMichael* v. *Horay,* 90 N. J. L. 142, also *Meisel* v. *Merchant's National Bank of Newark,* 85 N. J. L. 253, *Delker* v. *Board,* 90 N. J. L. 473, *Beach* v. *Palisade Realty & Amusement Co.,* 86 N. J. L. 238, *McCarty* v. *Town of West Hoboken,* 93 N. J. L. 247 and *Kleinert* v. *Hutchinson,* 98 N. J. L. 831. In the case of *Delker* v. *Board,* supra, this Court held that if the judgment of the lower Court varies from its decision, the cause may be remanded to the lower Court, so that the judgment may be corrected by amendment in that Court. In *McCarty* v. *Town of West Hoboken, supra,* the Court held that the propriety of the judicial action of the Court below and the soundness of the reason which prompted it, is the cause for determination upon review in an Appellate Court, and that if the Court below reached a right conclusion, even if upon a wrong reason, the judgment should not be disturbed.

Counsel for the appellants cites *Beall* v. *New York and New Jersey Water Co.,* 87 N. J. Eq. 390,

in support of his contention that the decree below should have adjudicated the amounts due to the various parties. This case does not support appellants' contention, but, on the contrary, is authority for the proposition that "there should be an adjudication in a decree of the rights to which a party or parties are entitled." It is perfectly obvious that since none of the creditors had a lien on real estate but, due to its sale by the Sheriff, could merely hope to participate in the fund in the Court of Chancery, that it was useless and superfluous for the Vice Chancellor to determine the order and priority of the several encumbrances. By determining the order of distribution of the fund, a similar result was reached. The order of distribution could not have been arrived at without determining the order in which the several creditors were entitled to share in the fund.

Even though it be a fact that the final decree of the Court of Chancery did not specifically contain a reference as to the amount due to the various parties for principal and interest and the order and priority of their several encumbrances, the failure of the Court to include such provisions was not error resulting in harm to these appellants, if it be a fact (which this respondent denies) that failure to include such matters in the decree results in error. This respondent most respectfully urges that this Court has ample jurisdiction and the necessary power to order a modification of the decree and that such error does not and should not result in a reversal of the decree, it being evident that the Court below came to the correct conclusion as to the distribution of the fund out of which the claims of the several defendants are to be paid.

New Jersey State Library

POINT II.

The final decree is not erroneous because it failed to adjudge that the judgments of Geo. F. Perry & Sons, Inc., and A. S. Reid & Co., were not conclusive on the parties.

Appellants, under Point II of their brief, attempt to assail the validity of the Perry and Reid judgments by collateral attack. It has been firmly established by the decisions of the Courts of this State through a long period of years that a judgment of a Court of general jurisdiction, having jurisdiction of the subject matter and person of the defendant, is invincible against collateral attack. *Diehl* v. *Page,* 3 N. J. Eq. 143; *National Docks, etc., R. Co.* v. *Pennsylvania R. Co.,* 52 N. J. Eq. 58; *Inskeep* v. *Lecony,* 1 N. J. L. 111; *Vandyke* v. *Bastedo,* 15 N. J. L. 224; *Podesta* v. *Binns,* 69 N. J. Eq. 387; *Palmer* v. *Board,* 77 N. J. L. 143; *Crawford* v. *Less,* 84 N. J. Eq. 324. It cannot be denied that the Union County Circuit Court had jurisdiction of both the subject matter and person of the defendant in the mechanics' lien action instituted therein by A. S. Reid & Co. The Mechanics' Lien Act confers jurisdiction upon Circuit Courts (Section 23).

Appellants emphasize the fact that the Perry and Reid judgments were entered after the entry of an order for the appointment of receivers of Capital Construction Co., Inc., and after the creditors of said corporation were restrained by said order from proceeding with the enforcement of their claims. That the Reid Company was within its rights in pursuing its mechanics' lien suit to judgment has been established by the

Supreme Court in the case of *Crane* v. *Brighton Mills,* 98 N. J. L. 308. It is true, as appellants allege, that in the *Crane* case, the contractor, and not the owner, was adjudged to be insolvent. This fact cannot alter the principle of law enunciated by the present Chief Justice, speaking for the Supreme Court, in the *Crane* case. The principle of law clearly laid down in this decision is that notwithstanding the provisions of Section 2 of the Supplement of 1919 to the Corporation Act (p. 455), the purpose of the Mechanics' Lien Law is to permit the materialman or laborer to recover judgment, "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."

Aside from the intention of the Courts to give efficacy to both the Mechanics' Lien Law and the Corporation Act, as expressed in the decision in the *Crane* case, it has been held by this Court in the case of *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." The *Taylor* case was cited with approval in the *Crane* case and the portion herein quoted was quoted by Chief Justice Gummere in the decision of the Supreme Court in the *Crane* case.

Appellants also allege in their brief that they were prevented by the order of the Court of Chancery, appointing receivers for Capital Construction Co., Inc., from defending the Perry and Reid suits in the Union County Circuit Court. Assuming, but not admitting, that Reid was re-

strained by said order from prosecuting its suit to judgment, there was no provision in the restraining order denying to creditors of Capital Construction Co., Inc., the right to defend any actions in which said creditors were interested. Such a provision would have been most unusual and beyond the scope of the order appointing receivers and restraining creditors. In addition, there is no ample proof before this Court, nor was there before the Court below, that Reid was actually restrained from prosecuting its suit. The only proof that Reid had knowledge of the existence of such a restraining order was contained in an affidavit filed in the Insolvency Proceedings (Case, p. 300), in which it is alleged that an employee of the office of the firm of Milberg and Milberg "caused a copy of the attached order appointing receiver, to be sent to the creditors of the above named defendant corporation by placing the said order appointing receiver in an envelope properly addressed with the postage prepaid thereon, and deposited same in the United States Mail Box No. 1, Exchange Place, Jersey City, N. J." The affidavit does not contain the names of the creditors to whom the order was mailed, nor does the deponent make oath to the effect that she personally mailed the order. She merely claims that she "caused a copy to be sent." It is submitted that the affidavit of mailing is insufficient to prove that Reid was served with or had knowledge of an order of the Court of Chancery restraining the prosecution of its suit, even if service with and knowledge of said order were sufficient to prevent the entry of a judgment on the mechanics' lien suit.

The State of the Case as printed by the four appellants is confusing in that there are included

a number of pleadings and orders of the Court of Chancery in the suit entitled: Ralph Cianfrone, et al., trading as *Venango Stone Company* v. *Capital Construction Co., Inc.* This suit was instituted by a creditor of the Capital Company for the purpose of procuring an adjudication of the insolvency of the Capital Company and the appointment of receivers. The present action, from a decision in which appeals have been taken to this Court, is entirely foreign to the bill filed in the *Cianfrone* case. The pleadings in the latter case were not offered in evidence and do not rightfully belong in the State of the Case. It is also to be noted that the receivers of the Capital Construction Co., Inc., have not in this action nor in any other suit, objected to the entry of the Reid judgment, nor have they claimed that the creditors or stockholders of the insolvent corporation have been prejudiced or injured by the entry of said judgment.

Appellants also argue that the judgments of Perry and Reid were not entitled to priority because the lien claims upon which they were based were absolutely void, and cites *Morris County Bank* v. *Rockaway Manufacturing Co.*, 16 N. J. Eq. 150, to support the argument. The case cited cannot be used in support of appellants' argument, because the facts in the two cases are entirely dissimilar. In the *Rockaway Manufacturing Co.* case, there was more than one building and the lienor filed a single lien claim, failing to apportion among the buildings the several claims arising out of the furnishing of materials to each. In the case at bar, there was a single building covering a curtilage which the Court below found to be the same as the curtilage described in the lien claims of Perry, Reid and the other lien

claimants, with the exception of the appellants, Mowre Lager and Max Platt. Reid did not furnish materials to any building except the apartment house which was being constructed by Capital Construction Co., Inc., and it was not only impossible, but unnecessary, to attempt to apportion its claim. Its failure to do so, therefore, cannot render its claim void and result in the lack of priority which the Court below found had been obtained over the claims of these appellants.

Neither *Ennis* v. *Eden Mills Paper Co.*, 65 N. J. Law 577, nor *Doty* v. *Auditorium Pier Co.*, 56 At. 720, affirmed 56 At. 1132, holds that a lien claimant is prevented from entering judgment on his lien claim as a result of the appointment of a receiver for an insolvent corporation. In *Ennis* v. *Eden Mills Paper Co.*, supra, it was held "that while the appointment of a receiver did not per se stay the plaintiff's suit, yet such an appointment does operate practically to stay suits which are in progress." The *Ennis* case merely supports the view that nothing could be gained by the entry of judgment except an ascertainment of the amount of the claim, which, in that case, was not disputed, but was admitted by the Receiver. In the case at bar, the receiver had not admitted the validity of the claim of Reid & Co., and there had been no evidence of the intention of the receiver to allow it. The decision in *Doty* v. *Auditorium Pier Co.*, supra, was to the effect that a lien claim filed within the statutory period should be given preference but did not hold that the lien claimant was not permitted to pursue the remedies allowed by the Mechanics' Lien Act and proceed to judgment.

It is true, as appellants allege, that they were

not parties in the suit brought by Reid in the Union County Circuit Court. This fact is not proof of the invalidity of the Reid judgment, nor can its validity be attacked in a collateral proceeding because of this fact. The Mechanics' Lien Act does not require the joinder of other lien claimants as defendants in a suit instituted for the enforcement of the lien claim. *Hall* v. *Spaulding,* 40 N. J. L. 166.

The appellants were denied the right to share in the funds realized from the sale of the corner tracts because their liens covered the middle tract only and the validity or invalidity of the Reid judgment would not in any wise affect their ability to participate in this fund.

It is respectfully submitted that neither the law nor the facts in this case would have justified the Vice Chancellor in advising a decree to the effect that the judgment of A. S. Reid & Co. was not conclusive and that his failure to so advise should not constitute error for which reason the decree should be reversed.

POINT III.

The final decree is not erroneous because it found that the curtilage consisted of the entire tract.

Counsel for the appellants has argued at length to the effect that the Court below erred in considering the entire tract as the curtilage upon which the apartment house was erected. This argument is chiefly based upon the assumption that "the large tract of land was divided, considered and treated by the owner, the defendant, Capital Construction Co., Inc., as three separate

parcels before the commencement of the erection of the apartment house upon the middle tract." (The quoted portion is from p. 16 of appellants' brief.)

It is submitted that the evidence in the case did not show that the tract was divided into three separate parcels and that the Vice Chancellor was correct in finding, as his opinion shows (Case, p. 275), that the whole tract was treated as one parcel and not as three parcels. The following is taken from the portion of the Court's opinion dealing with the curtilage:

> "The whole tract was treated by the owner as one parcel until the Junction Milling Company demanded a mortgage on the side pieces. This was several months after the erection of the building had commenced. Up to the time of the sale of the property in this suit, there were no fences or other physical signs of a division of the tract. During construction work, it was all used indiscriminately for the handling of material. The whole adds to the convenient and beneficial use of the apartment house and doubtless enables higher rentals to be had than could otherwise be obtained. I find that the entire tract is the curtilage subject to the liens describing it."

It is evident that the Vice Chancellor's decision as to the size of the curtilage is based upon the use to which the premises had been put by the owners prior to and after the commencement of the building. It had been purchased as a single tract by Capital Construction Co., Inc., from Starr & Silverman, who incidentally comprised Capital Construction Co., Inc. (Case, p. 96); the

entire premises were encumbered by two mortgages held by Riverside Apartment Corporation (Case, pp. 24-26); the entire premises were mortgaged to Shilowitz & Tucker (Case, p. 27), and to West Bergen Trust Company (Case, p. 28). The testimony of Louis Moore, the plumbing contractor, showed that there was no physical separation of the tract into separate divisions and nothing on the ground to show any division into separate tracts (Case, p. 429). The testimony of John W. Heins, a realtor, showed that there was nothing of a physical nature to indicate a separation into three parts (Case, p. 522). In addition, Mr. Harry Starr, one of the officers of the Capital Company, testified that as late as September, 1927, the plot had not been separated and that no division into parcels had been made, and no fence surrounding or dividing the separate parcels had been erected (Case, p. 394). There was no denial of the fact that the survey, recited in the deed to Capital Construction Co., Inc., referred to a single description (Case, p. 398).

Counsel for the appellants also argues that the apportionment of the surplus fund by the Vice Chancellor is a recognition by the Court that the two corner tracts were independent and unconnected with the apartment house development. The language of the Vice Chancellor does not support this view, because he plainly states, in his opinion, that he considers the entire tract as the curtilage. The reason for the apportionment of the surplus fund was the fact that the mortgage of Junction Milling Company covered the two corner tracts while the other liens with the exception of the lien claims of Mowre Lager and Max Platt, covered the entire curtilage. It was impossible to determine the priority of the several

defendants in a general fund without apportioning that fund, in view of the fact that not all defendants had a lien on the entire amount which was held by the Court.

This respondent also stresses the point that the curtilage had been fixed and determined by the Union County Circuit Court, prior to the hearings before the Special Master and before the Vice Chancellor. The fixing of the curtilage was res adjudicata just as much as the determination of the amount due Reid & Co., upon its lien claim. It was, therefore, impossible for the appellants to assail the judgment of Reid, and the curtilage upon which its judgment became a lien, by collateral attack in the Court of Chancery, and it is now impossible for it to do so before this Court.

Counsel for the appellants has also lost sight of the fact that the premises were sold as one parcel by the Sheriff of Union County, pursuant to the order of the Court of Chancery (Case, pp. 193-197). No objection was entered by the appellants to this method of sale and no appeal from the entry of the order for sale was made by the appellants. The effect of the argument advanced by counsel for the appellants would be to have this Court modify the order for sale, pendente lite, which directed that the liens should attach to the funds in the same manner as they attached to the mortgaged premises at the time of the sale. The time for appealing from the orders for sale had long since expired at the time of the final hearing, and it is now too late for the appellant to file an appeal on this ground. See *Nash* v. *Leiderman and Nash Building Co.*, 103 N. J. Eq. 287.

Counsel for the appellants has also used a considerable space in his brief to emphasize the fact

that Section 21 of the Mechanics' Lien Act renders invalid a lien claim on a tract of land of more than one-half acre. It seems almost unnecessary to review the decisions of the Courts of this State dealing with the inapplicability of Section 21 to large buildings, such as the apartment house in the case under consideration. At the time of the passage of the Act (1863), large buildings were constructed less frequently than at present, and it was then the unusual, rather than the usual thing, for a building and its immediate curtilage to consist of more than one-half acre. This Court will, no doubt, take judicial notice of the fact that it is a common occurrence for the foundation of a building to cover more than one-half acre in these days of construction of large buildings. Our Courts have held on several occasions, that the limitation to a half acre does not apply to a situation such as is presented here.

In the case of *Gerard* v. *Birch,* 28 N. J. Eq. 317, Chancellor Runyon, in an opinion by the Court of Chancery, held that a lien on a tract fronting on three streets, the dimensions being 500′ x 450′, was not invalid. Counsel for the appellants cites this case to substantiate his argument that the curtilage cannot consist of more than a half acre, although the case cited is not authority for this view.

In *James* v. *Van Horn,* 39 N. J. L. 353, the Supreme Court upheld a lien on a tract of fifty (50) acres, and, although the judgment of the Court below was reversed, the reversal was not based upon the alleged error of allowing a lien upon a tract of this size. *American Brick & Tile Co.* v. *Drinkhouse,* 59 N. J. L. 462, a decision of this Court, apparently approved of a curtilage of more

than half an acre and held that the extent of the curtilage was a question of fact to be settled by the trial Court. Vice Chancellor Howell, in rendering a decision for the Court of Chancery, in *Federal Trust Co.* v. *Guigues,* 76 Eq. 495, apparently approved of the curtilage of more than half an acre, because he held that Section 21 of the Act "does not apply in this case."

Counsel for the appellants also cites the case of *Board* v. *Freedman,* 99 N. J. Eq. 351, as being exactly in point, and in so doing, entirely misconceived the law laid down in that case. In the *Freedman* case, the Court held that a lien claim against several buildings must apportion the claim, pursuant to Section 22 of the Mechanics' Lien Act, in proportion to the value of the materials going into each of the buildings. The *Freedman* case has nothing in common with the case at bar since only one building was erected upon the plot of ground which the Vice Chancellor fixed as the curtilage.

It is submitted that the size of the curtilage as determined by the Court below, was not error and should not result in a reversal of the decree, because the evidence plainly shows that the entire tract was treated as the curtilage by the owner, because the question of the curtilage was res adjudicata by the judgment of the Circuit Court and cannot be assailed in collateral proceedings, because the order for sale, pendente lite, directed the sale of the entire tract as a single parcel and said order has never been modified or reversed, because the decisions of our Courts firmly establish the fact that a valid lien can exist on a tract of land consisting of more than a half acre and because the cases which hold that an apportionment of the debt must be made among the several

buildings for which materials have been furnished, does not apply in the case at bar, where a single building was erected.

POINT IV.

The final decree is not erroneous for its failure to adjudge that the lien claims of Mowre Lager and Max Platt are entitled to priority over all other mechanics' lien claims.

The lien claim of the appellant Lager was filed on February 21, 1928, and in its original form, covered the entire tract. It was amended on September 7, 1929, for the purpose of limiting the curtilage to the middle tract. The appellant Platt filed his lien claim on January 3, 1928, and amended it on September 7, 1929. The amendment was made for the same purpose, namely, to change the curtilage from the entire tract to the middle tract.

It is quite apparent from an examination of the dates of filing and amending the lien claims of these appellants that their claims are not valid against any portion of the land because the amendment took place more than one year after the commencement of suit without any proof of the entry of judgment within that time. Section 18 of the Act is quite explicit and contains this provision:

> "No debt shall be a lien * * * unless a lien claim is filed * * * within four months from the date of the last work done or material furnished * * *; * * * if such claimant shall fail to prosecute his claim diligently within one year from the date of the issuing such

summons, or such further time as the Court may by order direct, such lien shall be discharged." 3 C. S., page 3305, Sec. 18.

This provision of the Statute was thoroughly discussed in *Buchanan & Smock Lumber Co.* v. *Dougherty,* 88 N. J. L. 356. The Court said:

> "The clause in the Mechanics' Lien Act fixing the one year period contemplates the reduction of the lien to judgment within that time, if diligent prosecution will accomplish that result. Until prosecuted to judgment, the lien is ex parte and arbitrary, and, in view of this extraordinary feature, and of the disadvantage under which the owner naturally labors in defending against a stale, unjust claim, founded upon a contract to the terms of which he is usually an entire stranger, the one-year limitation prescribed by the Act should be strictly enforced, unless the claimant is able to set up a most excellent demonstration that it was, not only not because of any default of his, but in spite of the exercise of at least ordinary diligence on his part that he failed in that time to reduce his ex parte lien to the litigated lien embodied in a judgment. The burden is on the claimant to excuse his failure to get a judgment within one year. If he allows the year to pass without judgment, and without a Court extension of time order procured within the year, he does so at his peril."

This language was quoted with approval by this Court in *Gluck* v. *Ruiz-Urrutia,* 101 N. J. L. 558. It also appears in the recently decided case of *Hendrickson* v. *Frieland,* 150 At. 326.

The appellant Lager not only failed to prosecute his claim to judgment within one year, but also failed and neglected to institute suit within four months from the date of the furnishing of the last materials. In his lien claim (Case, p. 892), Lager claimed that his labor was performed and furnished between August 3, 1927 and December 9, 1927, so that it was incumbent upon him to commence suit within four months from December 9, 1927. As a matter of fact, no suit was ever instituted, in violation of the provision in the Mechanics' Lien Law which makes it mandatory to bring suit within the four months' period.

This Court has reiterated, from time to time, its opinion that the requirement of the statute for the issuing of summons and endorsement to that effect on the lien claim is mandatory. The leading case is *Wheeler* v. *Almond,* 46 N. J. L. 161. Although Justice Dixon was there referring to the one-year and not the four months' period, the logic contained in his opinion has the same effect. For further cases dealing with this subject see *Drinkhouse* v. *American Brick & Tile Co.,* 58 N. J. L. 432, *Vreeland Building Company* v. *Knickerbocker Sugar Refining Co.,* 75 N. J. L. 556, *Wilkinson* v. *Dodd,* 40 N. J. Eq. 123, *Austin* v. *Leer,* 101 N. J. L. 53, *Arlington Realty Company* v. *Gluck,* 98 N. J. Eq. 62.

Counsel for the appellants cites *Ennis* v. *Eden Mills Paper Co.,* 65 N. J. L. 577 and *Doty* v. *Auditorium Pier Co.,* 56 At. Rep. 720, as authority for his argument that the appointment of a Receiver and the insolvency of the owner relieved appellants from the necessity of suing on their lien claims and procuring judgment thereon within the statutory period. As has been shown under Point II of this brief, neither of these cases is

authority for such argument. This Court, in *Hendrickson* v. *Frieland,* 150 At. Rep. 326, has decided that the *Ennis* case allows no such distinction to be drawn.

