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Bill of Complaint.

## In Chancery of New Jersey

*To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:*

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The complainant, Berwyn Estates, a New Jersey corporation, with its principal office in the City of Newark, County of Essex and State of New Jersey, respectfully shows that:

1. On January 9, 1928, Conrad Deuchler, Sheriff of the County of Essex, conveyed to complainant, for a full and valuable consideration, by deed of bargain and sale in fee simple, the following described lands and premises, in the City of East Orange, County of Essex, and State of New Jersey:

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All those tracts or parcels of land and premises hereinafter particularly described, situate, lying and being in the City of East Orange, in the County of Essex and State of New Jersey,

### FIRST TRACT:

BEGINNING in the westerly line of North Park Street at the southeast corner of the lot now or formerly belonging to Henry Whitaker, and thence running along said Whitaker's line north seventy-seven degrees fifty minutes west one hundred and thirty feet; thence parallel with said street south twelve degrees ten minutes west twenty-five feet more or less; thence south seventy-seven degrees fifty minutes east one hundred and thirty feet to said North Park Street; thence along the westerly line of said street north

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*Bill of Complaint.*

twelve degrees ten minutes east twenty-five feet to said Henry Whitaker's line and the place of BEGINNING.

Being lot No. 7 on map of the Wilson and Long property, surveyed April 26, 1867, by L. D. Tompkins.

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## SECOND TRACT:

BEGINNING on the west side of North Park Street at the northeast corner of lot number seven (7) distant one hundred and ninety-eight feet northerly from the corner of North Park and Dodd Streets; thence running along the line of said lot north seventy-seven degrees fifty minutes west one hundred and thirty feet; thence north twelve degrees two minutes east twenty-five feet to lot number nine (9); thence along said lot number nine (9) south seventy-seven degrees fifty minutes east one hundred and thirty feet to said North Park Street and thence along the same south twelve degrees two minutes west twenty-five feet to the place of BEGINNING.

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The said deed having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon, was on February 16, 1928, duly recorded in the Register's Office of said County of Essex.

2. Complainant has ever since the recording of said deed been in the peaceable possession of the lands therein described, and has always claimed and does now claim to own same.

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3. Complainant's title to said lands or to some part thereof is denied and disputed by one Enrico Varlese, who claims to own the same or some part thereof, or some interest therein, or to hold some lien or encumbrance thereon.

*Bill of Complaint.*

4. On or about January 21, 1928, said Enrico Varlese sued out a general and special writ of fieri facias out of the Essex County Circuit Court directed to the Sheriff of the County of Essex, commanding said Sheriff to cause to be paid the sum of \$530.60 to said Enrico Varlese lately recovered by said Enrico Varlese against Boyarsky & Gordon, Inc., a corporation, owner and builder, and that if sufficient goods and chattels of said Boyarsky & Gordon, Inc., owner and builder be not found, then and in that case directing said Sheriff to make said sum out of the lands and premises described in paragraph 1 herein. Said writ is recorded in Book Z-2 of Circuit Court Executions, page 460. Pursuant to said writ the Sheriff of the County of Essex has advertised the public sale of lands and premises to be held on March 13, 1928.

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

1. That Enrico Varlese and Conrad Deuchler, Sheriff of the County of Essex, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

2. That the said defendant Enrico Varlese, may set forth and specify his title, claim, or encumbrance due upon the lands and premises hereinbefore described, and how and by what instrument or instruments the same is derived or created.

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3. That the rights of all of the parties to this suit in and to the lands hereinbefore set forth may be fixed and settled by this Court, and that complainant may be decreed to have a perfect title thereto, and the said defendant Enrico

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*Bill of Complaint.*

Varlese to have no estate, interest or right in, or incumbrance upon said lands or any part thereof.

10 4. That said Enrico Varlese be permanently enjoined from proceeding with the said writ of fieri facias sued out by him, and that he be directed to cause same to be discontinued as to said lands and premises, and the Sheriff of the County of Essex be permanently enjoined from selling said lands and premises under said writ of fieri facias.

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

20 **AARON MARDER,**  
Solicitor for and of Counsel with Complainant.

STATE OF NEW JERSEY, }  
COUNTY OF ESSEX. } ss.

JOSEPH ISAACS, of full age, being duly sworn according to law, on his oath deposes and says:

30 I am the President of the complainant in the foregoing bill of complaint. I have read the same and all of the matters in said bill of complaint with the exception of paragraph 4 are true of my own personal knowledge, and as to the statements in paragraph 4 I believe same are true upon the information from my counsel.

(Signed) JOSEPH ISAACS.

Sworn and subscribed to before me  
this 5th day of March, 1928.

40 (Signed) IRENE P. DALY,  
(SEAL) A Notary Public of N. J.

*Bill of Complaint.*

STATE OF NEW JERSEY, }  
 COUNTY OF ESSEX. } ss.

CHARLES S. OKIN, of full age being duly sworn according to law, on his oath deposes and says:

I am an Attorney at Law and Solicitor in Chancery, associated with Aaron Marder, Solicitor of Complainant.

10

I have personal knowledge of the matter stated in paragraph 4 of the bill of complaint. Statements contained in paragraph 4 of the bill of complaint are true.

CHARLES S. OKIN.

Sworn and subscribed to before me  
 this 5th day of March, 1928.

(Signed) RUTH C. ROBINSON,  
 A Notary Public of N. J.

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(SEAL)

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Order to Show Cause and Restraining Order.

IN CHANCERY OF NEW JERSEY.

10	BERWYN ESTATES, a New Jersey corporation, <div style="text-align: right;"><i>Complainant,</i></div>	}	<i>On Bill, etc.</i>
	<i>vs.</i>		<i>Order to Show Cause and Re- straining Order.</i>
	ENRICO VARLESE and CONRAD DEUCHLER, Sheriff of the County of Essex, <div style="text-align: right;"><i>Defendants.</i></div>		

20 This matter being opened to the Court by  
 Aaron Marder, solicitor for and of counsel with  
 the complainant, and upon reading and filing the  
 verified bill of complaint;

30 It is on this 6th day of March, 1928, ORDERED  
 that the defendants Enrico Varlese and Conrad  
 Deuchler, Sheriff of the County of Essex, show  
 cause before the Chancellor at Chancery Cham-  
 bers in the City of Newark, at 10 o'clock in the  
 forenoon or as soon thereafter as counsel can be  
 heard, on Tuesday, the 13th day of March, 1928,  
 why an order should not be made restraining  
 and enjoining said defendants, according to the  
 prayer of said bill, and why the complainant  
 should not have such other and further relief as  
 may be proper;

40 It is further ORDERED that in the meantime, and  
 until the further order of this Court, the said de-  
 fendants desist and refrain from selling and/or  
 causing to be sold the premises described in the  
 bill of complaint under the writ of fieri facias  
 described in said bill of complaint, and that the

*Order to Show Cause and Restraining Order.*

defendant Enrico Varlese desist and refrain from assigning his alleged interest in the premises mentioned and described in the bill of complaint.

It is further ORDERED that copies of the said bill of complaint and the affidavits thereunto annexed and of this order, none of which need be certified, be served upon said defendants either personally or by leaving same at the office or usual place of business or abode of each of said defendants within two days from the date hereof. 10

E. R. WALKER,  
C.

Respectfully advised,

ALONZO CHURCH, 20  
V.-C.

30

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Order for Restraint Pending Final Hearing.

IN CHANCERY OF NEW JERSEY.

10	BERWYN ESTATES, a New Jersey corporation, <p style="text-align: right;"><i>Complainant,</i></p> <p style="text-align: center;"><i>vs.</i></p> ENRICO VARLESE and CONRAD DEUCHLER, Sheriff of the County of Essex, <p style="text-align: right;"><i>Defendants.</i></p>	} <i>On Bill, etc.</i> } <i>Order for</i> } <i>Restraint</i> } <i>Pending</i> } <i>Final Hear-</i> } <i>ing.</i> } <i>Docket 67,</i> } <i>Page 447.</i>
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20 This matter being opened to the Court by Aaron Marder, solicitor of the complainant, in the presence of George A. Henderson, Esq., solicitor of the defendant Enrico Varlese, and the Court having considered the bill of complaint and affidavits filed herein and having heard and considered the arguments of counsel, and being satisfied that complainant is entitled to an order pending final hearing restraining the defendants from selling and/or causing to be sold the premises described in the bill of complaint under the writ of fieri facias described in said bill of complaint, and that the defendant Enrico Varlese desist and refrain from assigning his alleged interest in the premises mentioned and described in the bill of complaint until the further order of this Court, provided that the defendants may adjourn or cause to be adjourned from week to week the sale of the premises advertised under the writ of fieri facias described in the bill of

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40 complaint.

*Order for Restraint Pending Final Hearing.*

And it appearing that the order to show cause made in this matter on the 6th day of March, 1928, has been duly served in the manner therein directed;

It is on this 13th day of March, 1928 ORDERED that the said defendants, and their agents, be and they are each and everyone of them hereby enjoined and commanded to desist and refrain from selling and/or causing to be sold the premises described in the bill of complaint, under the writ of fieri facias described in said bill of complaint, and that the defendant Enrico Varlese desist and refrain from assigning his alleged interest in the premises mentioned and described in the bill of complaint until the further order of this Court, provided that the defendants may adjourn or cause to be adjourned from week to week the sale of the premises advertised under the writ of fieri facias described in the bill of complaint. 10  
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(Signed) E. R. WALKER,  
C.

Respectfully advised,

(Signed) ALONZO CHURCH,  
V.-C. 30

I hereby consent to the making and entry of the foregoing order.

(Signed) GEORGE A. HENDERSON,  
Solicitor of Defendant, Enrico Varlese.

**Notice of Motion to Strike Out Answer and  
Counter-claim.**

IN CHANCERY OF NEW JERSEY.

10	BERWYN ESTATES, a New Jersey corporation, <div style="text-align: right; padding-right: 20px;"><i>Complainant,</i></div>	}	<i>On Bill, etc.</i>
	<i>vs.</i>		<i>Notice of Motion.</i>
	ENRICO VARLESE and CONRAD DEUCHLER, Sheriff of the County of Essex, <div style="text-align: right; padding-right: 20px;"><i>Defendants.</i></div>		<i>Docket 67, Page 447.</i>

20 *To the Defendant Enrico Varlese or George A.  
Henderson, Esq., his solicitor:*

PLEASE TAKE NOTICE that on Tuesday, the first day of May, 1928, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, I shall apply to the Chancellor, at Chancery Chambers, 1060 Broad street, Newark, N. J., for an order striking out the answer and counter-claim filed by you in the above-entitled cause and for the entry of a final decree against Enrico Varlese, for the following reasons:

30 1. Said answer does not specify and set forth any estate, interest or encumbrance in said defendant Enrico Varlese in the lands and premises described in bill of complaint.

40 2. Said answer is sham and in connection with this point, I shall also rely upon the affidavit of Joseph Isaacs hereunto annexed, and submit other evidence if necessary.

*Notice of Motion to Strike Out Answer.*

3. The counter-claim does not constitute an equitable or legal cause of action, and is frivolous.

4. The counter-claim is sham, and in connection with this point I shall also rely upon the affidavits of Sidney Seidler and Joseph Isaacs hereunto annexed, and submit other evidence, if necessary. 10

5. The facts set forth in the counter-claim clearly demonstrate that said defendant Enrico Varlese has no estate, interest or encumbrance in the lands and premises described in the bill of complaint, in that:

a. Said counter-claim states that the complainant was not served in a mechanic's lien suit instituted by said Enrico Varlese and described in said counter-claim. 20

b. The defendant Enrico Varlese could have filed a mechanic's lien claim on July 1, 1927, whereas none was filed by him until September 28, 1927; complainant's title is made by deed (which I will offer in evidence) from the Sheriff of the County of Essex, dated January 9, 1928, pursuant to foreclosure proceedings had in this court between the above named complainant as complainant, and Boyarsky & Gordon, Inc., *et als.*, defendants, (Chancery Docket 65, page 158); as the files of said foreclosure proceedings disclose, which files I will use upon this motion, the bill of complaint was filed therein on August 12, 1927, and the subpoenas and tickets annexed were served on August 18, August 19 and August 23, 1927; hence any possible mechanics's lien claim by said Enrico Varlese, in connection with the premises in question, has been cut off by said foreclosure proceedings, and the deed given in pur- 30  
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*Affidavit of Joseph Isaacs.*

suance thereto and aforescribed. The above-mentioned foreclosure proceedings are the same as are mentioned in the counter-claim of said defendant Enrico Varlese.

AARON MARDER,  
Solicitor of Complainant.

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IN CHANCERY OF NEW JERSEY.

20	BERWYN ESTATES, a New Jersey corporation, <div style="text-align: right; padding-right: 20px;"><i>Complainant,</i></div>	} <i>On Bill, etc.</i>  } <i>Affidavit.</i>
	<i>vs.</i>	
20	ENRICO VARLESE and CONRAD DEUCHLER, Sheriff of the County of Essex, <div style="text-align: right; padding-right: 20px;"><i>Defendants.</i></div>	} <i>Docket 67,</i> } <i>Page 447.</i>

STATE OF NEW JERSEY, }  
 COUNTY OF ESSEX. } *ss.*

JOSEPH ISAACS, of full age, being duly sworn according to law, on his oath deposes and says:

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I am President of Berwyn Estates, complainant in the above-entitled cause of action, and handled the matters concerned in this suit and in which said company is interested.

On January 9, 1928, the Sheriff of the County of Essex conveyed to complainant, the premises described in bill of complaint, which deed was on February 16th recorded in the Register's Office of the County of Essex. Complainant has ever since the recording of said deed been in

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*Affidavit of Joseph Isaacs.*

peaceable possession of the lands therein described, and has always claimed and does now claim to own same.

No suit is pending to enforce or test the validity of the defendant Enrico Varlese's alleged title, claim or encumbrance.

I did not know of the alleged lien claim of Enrico Varlese, mentioned in his counter-claim herein, until some time after my company procured the aforementioned deed from the Sheriff of the County of Essex.

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JOSEPH ISAACS.

Sworn and subscribed to before me  
this 24th day of April, 1928.

EDNA L. CHAMBERLAIN,  
Notary Public of New Jersey.

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*Affidavit of Sidney Seidler.*

IN CHANCERY OF NEW JERSEY.

10	BERWYN ESTATES, a New Jersey corporation, <div style="text-align: right;"><i>Complainant,</i></div>	}	<i>On Bill, etc.</i>
20	<i>vs.</i>		<i>Affidavit.</i>
	ENRICO VARLESE and CONRAD DEUCHLER, Sheriff of the County of Essex, <div style="text-align: right;"><i>Defendants.</i></div>		<i>Docket 67, Page 447.</i>

STATE OF NEW JERSEY, }  
 COUNTY OF ESSEX. } ss.

20 SIDNEY SEIDLER, of full age, being duly sworn according to law, on his oath deposes and says:

I am Secretary of the Foundation Building and Loan Association of the City of Newark.

30 The mortgage of said Association referred to by the above named defendant Enrico Varlese in the counter-claim filed by him in the above entitled cause, is one made and executed by Boyarsky & Gordon, Inc., to the Foundation Building and Loan Association of the City of Newark, covering the premises described in the bill of complaint and dated June 21, 1927, and was recorded on June 29, 1927 in Book F-61 of Mortgages for Essex County, pages 486-487. Said Boyarsky & Gordon, Inc., never went through with the loan in connection with said mortgage and the Foundation Building and Loan Association of the City of Newark did not advance any money under said mortgage loan, and hence said association did not defend the mechanics lien suit instituted in the East Orange District Court.

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*Affidavit of Sidney Seidler.*

There is not, nor was there ever, any money due and owing under said mortgage to the Foundation Building and Loan Association and said mortgage has been cancelled of record.

SYDNEY SEIDLER.

Sworn and subscribed to before me  
this 25th day of April, 1928.

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CHARLES S. OKIN,  
Attorney at Law of N. J.

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## Order Denying Motion.

## IN CHANCERY OF NEW JERSEY.

10	BERWYN ESTATES, a New Jersey corporation, <div style="text-align: right;"><i>Complainant,</i></div>	}	<i>On Bill, etc.</i>
	<div style="text-align: center;"><i>vs.</i></div> ENRICO VARLESE and CONRAD DEUCHLER, Sheriff of the County of Essex, <div style="text-align: right;"><i>Defendants.</i></div>		

20 A motion having been made by Aaron Marder, Esq., solicitor of complainant to strike out the answer and counter-claim of Enrico Varlese, a defendant herein, and it appearing that due notice of this motion has been given to the said defendant and the Court having heard the arguments of Aaron Marder, Esq., solicitor of the said complainant, and George A. Henderson, Esq., solicitor of the defendant, Enrico Varlese, and being of the opinion that the objections taken by the complainant are not well founded;

30 It is thereupon on this 1st day of May, One Thousand Nine Hundred and Twenty-eight, ORDERED that the aforesaid motion be and the same is hereby denied.

And it is further ordered that the said defendant have leave to amend his said answer and counter-claim within seven days after date of this order.

E. R. WALKER,

Respectfully advised,  
 MAJA LEON BERRY,

*C.*

40

*V.-C.*

**Amended Answer and Counter-claim of  
Defendant, Enrico Varlese.**

IN CHANCERY OF NEW JERSEY.

BERWYN ESTATES, a New Jersey corporation, <div style="text-align: right; padding-right: 20px;"><i>Complainant,</i></div> <div style="text-align: center; padding: 0 20px;"><i>and</i></div> ENRICO VARLESE, <i>et als.</i> , <div style="text-align: right; padding-right: 20px;"><i>Defendants.</i></div>	}	<i>On Bill, etc.</i> <i>Amended An-          swer and          Counter-          claim of De-          fendant, En-          rico Varlese.</i>	10
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Defendant, Enrico Varlese, in his amended answer to the complainant's bill says:

(1) Paragraph one is admitted, excepting that this defendant denies that the conveyance by Conrad Deuchler, Sheriff was for a "full and valuable" consideration. 20

(2) The defendant, Enrico Varlese, has no knowledge as to the allegation contained in paragraph two, and leaves complainant to its proof.

(3) Paragraph three is admitted.

(4) Paragraph four is admitted. 30

(5) On September 28, 1927, Enrico Varlese the defendant herein, filed in the Essex County Clerk's Office a lien claim against the premises described in the complainant's bill and summons was issued out of the East Orange District Court, and on or about October 3, 1927, served on Boyarsky & Gordon, Inc., a corporation, and the Foundation Building and Loan Association. Service was not made upon the complainant herein, who had also been made a party defendant. 40

*Amended Answer and Counter-claim.*

(6) In due course, within a month, judgment was entered generally against the defendant Boyarsky & Gordon, Inc. and the Foundation Building and Loan Association, and specially against the land and building described in the bill. It was further ordered in that judgment that the mortgage of the Foundation Building and Loan Association covering the above premises, be subject to the plaintiff's lien claim. This judgment was docketed in the Essex County Circuit Court on December 5, 1927, twenty-two days before the mortgage foreclosure sale held at the instant of the complainant herein. At this sale complainant bid in the premises for two thousand dollars, and subsequently secured a deed from the Sheriff therefor on January 9, 1928, and recorded it on Feb. 16, 1928.

(7) The work was done and the materials were furnished by this defendant between the 27th day of April, 1927, and the first day of July, 1927, and at the time of the complainant's filing of the bill of foreclosure the said premises were subject to the right of the lien of this defendant for work and materials under the Mechanics' Lien Act.

(8) Complainant knowingly did not make the Foundation Building and Loan Association a party to its foreclosure proceedings, and at the Sheriff's sale took title subject to the mortgage of the Building and Loan Association and subject to defendant's lien claim, which was by Court decree, prior to the building and loan mortgage.

(9) This defendant was not made a party to this foreclosure suit and his right of lien remained unaffected thereby, and still so remains

*Amended Answer and Counter-claim.*

by virtue of the judgment obtained against said premises.

(10) The complainant herein had knowledge of the proceedings pending on behalf of Enrico Varlese, and took title from the Sheriff with full knowledge of the lien claim and the judgment above described. The mortgage foreclosed provided for advances on the mortgage loan in five installments as the work was done; it provides for inspections by complainant during the construction of the building; it further provided that the complainant might make expenditures to complete the building and pay and satisfy all liabilities for materials and labor, and it still further provided that the mortgagee was appointed agent of the mortgagor for making the above described expenditures and was authorized to use the rents, issues and profits for upkeep and maintenance of said premises, and the payment of prior liens.

(11) Since his lien claim was filed and judgment entered, defendant Enrico Varlese verily believes that the payments upon the principal sum of the building and loan mortgage would suffice to pay off his docketed District Court judgment.

(12) Defendant, Enrico Varlese is informed, and verily believes that the balance of the sheriff's sale purchase price, after deducting the necessary fees and costs, was delivered over to the complainant herein. The amount bid, \$2,000.00 is extremely inadequate.

*Counter-claim.*

COUNTER-CLAIM.

By way of counter-claim against the complainant and the Foundation Building and Loan Association, the defendant, Enrico Varlese, says that:

10 (1) The allegations set forth in the above answer to the complainant's bill of complaint are repeated and made paragraph one of this counter-claim.

20 (2) The complainant herein, and the Foundation Building & Loan Ass'n, through their agents, servants, employees or representatives did conspire to defraud defendant Enrico Varlese, out of the amount justly due to him on his judgment. They allowed a mortgage for \$10,000.00 to the Foundation Building and Loan Association, to remain on record and the property sold under foreclosure with it on record, and subsequently on April 25, 1928 (more than one year after it was executed), their solicitor cancelled it of record.

30 (3) In furtherance of the alleged conspiracy the Foundation Building and Loan Association allowed the lien claim suit to go to judgment in the manner described in this above answer; in the meantime, in the foreclosure suit the Berwyn Estates knowingly did not make the Foundation Building and Loan Association holding a mortgage of record, a party defendant.

40 (4) In furtherance of the alleged conspiracy, after, on April 25, 1928, they cancelled of record, the mortgage of \$10,000.00 to which the lien of Varlese attached and was prior, on the next day, April 26th, they placed on record a new mortgage for \$20,000.00 from the Berwyn Estates to the Foundation Building and Loan Association covering the same premises.

*Counter-claim.*

(5) After complainant's bill to quiet title was filed affidavits were filed in this court in connection with a notice of motion. The secretary of the Foundation Building and Loan Association on April 25, 1928, swore as follows "There is not, nor was there ever any money due and owing under said mortgage to the Foundation Building and Loan Ass'n, and the said mortgage has been cancelled of record." He artfully attempted to conceal from this court the fact that another mortgage on the same premises for \$20,000.00 from Berwyn Estates to Foundation Building and Loan Association, was allegedly executed on April 17th (just a day prior to the filing of the answer and counter-claim), and was about to be placed on record on the 26th day of April, 1928. In connection with the same motion, another affidavit was filed, this one of Joseph Isaacs, President of complainant corporation. He denies knowledge of the lien claim in issue. He did not mention to the Court that he was one of the incorporators of the Foundation Building and Loan Association, and, as this defendant verily believes, is one of the directors. Nor did he mention that the terms of the foreclosed mortgage provided for the payment of liens and made his company the agent of the mortgagor for that purpose.

This defendant therefore prays:

(1) That a writ of subpoena be issued out of this court directed to the Foundation Building and Loan Association, commanding the said Foundation Building and Loan Association to answer this counter-claim and to abide by such decree as this court may make in the premises.

*Counter-claim.*

(2) That said complainants, Berwyn Estates and Foundation Building and Loan Association may answer this counter-claim and each statement herein made.

10 (3) That the said complainant may be decreed to account for all the moneys received by it out of the purchase price of the premises in question at the Sheriff's sale, and, out of the same, pay and satisfy the judgment and costs of this defendant.

(4) That the said Foundation Building and Loan Association may be decreed to account for all moneys received by it as payments on account of the principal on the building and loan mortgages above referred to, or as payments on the loan on the certificates of stock pledged to it as  
20 security for the payment of the said mortgages.

(5) That the said complainant and the said Foundation Building and Loan Association or either of them may be decreed to pay to this defendant the amount of five hundred dollars with interest and costs due on the docketed judgment of the East Orange District Court.

(6) That this defendant's lien be declared a first lien on the premises in question.

30 (7) That the foreclosure decree of this court be re-opened, the sale thereunder set aside, and this defendant be given an opportunity to answer the foreclosure bill and have his claim passed upon.

(8) That the Court decree that the complainant herein holds the title to the premises in trust for the defendant Enrico Varlese, until the payment to him of the amount due him.

40 GEORGE A. HENDERSON,  
Solicitor of Defendant, Enrico Varlese.

**Answer of Foundation Building and Loan Association to Counter-claim of Defendant, Enrico Varlese.**

IN CHANCERY OF NEW JERSEY.

<p>BERWYN ESTATES, a New Jersey corporation, <i>Complainant,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>ENRICO VARLESE, and CONRAD DEUHLER, Sheriff of the County of Essex, <i>Defendants.</i></p>	}	<p><i>On Bill, Etc.,</i> 10</p> <p><i>Answer of Foundation Building and Loan Association to Counter-claim of Defendant Enrico Varlese.</i></p> <p><i>Docket 67, Page 447.</i> 20</p>
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By way of answer to the counter-claim of defendant Enrico Varlese Foundation Building and Loan Association says that:

It has no information or belief as to the allegations contained in paragraph 1 of the counter-claim and leaves defendant Enrico Varlese to the proof thereof, and denies paragraphs 2, 3, 4 and 5 of the said counter-claim, except as admitted in the following statement. 30

On or about June 21st, 1927, Boyarsky & Gordon, Inc., a New Jersey Corporation, then record owner of the premises in question, executed a Twenty Thousand Dollar (\$20,000.00) mortgage to the Foundation Building and Loan Association, which mortgage was recorded in Book F-61 of Mortgages for Essex County, pages 486-487 on June 29th, 1927. Boyarsky & Gordon, Inc., never went through with said Twenty- 40

*Answer of Foundation B. & L. Assn.*

Thousand Dollar (\$20,000.00) mortgage loan and the Foundation Building and Loan Association never acquired any interest in the property in question by reason of said mortgage, it never having advanced any money thereunder.

10       Consequently when the defendant Enrico Varlese instituted his mechanic's lien suit in the East Orange District Court the Foundation Building and Loan Association did not defend same, because as aforesaid, it had no interest in the property in question and allowed same to go uncontested. Foundation Building and Loan Association is informed that a general judgment was entered against Boyarsky & Gordon, Inc., in said mechanic's lien suit, and a judgment specially against the lands and premises, with an order  
20       in said judgment that the aforesaid mortgage of the Foundation Building and Loan Association be subject to the defendant Enrico Varlese's lien claim. This mortgage recorded in Book F-61 of Mortgages for Essex County, pages 486-487 could have been cancelled of record earlier than April 25th, 1928, but Foundation Building and Loan Association had no reason to cancel it sooner; said mortgage was cancelled on April 25, 1928, because of the new loan hereinafter mentioned and to clear up the records.