The Court was certainly not in error in failing to adjudge that the lien claims of Lager and Platt were prior to other lien claims, because as the evidence plainly shows, neither of these appellants had any valid claim at all. Not only did they fail to obtain judgment within the period required by the Mechanics' Lien Act, but the appellant Lager, also failed to bring suit within the statutory period. The Court of Chancery, in determining that they had liens on the middle tract, made no prejudicial mistake because, as a matter of fact, for reasons herein stated, they had no liens at all.

POINT V.

The final decree is not erroneous because it failed to adjudge that the lien claims of Lager and Platt are prior to the mortgage of West Bergen Trust Company.

Although this respondent, Reid & Co., agrees with that portion of Point V of the brief of the appellants which urges that the mortgage of West Bergen Trust Company was not an advance-money mortgage and that there was no competent proof by West Bergen Trust Company that its advances went into the building, it is emphatically denied that these facts constitute a basis for the reversal of the decree of the Court of Chancery. Neither is it admitted that the lien claims of the appellants Lager and Platt, are prior to the mortgage of West Bergen Trust Company. It was

shown under Point IV of this brief that neither of said appellants had a valid claim because of failure to comply with statutory requirements, and this being so, the failure of West Bergen Trust Company to prove that its advances were used in the construction of the building, does not react to the benefit of these appellants.

In addition to the reasons advanced under Point IV for the invalidity of the lien claims of Lager and Platt, the following reasons may also be advanced and are of equal importance in determining the validity of their claims. The appellant Lager also failed to prove the amount due and unpaid on his claim and failed to prove that the last work done by him was done within four months prior to the date of filing of the lien claim. His only witness was Jacob Starr, one of the stockholders of the Capital Construction Company (Case, pp. 496-501). It was testified that the contract price was $5,500.00, and that the work was not completed at the time of the appointment of the Receiver. No adequate proof of the value of the work done was furnished. The concession referred to by counsel for Lager, in his brief (Case, p. 580), did not concede that his claim was valid and that it was filed within four months of the time of the completion of his work.

The appellant Platt offered no adequate proof of the date when his work was completed (Case, pp. 420-422). He was obliged to refer to some paper or book entry, which was not made by him, in order to fix the date when the work was completed. No date having been fixed for the completion of the work there could certainly be no competent proof of the fact that the lien claim was filed within four months of its completion. That such proof must be furnished has been de-

cided by the cases of *Warshaw* v. *DeMayo,* 8 Misc. 359 and *Weinberger* v. *Goldstein,* 106 N. J. Eq. 489.

It is quite evident that the invalidity of the mortgage of West Bergen Trust Company, which this respondent also believes to be a proven fact, would have no effect upon the lien claims of these appellants. Since they are invalid for the several reasons shown under Points IV and V of this brief, they cannot be given validity because of the weakness of the proofs offered by West Bergen Trust Company.

In conclusion, A. S. Reid & Co., respectfully submits that none of the Points argued in appellants' brief are sufficient to justify this Court in reversing the decree of the Court of Chancery.

Respectfully submitted,

LEAVITT, ULBRICH & TALLEY,
Counsel for A. S. Reid & Co.,
Defendant-Appellee.

FAYETTE N. TALLEY,
of Counsel.

35 OCT.T 1971

New Jersey Court of Errors and Appeals

RIVERSIDE APARTMENT CORPORATION, a corporation, Complainant, *and* CAPITAL CONSTRUCTION CO., INC., a corporation, *et als.*, Defendants.	On Appeal from Court of Chancery.

REPLY BRIEF OF MAX PLATT AND MOWRE LAGER.

Answering briefs to the brief of the appellants Max Platt and Mowre Lager have been filed by the following respondents: Geo. F. Perry & Sons, Inc. and A. S. Reid & Co.

A reply will be made to such points raised in the answering briefs as are not covered in the appellants' main brief. Each of the answering briefs will be treated separately.

Reply of Max Platt to Answering Brief of Geo. F. Perry & Sons, Inc.

Counsel (p. 8) objects to certain documents which are printed in the record. These documents were all part of the record in a suit pending in the Court of Chancery, which were offered in evidence in the instant case (Case, pp. 363, 469) and no objection has ever been made to their inclusion in this record until the objection is raised in the brief.

It was never denied by the respondent Geo. F. Perry & Sons, Inc., that it knew of the insolvency proceedings against the defendant corporation and of the restraining order, or that it received a copy of the order.

Counsel asks (p. 9) why, if there was an injunctive order of the Court of Chancery restraining all parties from proceeding against the Capital Construction Co., did the appellant institute suit on his mechanics' lien claim. The answer is that respondent proceeded against the *Corporation* after the respondent had been enjoined from doing so, while the appellant proceeded against the *Receiver,* presumably by permission of the Court, actually by virtue of an order permitting such suit to be brought filed February 9th, 1928, which is not in the printed record but is in the files of the Court of Chancery and of which that Court could take judicial notice. The fact that the Receivers never objected to appellant's proceeding, but did object to the respondent's judgment bears this out.

Counsel contends (p. 11) that the respondent had the right to proceed with its suit notwithstanding the injunctive order, on the authority of *Crane* v. *Brighton Mills.* That case is not analogous. In that case it was held that it was necessary and proper for the claimant to proceed in order to establish its lien on the land. It was in effect an action *in rem* and the insolvency of the contractor did not relieve the claimant of the burden of establishing the lien on the land insofar as the owner was concerned. As to him, it was still necessary, notwithstanding the insolvency of the contractor to establish the lien; hence, it was necessary and proper to proceed with the suit after and notwithstanding the insolvency of the contractor.

In the instant case it was not necessary to proceed with the suit after the insolvency of the

owner of the land as pointed out in the main brief.

Counsel for the respondent insists that it was necessary to prosecute the Perry lien claim in order to preserve Perry's rights (p. 13) and that the appellant lost his right by not promptly prosecuting the proceedings on his lien claim (p. 14).

This is denied. After the insolvency of the owner it was not necessary to proceed on the lien claims in order to preserve the rights of the lien claimants (see Main Brief, p. 12). *Doty* v. *Auditorium,* 56 At. 720.

Counsel contends that the *Doty* case does not apply.

The Mechanics' Lien Law and the Corporation Act must be read together, harmonized and effect given to both as far as possible. To uphold the respondent's contention (p. 19) would result in chaos. It would mean in effect that when a Receiver is appointed for an insolvent corporation all lien rights would be preserved (*Doty* case), but as soon as a foreclosure suit was started a different rule would apply and all lien claimants would immediately be compelled to prosecute their liens—by that time they might find themselves out of court and unable to proceed because of the provisions of the Mechanics' Lien Act.

Respondent contends that there was no proof of appellant's lien (p. 21). Counsel objects that the proof offered was hearsay. Hearsay testimony may be sufficient if there is no objection to its admission, nor any motion to strike it out. There was no such objection or motion with respect to this testimony. The objection comes too late at this time. *State* v. *Krupen,* 100 N. J. L. 7; *Smith* v. *Delaware, etc.,* 65 N. J. E. 95.

Counsel contends that the appellant cannot collaterally assail the Perry judgment (p. 23).

In addition to what is said on this point in the reply brief of the Junction Milling Company, it

should also be borne in mind that the appellant was not a party to the Perry counterclaim and was in no position to assail the judgment in the foreclosure proceedings.

The Perry judgment was not *res adjudicata* as against this appellant, because the appellant was not a party to that suit, nor was the appellant precluded from assailing that judgment in the foreclosure proceedings, as the appellant not being a party to the counterclaim of Perry was not obliged to answer it.

Counsel contends that the case of *Morris County Bank* v. *Rockaway* does not apply, because it was decided under a previous act when there was no provision by which the rights of the third party might be heard and that since provision has been made for the filing of a caveat the reason for the rule in the *Morris County Bank* case no longer exists and accordingly, that case has no application to the case at bar. The answer to that is that the injunctive order (Case, p. 296) made it unnecessary to file a caveat as all parties were restrained from further proceedings in their actions at law and the appellant had a right to rely on the respondent's obedience to that order. It must be borne in mind that the appellant was not a party to that suit and should not be bound by proceedings to which he was not a party.

The case of *Hall* v. *Spaulding* cited by counsel (p. 28) does not apply. That was a proceeding for distribution between lien claimants, some of whom had entered judgments, while others had not. In that case, the lien claimants who had no judgment endeavored to exclude those who had entered judgments from participating in a *pro rata* distribution of the fund. The Court, properly held, that as all lien claims were concurrent a mere irregularity in procedure would not be sufficient to oust any of them from a share in the fund. In

that case some of the lien claimants were trying to obtain a priority over others. In the case at bar the appellant is endeavoring to *prevent* a lien claimant, Perry, from obtaining a priority to which it was not entitled. The appellant is not attacking nor denying the Perry lien—he is attacking the effect of a judgment which Perry improvidently entered on its lien claim, which would have been good without a judgment.

Likewise, the *Naylor* case (p. 28) is no authority against the appellant. The Court merely held that in that particular case the judgment was conclusive as establishing the lien—not that a judgment would be conclusive in all cases. In that case there was no attack on the lien, nor in fact was there any attack on the judgment. It seemed to be a question of proof.

On the question of what constituted the proper curtilage subject to mechanics' liens, counsel sets forth (p. 31) certain facts which he claims establish the three tracts as the land which were lienable. He fails, however, to point out that the Junction Milling Company mortgage definitely separates the mortgaged premises into three tracts and mortgaging two of them to that company. The Junction Milling Company mortgage was recorded on September 6, 1927, long *before* any lien claims were filed—thus bringing home to the lienors notice of the extent of the lienable curtilage.

Counsel further says (p. 33) that the survey showing the three tracts was made on September 8th, 1927, after the building was commenced. That is emphatically not so. The testimony (p. 17 main brief) shows that when the owner applied for a building permit he filed this survey in the Building Department. This, of course, was before the building operation was commenced, as no building could be done until the permit had been issued.

As to the failure of the appellant to object to the sale of the premises in the foreclosure suit as one parcel it is pointed out that the complainant mortgagee whose mortgage covered all three tracts was entitled to have them all sold together. If the proceeds of the sale were not sufficient to pay the mortgage it would never have been necessary to go into the question of the extent of the curtilage. The sale having resulted in a surplus it was time enough then to raise the question. *Vandyne* v. *Vanness,* 5 N. J. E. 485.

Furthermore, the orders for sale directed that the proceeds of the sale should be held subject "to the same liens and equities of all parties in interest as were the said mortgaged lands and premises" (Case, p. 197). These proceedings under review on this appeal were taken to carry out that order. The *Nash* case cited by counsel has no application.

Counsel for respondent assails appellant's sincerity in attacking respondent's lien claim on the ground that it included too much land by pointing to the fact that the appellant originally filed a lien upon the whole tract. It is true appellant did include all three tracts in his original lien claim, but on discovering his error appellant obtained an order of the Court (Case, p. 775) to amend his lien claim and did amend it by limiting his lien to the central tract upon which the building was erected, releasing the two corner tracts which were improperly included. This was in accord with the practice prescribed by the Mechanics' Lien Act (Sec. 20).

Counsel says finally (p. 41) that the fact that Perry alone of all the lien claimants did not postpone its claim to the mortgages entitles Perry to hold a superior position. That fact may give Perry some priority over some of the mortgages, but it does not of itself give it any superiority

over other mechanics' liens which have been properly filed.

We reiterate our contention (main brief, p. 27) that the Perry claim fails altogether as a lien upon the land because it included too much land and should be postponed to lien claims properly filed.

Counsel attempts to create the impression that the opinion of Vice Chancellor Bigelow in the case at bar has received the approval of this Court in the *Feinberg* case (p. 41) but that is not so. The only point in the *Feinberg* case related to the question of priority as between a construction mortgagee and a mechanic's lienor.

Reply of Mowre Lager to Answering Brief of Geo. F. Perry & Sons, Inc.

What has been said above in the reply of Max Platt applies in the case of Mowre Lager.

In the answering brief of Perry & Sons to the appeal of Mowre Lager, counsel says (p. 24) that Mowre Lager failed to prove his lien claim. It *was admitted* (Case, p. 580), and on page 498 it was testified to, that Mowre Lager worked up to the time the Receiver was appointed. That was January 4th, 1928 (p. 296). The lien claim was filed February 21st, 1928. This was within the four months period.

Reply of Max Platt and Mowre Lager to Answering Briefs of A. S. Reid & Co.

A large part of what has been said above applies to the argument of counsel for A. S. Reid & Co.

Counsel for this respondent also argues that there is not sufficient proof that A. S. Reid & Co.

were served with a copy of the injunctive order (p. 10). It is significant that there is no denial that this creditor knew of the insolvency and receivership, and the fact is that the judgment was entered by A. S. Reid & Co. after this firm had filed a Notice in Lieu of Answer to the foreclosure bill in which the insolvency and receivership are set forth. The Notice was filed April 10th, 1928 (Case, p. 49). The judgment was entered July 7th, 1928 (Case, p. 755). Certainly, at the time judgment was entered Reid Co. knew of the insolvency and receivership.

Counsel argues that the Platt and Lager claims must fail because the proceedings were not prosecuted and judgment entered within one year. It is our contention that after the insolvency of the builder-owner corporation and the appointment of a receiver, it was no longer necessary for these lienors to proceed further with the lien claim cases in the absence of a demand by the Receiver to do so.

The other matters raised in this brief have been adequately answered in the reply to the Perry brief.

Respectfully submitted,

Aaron A. Melniker,
Counsel for Appellants Max Platt
and Mowre Lager.

36 OCT.T.1931

New Jersey Court of Errors and Appeals

RIVERSIDE APARTMENT CORPORATION, a corporation, Complainant, *vs.* CAPITAL CONSTRUCTION CO., INC., *et al.*, Defendants.	On Appeal from Court of Chancery.

BRIEF FOR APPELLANT, WEST BERGEN TRUST COMPANY.

West Bergen Trust Company, one of the defendants in the above entitled foreclosure suit, appealed from the final decree therein on the grounds, that:

(1) It failed to adjudge the amount due to the several parties on their respective encumbrances, the order of priority thereof, and the portion of the premises encumbered thereby;

(2) It failed to adjudge that the West Bergen Trust Company mortgage, to the extent that it is an advance-money mortgage, is prior in lien to the lien of all mechanics' lien claims;

(3) It failed to adjudge that the West Bergen Trust Company mortgage, to the extent that it is an advance-money mortgage, is prior in lien to the general mortgage of the defendant, Junction Milling Company;

(4) It failed to adjudge that the West Bergen Trust Company mortgage, to the extent that it is an advance-money mortgage, is

prior in lien to the mechanics' lien claim and the alleged judgment thereon of the defendant, Geo. F. Perry & Sons, Inc.;

(5) It failed to adjudge that the lien of the West Bergen Trust Company mortgage, to the extent that it is an advance-money mortgage, is third in priority in the distribution of the fund in court, realized on the sale of the mortgaged premises.

Statement of the Case.

The facts pertinent to the appeal of the West Bergen Trust Company are as follows:

On January 4th, 1928, prior to the institution of the above-entitled foreclosure suit, the Court of Chancery, by order of that date, appointed receivers for the defendant, Capital Construction Co., Inc., the then owner of the mortgaged premises situated in the Township of Cranford, Union County, New Jersey. By paragraph 6 of that order (Case, p. 298) all creditors of the Capital Construction Co., Inc., were *"restrained from bringing any action or proceeding at law or otherwise against the said corporation and from taking any further proceedings in any action or proceeding heretofore commenced"*. This order, in accordance with paragraph 9 thereof, was served on all creditors (Case, p. 300). On January 9th, 1928, an order was made by the Court of Chancery, continuing the receivers for the defendant, Capital Construction Co., Inc. (Case, pp. 301-302). On March 3rd, 1928, having first obtained leave of the Court of Chancery to make the receivers parties to the suit, the Riverside Apartment Corporation, the holder of a second and third mortgage encumbering the premises in question, filed in the Court of Chancery its bill to foreclose its mortgages (Case, pp. 24-39). All subsequent mechanics' lienors, mortgagees and judgment creditors of the

Capital Construction Co., Inc., were made parties-defendants to the foreclosure suit. Among the defendants was the West Bergen Trust Company, which held an advance-money mortgage encumbering the premises; the Junction Milling Company, which held a general mortgage encumbering a portion of the premises; and Geo. F. Perry & Sons, Inc., which filed a mechanics' lien claim against the premises and had brought suit thereon in the Union County Circuit Court, against the Capital Construction Co., Inc., as builder and owner, and the West Bergen Trust Company and the Junction Milling Company, and others, as mortgagees, and upon which mechanics' lien claim judgment by default was entered in favor of Geo. F. Perry & Sons, Inc., on January 13th, 1928, *after the restraining order of the Court of Chancery* (above referred to) had been made and served upon it.

The advance-money mortgage of the West Bergen Trust Company was recorded subsequent to the general mortgage of the Junction Milling Company but prior to the filing of all lien claims.

The allegation of the bill, in respect to the general mortgage of the Junction Milling Company, is set forth in Paragraph 15 of the bill (Case, p. 28), and is as follows:

> "15. On September 16th, 1927, said Capitol Construction Co., Inc., mortgaged said lands to Junction Milling Co., a corporation, for $11,619.34, which said mortgage was, on October 6th, 1927, recorded in the Office of the Register of Union County in Book 886 of Mortgages, page 390."

The allegation of the bill, in respect to the West Bergen Trust Company advance-money mortgage, is set forth in Paragraph 16 of the bill (Case, p. 28), and is as follows:

> "16. On October 25th, 1927, said Capitol Construction Co., Inc. mortgaged said lands

> to West Bergen Trust Company, a corporation, for $6,000.00 which mortgage was on October 26th, 1927, recorded in the Office of the Register of Union County in Book 895 of Mortgages, page 38:"

The allegation of the bill, in respect to the mechanics' lien claim of Geo. F. Perry & Sons, Inc., is set forth in Paragraph 20 of the bill (Case, pp. 29-30) and is as follows:

> "20. On November 12th, 1927, Geo F. Perry & Sons, Inc., a corporation, filed in the Office of the Clerk of Union County a mechanics' lien claim against said lands and the building thereon erected in the sum of $5,792.25 and thereafter, to wit, on January 13th, 1928, entered judgment in the Union County Circuit Court in the sum of $5,965.00 besides costs to be taxed, which said costs were taxed at the sum of $63.37 and which said judgment was generally against said Capital Construction Co., Inc., and specially to be made of the lands and buildings in the complaint and lien claim in said action described, which constitute a part of the above described mortgaged lands and premises."

The defendant, West Bergen Trust Company, duly filed its answer to the bill (Case, pp. 40-41), alleging that its mortgage was prior in lien to the mechanics' lien claims mentioned in the bill, because its mortgage was an advance-money mortgage and was recorded prior to the filing of the mechanics' lien claims (which included the claim of Geo. F. Perry & Sons, Inc.), and that its mortgage was prior in lien to the lien of the mortgages set forth in Paragraphs 13, 15, 17, 18 and 19 of the bill (which included the mortgage of the Junction Milling Company) because these mortgages were general mortgages, and were recorded subsequent to the commencement of the construction of the building in question.

Defendant, Junction Milling Company, filed a notice in lieu of answer to the bill, stating that it desired to prove the amount due on its mortgage (Case, p. 57).

Defendant, Geo. F. Perry & Sons, Inc., filed an answer and counterclaim to the bill (Case, p. 78). In Paragraph 7 of its answer, it alleges "that said mortgage (referring to the West Bergen Trust Company mortgage) was subordinate to the *encumbrances* held by this defendant", (meaning Geo. F. Perry & Sons, Inc.). In Paragraphs 21, 22 and 23 of its counterclaim (Case, p. 82), it alleges that its mechanics' lien claim was filed on November 12th, 1927, in the Clerk's Office of Union County; that, on that date, suit was instituted thereon in the Union County Circuit Court against Capital Construction Co., Inc., as builder and owner, and against the West Bergen Trust Company, and others, as mortgagees; that judgment by default was recovered therein on January 13th, 1928 (copy of which is attached (Case, p. 86) to the answer and counterclaim), in which it was adjudged that the lien claim of Geo. F. Perry & Sons, Inc., *and the lien of its judgment* were prior to the lien of the West Bergen Trust Company mortgage. The West Bergen Trust Company answered the counterclaim of Geo. F. Perry & Sons, Inc. (Case, p. 89), and alleged that its mortgage had priority over the mechanics' lien claim of defendant, Geo. F. Perry & Sons, Inc., because the West Bergen Trust Company mortgage was an advance-money mortgage; and that it was recorded prior to the filing of the mechanics' lien claim of Geo. F. Perry & Sons, Inc.; that the West Bergen Trust Company mortgage had priority over the Junction Milling Company mortgage, and other mortgages therein designated, because they were not advance-money mortgages, and did not encumber the mortgaged

premises prior to the commencement of the building in question.