30       On or about April 17th, 1928, Foundation Building and Loan Association granted a new loan of \$20,000.00 to the Berwyn Estates on the premises in question, and on or about said date the Berwyn Estates executed its bond to the Foundation Building and Loan Association to secure said sum of Twenty Thousand Dollars (\$20,000.00) and also a mortgage covering the premises in question, to the Foundation Building and Loan Association, securing said bond, which  
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*Answer of Foundation B. & L. Assn.*

mortgage was recorded on April 26th, 1928 in Book C-64 of Mortgages for Essex County, pages 208-210. The Foundation Building and Loan Association in making said new loan relied upon title being in Berwyn Estates by deed by the Sheriff of the County of Essex to the Berwyn Estates, which deed is set forth in paragraph 1 of the bill of complaint filed herein, and which deed was on February 16th, 1928 recorded in Book U-77 of Deeds for Essex County, pages 358-360. The solicitor of the Foundation Building and Loan Association examined the foreclosure proceedings in connection with which said Sheriff's deed was given and was of the opinion that same vested good title in the Berwyn Estates, irrespective of and free from any mechanic's liens that might be filed after institution of suit in said foreclosure proceedings. 10

The statements contained in the affidavit of the Secretary of the Foundation Building and Loan Association mentioned in paragraph 5 of said counter-claim are true. 20

Foundation Building and Loan Association further reserves the right at the final hearing herein to move for and hereby gives notice that it will at said hearing move for an order striking out the counter-claim of defendant Enrico Varlese for the following reasons: 30

1. Said counter-claim is sham and I will rely upon the proofs made at the hearing in connection with this point.

2. Said counter-claim is frivolous in that it sets up no cause of action against the defendant Foundation Building and Loan Association.

AARON MARDER,  
Solicitor of Foundation Building  
and Loan Association. 40

Replication and Complainant's Answer to  
Counter-claim of Defendant, Enrico Varlese.

IN CHANCERY OF NEW JERSEY.

10	BERWYN ESTATES, a New Jersey corporation,  <div style="text-align: right; padding-right: 10px;"><i>Complainant,</i></div>	}	<i>On Bill, &amp;c.</i>
	<div style="text-align: center; padding: 5px 0;"><i>and</i></div> ENRICO VARLESE, <i>et als.</i> , <div style="text-align: right; padding-right: 10px;"><i>Defendants.</i></div>		<i>Replication and Com- plainant's Answer to Counter- claim of De- fendant En- rico Varlese.</i>
20			<i>Docket 67, Page 447.</i>

By way of replication to the Amended Answer of the defendant Enrico Varlese, complainant says that:

1. Paragraph 5 of the Amended Answer is admitted.

2. Paragraph 6 of the Amended Answer is admitted, except as denied herein and except that the mortgage of the Foundation Building & Loan Association mentioned therein was one given to the said Foundation Building & Loan Association by Boyarsky & Gordon, Inc., a New Jersey corporation, on or about June 21, 1927, in the sum of Twenty Thousand Dollars (\$20,000) and recorded in Book F-61 of Mortgages for Essex County, pages 486-487, on June 29, 1927.

Complainant further states that its foreclosure was of a mortgage given to it by Boyarsky & Gordon, Inc., on or about November 17, 1926, in the sum of Seven Thousand Dollars (\$7,000) cov-

*Replication and Complainant's Answer.*

ering the property in question and recorded on December 1, 1926, in the Essex County Register's Office in Book U-59 of Mortgages for Essex County, pages 131-134; said mortgage was given to secure advances to be made by complainant to the said Boyarsky & Gordon, Inc., in connection with the erection and construction on the premises in question by said Boyarsky & Gordon, Inc., of a one-story building containing three stores and was delivered by said Boyarsky & Gordon, Inc., to said complainant at the same time that complainant sold the premises in question to Boyarsky & Gordon, Inc. and complainant took back from said Boyarsky & Gordon, Inc. a purchase money mortgage in the sum of Seventeen Thousand Dollars (\$17,000) (which sum was the purchase price for said premises), so as to make said \$7,000.00 mortgage of complainant an advance money mortgage within the provisions of Section 14 of the Mechanic's Lien Act of the State of New Jersey. Moreover, complainant advanced the entire sum of \$7,000.00 and more on its advance money mortgage above mentioned and described, which money was applied to the erection and construction of the building mentioned and described in said advance money mortgage.

Complainant's said \$7,000 advance money mortgage which was foreclosed was prior to any possible mechanic's lien claim of the defendant Enrico Varlese. The Bill of Complaint in the complainant's foreclosure suit of the said \$7,000 advance money mortgage was filed in this Court on August 12, 1927 and the subpoenas and tickets annexed were served on August 18, 19 and 23, 1927 upon the defendants therein. Said foreclosure proceedings being filed in the Office of the

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*Replication and Complainant's Answer.*

Clerk of this Court under Chancery Docket 65, page 158.

Complainant denies that judgment in the mechanic's lien suit was entered generally against the Foundation Building & Loan Association.

10       3   Complainant admits that defendant Enrico Varlese's work and material, if any, were done and furnished between April 27, 1927 and July 1, 1927, and that said defendant Enrico Varlese could have filed his claim (if valid) before complainant filed its bill to foreclosure as aforesaid; the balance of paragraph 7 is denied.

4. Paragraph 8 is denied except as is admitted in the following statement:

20       Complainant did not make the Foundation Building & Loan Association a party to its foreclosure proceedings for the reason that the Foundation Building & Loan Association had advanced no moneys under its \$20,000.00 mortgage recorded in Book F-61 of Mortgages for Essex County, pages 486-487, and complainant knew that at that time the Foundation Building & Loan Association had no interest in the mortgaged premises.

30       5. Paragraph 9 is denied, except insofar as is admitted by the following statement:

Defendant Enrico Varlese was not a party defendant in the foreclosure proceedings; he could have filed a mechanic's lien claim on July 1, 1927, whereas none was filed by him until September 28, 1927; consequently his rights, if any, have been cut off by said foreclosure proceedings and the deed given in pursuance thereto.

40       6. That portion of paragraph 10 which cites the provisions of said \$7,000.00 advance

*Replication and Complainant's Answer.*

money mortgage is admitted, insofar as it accurately recites the provisions of said mortgage. The balance of said paragraph is denied.

7. Paragraph 11 is denied.

8. Complainant admits that portion of paragraph 12 which states that the balance of the Sheriff's sale purchase price after deducting the necessary fees and costs was delivered to the complainant. The balance of said paragraph is denied. Complainant further says that its decree in said foreclosure proceedings was for \$7,273.00, plus interest and costs. 10

Complainant joins issue on the balance of said Amended Answer.

By way of answer to the counter-claim of the defendant Enrico Varlese, complainant says that: 20

1. It makes the same allegations and denials made above and in the Bill of Complaint filed herein.

2. Paragraph 2 of the counter-claim is denied, except that complainant admits that said mortgage given to the Foundation Building & Loan Association by Boyarsky & Gordon, Inc. and recorded in Book F-61 of Mortgages for Essex County, pages 486-487, was cancelled of record on April 25, 1928. 30

3. Paragraph 3 is denied.

4. Paragraph 4 is denied. Complainant further states that it obtained a new mortgage loan of \$20,000 from the Foundation Building & Loan Association on the improved premises and relied upon the Sheriff's deed to it in giving it title to the premises in question so that it could mortgage the same to the Foundation Building 40

*Replication and Complainant's Answer.*

and Loan Association for the sum of \$20,000. Said new mortgage made and delivered by the complainant to the Foundation Building & Loan Association on or about April 17, 1928 and was recorded in the Essex County Register's Office on April 26, 1928 in Book C-64 of Mortgages for  
 10 Essex County, pages 208-210.

5. Paragraph 5 of said counter-claim is denied except insofar as same is admitted in the following statement:

The statement contained in the affidavits in connection with the Notice of Motion are true. Joseph Isaacs was one of the incorporators of the Foundation Building & Loan Association. He is not now one of the directors. Said Joseph Isaacs did not mention the terms of the fore-  
 20 closed mortgage since he did not believe they had anything to do with the purpose of the motion in connection with which the affidavit was made by him.

Complainant joins issue upon the remainder of the Amended Answer.

Complainant further reserves the right at the final hearing herein to move for and hereby gives notice that at said hearing, it will move for an  
 30 Order striking out the Amended Answer and Counter-claim of defendant Enrico Varlese for the following reasons:

1. Said amended answer discloses that the complainant was not served in the Mechanic's Lien suit instituted by said defendant Enrico Varlese so that said complainant is not affected by any proceedings in or by said Mechanic's Lien suit.

*Replication and Complainant's Answer.*

2. Said amended answer discloses that the defendant Enrico Varlese could have filed a mechanic's lien on July 1, 1927, whereas none was filed by him until September 28, 1927; complainant's title is made by deed from the Sheriff of the County of Essex dated January 29, 1928, pursuant to foreclosure proceedings had in this court by the above named complainant as complainant and Boyarsky & Gordon, Inc., *et als.*, defendants, (Chancery Docket 65, page 158); as disclosed by the files of said foreclosure proceedings the bill of complaint therein was filed on August 12, 1927 and the subpoenas and tickets annexed were served on August 18, 19 and 23, 1927; hence, any possible Mechanic's Lien claim by said defendant Enrico Varlese in connection with the premises in question has been cut off by said foreclosure proceedings.

3. Said \$7,000 advance money mortgage was prior to any possible mechanic's lien claim of the defendant Enrico Varlese by reason of Sections 14 and 15 of the Mechanic's Lien Act of the State of New Jersey.

4. Counter-claim is a sham and I will rely upon the proofs made at the hearing in connection with this point.

5. The counter-claim is frivolous, in that it does not set up a cause of action against the complainant.

AARON MARDER,  
Solicitor of Complainant.

**Rejoinder to Complainant's Replication and  
Notice of Motion.**

IN CHANCERY OF NEW JERSEY.

10	<p><i>Between</i></p> <p style="text-align: center;">BERWYN ESTATES, a New Jersey corporation, <i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">ENRICO VARLESE and CONRAD DEUCHLER, Sheriff of the County of Essex. <i>Defendants.</i></p>	<p><i>On Bill, etc.</i></p> <p><i>Rejoinder to Complainant's Replication; Replication to Answer to Counter-claim and Notice of Motion.</i></p>
20	<p>The defendant, Enrico Varlese joins issue with the complainant on its replication and on its answer to this defendant's counter-claim.</p> <p>This defendant reserves the right at the final hearing herein to move for an order striking out the complainant's replication and answer to this defendant's counter-claim, and hereby gives notice that at said final hearing he will move for an order striking out the complainant's replication and answer to this defendant's counter-claim, and entering judgment in favor of this defendant and against the complainant, on the following grounds the said pleadings are objectionable:</p> <p>(1) They are frivolous in that they set up matters not properly the subject of such pleadings.</p> <p>(2) They are impertinent, in that they introduce matters not material to the suit.</p>	
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*Replication to Answer.*

(3) They are argumentative in that they state conclusions of law, and in that they state matters of evidence rather than the facts on which the pleader will reply.

GEORGE A. HENDERSON,  
Solicitor for and of Counsel with Defendant,  
Enrico Varlese. 10

**Replication to Answer of Foundation Building  
and Loan Association.**

IN CHANCERY OF NEW JERSEY.

*Between*

BERWYN ESTATES, a New Jersey corporation,  
*Complainant,*

*vs.*

ENRICO VARLESE and CONRAD DEUCHLER, Sheriff of the County of Essex,  
*Defendants.*

*On Bill, etc.*  
*Replication to Answer of Foundation Building and Loan Association.*

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The defendant, Enrico Varlese, by way of replication to the Answer of the Foundation Building and Loan Association, says that:

(1) He joins issue with the defendant on the said answer.

This defendant reserves the right at the final hearing herein to move for an order striking out the above answer, and hereby gives notice that at said final hearing he will move for an order 40

*Replication to Answer.*

striking out said answer, and entering judgment in favor of the defendant, Enrico Varlese and against the defendant Foundation Building and Loan Association, on the following grounds:

10 (1) It is frivolous, and does not set up matters properly a subject of an answer.

(2) It is impertinent in that it introduces matters not material to the suit.

(3) It is argumentive in that it states conclusions of law and in that it states matters of evidence rather than the facts on which the pleader will rely.

GEORGE A. HENDERSON,  
Solicitor of Enrico Varlese, Defendant.

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## Designation.

## IN CHANCERY OF NEW JERSEY.

10	BERWYN ESTATES, a New Jersey corporation, <i>Complainant,</i>  <i>and</i> ENRICO VARLESE, <i>et als.</i> , <i>Defendants.</i>	} <i>On Bill, &amp;c.</i> } <i>Designation.</i> } <i>Docket 67,</i> } <i>Page 447.</i>
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20 This matter being opened to the court by Aaron Marder, solicitor of the complainant Berwyn Estates, and defendant, Foundation Building and Loan Association, and it appearing that George A. Henderson, solicitor for the defendant, Enrico Varlese has consented hereto:

It is, on this 26th day of June, nineteen hundred and twenty-eight, ORDERED, that the 28th day of January, nineteen hundred and twenty-nine, at the hour of ten o'clock in the forenoon, at the Chancery Chambers, Industrial Building, in the City of Newark, be designated as the time and place for the hearing of the above entitled cause.

30 MAJA LEON BERRY,  
*V.-C.*

I hereby consent to the entry of the foregoing order.

GEORGE A. HENDERSON,  
 Solicitor of Defendant, Enrico Varlese.

**Testimony.**

IN CHANCERY OF NEW JERSEY.

*Between*

THE BERWYN ESTATES, a New  
Jersey corporation,  
*Complainant,*

*and*

ENRICO VARLESE, *et als.*,  
*Defendants.*

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Transcript of testimony in the above-entitled cause before Honorable Maja Leon Berry, a Vice-Chancellor of the State of New Jersey, at the Chancery Chambers, Industrial Office Building, Newark, New Jersey, on May 7th, 1929.

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Appearances:

Aaron Marder, Esq., representing the Berwyn Estates and Foundation Building & Loan Association.

George A. Henderson, Esq., for the defendant, Enrico Varlese.

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The Court: I understand the facts are to be stipulated.

Mr. Marder: Yes. On November 17, 1926, the Berwyn Estates, the complainant, sold a property to a corporation known as Boyarski & Gordon, Inc., and took back at the same time from this Boyarski Company a purchase money mortgage of \$17,000 and an advance money mortgage of \$7,000, under which the complainant was to advance moneys to Boyarski & Gordon, Inc. to

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*Testimony.*

aid Boyarski & Gordon, Inc., to erect a certain three-story building on the premises in question.

10 On August 12, 1927, the complainant filed its bill to foreclose the \$7,000 advance money mortgage and subpoenas were issued on August 18, 19 and 23, 1927, and pursuant to said foreclosure proceedings complainants acquired title to the premises in question from the Sheriff by deed dated May 9, 1928.

20 Before Boyarski & Gordon fell down on the job they procured a \$20,000 building and loan mortgage from the Foundation Building & Loan Association, who is a co-defendant on the counterclaim of the defendant, Varlese. This mortgage was executed by Boyarski & Gordon to the Foundation Building & Loan Association on June 21, 1927, and recorded June 29, 1927, in the Essex County Register's Office.

Subsequently this mortgage was canceled of record, to wit, on April 25, 1928.

30 The Berwyn Estates, having acquired title under its foreclosure, applied to the Foundation Building & Loan Association for a first mortgage of \$20,000 on the premises in question and procured such a loan on April 17, 1928, said mortgage being recorded on April 26, 1928.

The moneys were paid out under this loan made by the Foundation Building & Loan Association to the Berwyn Estates under its title made by foreclosure.

40 Varlese obtained a judgment, or rather, filed a lien claim on September 28, 1927, and instituted suit in the East Orange District Court against Boyarski & Gordon, Inc., as owner, and Foundation Building & Loan Association as mortgagee. They also made the Berwyn Estates a party de-

*Testimony.*

fendant, but the Berwyn Estates was not served in their lien suit in the East Orange District Court. He obtained judgment on October 3, 1927, generally against Boyarski & Gordon, Inc., and specially against the land and premises in question. Then they started to advertise attempting to sell this property, when I, on behalf of the complainant, filed this bill to quiet title and procured an order to show cause why the sale should not be restrained pending hearing of this suit. 10

In this foreclosure the advertisement of the sale by the Sheriff reads as follows:

“Property to be sold subject to 1927 taxes and subject to mortgage or mortgages aggregating the sum of \$17,000 by way of principal, plus accrued and accruing interest.” 20

In other words, the \$7,000 mortgage is being foreclosed subject to the \$17,000 purchase money mortgage which is still open of record.

Mr. Henderson: I have certain exhibits which I desire to offer.

I offer in evidence a *lis pendens* filed by the defendant, Enrico Varlese.

(Marked Exhibit D. 1.) 30

Certified copy of mortgage, Boyarski & Gordon to the Foundation Building & Loan Association which was canceled by Aaron Marder on the 25th day of April, 1928.

(Marked Exhibit D. 2.)

Certified copy of the mortgage of the Berwyn Estates recorded on April 26, 1928, to the Foundation Building & Loan Association.

(Marked Exhibit D. 3.) 40

*Testimony.*

Statement for docketing from the County Clerk's office in the original mechanics' lien suit.

(Marked Exhibit D. 4.)

Certified copy of mortgage, Boyarski & Gordon to the Berwyn Estates, which mortgage was foreclosed.

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(Marked Exhibit D. 5.)

The defendant, Varlese, worked on these premises and filed his lien claim in due time in September, 1927. He made the Berwyn Estates and the Foundation Building & Loan Association, and the owner, Boyarski & Gordon, defendants, but the constable did not serve the Berwyn Estates. Both the Berwyn Estates and the Foundation Building & Loan Association are represented by Mr. Marder.

20

The judgment recorded in the County Clerk's office, which has been placed in evidence, indicates that a general judgment was entered against the Foundation Building & Loan Association and also Boyarski & Gordon.

30

The defendant, Foundation Building & Loan Association and the defendant, Boyarski & Gordon, allowed the suit in the East Orange District Court to go by default. The pleadings will indicate to your Honor that they consulted their counsel, who advised that there was no liability on them and to let the matter go without appearing. That is in the replication of the Building & Loan Association. The first the defendant knew about this foreclosure was after he had been informed that the Sheriff's deed had been placed on record to the Berwyn Estates.

Mr. Marder: I do not agree with this.

The Court: I only want you to put on the record what you are agreeing to. Is there

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*Testimony.*

anything you do not agree to which has been placed on the record by Mr. Henderson?

Mr. Marder: I do not agree to two things: It may be that Varlese did not know of the Sheriff's deed until after it was recorded. I do not know whether that was so or not. I do not think it is material. Secondly, I do not think that the judgment obtained in the East Orange District Court was general against the Foundation Building & Loan Association, mortgagee.

10

The Court: That is a matter of record.

Mr. Marder: I have a copy of the state of demand.

The Court: The judgment will speak for itself. That is not material in this issue to quiet title. In the foreclosure suit of the Berwyn Estates was Varlese a defendant?

20

Mr. Henderson: Varlese was not a defendant. His lien claim had not yet been recorded when their bill was filed, neither was the Foundation Building & Loan Association made a defendant, who had a \$20,000 mortgage on record. The sale was held by the Sheriff without their being made defendants. Subsequently the defendant, Varlese, was served with a notice of motion which was made before your Honor a year or so ago, to strike out the answer and counter-claim of the defendant. We argued the motion and with your Honor's permission the defendant, Varlese, was given additional time to amend his answer. In the argument before your Honor there were produced two affidavits, one of the affidavits was made by the Secretary of the Foundation Building & Loan Association, the last paragraph of which affidavit reads:

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"There is not, nor was there ever any money due and owing under the said mort-

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*Testimony.*

gage to the Foundation Building & Loan Association, and said mortgage has been canceled of record."

10 In the interval after that, and within the time allowed us to draw our answer, we consulted the records of the Essex County Clerk's office and we learned that on the same day as this affidavit, or possibly the day before, the mortgage to the Foundation Building & Loan Association from Boyarski & Gordon had been canceled.

20 On the day after, one day later, rather, the mortgage was presented for cancelation by Mr. Marder, one day after, the same Building & Loan Association placed on record through Mr. Marder another mortgage for the identical same amount on the same premises from the Berwyn Estates to the Foundation Building & Loan Association. In the judgment on record our lien attached to that \$20,000 mortgage. Under the judgment of the Court we were given a lien prior to their \$20,000 mortgage. That mortgage was wiped out on the cancelation and a new mortgage for the same amount on the same premises and the owner of the property placed the day following. We contend that our lien should attach to that new mortgage and that it was a mere fraudulent means of evading the amount due us.

30 The Court: Did you have any right to demand from the mortgagee an advance of sufficient moneys to pay your lien?

Mr. Henderson: We had a right under the \$7,000 mortgage to receive payment.

40 The Court: I mean under the \$20,000 mortgage which was canceled, did you have any right to receive from that mortgage, out of that mortgage, the amount of your lien claim?

*Testimony.*

Mr. Henderson: We contend that we did.

The Court: If you did, then you will have the same right under the new mortgage, on the state of facts which have been presented here. I won't stand for anything like that. If you had that right, you will still have it. All you have to do is to show me that you had the right and I will see that so far as this Court is concerned, you will get it out of the \$20,000 mortgage. Let me see your authority showing that you have the right from the first \$20,000 mortgage and I will give it to you from the second. 10

Is there any testimony to be submitted?

Mr. Marder: Not that I know of.

The Court: Let me have your memorandum. Mr. Marder will file the first brief. 20

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## Exhibit D. 1.

## IN CHANCERY OF NEW JERSEY.

	<i>Between</i>	}	
10	BERWYN ESTATES, a New Jersey corporation, <i>Complainant,</i>		<i>On Bill, &amp;c.</i>
	<i>and</i>		<i>Lis Pendens.</i>
	ENRICO VARLESE, <i>et als.</i> , <i>Defendants.</i>		

20 Notice is hereby given that a counter claim has been filed by the defendant, Enrico Varlese in the above entitled cause, and is now pending in said Court of Chancery.

The general objects of this suit are to compel the payment by the Foundation Building and Loan Association and the Berwyn Estates, a corporation, or either of them of a judgment of Five Hundred (\$500.00) dollars, which was docketed in Judgments, Book 1, page 425, Essex County, New Jersey.

30 Premises to be effected by said suit are described as follows:

FIRST TRACT. Beginning in the Westerly line of North Park Street at the SouthEasterly corner of lot now or formerly belonging to Henry Whitaker, and thence running along said Whitaker line North 77 degrees 50 minutes West 130 feet more or less; thence South 77 degrees 50 minutes East 130 feet to said North Park Street; thence along the westerly line of said Street, North 12 degrees 10 minutes East 25 feet to said Henry Whitaker line and the place of beginning.

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*Exhibit D. 1.*

Being lot #7 on map of the Wilson & Long property, surveyed April 26th, 1867 by L. D. Tompkins.

SECOND TRACT: Beginning on the West side of North Park Street at the NorthEast corner of lot #7 distant 198 feet North from the corner of North Park and Dodd Street; thence running along the line of said North 77 degrees 50 minutes West 130 feet; thence North 12 degrees 2 minutes East 25 feet to lot #9; thence along said lot #9 South 77 degrees 50 minutes East 130 feet to said North Park Street; thence along the same South 12 degrees 2 minutes West 25 feet to the place of beginning. 10

GEORGE A. HENDERSON,  
Solicitor of Complainant. 20

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*Exhibit D. 1.*

Office of  
REGISTER OF DEEDS AND MORTGAGES  
Essex County, New Jersey

STATE OF NEW JERSEY, }  
COUNTY OF ESSEX. } ss.

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I, HOWARD S. DODD, Register of Deeds and Mortgages of the County of Essex, State of New Jersey, do hereby certify that the foregoing is a true and correct copy of the record of a certain Lis Pendens made by Berwyn Estates to Enrico Varlese, *et als.*, as the same may be found recorded in my office, in book K of Lis Pendens for said County on pages 302-303.

20

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 6th day of May, A. D. 1929.

(L. s.)

HOWARD S. DODD,  
Register of Deeds and Mortgages.

Recorded May 15th, 1928 in Book K of Lis Pendens, Pages 302-303.

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## Exhibit D. 2.

BOYARSKY AND GORDON, INC. TO FOUNDATION B. & L. ASS'N OF THE CITY OF NEWARK.	\$20,000.00 THIS INDENTURE, Made the twenty-first day of June in the year one Thousand Nine Hundred and Twenty- seven, BETWEEN Boyarsky and Gordon, Inc., a New Jersey Corporation, of the Town of West New York in the County of Hudson and State of New Jersey party of the first part, and Foundation Building and Loan Association of the City of Newark, a body corporate of the State of New Jersey party of the second part; WHEREAS, the said Boyarsky and Gordon, Inc. justly indebted to the said party of the second part, in the sum of Twenty Thousand (\$20,000.00) dollars, lawful money of the United States of America, secured to be paid by its and others certain bond or obli- gation, bearing even date with these presents, in the penal sum of Forty Thousand \$(40,000.00) Dollars, lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of Twenty Thousand (\$20,000.00) Dollars, law- ful money as aforesaid, to the said party of the second part, its successors or assigns, in the man- ner following, viz: By the payment of One Dol- lar per month on each of one hundred shares of the capital stock of said association owned by said party of the first part, and standing in its name	10 20 30 40
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On April 25, 1928, the original mortgage here recorded or registered was produced by A. Marder, receipted by the Pres. and Secy. of the corporation, cancelled and made void.  
HOWARD S. DODD,  
Register,  
E. B.

*Exhibit D. 2.*

on the books of said Association, and assigned to said party of the second part as collateral security for the payment hereof, and on which this loan is based, on the second Tuesday of each and every month hereafter, or such other time as may hereafter be appointed for that purpose, until the

10 said shares shall attain the par value of Two Hundred Dollars each together with interest on said sum of Twenty Thousand (\$20,000.00) dollars, to be computed from the date hereof, at the rate of six per cent. per annum and payable monthly at the same time and in the same manner as the stock payments aforesaid, and also all fines that may become due, as provided for by the Constitution and By-Laws of said Association, which have been duly assented to by the

20 said party of the first part and are made a part hereof. AND IT IS THEREBY EXPRESSLY AGREED, that should any default be made in the payment of the said interest or installment on said shares, 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

30 should the said interest or installment on said share remain unpaid and in arrear for the space of two months 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 60 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 (\$20,000.00)

40 dollars, with all arrearage of interest thereon,

*Exhibit D. 2.*

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 condition thereof, reference being thereunto had, may more fully appear. 10

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 do 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 City of East Orange, in the County of Essex and State of New Jersey. 20 30

BEGINNING on the westerly line of North Park Street at a point distant 173 feet northerly from the northerly side of Dodd street; running thence (1) north 12 degrees 2 minutes east along the westerly line of North Park Street 51.18 feet; thence (2) north 77 degrees 58 minutes west 130.00 feet; thence (3) south 12 degrees 2 minutes west and parallel with North Park Street 51.18 feet; thence (4) South 77 degrees 50 min- 40

*Exhibit D. 2.*

10       utes east 130.00 feet to the point and place of  
       BEGINNING. According to survey made by  
       Fred A. Reimer, C. E. dated March 19, 1927, Be-  
       ing the same premises conveyed to the party of  
       the first part by Berwyn Estates, by deed dated  
       November 17, 1926, and recorded in the office of  
 20       the register of the County of Essex in Book  
       N-75 of deeds for said county on page 374. It is  
       hereby further agreed that the terms, covenants,  
       and conditions of this mortgage shall be binding  
       upon said Boyarsky and Gordon, Inc. its succes-  
       sors and assigns and shall be deemed covenants  
       running with the land. It is hereby further  
       agreed, anything herein contained to the con-  
       trary notwithstanding, that is for any reason any  
       fire insurance company should cancel any fire in-  
       surance policy covering any building or build-  
 20       ings on the premises hereinabove described, then  
       and in that event, the principal sum secured by  
       this mortgage, together with all interest, fines,  
       forfeitures, insurance premiums and any other  
       arrearages and/or sums payable, under this  
       mortgage or the bond secured by same, shall at  
       the election of the mortgagee, its successors or as-  
       sigs, be immediately due and payable.