Defendants, Louis Moore, Lipschitz Parquet Floor Company, Ira R. Crouse, and Meyer & Ruth Company, each filed an answer and counterclaim to the bill which was served upon the defendant, West Bergen Trust Company (Case, pp. 94, 116, 139, 164). These several counterclaims allege that the West Bergen Trust Company mortgage was subject and subordinate to the mechanics' lien claims of these defendants, respectively. The West Bergen Trust Company answered these counterclaims (Case, pp. 110, 133, 156, 176), alleging that its mortgage had priority over these mechanics' lien claims because it was an advance-money mortgage and that same was recorded prior to the filing of these lien claims, and that its mortgage had priority over the mortgages mentioned in the counterclaims because these mortgages were not advance-money mortgages and were not recorded prior to the commencement of the construction of the building in question. The answer of the West Bergen Trust Company to these counterclaims was filed on April 24th, 1928, within the time required by the rules of the Court of Chancery. However, on April 23rd, 1928, these defendants each filed an amended answer and counterclaim, without obtaining leave of court. These amended answers and counterclaims were served on West Bergen Trust Company, after it had filed its answers to the original counterclaims. There was no change or alteration in these amended answers and counterclaims, in so far as the West Bergen Trust Company mortgage was concerned. No *"Note"* was filed, as required by the rules of the Court of Chancery, by these counterclaimants to the answer of the West Bergen Trust Company. Although the West Bergen Trust Company had filed an answer to each coun-

terclaim within the time required by law, these defendants, on July 30th, 1928, each filed a Decree *Pro Confesso* on their counterclaims against the West Bergen Trust Company (Case, pp. 115, 138, 160, 181), reciting in the decree that West Bergen Trust Company had not filed any reply to their counterclaims within the time required by law or at any other time. Complainant, however, filed a replication to the answer of West Bergen Trust Company (Case, p. 182).

On petition of the complainant, filed March 27th, 1928 (Case, p. 185) the Court of Chancery ordered a sale of the mortgaged premises, *pendente lite* (Case, pp. 193-199). The sheriff of Union County sold the mortgaged premises on May 23rd, 1928, pursuant to the order for sale (Case, pp. 119-202) for $142,500 and the sheriff returned to court the sum of $140,777 being the amount of the bid plus interest less sheriff's fees (Case, pp. 203-204).

On June 5th, 1928, the cause was referred to the late, Honorable John Bentley, Vice-Chancellor (Case, p. 205). On June 25th, 1928, the late Vice-Chancellor Bentley designated July 12th, 1928, as the time for hearing the cause, at which time an order was made (Case, p. 212) directing the clerk to pay complainant's decree, costs and counsel fee amounting to $57,957.75, leaving a balance on deposit with the clerk, of $82,819.25 besides interest. On May 14th, 1929, by order of that date (Case, p. 215) the cause was referred to John Milton, Esq., as Special Master, to ascertain and report the amount due and owing to the various parties for principal and interest on their mortgages, lien claims, judgments and other demands, and to report the order of priorities of the various mortgages, lien claims, judgments, demands and other claims and whether they all embraced the premises mentioned in the bill of complaint. On June 13th, 1929, by order of that date (Case,

p. 216) Aloysius McMahon, Esq., was substituted as Master in the place and stead of John Milton, Esq., to ascertain and report as aforesaid. The Master duly summond the respective defendants to appear before him on June 25th, 1929 (Case, p. 217). On November 25th, 1929 (Case, p. 218) by order of that date, the Clerk in Chancery was directed to pay out of the funds in his hands, the expenses and disbursements of the receivers of the Capital Construction Co., Inc., fees of the receivers, and of counsel for complainant and defendant in the insolvency proceedings, totaling the sum of $11,876.72, leaving a balance on deposit with the Clerk in Chancery of $70,951.53 besides interest.

Hearings were had before the Master, and the respective defendants offered proof of their several claims and, on October 15th, 1930, the Master filed his report (Case, pp. 219-225).

The evidence before the Master established that the West Bergen Trust Company mortgage covered the entire premises in question, and was recorded October 26th, 1927 (Case, pp. 558, 874); that $5,758.96 of the amount of its mortgage (Case, p. 559, Ex. 10, pp. 880-882; Case, pp. 576-577, Ex. 11, pp. 883-885; Case, pp. 584-590, Exs. 13-28, pp. 895-902) was actually advanced by the West Bergen Trust Company to the Capital Construction Co., Inc. to pay for labor performed and materials furnished in the erection of the building in question; that the advancements were made and the payments applied prior to the execution and recording of the mortgage; that the mortgage was in the amount of $6,000.00, the difference being made up of interest of $38.82 and fees for services and disbursements of $202.22 in connection with the loan.

The evidence further established that the Junction Milling Company mortgage (Case, pp. 470,

804) was a general mortgage and encumbered a portion of the premises in question, and that it was recorded on October 6th, 1927. The consideration for the mortgage was the balance or remainder owing by the Capital Construction Co., Inc. to the Junction Milling Company for materials furnished to the Capital Construction Co., Inc.

The evidence further showed that the premises in question were acquired, and the erection of the building commenced in March, 1927 (Case, p. 319). The first mechanics' lien claim was filed November 12th, 1927 (Case, p. 688). This was the claim of Geo. F. Perry & Sons, Inc. It offered in evidence a certified copy of its mechanics' lien claim (Case, pp. 364, 688). It undertook to prove its claim before the Master, but failed to establish it (Case, pp. 354-361). It then offered in evidence a certified copy of the judgment by default (Case, pp. 364, 696) entered by it on January 13th, 1928, on its mechanics' lien claim in the Union County Circuit Court. This judgment purported to adjudge that its mechanics' lien claim and the judgment itself were prior in lien to the lien of the West Bergen Trust Company mortgage. The evidence showed (Case, p. 294) that the order aforesaid dated January 4th, 1928, made in the insolvency proceedings (Case, pp. 298, 299), had been served in accordance with its terms, upon all creditors on January 5th, 1928 (Case, p. 300); *so, that at the time Geo. F. Perry & Sons, Inc. took its judgment by default in the Union County Circuit Court against the Capital Construction Co., Inc., it did so in violation of the restraining order of the Court of Chancery.*

The Master, reported (Case, p. 224) the amount due to the various parties on their respective encumbrances, and the order of their priority, as follows:

First: To Shilowitz & Tucker for principal and interest on their mortgage	$23,482.00
Second: To Carteret Company for principal and interest on its mortgage	37,365.48
Third: To West Bergen Trust Company for principal and interest on its mortgage	6,874.00
Fourth: To 17 Mechanics' Lien Claimants, to be shared ratably and concurrently, after payment of above, (besides interest)	54,810.74
Fifth: To Junction Milling Company on its mortgage	7,973.00

On October 15th, 1930, Geo. F. Perry & Sons, Inc., filed exceptions to the Master's report (Case, pp. 228-234); on the same date A. S. Reid & Co. filed exceptions to the Master's report (Case, pp. 234-240); and on the same date Ira R. Crouse, Louis Moore, Lipschitz Parquet Floor Co. and Meyer & Ruh Company filed exceptions to the Master's report (Case, p. 241); and on October 20th, 1930, Max Platt and Mowre Lager filed exceptions to the Master's report (Case, pp. 242-244); and on that date Junction Milling Company also filed exceptions to the Master's report (Case, pp. 245-247) and, on November 6th, 1930, the Junction Milling Company filed amended exceptions to the Master's report (Case, pp. 248-251).

On October 20th, 1930 (Case, p. 227) an order was filed that the Master's report and all matters and things therein contained do stand in all things ratified and confirmed according to the true tenor and meaning thereof, unless the defendants, within eight days from the date thereof,

show cause to the contrary, and exceptions already filed should be deemed to have been filed pursuant to this order, and within proper time. On December 4th, 1930, an order was filed by his Honor, the Chancellor (Case, p. 252) referring the cause to Honorable John Bigelow, Vice Chancellor, the same having remained unheard by the late Vice Chancellor Bentley.

On December 8th, 1930 (Case, p. 254), an order was filed directing the Clerk in Chancery to pay the master's fees of $1,000.00, stenographers' fees of $508.00, and $14,500.00 on account of the Shilowitz and Tucker mortgage, and $15,000.00 on account of the Carteret Company mortgage, aggregating $31,008.00, leaving a balance of $39,943.53 besides interest on deposit with the Clerk in Chancery.

On December 4th, 1930, Vice Chancellor Bigelow heard the argument on the exceptions to the Master's report, and on December 26th, 1930 (Case, pp. 255-278) filed the opinion of the Court below overruling and setting aside the Master's report. After holding, among other things, that the mechanics' lien claims were prior in lien to the Junction Milling Company mortgage because that mortgage was a general mortgage and recorded after the commencement of the building in question; and that the West Bergen Trust Company mortgage, in so far as it was an advance-money mortgage, was prior in lien to the lien of mechanics' lien claims because this mortgage was recorded before the filing of any mechanics' lien claims; then held that the Junction Milling Company general mortgage was prior in lien to the lien of the West Bergen Trust Company advance-money mortgage because the general mortgage of the Junction Milling Company had been recorded prior to the advance-money mortgage of the West Bergen Trust Company, and further held that the

alleged judgment of Geo. F. Perry & Sons, Inc., established the priority of its mechanics' lien over the lien of the West Bergen Trust Company mortgage, although, as heretofore stated, that judgment was recovered in the Union County Circuit Court in violation of the restraining order of the Court of Chancery that no further prosecution should be had on that mechanics' lien claim after the appointment of the receivers for the Capital Construction Co., Inc.

After rendering this opinion, the Court below on January 23rd, 1931 (Case, pp. 280-284), filed a final decree which failed to adjudge the amount due to the various parties for principal and interest upon their respective liens, and the order and priority thereof, and whether they all embraced the premises mentioned in the bill of complaint. All the final decree adjudged was that the Clerk in Chancery should pay, in the order therein designated, to the persons therein mentioned, the sums specified. No adjudication whatever was made in the final decree as to the amount due the West Bergen Trust Company for principal and interest on its mortgage, or its order of priority, and the premises it embraced. In fact, the final decree makes no adjudication as to the West Bergen Trust Company mortgage.

Questions Involved.

1. The final decree failed to adjudge the amount due to the several parties on their respective encumbrances, the order of priority thereof, and the portion of the premises encumbered thereby;

2. The final decree failed to adjudge that the West Bergen Trust Company mortgage, to the extent that it is an advance-money mortgage, is prior in lien to the lien of all mechanics' lien claims;

3. The final decree failed to adjudge that the West Bergen Trust Company mortgage, to the extent that it is an advance-money mortgage, is prior in lien to the general mortgage of the defendant, Junction Milling Company;

4. The final decree failed to adjudge that the West Bergen Trust Company mortgage, to the extent that it is an advance-money mortgage, is prior in lien to the mechanics' lien claim and the alleged judgment thereon of the defendant, Geo. F. Perry & Sons, Inc.;

5. The final decree failed to adjudge that the lien of the West Bergen Trust Company mortgage, to the extent that it is an advance-money mortgage, is third in priority in the distribution of the fund in court realized on the sale of the mortgaged premises.

ARGUMENT.

POINT I.

The final decree is erroneous in that it did not adjudge the amount due to the various parties for principal and interest upon their several encumbrances and the order of priority thereof.

As above pointed out, the final decree (Case, p. 280) did not adjudicate the amount due to the various parties for principal and interest due upon their mortgages, lien claims, and other demands, nor did it adjudge the order of priority, and whether they embraced the entire premises. All it did was to order that from the funds then on deposit with the Clerk of the Court below he should pay in the order designated and to the persons named, the sums of money therein specified. There is no adjudication in the final decree in

respect to the West Bergen Trust Company mortgage. It is to be noted that the master reported in accordance with the order of reference to him (Case, p. 216) the amount due to the several encumbrancers in the following order of priority:

Shilowitz & Tucker mortgage for principal and interest	$23,482.00
Carteret Company mortgage for principal and interest	37,365.48
West Bergen Trust Company mortgage for principal and interest	6,874.00
Mechanics' Lien Claims besides interest, of 17 defendants to share ratably and concurrently	54,810.74
Junction Milling Company mortgage for principal and interest	7,973.00

It is also to be noted that there were exceptions filed to the master's report, by lien claimant Geo. F. Perry & Sons, Inc. (Case, p. 228), by lien claimant A. S. Reid & Co. (Case, p. 234), by lien claimants Ira R. Crouse, Louis Moore, Lipschitz Parquet Floor Co. and Meyer and Ruh Company (Case, p. 241), by lien claimants Max Platt and Mowre Lager (Case, p. 242), and by mortgagee Junction Milling Company (Case, pp. 245-251).

On the hearing of the exceptions to the master's report, the Court below in its opinion (Case, p. 255) found the amount which was paramount on the Shilowitz and Tucker mortgage and the Carteret Company mortgage, to be less than that found by the master, and changed the order of priority of the subsequent encumbrances and, in effect, overruled the master's report, but the decision of the Court below is not an adjudication. The final decree in this cause is the judicial action of the Court below and that is what is here for review.

Kleinert vs. *Hutchinson,* 98 N. J. L. 831;
Birtwistle vs. *Public Service Railway Company,* 94 N. J. L. 407;

McCarthy vs. *Town of West Hoboken*, 93 N. J. L. 247;
State, Ruckman vs. *Demarest, Collector of Harrington*, 32 N. J. L. 528.

The purpose to be accomplished by a decree in equity is to finally settle and determine the rights of all persons in the subject matter of the suit.

Beall vs. *New York & New Jersey Water Co.*, 87 N. J. Eq. 390, 393.

Since the final decree does not adjudicate the amount due to the several encumbrancers, and the order of priority thereof, it is submitted that the same is erroneous and must be reversed, and the cause remitted to the Court below for a proper and judicial determination.

POINT II.

The final decree is erroneous in that it did not adjudge that the West Bergen Trust Company mortgage, to the extent that it is an advance money mortgage, was prior in lien to the lien of all mechanics' lien claims.

The facts established by the testimony are that the erection of the building in question was begun in March, 1927 (Case, p. 319); that the first mechanics' lien claim was filed on November 12th, 1927 (Case, p. 688); that the West Bergen Trust Company loaned and advanced to the Capital Construction Co., Inc., on September 10th, 1927, which was deposited to its credit, on or about September 12th, 1927, $4,974.17 (Case, p. 883), and on September 24th, 1927, it loaned and advanced $800.00 to the Capital Construction Co., Inc., which was deposited to its credit on that date (Case, p. 885).

It was understood and agreed between the West Bergen Trust Company and the Capital Construction Co., Inc., when these respective loans and advances were made, that same were to be applied by the Capital Construction Co., Inc. to the cost of the erection of its Cranford building, and that the Capital Construction Co., Inc. was to execute and deliver to the West Bergen Trust Company a mortgage encumbering the Cranford premises described in the bill of complaint, to secure the payment of these loans and advances. (Case, pp. 554-558). It was also understood and agreed between the parties that a check for $2,000.00 dated September 9th, 1927, drawn by the Capital Construction Co., Inc., on the West Bergen Trust Company to the order of Siegel & Levine, plasterers on the Cranford building, was to be paid by the West Bergen Trust Company out of the first loan and advancement made by it as aforesaid. The Capital Construction Co., Inc., at the time this check was drawn, did not have sufficient funds in its account to pay same. Thereafter, checks bearing date from September 10th, 1927, to September 16th, 1927, aggregating $2,958.96, were drawn by the Capital Construction Co., Inc. on the West Bergen Trust Company to the order of various laborers and materialmen who had performed labor and furnished materials for the Cranford building, and these checks were paid by the West Bergen Trust Company out of the first loan and advancement to the Capital Construction Co., Inc. (Case, pp. 584-590, 883-885, 895-902); and, on September 24th, 1927, a check dated September 23rd, 1927 for $800.00 drawn by the Capital Construction Co. Inc., on the West Bergen Trust Company for the payroll on the Cranford job was paid by the West Bergen Trust Company out of the second loan and advancement made by it to the Capital Construction Co., Inc. (Case, pp. 885, 902). The evidence establishes that the $800.00 was actually

applied by the officers of the Capital Construction Co., Inc. to pay this payroll (Case, pp. 590, 610); so, that out of the $5,774.17 loaned and advanced as aforesaid, $5,758.96 was actually applied to the cost of the erection of the Cranford building. On October 25th, 1927, pursuant to the understanding and agreement aforesaid, the Capital Construction Co., Inc. executed and delivered to the West Bergen Trust Company, a mortgage of that date for $6,000 encumbering these premises, which mortgage was on October 26th, 1927, recorded in the Union County Register's Office (Case, p. 874). The amount thereof in excess of the $5,758.96 was for interest charges on the loans, and $202.22 for services and disbursements in negotiating the loans and examining the title to the premises in question, &c.,

Appellant concedes that these two items were not actually advanced and applied to the cost of the erection of the building, and, therefore, its mortgage is an advance-money mortgage only to the extent of $5,758.96; and, to that extent, under Section 15 of the Mechanics' Lien Law (P. L. 1898, p. 538, as amended) its mortgage is prior in lien to the mechanics' lien claims because the moneys were actually advanced by it and applied to the cost of the erection of the Cranford building, and was recorded prior to the filing of any mechanics' lien claim.

Young vs. *Haight,* 69 N. J. L. 453;
Erdman vs. *Moore,* 58 N. J. L. 445;
Franklin Society vs. *Thornton,* 85 N. J. Eq. 525;
Wix vs. *Fraenkel,* 87 N. J. Eq. 467;
Improved Ass'n vs. *Larkin,* 88 N. J. Eq. 52.

Section 15 of the Mechanics' Lien Law, *supra,* provides:

> "15. Every mortgage given or to be given upon lands in this state shall have priority over any claim that may be filed in pursuance of this act, to the extent of the money actually advanced and paid by the mortgagee and applied to the erection of any new building upon mortgaged lands or any alterations, repairs or additions to any building on said lands; provided such mortgage be registered or recorded before the filing of any such lien."

Manifestly, the Court below, by its final decree, should have adjudged that the West Bergen Trust Company mortgage, to the extent of $5,758.96, was prior in lien to all mechanics' lien claims, and, since it failed so to do, its final decree is erroneous and should be reversed.

POINT III.

The final decree is erroneous in that it did not adjudge that the West Bergen Trust Company mortgage, to the exent of $5,758.96, was prior in lien to the lien of the general mortgage of the defendant, Junction Milling Company.

The evidence establishes that the Junction Milling Company mortgage was given to secure the payment of $11,619.34, the balance due the Junction Milling Company for materials furnished to the Capital Construction Co., Inc. (Case, pp. 471, 804). The Master found that of this amount $7,973.00 was for materials used in the erection of the Cranford building (Case, p. 225). This mortgage encumbered only a part (known as the "wings") of the premises described in the bill of complaint. It was dated September 16th, 1927, and recorded October 6th, 1927, in the Union County Register's Office.

Obviously, this mortgage was not an advance-money mortgage, and, therefore, under Section 15 of the Mechanics' Lien Law, *supra,* it was subsequent in lien to all mechanics' lien claims because this mortgage was recorded subsequent to the commencement of the erection of the building in question.

As shown under Point II hereof, the West Bergen Trust Company mortgage was an advance-money mortgage to the extent of $5,758.96. It was recorded October 26th, 1927, subsequent to the recording of the Junction Milling Company mortgage, but, as above pointed out, the West Bergen Trust Company mortgage to the amount of $5,758.96 was prior in lien to all mechanics' lien claims.

In the instant case, it must be observed that the debt due materialmen and laborers was a lien which attached to the mortgaged premises as of the date of the commencement of the erection of the building, which was prior to the giving and recording of the Junction Milling Company mortgage; and, therefore, the mechanics' lien claims were always prior in lien to the Junction Milling Company mortgage.

> *Manhattan Life Ins. Co.* vs. *Paulison,* 28 N. J. Eq. 307;
> *Fishgrund* vs. *Erikson Real Estate Co.,* 147 Atl. (N. J.) 811.

The amount advanced by the West Bergen Trust Company and applied to the cost of the erection of the building was, under Section 15 of the Mechanics' Lien Law, *supra,* always prior in lien to all mechanics' lien claims.

The situation thus presented is, that the Junction Milling Company mortgage was always subsequent in lien to the mechanics' lien claims, and

the West Bergen Trust Company mortgage to the extent of the moneys actually advanced and applied to the erection of the building was always prior to all mechanics' lien claims.

To give the general mortgage of the Junction Milling Company priority over the advance-money mortgage of the West Bergen Trust Company and, thereby, prevent the latter from taking priority over the mechanics' lien claims, would, in effect, nullify the priority given to an advance-money mortgage under Section 15 of the Mechanics' Lien Law, *supra.*

It is, therefore, submitted that the court below erred in holding that the lien of the Junction Milling Company mortgage was prior in lien to the West Bergen Trust Company mortgage, and should have decreed that the West Bergen Trust Company mortgage, to the extent of $5,758.96, was an advance-money mortgage and entitled to be paid on the distribution of the fund in court, before mechanics' lien claims and the Junction Milling Company mortgage.