30       TOGETHER with all and singular the tene-  
       ments, hereditaments and appurtenances there-  
       unto belonging or in anywise appertaining, and  
       the reversion and reversions, remainder and re-  
       mainders rents, issues and profits thereof, AND  
       ALSO, all the estate, right, title, interest, prop-  
       erty, 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  
 40       the said party of the second part, its successors

*Exhibit D. 2.*

and assigns, to its and their own proper use, benefit and behoof forever. AND the said party of the first part, and its successors, heirs the above described and granted premises, and every part thereof, with the appurtenances, in the quiet and peaceful possession of the said party of the second part, its successors, legal representatives and assigns against every person whomsoever will WARRANT and forever DEFEND. PROVIDED ALWAYS, and these presents are upon this express condition, that if the said party of the first part, its successors and 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 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, said insurance shall be placed by the party of the second part and paid for by the party of the first part and the premium and premiums paid by the party of the second part, if any 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

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*Exhibit D. 2.*

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, Boyarsky and Gordon, Inc., its successors and assigns does covenant and grant to and with the said party of the second part, its successors and assigns, that

10 the said party of the first part, its successors and assigns, 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.

IN WITNESS WHEREOF, the said party of the first part has hereunto caused these presents to be signed by its president and attested by its

20 secretary and its corporate seal to be hereto affixed the day and year first above written.

BOYARSKY AND GORDON, INC.

By: Morris Boyarsky,  
President.

Sealed and Delivered in the presence of

AARON MARDER.

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Attest:

NATHAN BOYARSKY,  
Secretary.

BOYARSKY & GORDON, INC.  
CORPORATE SEAL

1926

NEW JERSEY.

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*Exhibit D. 2.*

STATE OF NEW JERSEY, }  
 COUNTY OF ESSEX. } ss.

BE IT REMEMBERED, That on this 28th day of June 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 Nathan Boyarsky who being by me duly sworn, doth depose and make proof to my satisfaction, that he well knows the corporate seal of Boyarsky and Gordon, Inc., Secretary of Boyarsky and Gordon, Inc. the grantor mentioned in the within Indenture; that the seal thereto affixed is the proper corporate seal of the said company; that the same was so affixed thereto and the said deed signed and delivered by Morris Boyarsky who was at the date and execution thereof, the President of 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.

NATHAN BOYARSKY.

Sworn and Subscribed before me on the day and year aforesaid.

AARON MARDER, 30  
 Master in Chancery of New Jersey.

Received in the office June 29th, A. D. 1927, at 2:06 P. M.

No. 66

*Exhibit D. 2.*

Office of  
REGISTER OF DEEDS AND MORTGAGES.  
Essex County, New Jersey.

STATE OF NEW JERSEY, }  
COUNTY OF ESSEX. } ss.

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I, HOWARD S. DODD, Register of Deeds and Mortgages of the County of Essex, State of New Jersey, do hereby certify that the foregoing is a true and correct copy of the record of a certain Mortgage made by BOYARSKY AND GORDON, INC., to FOUNDATION B. & L. ASS'N of the City of Newark, and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in Book F-61 of Mortgages for said County on pages 486-487.

20

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 6th day of May, A. D. 1929.

HOWARD S. DODD,  
Register of Deeds and Mortgages.

(SEAL)

Recorded June 29th, 1927 in Book F-61 of Mortgages. Pages 486-487.

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*Exhibit D. 3.*

corner of the lot now or formerly belonging to Henry Whitaker; and thence running along said Whitaker's line north seventy-seven degrees fifty minutes west one hundred and thirty feet; thence parallel with said street south twelve degrees ten minutes west twenty-five feet more or  
 10 less; thence south seventy-seven degrees fifty minutes east one hundred and thirty feet to said North Park Street; thence along the westerly line of said street north twelve degrees ten minutes east twenty-five feet to said Henry Whitaker's line and the place of BEGINNING. Being lot No. 7 on map of the Wilson and Long property surveyed April 26, 1867, by L. D. Tompkins.

SECOND TRACT: BEGINNING on the west side of North Park Street at the northeast corner  
 20 of lot number seven (7) distant one hundred and ninety-eight feet northerly from the corner of North Park and Dodd Streets; thence running along the line of said lot north seventy-seven degrees fifty minutes west one hundred and thirty feet; thence north twelve degrees two minutes east twenty-five feet to lot number nine (9); thence along said lot number nine (9) south sev-  
 30 enty-seven degrees fifty minutes east one hundred and thirty feet to said North Park Street; and thence along the same south twelve degrees two minutes west twenty-five feet to the place of BEGINNING. Being the same premises conveyed to the Berwyn Estates by the Sheriff of the County of Essex by deed dated January 9th, 1928 and recorded in the Essex County Register's Office in Book U-77 of Deeds for Essex County, pages 358-360.

TOGETHER with all and singular the tenements, hereditaments and appurtenances there-  
 40 unto belonging or in anywise appertaining, and

*Exhibit D. 3.*

the reversion and reversions, remainder and remainders, rents, issues, profits, privileges and advantages thereof; ALSO, all the estate, right, title, interest, property, possession, claim and demand whatsoever, of the said Mortgagor, of, in and to every part and parcel thereof. TO HAVE AND TO HOLD all singular, the above described tract or lot of land and premises, with the appurtenances, unto the said Mortgagee, its successors and assigns forever. And the said Mortgagor will upon demand by the said Mortgagee, execute, acknowledge and deliver to it, any further assurance of the title of said premises, and does hereby warrant, secure and defend the quiet and peaceable possession, and the title of the above described premises, with its appurtenances unto the said Mortgagee forever. PROVIDED ALWAYS, and it is agreed by and between the parties of these presents:

1. That the Mortgagor shall regularly pay unto the said Mortgagee, during its continuance as such Association, as aforesaid, and/or until the 100 shares of stock of the 35th series of said Association owned by said Mortgagor and assigned contemporaneously herewith as collateral security for the payments of the moneys herein specified, shall have matured, the sum of \$100.00 per month as installments on said shares of stock, together with interest on said principal indebtedness at the rate of six per cent per annum, payable monthly, amounting to the further sum of \$100.00 per month, in all amounting to the sum of \$200.00 per month, the first payment to be made on or before the date hereof, and all subsequent monthly payments to be made on or before the second Tuesday of each month and every month thereafter, and shall also pay to the said Mort-

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*Exhibit D. 3.*

gagee, during the period aforesaid, all fines, and other charges that my become due and payable from, or may be charged or imposed upon the Mortgagor, as the holder of such shares, pursuant to the Constitution, By-Laws, Rules and Regulations of said Association which are here-  
10 with duly assented to by the said Mortgagor; and pursuant to any amendments thereof which may hereafter be made; and

2. That the said Mortgagor shall also, during the period aforesaid, insure and keep insured the buildings now on, or which may hereafter be erected upon the lands and premises above conveyed, against loss or damage by fire, tornado and/or otherwise, in insurance companies, through brokers, in amounts (but not more than  
20 the value of the building on the mortgaged premises), and in forms of policies to be selected and approved by the Mortgagee, the amounts to be not less than the principal indebtedness, and the policies to provide that any moneys which may be due thereunder shall be payable to the Mortgagor and Mortgagee as their interest may appear, and to deliver said policies to the Mortgagee for retention by it until the conditions of this mortgage, and the bond accompanying same,  
30 have been satisfied; and

3. That the said Mortgagor shall pay and satisfy as and when they become due, all municipal, county, state, federal, or other taxes, assessments, water liens, rates, charges impositions or liens levied against said mortgaged premises and exhibit proof of such payment as and when requested by the Mortgagee; and

4. That the said Mortgagor shall duly perform all the terms and conditions of this mortgage and all the terms and conditions of a certain  
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*Exhibit D. 3.*

bond or obligation, executed and delivered by it to the Mortgagee contemporaneously herewith; and

5. That the said Mortgagor shall abide by and perform all of the provisions present and future of the aforesaid Constitution, By-laws, Rules and Regulations of the Mortgagee; and 10

6. That if the Mortgagor shall duly perform all of the terms, covenants, provisions and conditions hereof and the bond accompanying this mortgage,

THAT, THEN AND FROM THENCE-FORTH this mortgage and said bond, and everything herein and therein contained and the estate hereby granted, shall cease, determine, and become null and void, anything herein, or therein contained to the contrary in anywise notwithstanding. AND IT IS EXPRESSLY AGREED 20  
by and between the parties hereto

1. That if the Mortgagor defaults in the performance of any of the terms, covenants, provisions and conditions of this mortgage, and/or of the bond accompanying the same, as herein and therein set forth, and should such default continue for a period of two months; and/or

2. That if any of the facts set forth in the application for the loan, granted by this mortgage 30  
and said bond are untrue, irrespective of whether said application was made by the Mortgagor, or otherwise; and/or

3. That if the loan evidenced hereby is what is commonly known as a "construction loan," or if payments are to be made from time to time by the mortgagee to the mortgagor, as improvements, alterations, additions or repairs are made to the building now or hereafter to be erected on said premises, then the mortgagor hereby ex- 40

*Exhibit D. 3.*

pressly agrees and binds itself to all the covenants and provisions of the rider attached to the bond accompanying this mortgage and which rider it is hereby agreed is part of said bond and this mortgage as though the same were fully incorporated herein; and/or

- 10     4. That if for any reason any fire insurance company should cancel any fire insurance policy covering any building or buildings on the premises hereinabove described;

20     THEN THE ENTIRE PRINCIPAL INDEBTEDNESS DUE THEREUNDER together with all arrearages thereon, and all other sums due hereunder, shall, at the option of the Mortgagee, become and be immediately due and payable, although the time above limited for the payment thereof may not then have expired, anything herein, or in said bond contained to the contrary, in anywise notwithstanding, and thereupon the estate hereby granted shall become absolute in the Mortgagee, and it shall, and may from time to time, and at all times peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy, all and singular the said granted and bargained premises, with the appurtenances, including all the rents, issues, and profits therefrom, without the let, suit, trouble, hindrance, or denial of the Mortgagor. AND IT IS FURTHER UNDERSTOOD AND AGREED by and between

30     the parties hereto

- 40     1. That in the event of any default hereunder, and the institution of foreclosure proceedings by reason thereof, the Mortgagee shall be entitled, without regard to the adequacy of security, solvency of the Mortgagor, and/or physical condition or value of the mortgaged premises, to the appointment of a Receiver of the rents, issues

*Exhibit D. 3.*

and profits of said mortgaged premises, the Mortgagor hereby expressly waiving proof of such inadequacy of security, insolvency of the Mortgagor, physical condition and/or market value of the mortgaged premises. In the event of such default and the institution of such proceedings, the Mortgagor does hereby assign, transfer and set over to the Mortgagee, as of the date of the filing of the bill to foreclose, all the rents, issues and profits of said mortgaged premises, as additional collateral security for the performance of the terms and provisions of this mortgage and said bond, and does hereby appoint the Mortgagee as its Attorney-in-fact, irrevocably, to collect such rents, issues and profits, to rent said premises, or any part thereof, and dispossess tenants therefrom, and to take all steps necessary, legal or otherwise, for said purposes, said assignment to continue in full force and effect until the payment and satisfaction of said mortgage and the bond accompanying the same. In the event that at the time of the filing of said bill to foreclose, and/or the appointment of such Receiver, the Mortgagor is in possession of any part, or the whole of said premises, the Mortgagor agrees to attorn to the Mortgagee, or said Receiver, and to pay as rent for such portion of said premises so occupied by it a sum equal to the total monthly sums payable hereunder to said Mortgagee.

2. The Mortgagee may at its option, in addition to any other remedies granted to it hereunder, make payment of any moneys which, under the terms hereof, are required to be paid by the Mortgagor, and the amount of such payment shall be added to, and become part of the principal indebtedness due hereunder, and payable on demand with six per cent interest, per annum, plus a premium on the amount so paid, at

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*Exhibit D. 3.*

the rate at which this loan was granted. In the event of the failure of the Mortgagor to produce proof of payment of taxes, assessments and other charges herein required to be paid by the Mortgagor, the Mortgagee may cause examination of the title to said premises to be made for the purpose of ascertaining whether or not such payments  
 10 have been made, and in such event, the reasonable cost thereof, including counsel fee, shall be paid by the Mortgagor, and/or the amount thereof shall be added to, and become part of the principal indebtedness.

3. The Mortgagee may apply the withdrawal value of said shares of stock on account of the principal indebtedness due hereunder, in the event of a default hereunder, or in accepting payment of part or all thereof, or for any purpose involving the amount due hereunder.  
 20

4. That the terms of this mortgage shall be binding upon and inure to the benefit of the respective parties hereto, and their respective heirs, executors, administrators, successors and assigns.

5. That the neuter gender when used herein shall include all persons and corporations, and words used in the singular shall include words in the plural where the text of the instrument so requires.  
 30

IN WITNESS WHEREOF, the Mortgagor has caused these presents to be signed by its President, attested by its Secretary, and its corporate seal hereto affixed the day and year first above written.

Berwyn Estates  
 By Joseph Isaacs (Seal)  
 President  
 Attest: John J. Kelly (Seal)  
 Secretary

*Exhibit D. 3.*

Signed, Sealed and Delivered  
in the presence of

Aaron Marder

BERWYN ESTATES  
INC. 1915  
NEWARK, N. J.

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STATE OF NEW JERSEY, }  
COUNTY OF ESSEX. } ss.

BE IT REMEMBERED, That on this 24th day of April, Nineteen Hundred and Twenty-eight before me, the subscriber, A Master in Chancery of N. J. personally appeared John J. Kelly who being by me duly sworn on his oath, says that he is the Secretary of Berwyn Estates 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 Joseph Isaacs 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.

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30

John J. Kelly

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*Exhibit D. 3.*

Sworn and subscribed before  
me the date aforesaid

Aaron Marder  
Master in Chancery  
of New Jersey

10 Received in the office April 26th A. D. 1928 at  
12:48 P. M. No. 52

Office of  
REGISTER OF DEEDS AND MORTGAGES  
Essex County, New Jersey

(SEAL)

20 STATE OF NEW JERSEY, }  
COUNTY OF ESSEX. } ss.

I, HOWARD S. DODD, Register of Deeds and  
Mortgages of the County of Essex, State of New  
Jersey, do hereby certify that the foregoing is  
a true and correct copy of the record of a certain  
mortgage made by Berwyn Estates to Founda-  
tion B. & L. Ass'n. of the City of Newark and  
also of the certificate of acknowledgment there-  
30 to annexed, as the same may be found recorded in  
my office in Book C-64 of Mortgages for said  
County on pages 208-210.

IN TESTIMONY WHEREOF, I have hereunto set  
my hand and official seal this 7th day of May,  
A. D. 1928.

(SEAL)

HOWARD S. DODD,  
Register of Deeds and Mortgages.

Recorded April 26th, 1928, in Book C-64 of  
Mortgages, Pages 208-210.

## Exhibit D. 4.

## EAST ORANGE DISTRICT COURT

ENRICO VARLESE,	}	<i>Plaintiff,</i>	<i>Action</i>	10
vs.			<i>at Law.</i>	
FOUNDATION B. & L. ASS'N.,	}		<i>On Mechanics</i>	
BERWIN ESTATES and BOYAR-			<i>Lien.</i>	
SKY and GORDON, INC.,		<i>Defendants.</i>	<i>Statement</i>	
			<i>for Docket-</i>	
			<i>ing.</i>	

Judgment in the above entitled cause was entered in the EAST ORANGE DISTRICT COURT on the 18th day of November A. D. 1927, for the sum of five hundred dollars (\$500) debt and Thirty dollars and Sixty cents cost of suit in favor of the plaintiff generally Enrico Varlese, and against the defendants, Foundation B. & L. Ass'n., and Boyarsky & Gordon, Inc., and especially against the Land and Building described as follows:

Being in the City of East Orange, County of Essex, and State of New Jersey;

FIRST TRACT: BEGINNING in the Westerly line of North Park Street at the South Easterly corner of lot now or formerly belonging to Henry Whitaker, and thence running along said Whitaker line North 77 degrees 50 minutes West 130 feet more or less; thence South 77 degrees 50 minutes East 130 feet to said North Park Street; thence along the westerly line of said street North 12 degrees 10 minutes East 25 feet to said Henry Whitaker line and the place of beginning. Being lot #7 on map of the Wilson & Long prop-

*Exhibit D. 4.*

erty, surveyed April 26, 1867 by L. D. Tompkins.

10 SECOND TRACT: BEGINNING on the West side of North Park Street at the North East corner of lot #7 distant 198 feet North from the corner of North Park and Dodd Streets; thence running along the line of said lot North  
 77 degrees 50 minutes West 130 feet; thence North 12 degrees 2 minutes east 25 feet to lot #9; thence along said lot #9 south 77 degrees 50 minutes east 130 feet to said North Park Street; thence along the same South 12 degrees 2 minutes West 25 feet to place of BEGINNING.

20 And it was further ordered that judgment be also entered that the mortgage of the defendant, Foundation B. & L. Ass'n., mentioned in the plaintiff's complaint and covering the premises above described is subject to the plaintiff's lien claim.

I hereby certify that the foregoing statement is correct, and that said Judgment stands open and unpaid of record in this Court.

IN WITNESS WHEREOF I have hereto affixed my hand as the clerk of said Court and the seal of said court as provided by law this Fifth day of December, A. D., 1927.

30 (SEAL)

DENIS L. CONROY,  
 Clerk of East Orange District Court.

*Exhibit D. 4.*

AFFIDAVIT.

STATE OF NEW JERSEY, }  
COUNTY OF ESSEX. } ss.

GEORGE A. HENDERSON, being duly sworn on his oath says, that he is the attorney of the above named plaintiff; that there is due at the present time upon the within judgment, as entered in the District Court of East Orange, and which is about to be docketed in the Court of Common Pleas of the County of Essex the sum of five hundred dollars, being a sum not less than ten dollars. 10

GEORGE A. HENDERSON.

Sworn and subscribed to before me this 2nd day of December, 1927. 20

CHARLES McCARTHY,  
A Master in Chancery of N. J.  
(SEAL)

ESSEX COUNTY CLERK'S OFFICE.

STATE OF NEW JERSEY, }  
COUNTY OF ESSEX. } ss. 30

I, JOHN H. SCOTT, Clerk of the County of Essex in the State of New Jersey, do hereby certify, that the foregoing is a true and correct copy of Docket of Judgment on Mechanics Lien in the case of Enrico Varlese, Plaintiff, vs. Foundation B. & L. Ass'n., Berwin Estates & Boyarsky & Gordon, Inc. defendants, filed and recorded December 6th, 1927 in Book 1 page 425 of Docket of Judgments on Mechanics Lien, and the same 40

*Rule.*

is taken from and compared with the original record on file in this office, and as the same now remains on the files of said office.

10

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of said County at Newark, N. J., this 7th day of May, A. D. 1928.

(SEAL)

JOHN H. SCOTT,  
Clerk.

ESSEX COUNTY CIRCUIT COURT.

20

ENRICO VARLESE,

*Plaintiff,*

*vs.*

FOUNDATION BUILDING AND  
LOAN ASSOCIATION of the  
City of Newark, Berwyn Es-  
tates, a New Jersey corpora-  
tion, and BOYARSKY & GORDON,  
INC., a corporation,

*Defendants.*

*Action at  
Law.*

*On  
Mechanic's  
Lien.*

*Rule.*

30

It appearing that on November 16, 1927, the plaintiff, Enrico Varlese, recovered a judgment in the East Orange District Court in the sum of \$500.00 with costs to be taxed in favor of the plaintiff generally against the said defendant, Boyarsky & Gordon, Inc., and especially to be made of the lands and buildings in the complaint described and in said judgment it was further ordered that the mortgage of the defendant,

40

*Rule.*

Foundation Building and Loan Association, in the complaint mentioned, was subject to the plaintiff's lien claim and it appearing further that a statement for docketing said judgment obtained in the East Orange District Court as aforesaid was filed and recorded on December 6, 1927 in the office of the Clerk of the County of Essex in Book 1, page 425 of Docketed Judgments on Mechanics' Liens for the County of Essex and that said statement for docketing erroneously stated that the judgment was entered in favor of the plaintiff generally, Enrico Varlese, and against the defendant, Foundation Building and Loan Association, it is on this 13th day of June, 1929

ORDERED that said statement be and the same is hereby corrected by striking out any and all provisions therein to the effect that a general judgment was entered against the defendant, Foundation Building and Loan Association; and the clerk of this court is directed to discharge said general judgment as against the Foundation Building and Loan Association.

(Signed) WM. A. SMITH,  
Circuit Court Judge.

I hereby consent to the making and entry of the above rule.

(Signed) GEORGE A. HENDERSON,  
Attorney of Plaintiff, Enrico Varlese.

Filed June 13, 1929.

## Exhibit D. 5.

BOYARSKY & \$7,000.  
 GORDON, INC. THIS MORTGAGE,  
 TO Made the Seventeenth  
 BERWYN ESTATES. day of November, One  
 10 Thousand Nine Hun-  
 dred and Twenty six. BETWEEN Boyarsky &  
 Gordon, Inc., a corporation of the State of New  
 Jersey having principal offices in the City of Jer-  
 sey City, in the County of Hudson and State of  
 New Jersey of the First Part, hereinafter known  
 as the Mortgagor, AND Berwyn Estates, a cor-  
 poration of the State of New Jersey, having  
 principal offices in the City of Newark in the  
 County of Essex and State of New Jersey, of the  
 20 Second Part, hereinafter known as the Mortga-  
 gee, WITNESSETH, That the said mortgagor,  
 for and in consideration of the sum of Seven  
 Thousand (\$7,000.00) 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 re-  
 ceipt whereof is hereby acknowledged, and the  
 said mortgagor therewith fully satisfied, con-  
 tented and paid, has given, granted, bargained,  
 sold, aliened, enfeoffed, conveyed and confirmed  
 30 and by these presents does give, grant, bargain,  
 sell, alien, enfeoff, convey and confirm to the said  
 mortgagee and to its successors and assigns  
 ALL those tracts or parcels of land and prem-  
 ises hereinafter particularly described, situate  
 lying and being in the City of East Orange, in  
 the County of Essex and State of New Jersey.

*Exhibit D. 5.*

FIRST TRACT: BEGINNING in the westerly line of North Park Street at the southeast corner of the lot now or formerly belonging to Henry Whitaker, and thence running along said Whitaker's line north seventy seven degrees fifty minutes west one hundred and thirty feet; thence parallel with said street south twelve degrees ten minutes west twenty-five feet more or less; thence south seventy seven degrees fifty minutes east one hundred and thirty feet to said North Park Street; thence along the westerly line of said street north twelve degrees ten minutes east twenty five feet to said Henry Whitaker's line and the place of BEGINNING. Being lot No. 7 on map of the Wilson and Long property, surveyed April 26, 1867, by L. D. Tompkins.

SECOND TRACT: BEGINNING on the west side of North Park Street at the northeast corner of lot number seven (7) distant one hundred and ninety eight feet northerly from the corner of North Park and Dodd Streets; thence running along the line of said lot north seventy seven degrees fifty minutes west one hundred and thirty feet thence north twelve degrees two minutes east twenty five feet to lot number nine (9); thence along said lot number nine (9) south seventy seven degrees fifty minutes east one hundred and thirty feet to said North Park Street and thence along the same south twelve degrees two minutes west twenty five feet to the place of BEGINNING. Being the same lands and premises conveyed to the party of the first part hereto by the party of the second part, hereto by Deed bearing even date and intended to be recorded simultaneously herewith. The said sum of \$7,000.00 is to be advanced in connection with the erection of a one story building to contain three stores; said building to be ap-

5/2/28  
#6480 See  
Lis Pendens  
Bk. Pg.

*Exhibit D. 5.*

proximately 50 ft. front by 50 ft. in depth; said sum to be advanced as follows:

- \$1,000.00 when first tier of beams is laid.
- 2,000.00 when roof boards are on.
- 1,000.00 when white coat of plaster is on.
- 2,000.00 when trim and glass are installed.
- 10 1,000.00 when substantially completed.

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.

- 20 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.

- 30 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 it heirs, executors, administrators and assigns, to prosecute the work in a diligent and effective manner for a similar period; cessation of work on account of strikes not to be deemed abandonment.

*Exhibit D. 5.*

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 empowered 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

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*Exhibit D. 5.*

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 for 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 premises or any part thereof, under such terms and conditions as may seem advisable to the mortgagee and to use the rents, issues and

*Exhibit D. 5.*

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. 10

TOGETHER with all and singular the profits, privileges and advantages, with the appurtenances to the same belonging or in any wise 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 tracts or lots of land and premises with the appurtenances, unto the said mortgagee its successors and assigns, to the only proper use, benefit and behoof of the said mortgagee, its successors 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 does and shall well and truly pay, or cause to be paid, to the said mortgagee, its successors and assigns the sum of Seven Thousand Dollars (\$7,000.00) as follows: in six months from the date hereof, to wit, on the Seventeenth day of May, 1927, with lawful interest for the same from the date first payment is made, at the rate of six per cent. per annum, payable at maturity according to the conditions of a certain bond, bearing even date herewith, in the penal sum of Fourteen Thousand (\$14,000.00) Dollars, made by 20 30 40

*Exhibit D. 5.*

said Boyarsky & Gordon, Inc. Nathan Boyarsky & Benjamin Gordon 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  
10 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, its successors and assigns, 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  
20 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 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 and assigns, and assign the policy or  
30 policies and certificate or certificates thereof to the mortgagee, its successors 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 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  
40 day whereon the same shall become due and pay-

*Exhibit D. 5.*

able, after the period of default aforesaid, then it shall be lawful for the mortgagee, its successors 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, 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, 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 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 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

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*Exhibit D. 5.*

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 recommend-  
ations of any of the Departments or authority of  
10 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,  
20 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 as-  
signs, become and be due and payable immedi-  
ately 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 notwithstand-  
ing. AND agrees that the said mortgagee, its  
30 successors 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 con-  
dition 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  
40 aforesaid, the mortgagee, its successors and as-

*Exhibit D. 5.*

signs, shall have the right forthwith after any such default, to enter upon and take possession of the said mortgage 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 assigns 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, 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 its successors 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.

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IN WITNESS WHEREOF, the party of the first part has caused these presents to be signed by its duly authorized officers the day and year first above mentioned.

BOYARSKY & GORDON, INC.

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By Benjamin Gordon, President.

Signed, Sealed and Delivered  
in the presence of

EDWARD BEYER

Attest:

NATHAN BOYARSKY,  
Secretary.

40

*Exhibit D. 5.*

BOYARSKY & GORDON, INC.  
CORPORATE SEAL  
1926  
NEW JERSEY.

10 STATE OF NEW JERSEY, }  
COUNTY OF BERGEN. } ss.

BE IT REMEMBERED, That on this 24th day of  
November, in the year of our Lord One Thou-  
sand, Nine Hundred and Twenty six, before me,  
the subscriber, A Notary Public of New Jersey,  
personally appeared Nathan Boyarsky, known  
to me to be the Secretary of the Boyarsky & Gor-  
don Inc. a Corporation, the Mortgagor within  
20 named, who, being by me duly sworn on his oath,  
said and made proof to my satisfaction that he  
is such Secretary, and that he well knows the  
Common Seal of said Corporation, and that the  
Seal affixed to the within Mortgage is such Com-  
mon Seal and was thereto affixed by Benjamin  
Gordon the President of said Corporation, and  
that the said Mortgage was by the said President  
also signed and delivered as and for the volun-  
tary act and deed of said Corporation in the  
30 presence of said Deponent, who thereupon sub-  
scribed his name thereto as attesting witness.