The result thus produced under Section 15 of the Mechanics' Lien Law, *supra,* is that all mechanics' lien claims are prior in lien to the lien of the Junction Milling Company mortgage; that the West Bergen Trust Company mortgage, to the extent of $5,758.96, is prior in lien to all mechanics' lien claims. Therefore, the West Bergen Trust Company mortgage is prior in lien to the Junction Milling Company mortgage.

> *Tompkins* vs. *Horton,* 25 N. J. Eq. 284, 294.

This, it is submitted, is an equitable and just result, because the Junction Milling Company mortgage from its inception was subsequent to all mechanics' lien claims, and the money advanced

by the West Bergen Trust Company and applied to the payment in part or in whole of initiate mechanics' lien claims, did not change the position of the lien of the Junction Milling Company mortgage by placing the West Bergen Trust Company mortgage, in so far as it was an advance-money mortgage, prior to the lien of the Junction Milling Company mortgage.

The court below, however, in its opinion HELD (Case, p. 255 at 268) that the West Bergen Trust Company mortgage was subsequent in lien to the Junction Milling Company mortgage, because the West Bergen Trust Company took with notice of the Junction Milling Company mortgage, and in marshalling the fund in court, relied upon the cited cases of

Hoag vs. *Sayre,* 33 N. J. Eq. 552;
Albert and Kernahan vs. *Franklin Arms,* 146 Atl. (N. J.) 213;
13th Ward B. & L. Ass'n vs. *Kanter,* 147 Atl. (N. J.) 809.

See also

Fidelity Union Title & Mortg. Guar. Co. vs. *Magnifico,* 151 Atl. (N. J.) 499.

Appellant submits that these cases are not in point on the question here presented, because in none of these cases was considered, the order of priority of an advance-money mortgage which was recorded subsequent to a general mortgage that was subsequent to mechanics' lien claims, under Section 15 of the Mechanics' Lien Law, *supra.*

POINT IV.

The final decree is erroneous in that it did not adjudge that the West Bergen Trust Company mortgage, to the extent that it is an advance-money mortgage, was prior in lien to the mechanics' lien claim and alleged judgment thereon of the defendant, Geo. F. Perry & Sons, Inc.

It is to be observed in considering this point that the Perry judgment was obtained by default against the Capital Construction Co., Inc., on a mechanics' lien claim in the Union County Circuit Court, nine days after statutory receivers had been appointed for the Capital Construction Co., Inc., and an injunction issued by the Court of Chancery restraining any further proceedings in any action or proceedings theretofore commenced against the Capitol Construction Co., Inc. (Case, pp. 86, 296). No order was obtained from the Court of Chancery amending or modifying this injunctive order so as to permit further prosecution of the suit that had been brought on the Perry lien claim in the Union County Circuit Court.

Manifestly, in view of this injunctive order, permission should have been obtained from the Court of Chancery to prosecute the Perry lien claim in the Union County Circuit Court against the Receivers of the Capitol Construction Co., Inc., because, at the time of the obtaining of the judgment, the receivers held the title to the property against which the judgment was rendered. Furthermore, all mortgagees who were made parties-defendants to the suit brought on the Perry lien claim were entitled to notice that Perry would undertake to prosecute its lien claim to judgment (after the appointment of the receivers and the

restraining order aforesaid) so, that these defendants might appear and defend their claims. Surely, the West Bergen Trust Company had the right to rely upon the injunctive order of the Court of Chancery that no further prosecution could be had upon the Perry lien claim after the appointment of the receivers.

On this point the Court below in the instant case said (Case, p. 270):

> "The trust company (meaning the West Bergen Trust Company) apparently assumed that the action in the circuit court would not be pressed since the receivers had been appointed, and, therefore, interposed no defense."

This expression of the Court below would seem to indicate that litigants could not rest in security upon the injunctive order of that Court.

In view of this injunctive order, how could the West Bergen Trust Company have defended itself against this unlawful judgment? If the Perry corporation were restrained from prosecuting its suit on its lien claim, the West Bergen Trust Company by the same injunctive order was restrained from defending this suit. Obviously, the West Bergen Trust Company could not have appeared in the Union County Circuit Court to defend its rights after the making and serving of the injunctive order aforesaid, without infringing upon or violating same, and being in contempt of the authority of the Court below.

In *Cavagnaro* vs. *Indian Tire and Rubber Co.*, 107 Atl. (N. J.) 643, it was HELD that the effect of the appointment of a receiver and the award of the statutory injunction is to take from those who, previous thereto, were officers and directors of the corporation their power to act as such and to confer upon the receiver the right to exercise all of their powers and privileges.

Before the appointment of the receivers in the instant case, the officers and directors would necessarily appear on behalf of the corporation. After the appointment of receivers, the receivers themselves must appear on behalf of the corporation to defend it in the suit on the Perry lien claim.

Manifestly, if the officers and directors of the Capital Construction Co., Inc. had no right after the appointment of the statutory receivers and the issuing of the injunctive order to exercise any right on behalf of the corporation, surely the Perry corporation had no right to proceed against the Capital Construction Co., Inc. when its hands, so to speak, were tied by the order of the Court of Chancery.

See:

Bissell vs. *Besson,* 47 N. J. Eq. 580.

The case of *Peoples B. & L. Ass'n* vs. *Vaniewsky,* 85 N. J. Eq. 551, cited by the Court below to support its opinion that the Perry judgment cannot be controverted by the West Bergen Trust Company in the instant foreclosure suit, in which the West Bergen Trust Company and Geo. F. Perry & Sons, Inc. are parties-defendants, is not an authority on the question here presented. The facts in the Vaniewsky case are that an advance-money mortgage was adjudged in an action on a mechanics' lien claim to be prior in lien to the lien claim. Thereafter the mortgagee sought to foreclose its mortgage, and the mechanics' lien judgment creditor was made a party-defendant in the foreclosure suit and sought to have determined in that suit that his judgment was prior in lien to the mortgage. The Court rightfully held that the judgment creditor, relying upon the authority of his judgment, was estopped to question its validity.

Obviously the Vaniewsky case has no application to the case at bar. In the instant case the contention is that the Perry judgment was unlawfully recovered; that it was taken by defendant in violation of the injunctive order of the Court of Chancery and especially against the lands of the Capital Construction Co., Inc., after the title to these lands had vested in the Receivers.

In *Smith* vs. *Trenton, Delaware Falls Co.,* 4 N. J. Eq. 505, it was HELD that an execution creditor of a corporation cannot, after the appointment of a receiver, file a bill to settle the validity and priority of claims and encumbrances against the property of the company; it is the duty of the receivers to settle the priorities and, in so doing, to decide upon the validity of the claims against the company.

Counsel for the Perry corporation relies upon the case of *Crane* vs. *Brighton Mills,* 98 N. J. Eq. 308 to justify his action in proceeding upon the Perry lien claim to judgment after the appointment of the statutory receivers and the issuing of the injunctive order.

It is to be observed that in the Crane case, the builder was insolvent and not the owner of the property. It does not appear in the Crane case that the plaintiff obtained permission from the Court of Chancery to prosecute his claim in the Circuit Court, after the appointment of the receiver for the builder, nor does it appear that an injunctive order was issued in that case against creditors prosecuting their claims against the builder. Since no question is thus raised, it may be assumed that in the Crane case the action against the builder and owner of the land, after the appointment of the receiver for the builder, was according to law. In other words, the plaintiff had obtained permission to prosecute his claim to judgment in the Circuit Court. Furthermore,

there was reason for having the mechanics' lien claim in that case prosecuted to judgment because the lien claimant had the right to have his lien claim established against the land; while, in the instant case, there was no reason (as the Court below well said in its opinion, Case, p. 276) because "The appointment of the receivers relieved the claimants from the necessity of bringing suit on their lien claims until the receivers or the Court of Chancery should require suit to be brought. Likewise, if action had been started before the appointment of the receivers, the diligent prosecution of that action became unnecessary after the appointment. All controversies concerning the indebtedness of the insolvent company and the liens upon its property may be disposed of by the Court in the insolvency proceeding." (Citing authorities.)

It is, therefore, submitted that upon the appointment of the statutory receivers, the title to the property of the Capital Construction Co., Inc., passed to them and the Court below took jurisdiction of the *res* and, as above quoted from the Court's opinion:

> "All controversies concerning the indebtedness of the insolvent company and the liens upon its property may be disposed of by the court in the insolvency proceedings."

In *Mack Mfg. Co.* v. *Citizens Const. Co.*, 85 N. J. Eq. 331, Vice Chancellor Leaming said:

> "The insolvent provisions of our Corporation Act render it clear that upon the appointment of a receiver in insolvency, the title of the insolvent corporation to its assets are divested and forthwith vested in the receiver, subject only to liens then existing, to the end that an equal distribution of the net assets may be made among general creditors. The assets are thus placed in *custodia legis* for purpose stated."

Obviously, under this exposition of the law, the lien of the West Bergen Trust Company mortgage, which was prior to the lien of the Perry lien claim at the time of the appointment of the receivers, could not be changed by the Perry judgment in the Union County Circuit Court so as to make the lien of the Perry judgment prior to the lien of the West Bergen Trust Company mortgage. Otherwise, the position and status of the respective liens could be changed after the appointment of a receiver of an insolvent corporation.

In *Cooper* vs. *Philadelphia Worsted Co.*, 57 Atl. (N. J.) 733, Vice Chancellor Reed said:

> that a suit against a corporation did not "abate by reason of the appointment of the receiver, and if the receiver had applied to be made defendant he would have been admitted. The general rule is stated by Mr. Justice Depue, in delivering the opinion in *Ennis* vs. *Eden Paper Mills Co.* (N. J. Err. and App.) 48 Atl. 610. This is the general rule laid down in the books, which controls *unless there is an injunction restraining the suit or a legislative provision to the contrary.*" (Italics ours.)

In the instant case, the prosecution of all pending actions against the Capital Construction Co., Inc., was enjoined at the time of the appointment of the receivers; and it is, therefore, submitted that under the Cooper case, *supra,* the Perry company should have applied to the Court below for a modification or amendment of the injunctive order if it desired to further prosecute the Perry lien claim against the defendant corporation.

The Perry judgment having been obtained contrary to and in violation of the injunctive order, it should have been considered by the Court below as unlawful and determining no rights as between

the Perry lien claim and the West Bergen Trust Company mortgage, as to priority.

Furthermore, it must be borne in mind that if the Perry lien claim, by reason of the default judgment in the Union County Circuit Court, was made prior in lien to the lien of the West Bergen Trust Company mortgage, that it has thereby secured an advantage over other mechanics' lien claims in violation of Section 29 of the Mechanics' Lien Law which provides in part as follows:

> "All lien claims for erecting, adding to, repairing or altering the same building shall be concurrent liens upon the building and the lands whereon the same is erected, and shall be paid pro rata out of the proceeds thereof when sold by virtue of this Act. * * *
>
> In *Stiles* vs. *Galbreath,* 3 Rob. 69 N. J. Eq. 222, it was held: If the land has been sold under foreclosure of a mortgage to which the lien claims are prior, they share the fund produced pro rata."

Manifestly the converse of this principle must be true, that if the lien claims are subsequent to a mortgage the lien claimants must share pro rata in the fund, after the mortgage has been satisfied.

Appellant, therefore, submits that the Perry Corporation cannot, by virtue of its judgment, take anything by way of priority over other lien claimants, and that all lien claimants including Perry must remain concurrent in the distribution of the fund realized on the sale of the property in question.

It is therefore submitted that the final decree is erroneous in that it failed to adjudicate that the West Bergen Trust Company mortgage was prior in lien to the mechanics' lien claim and the judgment thereon of the Perry Corporation.

POINT V.

The final decree is erroneous in that it did not adjudge that the lien of the West Bergen Trust Company mortgage, to the extent that it is an advance-money mortgage, is third in priority in the distribution of the fund in court realized on the sale of the mortgaged premises.

Appellant conceded in the record (Case, pp. 553, 554) that the Shilowitz and Tucker mortgage and the Carteret Company mortgage were prior in lien to the lien of the West Bergen Trust Company mortgage in the distribution of the fund in court in this cause.

By the foregoing argument under Points II, III and IV hereof, the West Bergen Trust Company mortgage is prior in lien to all mechanics' lien claims, is prior in lien to the Junction Milling Company mortgage, and is prior in lien to the alleged judgment of Geo. F. Perry & Sons, Inc. Therefore, the West Bergen Trust Company mortgage is third in priority in the distribution of the fund.

No consideration has been given in this brief to the counterclaims filed in the instant foreclosure suit by several of the defendants against the West Bergen Trust Company and others. Appellant submits that a counterclaim against a co-defendant is not a proper proceeding in a foreclosure suit, where the amount due on subsequent encumbrances and the order of priority is the same matter sought to be determined by the counterclaim. The sole object of these counterclaims was to have the encumbrances of the counterclaiming defendants determined to be prior to the encumbrances of other defendants. No affirmative relief was sought. The bill of complaint sets forth the

several encumbrances, and the order of reference to the Master was for the purpose of having him determine the amount due each encumbrancer for principal and interest, and their order of priority, so that the matter attempted to be presented by the respective counterclaimants was before the Master on the bill, answers, and the order of reference.

Furthermore no discussion is here made as to the decrees *pro confesso* taken by Ira R. Crouse, Louis Moore, Lipschitz Parquet Floor Co. and Meyer and Ruh Company, four of the mechanics' lienor counterclaimants against the West Bergen Trust Company. These decrees were taken after answer had been filed by the West Bergen Trust Company to each counterclaim (Case, pp. 110, 156, 133, 176; 160, 115, 138, 181), and therefore, the decrees are of no effect. Moreover, one mechanics' lien claimant could not obtain an advantage over another in the foreclosure suit.

In conclusion, appellant submits that the final decree of the Court below should be reversed and set aside, for the reasons herein stated.

Respectfully submitted,

Edward P. Stout,
Counsel for Appellant, West Bergen
Trust Company.

36 OCT.T.1931

New Jersey Court of Errors and Appeals

Riverside Apartment Corporation, a corporation, Complainant, *vs.* Capital Construction Co. Inc., a corporation, *et als.*, Defendants.	On Appeal of West Bergen Trust Company.

ANSWERING BRIEF OF IRA R. CROUSE; LOUIS MOORE; MORRIS PORTNOW and ABRAHAM LIPSCHITZ, PARTNERS TRADING AS LIPSCHITZ PARQUET FLOOR CO., AND MEYER & RUH COMPANY.

Aaron Kaufman, of counsel with Ira R. Crouse; Louis Moore; Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co.; and Meyer & Ruh Company.

Statement of the Case.

The Capital Construction Co., Inc., a corporation of New Jersey, was the owner of a tract of land in Cranford, New Jersey, upon which an apartment house was erected. During the construction of the building, the Capital Construction Co., Inc., gave a mortgage to Israel Shilowitz and Jacob Tucker to secure moneys to be advanced in the construction of the building, which mortgage was dated, July 29, 1927, and recorded August 2, 1927.

Thereafter, on September 16, 1927, the Capital Construction Co., Inc., gave a mortgage to the Junction Milling Company, which mortgage was recorded on October 6, 1927, to secure the purchase price of materials which were furnished and which were to be furnished for the said apartment house, and this mortgage covered the outside wings of the property and did not cover the apartment building itself.

Subsequently, and on October 14, 1927, the Capital Construction Co., Inc., gave a mortgage to the Carteret Company, which mortgage was recorded on October 24, 1927, and which mortgage was given for moneys to be advanced in the construction of the apartment house.

On October 25, 1927, the Capital Construction Co., Inc., gave to the West Bergen Trust Company a mortgage, which mortgage was recorded on October 26, 1927, and which was given presumably for moneys to be advanced in the construction of the building.

On January 4, 1928, the Court of Chancery declared the Capital Construction Co., Inc., insolvent.

On January 12, 1928, Ira R. Crouse; Louis Moore; Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co.; and Meyer & Ruh Company each filed in the Union County Clerk's Office a lien claim for material and/or labor furnished in the construction of the apartment house.

On March 3, 1928, the Riverside Apartment Corporation, a corporation of the State of New Jersey, who held a mortgage in the sum of Thirty Thousand ($30,000.00) Dollars undisputedly prior in lien to all the mortgages and liens involved in this appeal, filed a bill to foreclose its mortgage.

On April 5, 1928, order for sale of the property

pendente lite was made and the property was sold by the Sheriff of Union County for the sum of One Hundred Forty-two Thousand Five Hundred ($142,500.00) Dollars. After the payment of the moneys due to the Riverside Apartment Corporation, and deductions made for costs connected with a Receivership and other expenses allowed by the Court of Chancery, there remained in the hands of the Clerk in Chancery the sum of Seventy Thousand Three Hundred Forty-seven Dollars and Twenty-one ($70,347.21) Cents. The question of the distribution of this fund was referred to Aloysius McMahon, Esq., one of the Special Masters of the Court of Chancery on July 13, 1929.

The Master's report was filed on October 15, 1930 (page 219, State of Case), and exceptions were filed by Ira R. Crouse; Louis Moore; Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co.; and Meyer & Ruh Company (page 241, State of Case), in which these defendants excepted to report that the mortgage of the defendant, West Bergen Trust Company was prior to their lien claims. The final decree entered was entered January 23, 1931 (page 280, State of Case).

There is only one question that arises as the result of the appeal of West Bergen Trust Company, namely:

Where two valid mortgages are recorded, the first of which is subsequent to mechanics' liens and the second of which is prior to mechanics' liens and a fund is created sufficient to satisfy only one class of liens, to whom does the fund go?

POINT I.

Mechanic Lien Claims, although not prior to the West Bergen Trust Company mortgage, are prior to the mortgage of the Junction Milling Company mortgage and, therefore, participate in the amount found to be due on the Junction Milling Company mortgage.

There is no question that the Junction Milling Company mortgage was given for a valuable consideration. The Master to whom this matter was referred had found that there was due upon it the sum of Seven Thousand Nine Hundred Seventy-Three ($7,973.00) Dollars, besides interest from July 29, 1930 (page 225, State of Case). Both the Master and the Vice-Chancellor had found that the Junction Milling Company mortgage was given to secure materials used in the construction of the building or materials furnished or debts due from the Capital Construction Company which had nothing to do with the apartment building. By reason of Section 15 of the Mechanic's Lien Act, the mechanic lien claims held a priority over this mortgage. But the Junction Milling Company mortgage was recorded on October 6, 1927, and the mortgage of the West Bergen Trust Company was recorded on October 26, 1927, and therefore, the Junction Milling Company mortgage is prior to the West Bergen Trust Company mortgage, 2 Comp. St. 1552, Section 53. The Vice-Chancellor has held that the West Bergen Trust Company held a valid advanced money mortgage to secure moneys actually used in the construction of the building. Subsequent to October 26, 1927, and beginning with November 12, 1927, mechanic lien claims were filed against the mortgaged premises.

The West Bergen Trust Company argues that since they are prior in lien to mechanic lien claims and mechanic lien claims are prior to the mortgage of the Junction Milling Company, that therefore, the West Bergen Trust Company is prior in lien to the mortgage of the Junction Milling Company. The mechanic lien claimants could allege that since the mortgage of the Junction Milling Company is prior to that of the West Bergen Trust Company, and they in turn are prior to the mortgage of the Junction Milling Company, that therefore, their mechanic lien claims are prior to the West Bergen Trust Company mortgage. Or it may be argued, that since the West Bergen Trust Company mortgage is prior in lien to mechanic's liens and the Junction Milling Company mortgage is prior in lien to the West Bergen Trust Company mortgage, that therefore, the lien of the Junction Milling Company is prior to the lien of the mortgage of the West Bergen Trust Company. In other words, the syllogism works three ways according to which first premise is used.

But this Court has answered the query in the recent case of *Atlantic City National Bank, et al.* v. *Wilson, et al.*, 154 Atl. 537. The facts in that case were as follows:

One, Andrew P. Wilson, owned a parcel of land approximately 135 feet front by 65 feet deep, which was mortgaged by eight separate mortgages to one, Satanov, to secure Eighty Thousand ($80,000.00) Dollars. These mortgages were duly recorded, and on the same day assigned as collateral to Atlantic City National Bank.

On June 5, 1923, Wilson executed four other mortgages on the same land to William Staiger, to secure Ten Thousand ($10,000.00) Dollars ($2,500.00 each), which were also seasonably recorded.

On June 8, 1923, Wilson again mortgaged the land; this time to the Atlantic City Lumber Company to secure Forty-five Hundred ($4,500.00) Dollars, which mortgage was likewise recorded and was a third lien thereon.