NATHAN BOYARSKY.

Sworn and subscribed before me  
at Newark, N. J. the day and  
year first above mentioned.

EDWARD BEYER,  
A Notary Public of New Jersey.

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*Exhibit D. 5.*

EDWARD BEYER,  
NOTARY PUBLIC,  
HACKENSACK, N. J.

Received in the Office December 1st, A. D. 1926  
at 3:01 P. M. No. 100.

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Office of  
REGISTER OF DEEDS AND MORTGAGES  
Essex County, New Jersey.

STATE OF NEW JERSEY, }  
COUNTY OF ESSEX. } ss.

I, HOWARD S. DODD, Register of Deeds and  
Mortgages of the County of Essex, State of New  
Jersey, do hereby certify that the foregoing is a  
true and correct copy of the record of a certain  
Mortgage made by BOYARSKY & GORDON,  
INC. to BERWYN ESTATES, and also of the  
certificate of acknowledgment thereto annexed,  
as the same may be found recorded in my office  
in Book U 59 of Mortgages for said County on  
pages 131-134.

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IN TESTIMONY WHEREOF, I have  
hereunto set my hand and official seal  
this 8th day of May, A. D. 1928.

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HOWARD S. DODD,  
Register of Deeds and Mortgages.

(SEAL)

Recorded December 1st, A. D. 1926 in Book  
U 59 of Mortgages, Pages 131-134.

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## Memoranda of Vice-Chancellor.

## COURT OF CHANCERY OF NEW JERSEY.

Toms River, N. J.

May 24, 1929.

10 To Marder & Okin  
810 Broad Street,  
Newark N. J.

and

George A. Henderson, Esq.,  
409 Academy Building,  
Newark, N. J.

Dear Sirs:

In the matter of BERWYN ESTATES *v.*  
VARLESE, et als., I have received from both  
20 counsel supplemental briefs and inasmuch as  
there is no authority for the contention of the de-  
fendant Varlese that he had a right to have his  
judgment paid out of the Foundation Building &  
Loan Association mortgage I will advise a de-  
cree for the complainant. An important fact  
which seems to have been overlooked by the de-  
fendant is that the complainant's title rests upon  
a sheriff's sale in the foreclosure suit of a \$7,000  
mortgage which was prior to both the defend-  
30 ant's judgment and the Foundation Building and  
Loan Association mortgage. It is clear then that  
the estate of the complainant is superior to that  
of the defendant judgment creditor. This de-  
fendant's rights against the Foundation Building  
and Loan Association depend, it seems to me,  
upon the statute which provides that a me-  
chanic's lien judgment shall take precedence over  
an advance money mortgage except as to moneys  
actually advanced and used in the building. As  
40 no moneys were advanced on the mortgage in

*Memoranda of Vice-Chancellor.*

question, of course the defendant's judgment was completely prior to that mortgage. Nothing has disturbed that priority but defendant's difficulty lies in the fact that there is no statutory authority for his alleged right to compel an advance mortgagee to advance moneys for the defendant's benefit and I know of no legal or equitable principle on which such right could be based. 10

Very truly yours,

MAJA LEON BERRY.

MLB:ELS

COURT OF CHANCERY OF NEW JERSEY.

Toms River, N. J. 20  
May 27, 1929.

George A. Henderson, Esq.  
409 Academy Street  
Newark, N. J.

I have your letter of the 25th instant in BERWYN ESTATES *v.* VARLESE. The facts recited in your letter show no reason for any change in my decision of which you have already been advised. If no moneys had been advanced on the Foundation Building and Loan Association mortgage there was no occasion for making that Association a party defendant to the suit to foreclose the \$7000 mortgage. Of course if the Association were not made a party defendant its mortgage would be a lien but only to the extent of moneys advanced thereon. You suggest that there is no evidence that no moneys were advanced on this mortgage. While it may not have been your intention to stipulate that as a fact, 30

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*Memoranda of Vice-Chancellor.*

it appears from the record very clearly that that is the claim of the complainant and in support of the claim a portion of the affidavit of the Association was read into the record, but it seems to me that this discussion is all aside from the mark. The fact is that you are now claiming precedence  
10 over a new mortgage given by the present complainant and not over the mortgage which was on the property when you obtained your judgment, that mortgage having been cancelled. I stated very plainly at the hearing that if you could show that you had a right to compel the Building and Loan Association to advance moneys to your client out of the original \$20,000 mortgage I would give you the same right, so far as this court was concerned, out of the new \$20,000 mortgage. That statement still stands, but the difficulty is, as I see it, that there is no authority for  
20 your contention.

Very truly yours,

MAJA LEON BERRY.

MLB:ELS

Copy to Mr. Marder.

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*Final Decree.*

defendant, or now appearing, and the complainant appearing to be entitled to the relief prayed in its bill;

And it further appearing that said defendant, Enrico Varlese, is not entitled to any moneys from either the complainant or the defendant, 10 Foundation Building and Loan Association of the City of Newark, and that the defendant, Enrico Varlese is not entitled to any relief on his counter-claim as amended against the complainant and the defendant, Foundation Building and Loan Association of the City of Newark,

It is on this            day of June, 1929, ORDERED, ADJUDGED and DECREED that said defendant, Enrico Varlese, has no estate in or encumbrance upon the said lands and premises or any part 20 thereof and it is further

ORDERED, ADJUDGED and DECREED that as to all of the said lands and premises described in said bill of complaint, to wit:

All those tracts or parcels of land and premises hereinafter particularly described, situate, lying and being in the City of East Orange, in the County of Essex and State of New Jersey.

## FIRST TRACT:

30 BEGINNING in the westerly line of North Park street at the southeast corner of the lot now or formerly belonging to Henry Whitaker, and thence running along said Whitaker's line north seventy-seven degrees fifty minutes west one hundred and thirty feet; thence parallel with said street, south twelve degrees ten minutes west twenty-five feet more or less; thence south seventy-seven degrees fifty minutes east one hundred and 40

*Final Decree.*

thirty feet to said North Park street; thence along the westerly line of said street north twelve degrees ten minutes east twenty-five feet to said Henry Whitaker's line and the place of BEGINNING. Being lot No. 7 on map of the Wilson and Long property, surveyed April 26, 1867, by L. D. Tompkins. 10

## SECOND TRACT:

BEGINNING on the west side of North Park street at the northeast corner of lot number seven(7) distant one hundred and ninety-eight feet northerly from the corner of North Park and Dodd street; thence running along the line of said lot north seventy-seven degrees fifty minutes west one hundred and thirty feet; thence north twelve degrees two minutes east twenty-five feet to lot number nine (9); thence along said lot number nine (9) south seventy-seven degrees fifty minutes east one hundred and thirty feet to said North Park street and thence along the same south twelve degrees two minutes west twenty-five feet to the place of BEGINNING. 20

so far as relates to any claims thereon by or on behalf of the said defendant, Enrico Varlese, the title of the said complainant Berwyn Estates in and to the same and every part thereof is hereby determined, fixed and settled and declared to be good, and it is further 30

ORDERED, ADJUDGED and DECREED that the said defendant, Enrico Varlese, is not entitled to any moneys from either the complainant or the defendant, Foundation Building and Loan Association of the City of Newark, and that the counterclaim as amended of said defendant, Enrico Varlese against the complainant and the defendant, 40

*Final Decree.*

Foundation Building and Loan Association of the City of Newark be and the same is hereby dismissed; and it is further

10 ORDERED, ADJUDGED and DECREED that the said defendant, Enrico Varlese, his agents and servants, and each and every one of them be and they are hereby permanently enjoined from proceeding with the writ of Fieri Facias described in paragraph 4 of the bill of complaint herein as against the said lands and premises described in the bill of complaint and that said Enrico Vallese, his agents and servants cause the said writ of Fieri Facias to be discontinued as against the said lands and premises and the Sheriff of the County of Essex be and is hereby permanently enjoined from selling said lands and premises under said writ of Fieri Facias; and it is further

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ORDERED, ADJUDGED and DECREED, that the said defendant, Enrico Varlese, his agents or servants, discharge the lis pendens, hitherto filed by said defendant, Enrico Varlese, in connection with this cause, which lis pendens is recorded in Book K of Lis Pendens for Essex County, pages 302-303; and it is further

30 ORDERED, ADJUDGED and DECREED that the said defendant, Enrico Varlese, pay to the complainant and to the Foundation Building and Loan Association of the City of Newark, their costs of this suit to be taxed including a counsel fee of \$25.00 which is hereby allowed to said complainant, and a counsel fee of \$25.00 which is hereby allowed to said defendant, Foundation Building and Loan Association; and it is further

40 ORDERED, ADJUDGED and DECREED that within ten days after service upon the defendant, Enrico Varlese or his solicitor of a copy of this decree and a copy of the bill of taxed costs of the com-

*Final Decree.*

plainant and of the defendant, Foundation Building and Loan Association of the City of Newark, certified to by the solicitor of the complainant and the defendant Foundation Building and Loan Association of the City of Newark, that said defendant, Enrico Varlese pay said cost to the solicitor of the complainant and defendant, Foundation Building and Loan Association of the City of Newark, and that in default thereof execution issue thereon out of and under the seal of this court, directed to the Sheriff of the County of Essex for the amount of such costs and the costs of such writ of execution.

E. R. WALKER,  
C.

Respectfully advised,  
MAJA LEON BERRY,  
V.-C.

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**Notice of Appeal.**

IN CHANCERY OF NEW JERSEY.

	<i>Between</i>		
10	BERWYN ESTATES, a New Jersey corporation, <i>Complainant,</i>	}	<i>On Bill, &amp;c. Notice of Appeal.</i>
	<i>and</i>		
	ENRICO VARLESE and CONRAD DEUHLER, Sheriff of the County of Essex, <i>Defendants.</i>		

20     The defendant, Enrico Varlese, hereby appeals from the final decree made by the Chancellor on the advice of Vice-Chancellor Maja Leon Berry, in the above entitled cause on Tuesday, June 4th, 1929, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated June 4, 1929.

30                     GEORGE A. HENDERSON,  
Solicitor for and of Counsel  
with Defendant Enrico Varlese.

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

GEORGE A. HENDERSON,  
Of Counsel with Defendant  
Enrico Varlese.

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*Notice of Appeal.*

Service of the within notice is hereby  
acknowledged this 4th day of June, 1929.

AARON MARDER,  
Solicitor of the Complainant  
and of the Defendant Founda-  
tion Building and Loan Asso-  
ciation. 10

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**Petition of Appeal.**

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

10	<i>Between</i> BERWYN ESTATES, a New Jersey corporation, <i>Complainant-Appellee,</i> <p style="text-align: center;"><i>and</i></p> ENRICO VARLESE, <i>Defendant-Appellant,</i>	<i>On Appeal from the Court of Chancery.</i>
20	FOUNDATION BUILDING AND LOAN, ASSN'N, a corporation, <i>Defendant-Appellee.</i>	<i>Petition of Appeal.</i>

To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of Enrico Varlese, appellant in the above entitled cause, respectfully shows that:

- 30 1. Petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey on the advice of Honorable Maja Leon Berry, Vice-Chancellor, bearing date, June 4th, 1929 in certain causes in said Court of Chancery, wherein the said Berwyn Estates, a N. J. corporation was complainant and the said Enrico Varlese was defendant and the said Foundation Building and Loan Association of Newark, N. J., was defendant on the appellant's counter-claim in this respect, to wit,

*Petition of Appeal.*

That the said decree adjudges that the said defendant Enrico Varlese has no estate in or encumbrance upon the lands and premises involved in this suit and described in the bill of complaint, or any part thereof;

And the said decree further adjudges that as to all the said lands and premises so far as they relate to claims thereon by or on behalf of the said defendant Enrico Varlese, the title of the said complainant Berwyn Estates in and to the same and every part thereof is determined, fixed, settled and declared to be good; 10

In that the said decree further adjudges and orders that the amended counter-claim of the said defendant Enrico Varlese against the complainant Berwyn Estates, and the defendant Foundation Building and Loan Association of the City of Newark, be dismissed; 20

And that the said decree adjudges and orders that the said Enrico Varlese, his agent or servant and each and every one of them be permanently enjoined from proceeding with the writ of fieri facias described in paragraph four of the bill of complaint, against the lands and premises described in the bill of complaint, and that the said Enrico Varlese, his agents and servants cause the said writ of fieri facias be discontinued as against the said lands and premises and that the Sheriff of the County of Essex be permanently enjoined from selling same under said writ of fieri facias; 30

And in that said decree further adjudges and orders that the said defendant Enrico Varlese, his agents or servants discharge the lis pendens hitherto filed by the said defendant Enrico Varlese in connection with this cause;

And in that the said decree adjudges and orders that the said defendant Enrico Varlese pay 40

*Petition of Appeal.*

to the complainant and to the Foundation Building and Loan Association of Newark, New Jersey, their costs, including counsel fees.

10 And your petitioner appeals from the aforesaid decree of the Chancellor upon the ground that the same is erroneous in that the Court of Chancery should dismiss the bill of complaint  
and order that the prayer for relief in the counter-claim of the defendant Enrico Varlese be granted; and in that the Court of Chancery should adjudge that the defendant Enrico Varlese has a lien upon the premises in question and in that the Court of Chancery should adjudge that the said lien of the defendant Enrico Varlese is prior to the lien of the mortgage on the premises in question; held by the defendant,  
20 Foundation Building and Loan Association; and in that the Court of Chancery should permit the said Enrico Varlese, his agent or servant, to proceed with the writ of fieri facias described in paragraph four of the bill of complaint and permit the Sheriff of Essex County to proceed with the sale of aforesaid lands and premises under said writ of fieri facias and in that the Court of Chancery should not order to be discharged the lis pendens described in the decree appealed from.  
30 And in that the defendant Enrico Varlese should not be ordered to pay costs, including counsel fees to the complainant and the defendant Foundation Building and Loan Ass'n but the defendant Varlese should be allowed costs and a reasonable counsel fee.