On July 16, 1923, Mason & Gaskill filed a mechanics lien claim against the building and lands for the sum of Three Thousand Nine Hundred Forty-six Dollars and Forty-two ($3,946.42) Cents, making the three prior mortgagees parties. Neither Satanov nor Staiger contested the priority of the lien claim, with the result that judgment by default was entered. A priority over these mortgages was established.

This left the respective priorities of the liens of the several encumbrances, at this juncture, standing as follows:

1. The Satanov (second as to Mason & Gaskill).

2. The Staiger mortgage (third as to Mason & Gaskill).

3. The Atlantic City Lumber Company (prior to Mason & Gaskill mechanic's lien claim but subsequent to Satanov and Staiger mortgages).

The Atlantic City Lumber Company foreclosed its third mortgage and the property was purchased by one Nicholson.

Subsequently, the Atlantic City National Bank and Louis Satanov filed a bill to foreclose the first mortgage, making party defendants all junior encumbrancers. The property was sold under this foreclosure for the sum of One Hundred Eighteen Thousand Four Hundred Seventy-five ($118,475.00) Dollars. There was sufficient money to pay the complainant's decree in full, leaving a surplus to be applied to the subsequent

encumbrancers. That surplus and the rents collected by the receiver appointed in this cause and the surplus thereof had occasioned controversy.

This Court held that the lien claim of Mason & Gaskill, although not prior to the Atlantic City Lumber Company, and therefore not payable by Nicholson or from funds otherwise due him, is by virtue of the statute prior to the Staiger mortgage, and the amount due on said liens should be paid out of the amount due under the said Staiger mortgage. In other words, mechanic's lien claim, although not prior to third mortgage, and therefore not payable by purchaser at third mortgage foreclosure sale or from funds otherwise due him, was, because of statute, prior to second mortgage, and amount due on such lien (mechanic's lien) should be paid out of the amount due under second mortgage.

There is a marked difference between an ordinary priority gained, for example, in the case of a levy of one judgment-creditor before another and the type of priority of a mechanic's lien over a mortgage. In the first instance, the effect is to place the one judgment ahead of the other, while in the second instance, the mechanic's lien is *substituted* for the mortgage.

The West Bergen Trust Company, at the time of the recording of its mortgage, had notice of the existence of the mortgage of the Junction Milling Company in the sum of Eleven Thousand ($11,000.00) Dollars. They also had notice of the Shilowitz mortgage. In the final decree the amount due on the Shilowitz mortgage which was not applied to the construction of the building was given to the mechanic lien claimants who had not postponed their right of lien claim to that mortgage. The same is true as to the Carteret Company mortgage. There is not a word

of complaint or exception for this action and yet it is founded upon the same theory of law that the Vice-Chancellor decided that the mechanic lien claimants were substituted for that portion of the Junction Milling Company mortgage which was due and not applied to the construction of the building.

The Junction Milling Company mortgage was a lien on only the wings. The expert testimony of the proportionate value of the wings to the balance of the property was between eight and nine per cent. The total value of the property, according to John W. Hines, was Two Hundred Fifty Thousand ($250,000.00) Dollars; Two Hundred Thirty Thousand ($230,000.00) Dollars for the land and building excepting the wings and Ten Thousand ($10,000.00) Dollars for each wing (page 509, State of Case). It was upon this basis that the Honorable Vice-Chancellor held that on the basis of the amount that the property brought at the Sheriff's sale the wings were to be regarded as valued at Eleven Thousand Four Hundred ($11,400.00) Dollars (page 267, State of Case).

Under the cases of *Ennis* v. *Eden Paper Co.*, 65 N. J. L. 577, 48 A. 610; *Doty* v. *Auditorium Pier Co.*, 56 A. 720; affd. 65 N. J. Eq. 768, 56 A. 1132; *Meister* v. *Meister, Inc.*, 142 A. 312, this Court has laid down the rule that where a corporation has been adjudged insolvent, it is not necessary for mechanic lien claimants to proceed in the Court of Law to perfect their lien claims. The policy of the law in this State is that all controversies concerning the indebtedness of insolvent companies and liens upon its property shall be disposed of in the Court of Chancery. The lien claim claimants had proved their claims before the Master. There is no dispute by the appellant, West Bergen Trust Company, as to their validity.

I have not answered the other points raised by

the West Bergen Trust Company in their brief since they do not deal with the real substance of appeal or refer to matters with which these defendants-appellees are not concerned.

Conclusion.

The theory upon which the Honorable Vice-Chancellor gave the lien claimants the right to participate in the fund created as the result of the Junction Milling Company mortgage is sound and in accordance with law and equity, and these defendants-appellees request that the final decree of the Court below shall be affirmed.

Respectfully submitted,

Aaron Kaufman,
Counsel for Ira Crouse, Louis Moore, Morris Portnow and Abraham Lipschitz, partners, trading as Lipschitz Parquet Floor Co. and Meyer & Ruh Company.

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New Jersey Court of Errors and Appeals

Between: RIVERSIDE APARTMENT CORPORATION, a corporation, Complainant, *and* CAPITAL CONSTRUCTION CO., INC., et al., Defendants.	On Appeal of West Bergen Trust Company.

ANSWERING BRIEF OF A. S. REID & CO.

Facts.

On or about March 3, 1928, after having obtained leave of the Court of Chancery, the complainant filed its bill in the Court of Chancery, for the foreclosure of two mortgages encumbering certain premises situated in the Township of Cranford, County of Union and State of New Jersey. Prior to the filing of the bill of complaint, receivers had been appointed for the defendant, Capital Construction Co., Inc., and permission to join the receivers as defendants in the foreclosure suit had been given by the aforementioned order. The premises in question were also encumbered by several additional mortgages, as well as with mechanics' liens and judgments, and all such mortgagees, mechanics' lien creditors and judgment creditors were made defendants in the foreclosure suit.

On petition of the complainant, filed March 27, 1928 (Case, p. 185), the Court of Chancery ordered a sale of the mortgaged premises, pendente lite (Case, pp. 193-197). The premises were sold by the Sheriff of Union County on May 23, 1928 (Case, pp. 200-201), the sale was confirmed by the Chancellor on June 4, 1928 (Case, p. 202), and the Sheriff paid to the Clerk of the Court the sum of $140,777, being the amount of the bid, together with interest, less Sheriff's Fees (Case, pp. 203-204).

After issue had been joined and upon due notice, the cause was referred on June 5, 1928, to the late Honorable John Bentley, Vice Chancellor, for hearing and determination (Case, p. 205). The late Vice Chancellor designated July 12, 1928, as the time for the hearing of said cause and on said date an order was made (Case, p. 212), directing the Clerk of the Court of Chancery to pay complainant's decree, costs and counsel fee amounting to $57,957.75, leaving on deposit with the Clerk of said Court, a balance of $82,819.25, with accrued interest. On May 14, 1929, by order of that date (Case, p. 215), the cause was referred to John Milton, Esq., as Special Master, and after said Special Master had decided that he was unwilling to act because of his prior knowledge of the case, an order was made, on June 13, 1929 (Case, p. 216), substituting Aloysius McMahon, Esq., as Special Master in the place and stead of John Milton, Esq. On November 25, 1929 (Case, p. 218), by order of that date, the Clerk of the Court of Chancery was directed to pay out of the funds in his hands the expenses and disbursements of the Receivers of Capital Construction Co., Inc., the fees of the receivers, and of counsel for complainant and defendant in

the insolvency proceedings, amounting to $11,876.72, leaving a balance in the hands of said Clerk of $70,951.53, with accrued interest.

On June 13, 1929, Special Master McMahon, by Master's Summons bearing that date (Case, p. 217), ordered the defendants to appear before him on June 25, 1929, at which time he would proceed to ascertain and report the amount due the various parties defendant. After several continuations of this hearing, the Master filed his report on October 15, 1930 (Case, pp. 219-225).

Several defendants having filed exceptions to the Master's Report and an order having been made referring the cause to Honorable John Bigelow, Vice Chancellor (Case, p. 252), the cause came on for hearing before Vice Chancellor Bigelow on exceptions to the Master's Report on December 4, 1930, and on December 26, 1930, the Vice Chancellor filed his opinion overruling and setting aside a portion of the Master's Report (Case, pp. 255-278). On January 23, 1931, a final decree was advised by Vice Chancellor Bigelow (Case, pp. 280-284), from the whole and every part of which the appellant, West Bergen Trust Company, has appealed, alleging in its brief filed with this Court that said decree is erroneous for the following reasons:

1. The final decree is erroneous in that it did not adjudge the amount due to the various parties for principal and interest upon their several encumbrances and the order and priority thereof.

2. The final decree is erroneous in that it did not adjudge that the West Bergen Trust Company mortgage, to the extent that it is an advance-money mortgage, was prior in lien to the lien of all mechanics' lien claims.

3. The final decree is erroneous in that it did not adjudge that the West Bergen Trust Company mortgage, to the extent of $5,758.96, was prior in lien to the lien of the general mortgage of the defendant, Junction Milling Company.

4. The final decree is erroneous in that it did not adjudge that the West Bergen Trust Company mortgage, to the extent that it is an advance-money mortgage, was prior in lien to the mechanics' lien claim and alleged judgment thereon of the defendant, Geo. F. Perry & Sons, Inc.

5. The final decree is erroneous in that it did not adjudge that the lien of the West Bergen Trust Company mortgage, to the extent that it is an advance-money mortgage, is third in priority in the distribution of the fund in Court, realized on the sale of the mortgaged premises.

West Bergen Trust Company is one of four defendants who have appealed from the decree of the Court below. The four appellants have joined in printing one State of the Case, but each has filed a separate brief and this respondent, A. S. Reid & Co., deems it advisable to file a separate brief in answer to the three briefs filed by the four appellants. Although several points raised by this appellant, West Bergen Trust Company, appear to be a direct challenge of the validity and superiority of the judgment of the defendant, Geo. F. Perry & Sons, Inc., this respondent disputes the arguments advanced in this appellant's brief because its right to share in the distribution of the fund, as decreed by the Court below, would be affected by a determination of this Court, reversing the Court of Chancery.

POINT I.

The final decree is not erroneous by reason of its failure to adjudge the amount due to the various parties for principal and interest upon their several encumbrances and the order and priority thereof.

It has already been shown that the premises were sold by the Sheriff of Union County, pendente lite (Case, pp. 119-202), and the fund paid to the Clerk of the Court of Chancery was substituted for the premises. The several defendants, whether mortgagees, judgment-creditors or mechanics' lien creditors looked to this fund as a source for the payment of their respective claims. The fund had been depleted by payments ordered by the Court of Chancery and at the time of the entry of the final decree, it amounted to approximately $40,000.00. This sum was entirely inadequate for the payment of the claims of the several creditors and it became necessary for the Vice Chancellor, in passing upon the correctness of the report of the Special Master, to determine the amounts due to the various parties and the order of priority of their claims. It is evident from an examination of the opinion of the Vice Chancellor (Case, pp. 255-278), that the order of distribution advised by the Vice Chancellor (Case, p. 278), could not have been arrived at without a determination of the amounts due and the order of priority.

The appellant, West Bergen Trust Company, is, therefore, merely raising a technical objection to the language of the decree and certainly is not attacking and cannot attack the reasons which

prompted the Court below in reaching the conclusions embraced in its opinion. It is fundamental law that this Court will not reverse the Court below where the reasoning of the Court was correct, even if the language of the order or decree which is the embodiment of that reasoning may be improperly framed. See *Chauinger* v. *Apter,* 96 N. J. E. 302, in which this Court modified the decree of the Court below because the reasons for the decree were proper. This Court said: "The Court will examine the opinion of the Court below, filed pursuant to the requirement of our State Constitution (Article 6, Section 2, Paragraph 5), that 'when an appeal from an order or decree shall be heard, the Chancellor shall inform the Court, in writing, of the reasons for his order or decree,' and such opinion will be examined even though it was filed after the appeal was taken."

The same conclusion was reached by this Court in the case of *McMichael* v. *Horay,* 90 N. J. L. 142, also *Meisel* v. *Merchant's National Bank of Newark,* 85 N. J. L. 253, and *Delker* v. *Board,* 90 N. J. L. 473. In the last case, this Court held that if the judgment or the lower Court varies from its decision, the cause may be remanded to the lower Court, so that the judgment may be corrected by amendment in that Court.

Even though it be a fact that the final decree of the Court of Chancery did not specifically contain a reference as to the amount due to the various parties for principal and interest and the order and priority of their several encumbrances, the failure of the Court to include such provisions was not error resulting in harm to this appellant, if it be a fact (which this respondent denies) that failure to include such matters in the decree

results in error. This respondent most respectfully urges that this Court has ample jurisdiction and the necessary power to order a modification of the decree and that such error does not and should not result in a reversal of the decree, it being evident that the Court below came to the correct conclusion as to the distribution of the fund out of which the claims of the several defendants are to be paid.

POINT II.

The final decree is not erroneous because it did not adjudge that the West Bergen Trust Company mortgage was prior in lien to the lien of all mechanics' lien claims.

The appellant admits in its brief (p. 17), that the amount of its mortgage in excess of $5,758.96 was for charges and fees and cannot be applied to the cost of the erection of the building. It argues, however, that to the extent of $5,758.96, it is a lien prior to the liens of mechanics' lien claimants.

The Vice Chancellor, in his opinion (Case, pp. 268-278), very clearly explains the status of the mortgage of this appellant and in no part of his opinion is to be found a statement to the effect that the mortgage of this appellant is not prior in lien to the lien of mechanics' lien claims, with the exception of the lien claim of Geo. F. Perry & Sons, which had been reduced to a judgment in the Union County Circuit Court (Case, p. 364), and with the exception of that portion of the fund in Court realized from the sale of the "wings." The point now advanced by this appellant, there-

fore, is in the nature of an argument with the defendant, Geo. F. Perry & Sons, Inc., and appellant is apparently contending that its mortgage is superior and prior to the Perry judgment. As already pointed out in this brief, the fund in Court was insufficient to pay all claims and it is due to this fact, rather than to the fact that the decree did not specifically fix the position of the mortgage of this appellant, that this appellant failed to obtain the amount due on its mortgage from the fund.

Since there would be no money out of which to pay the amount due this appellant on its mortgage, because of the depletion of the fund by the payment of prior liens, it is quite evident that the appellant has suffered no harm by the omission in the decree of an adjudication to the effect that its mortgage is superior to mechanics' liens. The Vice Chancellor, in marshalling the fund in Court, determined that the mortgage of the Junction Milling Company was inferior to mechanics' lien claims and that lien claimants should share pro rata in the portion of the fund realized from the sale of the "wings." In another portion of this brief, this respondent argues that the portion of the fund in Court realized from the sale of the "wings" should be divided pro rata among lien claimants and that as to this portion of the fund, lien claims are prior to the mortgage of the appellant. As to the balance of the fund, realized from the sale of the middle tract, respondent contends that mechanics' liens are prior to appellant's mortgage, because appellant failed to trace its funds into the building, but since the fund from the middle tract has been depleted by payment of prior liens, no purpose would be served in arguing the point under Point II of this brief.

POINT III.

The final decree is not erroneous for its failure to provide that the West Bergen Trust Company mortgage to the extent of $5,758.96, was prior in lien to the lien of the mortgage of the defendant, Junction Milling Company.

The Junction Milling Company mortgage was dated September 16, 1927 (Case, p. 804), and was recorded on October 6, 1927 (Case, p. 811). The mortgage of this appellant was dated October 25, 1927 (Case, p. 874), and was recorded on October 26, 1927 (Case, p. 879). It is at once evident that the mortgage of the Junction Milling Company was recorded prior to the mortgage of the appellant and ordinarily would be considered a prior lien. *Westervelt* v. *Voorhis,* 42 N. J. Eq. 179, affirmed 43 N. J. Eq. 642, also *Fidelity Union Title Co.* v. *Magnifico,* 151 At. Rep. 499; 2 Comp. St. 1552, Sec. 53.

Appellant contends in its brief, that since the Junction Milling Company mortgage was given to secure materials furnished to the Capital Construction Co., Inc. (Case, p. 471), and appellant's mortgage was intended to be an advance-money mortgage, the time of recording should have been ignored by the Court of Chancery and appellant's mortgage should have been considered prior to the Junction Milling Company mortgage for the purpose of permitting appellant to share in the fund realized from the sale of the "wings," which fund the Vice Chancellor held should be distributed pro rata among mechanics' lien claimants.

Vice Chancellor Bigelow correctly held in his opinion (Case, pp. 266-267), that the mortgage of

Junction Milling Company was deferred to mechanics' lien claims, relying upon *Meister* v. *Meister,* 142 At. Rep. 312. The Junction Milling Company mortgage having covered only a portion of the entire tract, considered by the Vice Chancellor to have a value of eight per cent of the whole (Case, p. 267), the Court correctly found that the sum of $11,400.00 represented the proceeds of the tract covered by the Junction Milling Company mortgage at the Sheriff's Sale. Since the mortgage of the Milling Company, toward payment of which the $11,400.00 would have been available if the Milling Company had not attempted to secure itself by taking a mortgage for materials delivered, was deferred to mechanics' lien claims, said fund was certainly made available for the payment pro rata of said lien claims. It was not improper to marshal the entire fund, in accordance with the plan followed by the Vice Chancellor (Case, p. 277), and the cases of *Hoag* v. *Sayre,* 33 N. J. Eq. 552, *Albert & Kernaham* v. *Franklin Arms,* 146 At. Rep. 213, and *Thirteenth Ward B. & L.* v. *Kanter,* 147 At. Rep. 809, constitute ample authority for the plan followed.

It does not necessarily follow that because an advance-money mortgage takes priority over mechanics' lien claims, to the extent that the money advanced can be traced into the building, that an advance-money mortgage automatically takes priority over a mortgage of record at the time the advance-money mortgage is recorded. Counsel for appellant very ingeniously attempts to procure the fund produced from the sale of the "wings," but has cited no authority in support of his contention. The case of *Tompkins* v. *Horton,* 25 N. J. Eq. 284, is not authority for this

proposition. The recent case of *Atlantic City National Bank* v. *Wilson,* 154 At. Rep. 537, is authority to the contrary, it having been there decided that "a mechanics' lien claim, although not prior to a third mortgage, * * * was, because of statute prior to a second mortgage, and the amount due on such lien should be paid out of the amount due under the second mortgage." West Bergen Trust Company cannot claim priority over the mortgage of Junction Milling Company, the Milling Company mortgage having been recorded before appellant's mortgage and the date of recording being the final test as to priority. The final decree should not be reversed because it did not adjudge appellant's mortgage to be prior to the Milling Company mortgage.

POINT IV.

The final decree is not erroneous for its failure to adjudge that the West Bergen Trust Company mortgage, to the extent that it is an advance-money mortgage, was prior in lien to the mechanics' lien claim and judgment of the defendant, Geo. F. Perry & Sons, Inc.

Under Point IV of appellant's brief, it attempts to assail the validity of the Perry judgment by collateral attack. It has been firmly established by the decisions of the Courts of this State through a long period of years that a judgment of a Court of general jurisdiction, having jurisdiction of the subject matter and person of the defendant, is invincible against collateral attack. *Diehl* v. *Page,* 3 N. J. Eq. 143; *National Docks, etc. R. Co.* v. *Pennsylvania R. Co.,* 52 N. J. Eq. 58; *Inskeep* v. *Lecony,* 1 N. J. L. 111; *Vandyke*

v. *Bastedo,* 15 N. J. L. 224, *Podesta* v. *Binns,* 69 N. J. Eq. 387; *Palmer* v. *Board,* 77 N. J. L. 143; *Crawford* v. *Lees,* 84 N. J. Eq. 324. It cannot be denied that the Union County Circuit Court had jurisdiction of both the subject matter and person of the defendant in the mechanics' lien action instituted therein by Geo. F. Perry & Sons, Inc. The Mechanics' Lien Act confers jurisdiction upon Circuit Courts (Section 23).

Appellant emphasizes the fact that the Perry judgment was entered after the entry of an order for the appointment of receivers of Capital Construction Co., Inc., and after the creditors of said corporation were restrained by said order from proceeding with the enforcement of their claims. That the Perry Company was within its rights in pursuing its mechanics' lien suit to judgment has been established by the Supreme Court in the case of *Crane* v. *Brighton Mills,* 98 N. J. L. 308. It is true, as appellant alleges, that in the *Crane* case, the contractor, and not the owner, was adjudged to be insolvent. This fact cannot alter the principle of law enunciated by the present Chief Justice, speaking for the Supreme Court, in the *Crane* case. The principle of law clearly laid down in this decision is that notwithstanding the provisions of Section 2 of the Supplement of 1919 to the Corporation Act (p. 455), the purpose of the Mechanics' Lien Law is to permit the materialman or laborer to recover judgment, "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."

Aside from the intention of the Courts to give efficacy to both the Mechanics' Lien Law and the

Corporation Act, as expressed in the decision in the *Crane* case, it has been held by this Court in the case of *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." The *Taylor* case was cited with approval in the *Crane* case and the portion herein quoted was quoted by Chief Justice Gummere in the decision of the Supreme Court in the *Crane* case.

There can be no dispute of the fact that the appellant had timely knowledge of the entry of the Perry judgment. The counterclaim filed by Perry in this suit alleged the entry of said judgment (Case, p. 82), and on April 24, 1928, the appellant filed an answer to said counterclaim (Case, pp. 89-90), indicating that knowledge of the existence of the judgment was had by the appellant on or before that date. It was the duty of the appellant to apply to the Circuit Court to have the judgment set aside, if it had been erroneously entered.

Appellant also alleges in its brief that it was prevented by the order of the Court of Chancery, appointing receivers for Capital Construction Co., Inc., from defending the Perry suit in the Union County Circuit Court. Assuming, but not admitting, that Perry was restrained by said order from prosecuting its suit to judgment, there was no provision in the restraining order denying to creditors of Capital Construction Co., Inc., the right to defend any actions in which said creditors were interested. Such a provision would have been most unusual and beyond the scope of the order appointing receivers and restraining

creditors. In addition, there is no ample proof before this Court, nor was there before the Court below, that Perry was actually restrained from prosecuting its suit. The only proof that Perry had knowledge of the existence of such a restraining order was contained in an affidavit filed in the Insolvency proceedings (Case, p. 300), in which it is alleged that an employee of the office of the firm of Milberg and Milberg "caused a copy of the attached order appointing receiver, to be sent to the creditors of the above named defendant corporation by placing the said order appointing receiver in an envelope properly addressed with the postage prepaid thereon, and deposited same in the United States Mail Box No. 1, Exchange Place, Jersey City, N. J." The affidavit does not contain the names of the creditors to whom the order was mailed, nor does the deponent make oath to the effect that she personally mailed the order. She merely claims that she "caused a copy to be sent." It is submitted that the affidavit of mailing is insufficient to prove that Perry was served with or had knowledge of an order of the Court of Chancery restraining the prosecution of its suit, even if service with and knowledge of said order were sufficient to prevent the entry of a judgment on the mechanics' lien suit.

The state of the case as printed by the four appellants is confusing in that there are included a number of pleadings and orders of the Court of Chancery in the suit entitled: *Ralph Cianfrone, et al.*, trading as *Venango Stone Company* v. *Capital Construction Co., Inc.* This suit was instituted by a creditor of the Capital Company for the purpose of procuring an adjudication of the insolvency of the Capital Company and the

appointment of receivers. The present action, from a decision in which appeals have been taken to this Court, is entirely foreign to the bill filed in the Cianfrone case. The pleadings in the latter case were not offered in evidence and do not rightfully belong in the state of the case. It is also to be noted that the receivers of the Capital Construction Co., Inc., have not in this action nor in any other suit, objected to the entry of the Perry judgment, nor have they claimed that the creditors or stockholders of the insolvent corporation have been prejudiced or injured by the entry of said judgment.

Inasmuch as the pleadings in the insolvency suit of *Cianfrone* v. *Capital Construction Co., Inc.,* have been printed in the State of the Case, it is not amiss to direct the Court's attention to the fact that no decree adjudging Capital Construction Co., Inc., to be insolvent was entered in the Court of Chancery. This was quite obviously due to the fact that the only asset of the corporation was the real estate located in Cranford, which was sold pendente lite during the foreclosure proceedings. The fund in Court having been substituted for the res the receivers apparently decided it was not necessary to pursue the insolvency proceedings further. Any cases cited by appellant, therefore, to the effect that an adjudication of insolvency prevents creditors from prosecuting their claims are not applicable to the present case. The receivers did nothing after the Sheriff's Sale and the insolvency proceedings were never continued beyond that date. All allowances and disbursements of the receivers and their counsel were paid out of the proceeds of the sale of the mortgaged premises by

an order of the Court of Chancery entered in the foreclosure proceedings.

Appellant admits in its brief (p. 10), that the judgment of the Law Court is res adjudicata in the foreclosure suit. *People's Building & Loan Association of Ridgefield Park* v. *Vaniewsky,* 85 N. J. Eq. 551, cited by appellant, is in support of this view. In the case cited, the Law Court held that the lien claim of a mechanics' lien claimant was not prior to the mortgage which was also a lien on the premises. The Court of Chancery, in determining the respective priorities of the mechanics' lien and mortgage, considered itself bound by the adjudication of the Law Court. In addition to the fact that Perry's judgment cannot be attacked in these proceedings because such an attack is collateral in nature, the entire controversy is now res adjudicata, the Circuit Court having adjudged that the judgment was prior to appellant's mortgage. *People's Building & Loan Association of Ridgefield Park* v. *Vaniewsky,* 85 N. J. Eq. 551.

It is respectfully submitted that neither the law nor the facts in this case would have justified the Vice Chancellor in advising a decree adjudging the mortgage of the appellant to be prior in lien to the lien and judgment of the defendant, Perry, and that failure to so adjudge does not constitute ground for the reversal of the final decree.

POINT V.

The final decree is not erroneous for its failure to adjudge that the lien of the West Bergen Trust Company mortgage to the extent that it is an advance-money mortgage, is third in priority in the distribution of the fund in Court.

To justify the Court of Chancery in adjudicating that appellant's mortgage was third in priority in the distribution of the funds, it would have been necessary to have found that it had priority over mechanics' liens, as well as the mortgage of Junction Milling Company, and the judgments of Geo. F. Perry & Sons, Inc., and A. S. Reid & Co., this respondent.

The testimony taken before the Special Master does not disclose that appellant's mortgage was an advance-money mortgage. In order for the mortgage to have priority over mechanics' liens, it is necessary that it be an advance-money mortgage, and it is encumbent upon the mortgagee, in order to obtain priority over mechanics' liens, to show by convincing evidence that the advances were used in the construction of the building; *Franklin Society* v. *Bens,* 152 At. Rep. 376; *Thirteenth Ward B. & L. Association* v. *Kanter,* 147 At. Rep. 809; *Fischgrund* v. *Eriksen,* 147 At. Rep. 811, and this the appellant failed to do. An examination of the testimony of counsel for the appellant (Case, pp. 553-578 and pp. 622-638), who was the principal witness in its behalf at the hearing before the Special Master, will clearly show that the appellant failed to trace the amount advanced on its mortgage into the building.

It is obvious that in the beginning, appellant's loan to Capital Construction Co., Inc., was regarded as an ordinary commercial loan. The loan was made on September 10, 1927 (Case, p. 554), and the bond and mortgage, which appellant claims were given as security for the loan, were dated on October 25, 1927, six weeks afterward (Case, pp. 872-873 and pp. 874-879). According to counsel's testimony, Five thousand ($5,000.00) Dollars was actually requested on September 10, 1927, and since that day was Saturday and it was too late to advance the money to the borrower, a note was requested, which was deposited in the borrower's account on Monday, September 12, 1927 (Case, pp. 554-555). The records of the Bank show that on September 10, 1927, $500.00 from another source was also deposited in the borrower's account (Case, p. 556), and on that date, a check for $2,000.00 was drawn against the account, resulting in an over-draft of $1,348.47 (Case, p. 907).

On September 12, 1927, the date on which the note was credited to the borrower's account, a deposit of $4,974.17 is shown, which is presumably the amount of the $5,000.00 loan, less the discount, and on September 15, an additional deposit of $2,250.00 was made. Against the total deposits, numerous checks were drawn, some of which may have been used in connection with the construction of the building, but it is quite evident that the proceeds of the $5,000.00 loan, having been mingled with other funds, cannot in this manner be traced to the building.

The Bank's ledger sheet very plainly shows an over-draft of $1,348.47 on September 10th. It was because of the condition of the account that application for the loan was made (Case, pp. 554-

555), and it, therefore, becomes apparent that a part of the loan granted by the appellant was used to take care of the over-draft. Such being the case, the funds loaned could not be traced to the building and in attempting to show that the advancement was used in the construction of the apartment house, appellant does not sustain the burden required under the law as laid down in *Thirteenth Ward B. & L. Ass'n.* v. *Kanter,* 147 At. Rep. 809. In this case, Vice Chancellor Backes said:

> "Mortgage moneys paid to a builder, who used it to repay moneys he had borrowed and applied to the construction of the building, is not an item earning priority under Section 15 of the Mechanics' Lien Law."

Further evidence of the intention of the appellant to regard this loan as a commercial loan is indicated by the records of the Bank (Case, p. 904). The card, marked as Exhibit 2, refers to the loan as "unsecured demand notes." If it was the intention of the appellant at the time the records were made to secure this loan by a mortgage, it is quite unlikely that the loan would have been referred to in this manner. It is also to be noted, that the records of the Bank show that the notes, for which the mortgage is alleged to have been security, were paid (Exhibit 3, Case, p. 905). This exhibit indicates that the balance due on the notes on May 23, 1929, was $1,246.99, and that this balance was paid on September 11, 1929. The payment of the notes for which the mortgage acted as security, entitled the borrower to a cancellation of the mortgage. Although this was not done, the appellant cannot

claim priority over lien claims merely by reason of the fact that the mortgage remained open of record.

The attempt of counsel for appellant to trace the additional note of $800.00 which was discounted on September 24, 1927, was equally futile. The undisputed evidence shows that the check was cashed and there is considerable question as to the use made of the proceeds of the check (Case, pp. 590, 593-594). The convincing evidence of the employment of funds advanced on a mortgage for the purchase of materials or the payment of labor used in a building which is required under the decisions of the Courts of this State, has not been shown in the evidence offered by the appellant. That such evidence is necessary is indicated by the decisions in the following cases: *Young* v. *Haight,* 69 N. J. L. 453, *Porch* v. *Agnew Co.,* 71 N. J. Eq. 305, *Franklin Society, etc.* v. *Thornton,* 85 N. J. Eq. 525, *Lincoln Materials Co.* v. *Goodwin Construction Co.,* 106 N. J. Eq. 326, *Improved B. & L. Ass'n.* v. *Larkin,* 88 N. J. Eq. 52.

In conclusion, A. S. Reid & Co., urges that none of the points argued in appellant's brief are sufficient to justify this Court in reversing the decree of the Court of Chancery.

Respectfully submitted,

LEAVITT, ULBRICH & TALLEY,
Counsel for A. S. Reid & Co.,
Defendant-Appellee.

FAYETTE N. TALLEY,
of Counsel.

New Jersey Court of Errors and Appeals

RIVERSIDE APARTMENT CORPORATION, a corporation, *Complainant,* *vs.* CAPITAL CONSTRUCTION CO. INC., a corporation, *et als.,* *Defendants.*	*On Appeal of West Bergen Trust Company.*

ANSWERING BRIEF OF GEO. F. PERRY & SONS INC.

Kanter & Kanter, of counsel with Geo. F. Perry & Sons Inc.

Elias A. Kanter of counsel.

Introductory Statement of Uncontradicted Facts.

1. As this Court will observe, from the state of the case, there are four appellants and about twenty respondents. We represent only one of such respondents, to wit, Geo. F. Perry & Sons Inc. and we consider it proper, therefore, to discuss only those questions which affect that respondent. This brief is confined solely to the interest of that respondent as raised by the appeal of West Bergen Trust Company. Clarity of statement and discussion will best be served, we think, by a separate consideration of the questions particularly affecting that appellant, West Bergen Trust Company, and the respondent, Geo. F. Perry & Sons Inc. which we represent, particularly in view of the fact that the facts and law applicable to it are not common to all the parties.

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2. Counsel for West Bergen Trust Company (page 22, *et seq.* of his brief) claims that the final decree is erroneous in failing to adjudge that the mortgage of West Bergen Trust Company was prior to the lien of Geo. F. Perry & Sons Inc., and in developing that point, counsel for West Bergen wholly ignored the counter-claim filed by Geo. F. Perry & Sons against West Bergen. The ignoring of such counter-claim by counsel for West Bergen was in accordance with the statement in his brief that "no consideration has been given in this brief to the counter-claims filed in the instant foreclosure suit by several of the defendants against West Bergen Trust Company, and others" (West Bergen brief, page 29, paragraph 3). Counsel for West Bergen further says, without any citation of authority, "that a counter-claim against a co-defendant is not a proper proceeding in a foreclosure suit" (West Bergen brief, page 29, paragraph 3). We, however, will not ignore any part of the record below, particularly as counsel for West Bergen has shown in his "Statement of the Case," that the counter-claim of Geo. F. Perry & Sons Inc. was answered by West Ber-Gen Trust Company (West Bergen's brief, page 5, line 30). Such counter-claim cannot be ignored, because, by an appropriate statement of facts, *it showed that the lien claim and judgment of Perry were prior to the mortgage of West Bergen.*

3. The bill of complaint which was filed by Riverside Apartment Corporation, the holder of the paramount mortgage, merely alleged that all other liens were inferior to that mortgage. The defendant, Geo. F. Perry & Sons Inc., *filed an answer and counter-claim,* TO WHICH COUNTER-CLAIM THE WEST BERGEN TRUST

COMPANY WAS MADE A PARTY DEFENDANT (state of case, pages 78-89). By that counter-claim, which was "duly served" (state of case, page 78, line 5), Geo. F. Perry & Sons Inc. alleged the furnishing of its materials to the building between May 24th, 1927 and July 14th, 1927 (state of case, page 81, lines 20-40), the filing of its lien claim on November 12th, 1927 (state of case, page 82, lines 1-11), and the institution of the suit in the Union County Circuit Court, in which suit West Bergen Trust Company was among the party defendants (state of case, page 82, lines 11-30). The counter-claim of Geo. F. Perry & Sons Inc. further alleged the recovery of a judgment, in the mechanic's lien suit at law (state of case, page 82, lines 30-40), which judgment was made part of the counter-claim by reference. A copy of that judgment, so annexed to the counter-claim (state of case, pages 86-88), shows that that judgment entered on January 13th, 1928, finally adjudged the following:

> (a) That judgment final be (and thereby was) entered in favor of the plaintiff, Geo. F. Perry & Sons Inc., a corporation, *generally* against the defendant, Capital Construction Co. Inc. (which was the builder and owner) for $5,965.00, damages, and costs of suit (taxed at $63.37); see state of case, page 86, lines 30-40.
>
> (b) That said judgment be *specially* against the lands and building described in the lien claim and complaint. In this judgment, a complete metes and bounds description is specifically set forth, and *such description is identical with the mortgaged premises, and, of course, identical, with the premises ordered to be sold,* and subse-

quently, actually sold, *pendente lite;* see state of case, page 87. (Of course, the fund in court is now the substitute for the land and building.)

(c) "IT IS FURTHER ORDERED AND ADJUDGED THAT THE LIEN CLAIM OF SAID PLAINTIFF, AND THE LIEN OF THIS JUDGMENT, ARE PRIOR AND PARAMOUNT TO THE LIEN OF THE MORTGAGE DATED OCTOBER 25TH, 1927, ACKNOWLEDGED OCTOBER 25TH, 1927, AND RECORDED ON OCTOBER 26TH, 1927, IN THE OFFICE OF THE REGISTER OF UNION COUNTY IN BOOK 895 OF MORTGAGES FOR SAID COUNTY, AT PAGE 38, MADE OR GIVEN BY SAID CAPITAL CONSTRUCTION CO. INC., A CORPORATION, TO THE DEFENDANT, WEST BERGEN TRUST COMPANY, A CORPORATION" (see state of case, page 88, lines 20-30).

A certified copy of the judgment is printed at pages 696-700 of the state of the case; a certified copy of the lien claim is printed at page 688-695 of the state of the case.

4. In answer to the counter-claim, West Bergen Trust Company admitted that the Capital Construction Company Inc. erected the building, the construction of which was commenced prior to May 24th, 1927 (state of case, page 89, line 29); West Bergen Trust Company's answer further was that it had "no knowledge or information" concerning the other allegations of the counter-claim, but it nevertheless claimed priority over the "lien claim" of Geo. F. Perry & Sons Inc. (state of case, page 89, lines 30-35). It will be observed that West Bergen Trust

Company saw fit to ignore the adjudication made against it that the *judgment of Geo. F. Perry & Sons Inc. was prior to the West Bergen mortgage,* although the answer was filed on April 24th, 1928 (state of case, page 89, line 20).

5. The final decree distributed the fund, giving part thereof to Perry. Obviously, the fund was not great enough to allow of payment to all the parties, for, if the fund had been large enough, there would be no appeals. We intend on demonstrate that West Bergen was not injured by the award made to Perry, and that the decree below, as between Perry and West Bergen, should be sustained, because it is correct in result, regardless of the *reasons* for the action below. Certainly, our argument will demonstrate that West Bergen has no cause to complain against the award made to Perry.

POINT I.

The Final Decree is not erroneous because the basis of the separate awards was not therein set forth.

Counsel for West Bergen, as his Point I, says that the decree below is erroneous because it did not adjudge the amounts due to the various parties, and the order of priority thereof. In effect, this is an argument attacking the reasons assigned by the court below for making the order of distribution. The fund in court was highly insufficient to make payment in full. It was, therefore, unnecessary for the court to make a specific finding as to the amount due to each of the claimants, but such finding was, in effect, made, and actually computed by the court below because there is awarded to each claimant a certain and specific sum, and in each case, the sum

so awarded is less than the amount due to the specific claimant. The objection of West Bergen goes to the *form* and not to the *substance* of the order.

The decree of distribution (printed at page 280, *et seq.* of the state of the case) directs specific payment, in the order from No. 1 to No. 26, of the sum of $41,559.59. The decree was made on January 23, 1931. At that time, the balance in the hands of the clerk was $39,943.53 (we have taken this figure from West Bergen's brief, page 11, line 14). The amount due to the lien claimants alone was $74,810.74 (state of case, page 261, line 21). Clearly, what the Chancellor did, was to order the distribution, in accordance with his opinion, with the amount to be paid to each separate claimant, separately computed, instead of having the clerk make the computation.

It is the well-established rule of this Court that not the reasons of the action, but the action itself, of the court below, which gives an appellant a basis for claiming error.

The fact that no reasons were assigned in the court below for the action taken, or the fact that wrong reasons were assigned by the court below, is not ground for reversal. See *McMichael* v. *Horay,* 90 N. J. L. 142, a decision of this Court, *Meisel* v. *Merchants' National Bank of Newark,* 85 N. J. L. 253, also a decision of this Court, *Beach* v. *Palisade Realty & Amusement Co.,* 86 N. J. L. 238, also a decision of this Court, *Shauinger* v. *Apter,* 95 N. J. E. 70, also a decision of this Court, the last-named case being on an appeal from the Court of Chancery.

West Bergen, in arguing Point I in its brief, does not attempt to show that the action taken by the court below is incorrect, and hence fails

to show any legal error, if error was committed (which we deny) in failing to make specific adjudications of the amounts due to each of the claimants, when, as a matter of fact, the distribution was calculated upon such amounts, and the order of distribution was specifically given. In view of the insufficiency of the fund, it would have been a futile gesture for the court below to have adjudicated the amounts due to each of the parties severally. The decree represents the Court's action, taken after calculation, and the basis of the calculation is not necessary for the efficacy of the decree.

Counsel for West Bergen (on page 15 of his brief) cites *Beall* v. *New York & New Jersey Water Co.*, 87 N. J. E. 390, in support of his contention that the decree below should have adjudicated the amounts due to the various parties. As a matter of fact, the Beall case contains no such intimation, but, on the contrary, the Chancellor there said, in part:

> "In a decree in chancery there need not be, in the ordering or mandatory part, an adjudication of the existence of facts warranting such decree, although they may be stated in the recital preceding the decretal paragraph, or may be omitted entirely (Bull *v.* International Power Co., 84 N. J. Eq. 14, 92 Atl. 796); but there should be an adjudication in a decree of the rights to which a party or parties are entitled."
>
> *Beall* v. *New York & New Jersey Water Co.*, 87 N. J. E. 390.

In the case at bar, the decree followed the quoted language, because it gave the parties distribution of certain specific sums, those being the rights to which they were entitled.

Rather than supporting West Bergen's view, we think *McCarty* v. *Town of West Hoboken*, 93

N. J. L. 247, cited by counsel for West Bergen at the top of page 15 of his brief, supports our contention on this phase of the case, for it was there said:

> "The question to be determined upon review in an appellate court is always as to the propriety of the judicial action of the court below, and not the soundness of the reason which prompted it. * * * It must be perfectly obvious that, if the court below reached a right conclusion, even if upon a wrong reason, the judgment should not be disturbed; and therefore it is that errors may be assigned upon matters in the record only, and not upon the reasoning which induced the rendering of the judgment under review."
>
> *McCarty* v. *Town of West Hoboken,* 93 N. J. L. 247.

The case of *Kleinert* v. *Hutchinson,* 98 N. J. L. 831, and the case of *Birtwistle* v. *Public Service Railway Company,* 94 N. J. L. 407, reaffirm the principle of the McCarty case, cited *supra,* and are no authority for West Bergen's contention.

In the light of these principles, we will now demonstrate that the decree of distribution, to the extent that it was in favor of Geo. F. Perry & Sons Inc., was not to the legal prejudice of West Bergen Trust Company.

POINT II.

The judgment at law recovered by Geo. F. Perry & Sons Inc., was res adjudicata against West Bergen Trust Company.

We have already (in paragraph 3 of our introductory statement of facts) pointed out the character and scope of the judgment recovered by Geo. F. Perry & Sons Inc. in the Union

County Circuit Court, in the suit where West Bergen Trust Company was a party defendant, and which adjudged, among other things, that West Bergen Trust Company's mortgage was *inferior* to the lien claim and judgment of Geo. F. Perry & Sons Inc.

A certified copy of the lien claim was received in evidence (state of case, top of page 364); a certified copy thereof is now printed in the state of the case, at pages 688-695). That lien claim shows an account of the materials sold and delivered, in the customary form, properly verified and with the statutory endorsements.

A certified copy of the judgment of Geo. F. Perry & Sons Inc. was received in evidence (state of case, top of page 364); a certified copy thereof is now printed in the state of the case, at pages 696-700.

NO EVIDENCE WAS OFFERED TO OVERCOME THE EFFECT OF THE JUDGMENT OF GEO. F. PERRY & SONS INC. NOR DID WEST BERGEN'S ANSWER TO PERRY'S COUNTER-CLAIM EVEN ATTEMPT TO CONTROVERT OR ASSAIL THAT JUDGMENT.

This Court has already ruled that a judgment in a lawsuit, in a mechanic's lien action, is *res adjudicata* on the issues decided by the judgment at law, and that the issues so decided cannot again be litigated in a foreclosure suit in the Court of Chancery. Thus, it appeared, in *People's Building & Loan Association of Ridgefield Park* v. *Vaniewsky, et ux.*, 85 E. 551, that one of the defendants in the action was a lien claimant, who had filed a lien against the mortgaged premises, had recovered a judgment generally against the builder and owner and specially

against the lands and building, but "subject to the lien of the mortgages." When the foreclosure suit was instituted by the complainant in that cause, the lien claimant again tried to litigate the question of priorities as between him and the mortgagees. In reversing the action of the Chancery Court permitting such a course of conduct, this Court said:

> "This court held in Culver *v.* Lieberman, 69 N. J. L. 341, 55 Atl. 812, that the purpose of this statute was to settle in a single suit the liens of all persons who have any interest in the property, and to determine, among other matters, 'What mortgage incumbrance is upon each piece of property, and the priorities between the mortgagees and the plaintiffs' special judgment.' * * * Upon these conditions the presumption must be that when the judgment was entered in the suit brought by the lien claimant, the defendant in this cause, adjudging that such judgment is subject to the lien of complainant's mortgage, that the trial court found that it was subject to the entire sum for which the mortgage was given. * * * Upon these circumstances, the judgment plaintiff is estopped from now denying the force and effect of the judgment entered by him * * *."
>
> *People's Building & Loan Ass'n of Ridgefield Park* v. *Vaniewsky, et ux.*, 85 E. 551.

Of course, whatever way the law judgment be, that is whether in favor of, or against the lien claimant, it is *res adjudicata.* In the cited case, the law judgment was against the lien claimant and was held to be *res adjudicata* in the subsequent foreclosure case; in the case at bar the law judgment is in favor of the lien claimant, and is likewise *res adjudicata* in the subsequent foreclosure case.

We do not find that the case just cited has in any way been overruled, criticized or in any way modified. We do find that it has been cited by this Court in *Bergenfield Printing Co.* v. *Intertype Corporation,* 7 A. R. 366, 144 Atl. 730, not yet officially reported.

We therefore respectfully contend that the decision of the Court of Chancery in the case at bar upholding the priority of the lien claim and judgment of Geo. F. Perry & Sons Inc. over the mortgage of West Bergen Trust Company was proper, because the Court of Chancery was bound to respect, as *res adjudicata,* the decision of the law court, in Perry's favor against West Bergen, which stood in its full force and vigor. It is, therefore, actually unnecessary to examine the evidence concerning the alleged advancements of West Bergen Trust Company.

POINT III.

Geo. F. Perry & Sons Inc. had the right to proceed with its lien claim action notwithstanding the insolvency of Capital Construction Co. Inc. and the appointment of a receiver for it.

At pages 286-302 of the state of the case, a number of documents have been printed, *as if they were part of the record of this case,* and as if they had been filed in this case; such documents are not headed as exhibits. To prevent any misunderstanding, we call this Court's attention to the fact that THOSE DOCUMENTS ARE NOT PART OF THE RECORD IN THE CASE AT BAR; all of such documents relate to the case of Ralph Cianfrone, *et al.,* trading as Venango Stone Company *vs.* Capital Construction Co., that heading being printed at the top of page 286 of the state of the case, and

THOSE DOCUMENTS WERE NOT OFFERED IN EVIDENCE, NOR RECEIVED IN EVIDENCE IN THE CASE AT BAR. In the index to the state of the case (on page IX thereof) some of these papers are referred to as if they had been offered in evidence in behalf of Geo. F. Perry & Sons, *but such is not the fact.* Strictly speaking, therefore, the argument made by West Bergen Trust Company (bottom of page 27 of its counsel's brief) based on some of those papers, is improper.

However, to prevent any misapprehension on this subject, we will proceed to examine the argument of West Bergen Trust Company as if the papers upon which its argument is based were before the Court.

Counsel for West Bergen Trust Company says that on January 4, 1928, the Court of Chancery in the Cianfrone receivership suit made an order appointing receivers for the Capital Company and restrained all persons from taking any further proceedings in actions theretofore commenced against it. THERE IS NO PROOF THAT GEO. F. PERRY & SONS INC. EVER HAD KNOWLEDGE OF THAT ORDER. On page 300 of the state of the case, there is printed a copy of an affidavit *which was filed in the Cianfrone case* wherein the young lady affiant said that she "*caused* a copy of the attached order appointing receiver *to be sent to the creditors* of the above-named defendant corporation, etc." Assuming that this affidavit was offered and received in evidence in the case at bar, such offer and receipt WERE NOT EVIDENCE OF THE FACT STATED IN THE AFFIDAVIT. Furthermore, that affidavit does NOT show that the affiant mailed the notices, nor does it show that a copy was mailed to Geo. F. Perry & Sons,

as the affiant merely contents herself with saying that it was mailed "to the creditors," *without identifying them and without any showing that she knew who all the creditors were.* It is thus seen that the affidavit is not competent nor does it prove the facts therein sworn to.

At page 301 of the state of the case, the appellant prints an "Order Continuing Receivers" which was filed in the Cianfrone case, as if it were part of the record or an exhibit in this case; neither of the last-mentioned conditions is the fact. Assuming again, however, that this order continuing the appointment of the receivers was part of the record of the case at bar, *there is not a word in the record showing that Geo. F. Perry & Sons Inc. had knowledge of the entry of that order when the judgment was entered in the Union County Circuit Court.* But even assuming that Geo. F. Perry & Sons Inc. was in contempt of the Court of Chancery for proceeding with its law action notwithstanding the restraining orders of the Court of Chancery (and there is no proof that it was in such contempt, and the contrary is the fact) the appellant cannot take advantage of such alleged contempt in order to assail the judgment of Geo. F. Perry & Sons, WHICH WAS REGULARLY ENTERED AGAINST THE APPELLANT-MORTGAGEE, AS THERE WAS NO RESTRAINT AGAINST GEO. F. PERRY & SONS FROM PROCEEDING AGAINST THAT MORTGAGEE, NOW THE APPELLANT. It is significant to observe that neither the insolvent corporation nor its receivers are before this Court as claiming any irregularity.

However, as a matter of law, and notwithstanding the restraining order of the Court of Chancery, *Geo. F. Perry & Sons Inc. had a right*

to proceed with the action at law which it had instituted prior to the filing of the receivership bill against the Capital Construction Co. Perry's suit was started on November 12, 1927 (see endorsement on lien claim, state of case, page 695, line 30). The Cianfrone bill for the appointment of a receiver was filed on December 21, 1927 (see state of case, page 286, line 2). We also stress that the Capital Construction Company was never *adjudged* an insolvent corporation. The present foreclosure bill, which is the case at bar, was filed on March 3, 1928 (see state of case, page 24, line 2).

At page 23 of his brief, counsel for the West Bergen Trust Company asks how the West Bergen Trust Company could have *defended* the lawsuit brought by Perry when Perry was restrained from prosecuting the lawsuit. Counsel for West Bergen also there says that "the West Bergen Trust Company could not have appeared in the Union County Circuit Court to defend its rights after the making and serving of the injunctive order aforesaid, without infringing upon or violating same, and being in contempt of the authority of the court below." This conclusion is plainly erroneous. There was nothing to prevent the West Bergen Trust Company from defending the law action, and it was not enjoined from defending that suit. There was nothing that prevented the West Bergen Trust Company from appearing in the Union County Circuit Court and there is nothing in the injunctive order which leads to any such inference.

The question whether a mechanic's lien claimant has a right to proceed with a lien claim suit, notwithstanding insolvency proceedings against the builder, has definitely, and with an admirable

opinion by the present Chief Justice, been settled, *in favor of such right to proceed,* in *Crane* v. *Brighton Mills,* 98 N. J. L. 308. On this precise question, it was there written:

> "The other ground upon which the motion to non-suit 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 contractor. The contention that no general judgment was recoverable against the Berridge Company is based upon section 2 of the supplement of 1919 of our Corporation Act (page 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. 612, 44 Atl. 668, that—
>
> > *'A pending action against a corporation may regularly proceed, notwithstanding an adjudication of insolvency and the appointment of a receiver to wind up its affairs and distribute its assets among creditors and stockholders.'*

"This judicial declaration seems to us dispositive of the question we are now considering. But, in the absence of any such precedent, we would have no doubt that the motion to non-suit upon the ground secondly stated was properly refused. The purpose of the Mechanic's Lien Law, as stated in its title is to secure to mechanics and materialmen for their labor and 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 materialman or laborer, when seeking to enforce by suit his claim against the building, to join the owner and contractor as codefendants; and, for the purpose of demonstrating his right to a lien and its amount, to prove not only that the labor was done 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 Mechanic's Lien Law (3 Comp. St. 1910, page 3290, *et seq.*), 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 materialman 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 non-suit upon this latter ground, and we have no doubt of its soundness.

"The judgment under review will be affirmed."

Crane v. *Brighton Mills,* 98 N. J. L. 308.

The procedure in the case at bar in the law action had for its purpose the establishing of the facts, to substantiate the lien claim, and there is no suggestion, at least in the record before the Court, that Geo. F. Perry & Sons Inc. attempted to sell the property or interfered with the receivers. The judgment was properly prosecuted, and in view of the provisions of a mechanic's lien act, requiring prompt prosecution, it was the only safe course for the lien claimant to follow.

POINT IV.

Independently of the law adjudication in Perry's favor, the facts established in the case at bar show the inferiority of the mortgage of West Bergen Trust Company, or that nothing is due it.

We have already, under POINT II of this brief, indicated why, as a matter of law, or because of the judgment recovered by Perry against West Bergen, the Court of Chancery was bound to accord the priority thus adjudicated in the present foreclosure suit. However, in view of the argument made by counsel for West Bergen, and the possibility that this Court may go into the facts, as adduced at the trial of this case, we think it proper to refer to the evidence showing why the decree does no injury.

The primary fact is that the mortgage of West Bergen was recorded subsequent to the commencement of the building, and hence its mortgage must be viewed with regard to Section 15 of the Mechanic's Lien Act. It is established, as a matter of record, that the building was commenced prior to May 24, 1927 (*that was the charge* of paragraph 19 of Perry's counter-claim,

such charge being printed on page 81 of the state of the case, lines 30-35, *and admitted by West Bergen's answer,* as printed on page 89 of the state of the case, line 29); the mortgage of West Bergen was recorded on October 26, 1927 (state of case, page 879, lines 35-40).

It is very significant to observe that although West Bergen claimed that it advanced $5,000.00 on account of this mortgage loan on September 10, 1927, neither the bond nor the mortgage was drawn until October 25, 1927; the bond bearing that date is printed at pages 872-873 of the state of the case; the mortgage also bearing that date is printed at pages 874-879 of the state of the case. As a matter of fact, however, even according to the statements of its own Vice-President, West Bergen regarded this as a purely commercial transaction. The Vice-President of that bank testified:

Testimony on July 10, 1929 (which commences on page 537 of the state of the case).

> Mr. Harry Starr and Mr. Hyman Silverman called at my office on September 10, 1927 (state of case, page 554, lines 30-35), and told me they had come to see me about borrowing some money from the West Bergen Trust Company in respect to the Cranford job, and that they had issued checks for about $3,000.00, for which there was not money in the bank (state of case, bottom of page 554 and top of page 555). Mr. Starr said they wanted $5,000.00 and would give the trust company a mortgage for the money. This conversation was around noon hour. A note for $5,000.00 was drawn, but it was too late that day (which was a Saturday) to get the money from the bank, but on the following Monday, September 12, 1927, the note was deposited to their account (state of case, bottom of page 555). On September 10,

1927, $500.00 from another source was also deposited in that account (state of case, page 556, lines 10-20). On September 24, 1927, Saturday at noon, the Starrs and Silverman again came to my office and another note for $800.00 was drawn, but at that time the mortgage had not yet been executed (state of case, bottom of page 557 and top of page 558). On October 25, 1927, the mortgage was drawn (state of case, page 558, line 20).

Testimony on July 12, 1929 (which commences on page 622 of the state of the case).

"I desire, if the Court please, to correct my testimony about these notes. I have since found that the $5,000.00 was for one month and not three months and that it was thereafter renewed for two weeks" (state of case, bottom of page 622).

The written records of the bank, however, contradict the oral version of the transaction just referred to. The bank's ledger account (Exhibit 11 of July 10, 1929, printed on pages 907 of the state of the case), and we here re-print only that portion thereof which is material on that question, shows the following:

September	9, 1927	Balance	151.53
	10, 1927	Deposit	500.00
			651.53
	10, 1927	Check paid	2,000.00
			1,348.47 OD

1,348.47—

We call the Court's attention to the cyrptic *minus sign* on one side of the ledger sheet, and to the significant "OD" on the other side of the ledger sheet (which is also thus explained, at the foot of the exhibit, as "overdraft"), clearly showing that at the close of business on September 10,

1927, there was an "overdraft" of $1,348.37. That fact cannot be camouflaged by any language; the discount of the $5,000.00 note was made to wipe out the overdraft. The law applying to this situation was expressed very tersely by Vice-Chancellor Backes in the Thirteenth Ward B. & L. Ass'n case, when he said:

> "Mortgage *moneys* paid to a builder, who *used* it *to repay moneys* he had *borrowed and applied to the construction* of the building, *is not an item earning priority under Section 15 of the Mechanics' Lien Law.*" *Thirteenth Ward B. & L. Ass'n* v. *Kanter, et al.*, 105 E. 338, 147 Atl. 809.

THE UNCONTRADICTED WRITTEN RECORDS OF THE BANK further show conclusively that the attempt to call this transaction between the bank and Capital Construction Company a bond and mortgage transaction, was purely an afterthought. We refer particularly, in this connection to Exhibit 1 of July 12, 1929, printed on page 904 of the state of the case. That exhibit is headed:

"DIRECT LIABILITY ON UNSECURED TIME NOTES."

We specifically stress that the entry on this card shows that the loans were "unsecured." This card contains the entry of September 12, 1927 for the $5,000.00 note, discounted by Capital Construction Co., and the entry of October 18, 1927, for the $800.00 note, similarly discounted. We repeat that to convert these transactions into a mortgage loan was purely an afterthought, as the bond and mortgage were not executed until October 25, 1927 (see Exhibits, pages 872 and 874 of the state of the case), when the records of the bank made contemporaneous with the transfer shows "unsecured" notes.

The UNCONTRADICTED WRITTEN RECORDS OF THE BANK further show that THESE NOTES WERE PAID. We refer particularly in this connection to Exhibit 2 of July 12, 1929, printed on page 904 of the state of the case and Exhibit 3 of July 12, 1929, printed on page 905 of the state of the case. Exhibit 2 was started on November 14, 1927 *which was after the mortgage had been executed.* Taking Exhibit 2 and Exhibit 3 together, it shows that on May 23, 1929, the *balance due on all the notes* was $1,246.99, and THAT BALANCE WAS PAID ON SEPTEMBER 11, 1929.

Counsel for the West Bergen Trust Company made an effort, in the court below, to show that the proceeds of the $5,000.00 loan "went into the building." In attempted substantiation of such a claim, a check for $2,000.00, Exhibit 13 (printed on the top of page 895 of the state of the case) was introduced in evidence. That check, however, was drawn on September 9, 1927, *which was before the loan had even been discussed,* and as the secretary and treasurer of West Bergen testified, the check was paid on September 9, 1927, and the "PERFORATION SHOWS IT WAS PAID ON SEPTEMBER 9TH, 1927" (state of case, page 642, line 18). Undoubtedly, it was for this reason that the overdraft occurred, which resulted in the subsequent call upon the Vice-President of the bank, and the making of the $5,000.00 loan, carried through on the following Monday, September 12, 1927, to wipe out the overdraft. The ledger account of the bank, printed on page 907 of the state of the case, conclusively establishes that our contention is correct. Counsel for the West Bergen Trust Company also attempted to show that the series of checks drawn between September 12, 1927 and

September 24, 1927, represented the proceeds of the discounted $5,000.00 note. The ledger sheet of the bank (page 907 of the state of the case) shows, however, that between the dates mentioned, other sums were deposited in that account; these sums were:

September 15, 1927	2,250.00
19, 1927	200.00
20, 1927	50.00
Total	2,500.00

During that same period, as the bank ledger sheet on page 907 of the state of the case shows, that is, between September 12, 1927 and September 24, 1927, the following checks were withdrawn:

September 12, 1927	500.00	54.73	150.00
13, 1927	48.00	42.00	50.00
13, 1927	1,000.00		
14, 1927	26.65	44.80	
14, 1927	50.00	50.00	
14, 1927	63.60		
15, 1927	44.80	16.71	500.00
16, 1927	1,000.00	37.50	36.00
16, 1927	100.00	900.00	
17, 1927	400.00		
17, 1927	17.97	15.00	25.00
17, 1927	505.00		
19, 1927	200.00	114.20	
20, 1927	25.00		
21, 1927	9.00	25.00	
22, 1927	28.28	36.00	
	4,018.30	1,335.94	761.00

There are sixteen (16) checks in the first column above, eleven (11) checks in the second and five (5) checks in the third; in all, there were thirty-

two (32) checks, aggregating $6,115.24. *Counsel for the West Bergen did not even attempt to show that all of the foregoing thirty-two checks were for materials or labor in this building;* the record (ledger sheet) shows that the Capital was depositing funds from other sources, as the ledger sheet shows and as we have pointed out in the last preceding paragraph. How can it then be shown that the *proceeds of the loan* went to pay for labor or materials on this building only, when the exact contrary is the fact, or at least, there was a commingling of various funds from different sources. *The proof fails to show that the proceeds of the mortgage loan went into the building,* the only thing the proof shows is that the proceeds of the discount and other funds were commingled, and such commingled funds were used in paying checks, *most of which, as a matter of fact, are not shown to be for labor or materials in this building.*

Counsel for West Bergen attempted to show that the note of $800. which was discounted on September 24, 1927, went "into the building," because on the same day a check for that amount was cashed. What happened to the proceeds of that check, however, is quite a different story, and does not bear out West Bergen's contention that the money "went into the building."

Hyman Silverman, testified: This $800.00 check, Exhibit 28, was "drawn for the payroll" (top of page 590, state of case). That witness was cross examined on that check (commencing at page 590, state of case) and showed that he did not know anything about it, and finally he says:

> "Q In other words, you do not know whether you cashed the check or whether Mr. Starr cashed the check, or whether somebody else cashed the check?

"A No, no, it was handled between us two.

"Q Between who two?

"A Between me and Mr. Starr.

"Q Which Starr.

"A Harry Starr.

"Q Between you and Harry Starr?

"A Yes, sir.

"Q Did you pay the men that Saturday, September 24?

"A Probably I did.

"Q Not probably. Did you?

"A One of us sure.

"Q Then you do not know of your own knowledge that you did, do you?

"A I don't remember, it is two years ago already." (State of case, bottom of page 593 and top of page 594.)

"Q YOU DO NOT REMEMBER WHETHER YOU PAID OUT THIS $800., DO YOU?

"A I DON'T REMEMBER IF I DID OR MR. STARR." (State of case, page 594, lines 28-30.)

"Q AND YOU CANNOT TELL US WHETHER YOU PAID THEM OR STARR PAID THEM?

"A NO, SIR, I CANNOT TELL." (State of case, page 595, lines 23-24.)

Of course, this is not testimony showing application of the proceeds of the loan for labor, within the meaning of the adjudicated cases.

It is well settled that the mortgagee must show not only that he advanced the money but that the ADVANCEMENTS HAVE ACTUALLY BEEN APPLIED IN DISCHARGE OF THE CONSTRUCTION COSTS ONLY. This has been the uniform ruling. *Young* v. *Haight,* 69 N. J. L. 453; *Porch* v. *Agnew Co.,* 71 N. J. E. 305, affirming 70 N. J. E. 328; *Franklin Society etc.* v. *Thornton,* 85 N. J. E. 525; *Lincoln Materials Co.* v. *Goodwin Construction Co.,* 106 N. J. E. 326,

which also holds that proof that the advancements went into the building must be "clear"; *Fischgrund* v. *Eriksen Realty Estate Co.,* 105 N. J. E. 345, opinion by Vice-Chancellor Backes; *Improved B. & L. Ass'n* v. *Larkin,* 88 N. J. E. 52, opinion by Vice-Chancellor Stevens, which has been cited with approval by this Court in subsequent cases, and which also holds that where mortgage proceeds are commingled with other funds, the mortgagee does not show "application to the building"; *Thirteenth Ward B. & L. Ass'n* v. *Kanter, et al.,* 105 N. J. E. 338, opinion by Vice-Chancellor Backes.

On this branch of the case, we urge that the evidence established the following:

(First) The advancements made by West Bergen were not applied for the erection costs, and hence its mortgage was clearly inferior to the Perry claim;

(Second) The claims of West Bergen were purely unsecured note transactions; and

(Third) The claim of West Bergen, if it ever lawfully existed, has been extinguished by payment.

POINT V.

The lien claim and judgment of Geo. F. Perry & Sons Inc. are entitled to a priority, different from that to be accorded to the other lien claimants, because all the others had, by voluntary act, changed their ordinary priorities, but Geo. F. Perry & Sons Inc. did not.

At page 28 of its brief, West Bergen Trust refers to the fact that all lien claims are usually concurrent, and that the action of the Court, in

according priority to Perry's lien claim over the mortgage of West Bergen, gives it "an advantage over other mechanics' lien claims." Of this, however, West Bergen cannot be heard to complain because it is not a lien claimant, and there is no appeal by any valid lien claimant attacking such result.

At page 28 of West Bergen's brief, it is argued that if the other lien claimants are subordinate, and must share pro rata, then it follows that Perry's lien claim must also be subordinate. This argument, however, overlooks the essential outstanding fact that PERRY WAS ENTITLED TO SECURE THE PRIORITY ACCORDED TO IT BY ITS JUDGMENT, and that no other lien claimant, as far as we know, established such priority. There is, however, an even more significant fact why Perry should not be relegated to the position of other lien claimants, if they are to be subordinated, and that fact is that PERRY ALONE NEVER POSTPONED ITS LIEN IN FAVOR OF ANY MORTGAGES WHILE THE OTHER LIEN CLAIMANTS DID IN FACT EXECUTE SUCH POSTPONEMENTS, OR ADMITTED THEIR INFERIORITY. The following is a recapitulation where such subordination is to be found:

Junction Milling Co. (state of case, page 723, line 30).

Mowre Lager (state of case, page 497, lines 20-32).

Max Platt (state of case, page 422, lines 18-20; also page 723, line 13).

Ira R. Crouse (state of case, page 423, lines 25-30).

Louis Moore (state of case, page 725, line 33; also page 424, line 29).

Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co. (state of case, page 723, line 11; also page 529, line 12).

A. S. Reid & Co. (state of case, page 422, line 22; also page 723, line 25).

Joseph Machetto (state of case, page 722, line 40).

E. W. Booth & Bro. (state of case, p. 723, line 18).

Alpheus S. VanWoeart (state of case, page 723, line 1).

Venango Stone Company (state of case, page 723, line 3).

Roderick M. Crockett (state of case, page 723, line 6).

John Nicaretta (state of case, page 722, line 35).

In this case, therefore, with the other lien claimants by voluntary stipulation postponing their lien claims in favor of mortgages, we find that *Geo. F. Perry & Sons Inc. did not do so.* PERRY IS NOT TO BE RELEGATED TO THE INFERIOR POSITION OF SUCH LIEN CLAIMANTS, BUT IS RATHER TO BE ACCORDED THE SUPERIOR POSITION TO WHICH IT IS ENTITLED, AS A MATTER OF LAW, AND WHICH IT NEVER SURRENDERED. It is for this reason that the Chancellor had to differentiate in the priorities allowed to Geo. F. Perry & Sons Inc., from the priorities allowed to the other, but voluntarily-subordinating, lien claimants. To place Perry in the same position with the other lien claimants, who received consideration for their subordinations, would manifestly be unjust to Perry. In any event, West Bergen, not being in the position of a lien claimant, cannot argue as if it were a lien claimant.

The marshalling of the liens, and the classification of priorities, followed in the case at bar, was in accordance with this Court's decisions in Hoag v. Sayre, 33 N.J.E. 552, and Albert & Kernahan Inc. v. Franklin Arms, Inc., 7 A.R. 717, 146 At 215, not yet officially reported. It also followed the reasoning of Meister v. J. Meister Inc., 103 N.J.E. 78.

We have since observed that the opinion in the case at bar has been cited with approval by this Court in Feinberg v. Building Construction Company, case #99, October Term, 1930, decided very recently and not yet reported.

CONCLUSION.

It is our opinion that the decree below should be affirmed.

We recognize that other lien claimants, not appearing before this Court, may not justify the decree as to them. If this Court should modify the decree below, as to such other lien claimants, such modification ought to include the provision that Geo. F. Perry & Sons Inc. is to receive payment of the entire judgment and interest due it before West Bergen shall be entitled to the payment of any part of the fund, if at all entitled.

Respectfully submitted,

KANTER & KANTER,
Counsel of Geo. F. Perry & Sons Inc.,
Defendant-Appellee.

ELIAS A. KANTER,
Of Counsel.

36 OCT.T.1931

New Jersey Court of Errors and Appeals

[Case No. 36, October Term, 1931.]

RIVERSIDE APARTMENT CORPORATION, a corporation,
Complainant,

vs.

CAPITAL CONSTRUCTION CO., INC., a corporation, *et al.*,
Defendants.

On Appeal from the Court of Chancery.

REPLY BRIEF FOR APPELLANT, WEST BERGEN TRUST COMPANY.

When this cause was moved, leave was granted by the Court to the appellant, West Bergen Trust Company, to file a reply brief in lieu of an oral argument. Appellant, therefore, submits this general reply to the contentions made in the answering briefs filed in this cause by respondent, Geo. F. Perry & Sons, Inc., by respondent, A. S. Reid & Co., by respondents, Ira R. Crouse, Louis Moore, Morris Portnow and Abraham Lipschitz, partners trading as Lipschitz Parquet Floor Co., by respondent, Carteret Company, and by respondents, Shilowitz & Tucker.

ARGUMENT.

POINT I.

The final decree in this cause did not adjudicate the rights of all parties thereto, as contended by the respondents, but is only an order for the distribution of surplus moneys.

The gist of the contentions on behalf of the respondents is that the final decree in the instant foreclosure suit is an adjudication of the rights of the parties litigant, because it is an order for the distribution of surplus moneys. The fact is, that in this foreclosure suit there was no application made to the Court for distribution of surplus moneys. The property encumbered by complainant's mortgages was sold *pendente lite*. Thereafter the cause was duly referred to one of the masters in chancery to ascertain and report the amount due to the various parties-defendant, for principal and interest upon their several mortgages, lien claims, judgments, and other demands, and the order of priority thereof, and whether they all embraced the premises mentioned in the bill of complaint (Case, p. 216).

As pointed out in Brief for Appellant, West Bergen Trust Company (p. 14), the master reported in accordance with the order of reference to him. Exceptions were then filed by some of the encumbrancers to the Master's Report. These exceptions duly came on for hearing before Vice-Chancellor Bigelow in the Court below, and the Court, by its opinion filed in the cause, overruled the findings of the master, but, instead of adjudicating in the final decree the amount due to the

various parties upon their encumbrances, the order of priority thereof, and whether they embraced the entire premises (as the Court had found in its opinion), the Court ordered the fund in court in the foreclosure proceedings to be paid to certain designated encumbrancers, as if the cause were before the Court on distribution of surplus moneys.

Obviously, the contention of the respondent, Carteret Company (Brief, pp. 3 and 4) that, under Rule 133 of the Court of Chancery, this appellant has waived all objections to the form of the decree, is without merit. That rule only applies when the order or decree is *not* settled by the Chancellor, Vice-Chancellor or Advisory Master. In the instant case, the order or decree complained of *was* settled by the Vice-Chancellor. Moreover, this appellant is not attacking the form of the decree below, but the substance and propriety thereof.

The argument of the appellant, West Bergen Trust Company, as to the validity of the final decree is that the opinion of the Court below is not an adjudication of the rights of the parties to the cause. Their rights can only be settled by the final decree. The final decree herein, failing to settle and determine these rights is, therefore, manifestly erroneous, and this appellant submits that the respondents have not answered this argument.

POINT II.

The Perry judgment recovered in the Union County Circuit Court on its lien claim is not *res adjudicata* against the rights of appellant, West Bergen Trust Company, in the foreclosure suit.

The contention of respondent, Geo. F. Perry & Sons, Inc., is that the judgment recovered by it on its lien claim in the Union County Circuit Court against the Capital Construction Co., Inc., and the appellant, West Bergen Trust Company, and others (after all claimants were enjoined in the insolvency proceedings against the Capital Construction Co., Inc.) conclusively determined that its lien claim was prior to the advance-money mortgage of appellant, West Bergen Trust Company.

The legal effect of this judgment and the rights determined thereby are fully discussed under Point IV of Brief for Appellant, West Bergen Trust Company. It is there pointed out that the rights of all claimants, after the appointment of the receivers for the Capital Construction Co., Inc., by the Court of Chancery in the insolvency proceedings, were to be determined in that Court, and that all lien claimants were enjoined from further proceeding at law in the Union County Circuit Court. Geo. F. Perry & Sons, Inc., however, obtained its judgment in direct violation of this injunctive order and the Court of Chancery proceedings. Manifestly, the Court of Chancery should not recognize this judgment as adjudicating the rights of the parties in that cause. How manifestly unjust it would be to hold that the Perry lien claimant (while all other lien claimants were enjoined from prosecuting their respective

claims, and mortgagees from defending as to their respective mortgages) could obtain a judgment in a Court of law, which would make the lien claim of Perry superior to all other lien claims, and superior to advance-money mortgages.

It is submitted that the Perry lien claim did not and could not change its status after receivers were appointed for the Capital Construction Co., Inc., and all claimants enjoined from the prosecution of their claims. It is further submitted that when the foreclosure suit by the 2nd and 3rd mortgagees of the premises in question was instituted by leave of the Court below against the receivers of the Capital Construction Co., Inc., and all subsequent encumbrancers of the mortgaged premises were made parties-defendant in the foreclosure suit, these subsequent encumbrancers, which included the Perry lien claim, took the same status and position in the foreclosure suit, that they occupied at the time of the appointment of the receivers for the Capital Construction Co., Inc.; that when the matter was referred to the Master to ascertain and report the amount due on these subsequent encumbrances and the order of priority thereof, the Perry lien claim as well as all other lien claims were to be determined upon the status existing at the time all lien claimants were enjoined in the insolvency proceedings against the Capital Construction Co., Inc. Therefore, the Court below, in the foreclosure suit, could only properly recognize the encumbrance of the Perry Company as a lien claim and not as a judgment recovered thereon in the Union County Circuit Court, after it was enjoined from taking judgment.

This appellant submits that the cases of *Peoples B. & L. Ass'n of Ridgefield Park* vs. *Vaniewsky,* 85 N. J. Eq. 551; *Bergenfield Printing Company* vs. *Intertype Corporation,* 144 Atl. (N. J.) 730;

Crane vs. *Brighton Mills,* 98 N. J. L. 308; *Taylor* vs. *Gray,* 59 N. J. Eq. 612, cited in some of the respondents' briefs, are not in point for in none of them was the question considered which is here presented.

The Perry lien claim was not in the class of cases where it is necessary to establish a lien against property other than that involved in the insolvency proceedings. In the instant case the Capital Construction Co., Inc., was the builder as well as the owner, and, as pointed out in Brief for Appellant, West Bergen Trust Company (p. 26), all controversies concerning the indebtedness of the insolvent company and the liens upon its property should be disposed of by the Court in the insolvent proceedings.

Manifestly, the controversy as to the Perry lien claim and all other lien claims came under the exclusive jurisdiction of the Court of Chancery upon the appointment of the receivers and the enjoining of the prosecution of the claims in a court of law, and thereafter it was illegal or unlawful for any lien claimant to obtain a judgment in a court of law.

POINT III.

The appointment of receivers by the Court of Chancery of the instant property of the Capital Construction Co., Inc., and the issuing of the injunctive order by that Court, brought all mechanics' lienors as well as other claimants into the jurisdiction of that Court and the respondent, Geo. F. Perry & Sons, Inc., had no right thereafter to prosecute its lien claim in the Union County Circuit Court without leave of the Court of Chancery.

The respondent, Geo. F. Perry & Sons, Inc., in its brief (p. 11), contends that it had the right to proceed with its lien claim action in the Union County Circuit Court, notwithstanding the insolvency of the Capital Construction Co., Inc., and the appointment of a receiver for it. In its brief it also criticizes the printing of the bill of complaint, the order to show cause why receiver should not be appointed, the order appointing receiver with restraint, and the order continuing receiver in the insolvency proceedings against the Capital Construction Co., Inc.

If respondent really objected to the printing of these documents in the instant State of Case, its remedy was to have objected thereto within 10 days after service thereof (pursuant to Rule 19a of this Court) instead of making a criticism in its brief.

However, it was proper that these documents be printed in the State of Case. The order appointing receivers with restraint was received in evidence before the master in the foreclosure proceedings (Case, pp. 363, 469), and, in order for the Court below to pass upon the effect and extent of the injunctive order, it had to take

judicial notice of the other documents in the insolvency proceedings.

As to the contention of the respondent that the insolvency proceedings against the Capital Construction Co., Inc., and the appointment of the receivers of the instant property, and the restraining of all actions at law against the Capital Construction Co., Inc., in no way legally prevented Geo. F. Perry & Sons, Inc., from prosecuting its lien claim in the Union County Circuit Court, this appellant refers to Point IV of its Brief (pp. 22-28, inclusive), as a complete reply thereto; and, appellant also here points out that the cases cited in the answering briefs of Geo. F. Perry & Sons, Inc., and other respondents on this question do not support their contention, for, in none of these cases was involved a mechanics' lien claim in which a receiver had been appointed for the *owner* of the liened land. It was unnecessary and improper in the instant case for the Perry Company to establish its lien against the lands, in a court of law, when this company was required to establish its lien claim against these lands in the Court of Chancery in the insolvency proceedings as well as in the foreclosure suit.

The question is, should the Court of Chancery, after taking complete jurisdiction of the *res* and having enjoined all actions at law against the *res,* give full faith and credit to the Perry judgment in establishing its lien upon the property which was then under the jurisdiction of the Court of Chancery, which judgment was obtained in violation of its injunctive order?

This appellant submits that none of the respondents have answered this question.

POINT IV.

The advance money mortgage of the West Bergen Trust Company is prior in lien to the lien of the general mortgage of the defendant, Junction Milling Company, even though the latter mortgage was recorded prior to the former.

The contention of the respondents who have argued this question is that the mere fact that the general mortgage of the Junction Milling Company was recorded before the advance money mortgage of the West Bergen Trust Company, gives the former priority in lien.

This appellant has argued this question under Point III of its Brief (pp. 18-21), and here again points out that the priority of these mortgages is not to be determined by the Recording Act, but by Section 15 of the Mechanics' Lien Law (P. L. 1898, p. 538, as amended).

Although some of the respondents contend that the cases cited in their respective answering briefs are decisive of this question, in favor of the Junction Milling Company's general mortgage, this appellant submits that in none of these cited cases was this question considered and decided.

Manifestly, if the West Bergen Trust Company advance money mortgage must be given priority over the mechanics' lien claims, pursuant to Section 15 of the Mechanics' Lien Law, *supra*, it must be given priority over the general mortgage of the Junction Milling Company, otherwise an advance money mortgage can only take priority over mechanics' lien claims when there is no intervening general mortgage.

POINT V.

The mortgage of the West Bergen Trust Company is an advance money mortgage to the extent of the moneys loaned by the Trust Company to the Capital Construction Co., Inc., and actually paid by it to material-men and laborers in the erection of the building in question.

In arguing this point, it is to be noted that the Master was required under the order of reference to him, to ascertain and report the amount due on the several encumbrances and the order of priority thereof. The Master determined, by his report, that the mortgage of the West Bergen Trust Company was prior in lien to all mechanics' lien claims including the Perry lien claim and was prior in lien to all general mortgages which were made and recorded subsequent to the commencement of the building.

Therefore, the Master must have found that the West Bergen Trust Company mortgage was an advance money mortgage, otherwise he could not have given this mortgage priority over the lien claims and general mortgages. It is further to be noted that none of the respondents excepted to the Master's report in this respect.

The court below, in over-ruling the Master's report, held that the West Bergen Trust Company mortgage was an advance money mortgage, but did not determine to what extent.

Respondent, Geo. F. Perry & Sons, Inc., in its brief, contends that the West Bergen Trust Company mortgage is not an advance money mortgage. This appellant submits that since Perry did not raise this question before the court below, on exceptions to the Master's report, and the court be-

low did not consider this question as an exception to the Master's report, under the well-settled practice of this Court, this question cannot be considered here.

However, the proof before the Master clearly established (Case, pp. 881-882) that the West Bergen Trust Company mortgage is an advance money mortgage to the extent of $5,758.96. The evidence shows that $5,774.17 was actually loaned by the West Bergen Trust Company to the Capital Construction Co., Inc., to pay laborers and material-men in the erection of the building in question; that these moneys were deposited in the account of the Capital Construction Co., Inc., with the West Bergen Trust Company; that, to the extent of $5,758.96, these moneys so deposited were paid by the West Bergen Trust Company to material-men and laborers in the erection of the building in question, upon the check of the Capital Construction Co., Inc. These checks were, in effect, a demand upon the West Bergen Trust Company to pay to these material-men and laborers for materials furnished and labor performed by them in the erection of this building.

This appellant contends that it is immaterial whether there were other moneys to the credit of the Capital Construction Co., Inc., in its account at the time that the moneys of the West Bergen Trust Company were credited to this account, or that checks were drawn by the Capital Construction Co., Inc., on this account, payable to others. There was no co-mingling of funds in the instant case. The moneys advanced by the West Bergen Trust Company to the Capital Construction Co., Inc., were deposited in the account of the Capital Construction Co., Inc., for a specific purpose and used for that purpose. The mechanics' lien law is complied with, if the money advanced by the West Bergen Trust Company was actually paid by it

to material-men and laborers who furnished materials and performed labor in the erection of this building. The effect of the arrangement between the West Bergen Trust Company and the Capital Construction Co., Inc., was that the West Bergen Trust Company would advance and did advance $5,774.17 to the Capital Construction Co., Inc., to be by the West Bergen Trust Company paid directly to material-men and laborers upon the respective checks of the Capital Construction Co., Inc.

Exhibit 10 (Case, pp. 880-882) itemizes the name of the respective material-men or laborers to whom the money was paid by the West Bergen Trust Company, and the amount of the payment to each.

The evidence also establishes that the moneys loaned by the West Bergen Trust Company to the Capital Construction Co., Inc., was for a distinct purpose and that was to pay material-men and laborers in the erection of this building; and that the Capital Construction Co., Inc., was to give to the West Bergen Trust Company a mortgage encumbering the premises in question to secure the payment of moneys so advanced. This appellant submits that it is immaterial whether a mortgage was given at the time of the making of the advances, if the West Bergen Trust Company proves, as it has in this case, that the moneys so advanced by it to the extent of $5,758.96 was actually applied to the cost of the building. Under the authority of *Young* vs. *Haight*, 69 N. J. L. 453 and the other authorities cited in Brief for Appellant, West Bergen Trust Company, the mortgage to the West Bergen Trust Company is an advance money mortgage.

In conclusion, this appellant contends that the final decree in the cause is erroneous, because it does not adjudicate: (1) the rights of the parties;

(2) that the mortgage of the West Bergen Trust Company is an advance money mortgage to the extent of $5,758.96 and that, being an advance money mortgage to that extent, it is prior to the general mortgage of the Junction Milling Company; (3) that the advance money mortgage of the West Bergen Trust Company is paramount in lien to all lien claims; (4) that the Perry judgment is unlawful and did not determine the rights of any of the parties to the foreclosure suit and should not be given any force and effect in this cause.

For these reasons the final decree of the Court below should be reversed.

Respectfully submitted,

EDWARD P. STOUT,
Counsel for Appellant,
West Bergen Trust Company.