Petitioner therefore prays that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden and that

*Petition of Appeal.*

petitioner may have such other relief in the premises as this Court shall deem proper.

Dated July 1st, 1929.

GEORGE A. HENDERSON,  
Solicitor for and of Counsel  
with Appellant. 10

Sat below

EDWIN ROBERT WALKER, *C.*  
MAJA LEON BERRY, *V.-C.*

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**Answer to Petition of Appeal.**

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

10	<p><i>Between</i></p> <p style="text-align: center;">BERWYN ESTATES, a New Jersey corporation, <i>Complainant-Appellee,</i></p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">ENRICO VARLESE, <i>Defendant-Appellant,</i></p> <p style="text-align: center;">FOUNDATION BUILDING AND LOAN, ASSOCIATION, a corporation, <i>Defendant-Appellee.</i></p>	<p><i>On Appeal from Court of Chancery.</i></p> <p><i>Answer to Petition of Appeal.</i></p>
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The answer of Berwyn Estates, a New Jersey corporation, and Foundation Building and Loan Association, a corporation, the above named appellees, to the petition of appeal of Enrico Varlese, the above named appellant.

30 These appellees, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admit that a decree was, on June 4, 1929, made and entered in the Court of Chancery of New Jersey in the above entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, these appellees beg to refer thereto when the same shall be produced.

40 These appellees are advised and believe that the said decree is agreeable to equity; and they

*Answer to Petition of Appeal.*

pray that the same may be affirmed with costs to be taxed in favor of these appellees.

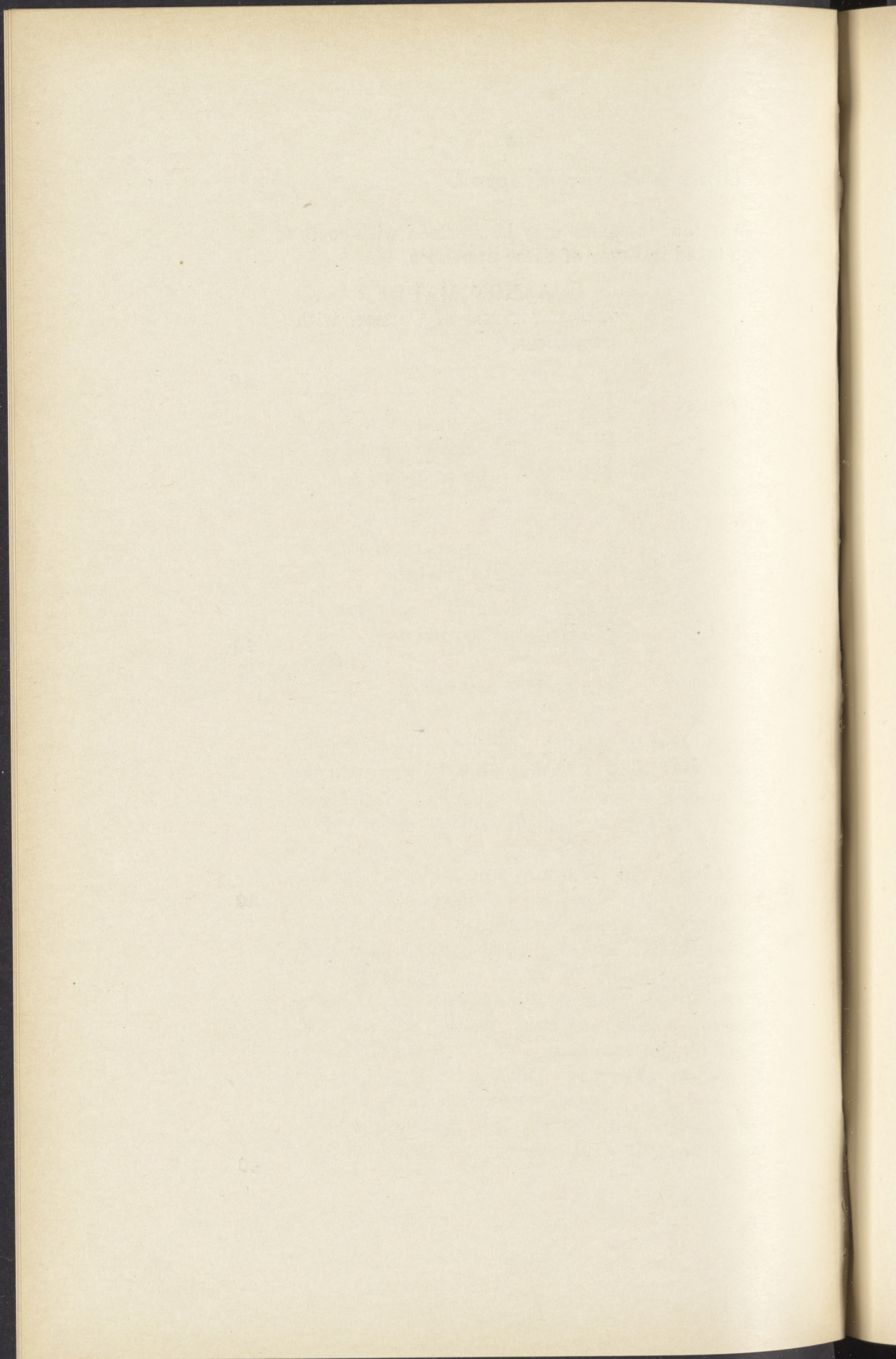
AARON MARDER,  
Solicitor for and of Counsel with  
Appellees.

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## New Jersey Court of Errors and Appeals

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*Between:*

BERWYN ESTATES, a New Jersey  
Corporation,  
Complainant-Appellee,

AND

ENRICO VARLESE,  
Defendant-Appellant,

FOUNDATION BUILDING AND LOAN  
ASSOCIATION, a Corporation,  
Defendant-Appellee.

ON APPEAL  
FROM THE  
COURT OF  
CHANCERY.

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### **Brief of Defendant-Appellant.**

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#### **Statement of Case.**

On November 17th, 1926, the complainant, Berwyn Estates sold to Boyarsky & Gordon, Inc., the premises involved in this suit, and took back two mortgages, one a purchase money mortgage in the amount of \$17,000, and the second (P. 70, Ex. D-5) a mortgage for \$7,000 to be advanced by complainant as buildings were erected on the premises.

Subsequently Enrico Varlese, defendant-appellant was employed by Boyarsky & Gordon, Inc., to supply labor and materials on the buildings

being erected on the premises, which he admittedly did between April 27th, and July 1st, 1927 (vd. page 28, complainant's replication, par. 3).

On June 29th, 1927, there was placed on record a mortgage on the same premises in the amount of \$20,000 bearing date of June 21st, 1927, and executed by Boyarsky and Gordon, Inc., to the Foundation Building and Loan Association, defendant-appellee (Exhibit D-2, page 47).

On September 28th, 1927, Enrico Varlese filed a lien claim and a few days thereafter started a mechanic's lien suit in the East Orange District Court against Boyarsky and Gordon, Inc., Berwyn Estates and the Foundation Building and Loan Association. The Berwyn Estates was never served and eventually a general judgment was entered against Boyarsky & Gordon, Inc., in the sum of \$500 and costs, and a special judgment against the lands and premises; which judgment was entered November 18th, 1927, and docketed on December 5th, 1927 (Ex. D-4, page 65) and provided that the lien of said judgment was prior to the lien of the Foundation Building and Loan mortgage.

On August 12th; 1927, a month and a half prior to the filing of the above lien claim, the Berwyn Estates instituted a foreclosure suit based on the above \$7,000 construction mortgage. The Foundation Building and Loan Association, whose \$20,000 mortgage was open of record was *not* made a party defendant nor was the defendant-appellant (p. 41, line 23). A decree was entered and eventually the sheriff conducted a foreclosure sale of the valuable property, which was bought in by Berwyn Estates for \$2,000 (vd. amended answer, p. 18, lines 16, 20 as admitted in complainant's replication, p. 26, line 27).

On January 21st, 1928, defendant-appellant proceeded with his general and special *fiere facias* and the sheriff's sale was set for March 13, 1928, shortly before which date the complainant-appellee filed a bill to quiet title. To this Varlese counter-claimed against complainant and the Foundation Building and Loan Association, and this suit was eventually referred to the Honorable Maja Leon Berry, Vice Chancellor, who after hearing the facts as stipulated (pages 37-43) and examining the exhibits, advised a decree granting the prayer of complainant's bill.

The original \$20,000 mortgage to the Foundation Building and Loan Association was on record at the time of the institution of the foreclosure suit and was not cancelled until April 25th, 1927 (pg. 47) sometime after the recording of the foreclosure Deed delivered by the Sheriff to the complainant Berwyn Estates, purchaser at the foreclosure sale. In fact it was not cancelled until sometime after the new mortgage for the *same amount*, on the *same premises*, was executed to the *same Building and Loan Association by the Berwyn Estates* (Ex. D-3, pg. 53).

The defendant-appellant contends that the Court of Chancery erred in its decree and that the lien adjudged by the District Court of East Orange to be a lien prior to the original Building and Loan mortgage is a lien of record and should be prior to the new mortgage, the complainant having purchased the premises with the building and loan mortgage open of record and recorded long before institution of foreclosure, and that the defendant-appellant should be permitted to proceed with his *fiere facias* and Sheriff's sale.

### Grounds of Appeal.

The defendant-appellant relies upon the following grounds of appeal:

1. That the Decree erroneously adjudges that the said defendant Enrico Varlese has no estate in or encumbrance upon the lands and premises involved in this suit and described in the bill of complaint, or any part thereof (pg. 86, lines 16, 20).
2. That the said decree further erroneously adjudges that as to all the said lands and premises so far as they relate to claims thereon by or in behalf of the said defendant Enrico Varlese, the title of the said complainant, Berwyn Estates in and to the same and every part thereof is determined, fixed, settled and declared to be good (pg. 86, line 21 to pg. 87, line 32).
3. That the said decree further erroneously adjudges and orders that the amended counterclaim of the said defendant Enrico Varlese against the complainant Berwyn Estates, and the defendant Foundation Building and Loan Association of the City of Newark, be dismissed (pg. 87, line 38 to pg. 88, line 6).
4. That the said decree erroneously adjudges and orders that the said Enrico Varlese, his agent or servant and each and every one of them be permanently enjoined from proceeding with the writ of *feri facias* described in paragraph four of the bill of complaint, against the lands and premises described in the bill of complaint, and that the said Enrico Varlese, his agents and servants cause the said writ of *feri facias*

be discontinued as against the said lands and premises and that the Sheriff of the County of Essex be permanently enjoined from selling same under said writ of *feri facias* (pg. 88, lines 7, 21).

5. That the said decree further erroneously adjudges and orders that the said defendant Enrico Varlese, his agents or servants discharge the *lis pendens* hitherto filed by the said defendant Enrico Varlese in connection with this cause (pg. 88, lines 22, 28).

6. That the said decree further erroneously adjudges and orders that the said defendant Enrico Varlese pay to the complainant and to the Foundation Building and Loan Association of Newark, New Jersey, their costs, including counsel fees (pg. 88, lines 28, 36).

7. That the Court of Chancery erroneously did not dismiss the bill of complaint and grant the prayer for relief on the Counter Claim of defendant, Enrico Varlese.

8. That the Court of Chancery did not adjudge that the defendant Enrico Varlese has a lien upon the premises in question prior to the mortgage of the Foundation Building and Loan Association.

9. That the Court of Chancery erroneously did not order complainant and defendant-appellee to pay costs and reasonable counsel fees to defendant-appellant.

There was error in the above decrees, orders and adjudications made by the Court of Chan-

cery, and in the failure to grant the prayer for relief set forth in the defendant-appellant's counter-claim.

### **BRIEF OF ARGUMENT.**

#### **(1) The Judgment of the East Orange District Court is Conclusive as to the Facts therein Determined.**

Section 205 of the District Court act reads as follows "That if the parties to any action in any District Court fail to demand trial by jury in cases where such demand is necessary and so elect to permit questions of fact to be determined by the judge thereof, then such determination of the judge or in cases where there is a jury, then the verdict of a jury and any judgment thereupon, shall be final and conclusive between the parties upon questions of fact, except as herein otherwise provided."

Our courts have held the following:

"A Judgment on a lien claim has the same quality of conclusiveness that an ordinary common law judgment has, when put in issue in a collateral proceeding. It may be avoided for fraud but cannot be set aside for imperfections in the lien claim or irregularities in the prosecution of the suit. *Jacobus v. Mut. Ben. Life Ins. Co.*, 12 C. E. Gr. 604; *S. C. 11 C. E. Green*, 389, sub. nom. *Mut. etc., Co. v. Rowand.*"

"Two questions may be raised, respecting the record of such judgment, in a collateral proceeding. One respects the jurisdiction of the court upon the subject matter adjudicated upon. The other relates to the existence of the adjudication. The later question can be tried only on the record, *which*

*imports absolute verity*, and against which no averment, or proof to the contrary, can be received. *Cutter v. Kline*, 8 Stew. 534, reversing S. C. 7, Stew. 329.”

**(2) The Contention of the Building and Loan Association that it Did Not Defend Because it was Not Interested is Most Unsound.**

Its counsel, Mr. Marder who also represents the complainant-appellee, and was its counsel and agent for service of process, and knew that if it had any defense in the district court suit, it was incumbent upon it and him to present it. What a chaotic condition we should have in the law courts of this state if this palpably absurd theory were followed. Every defendant feeling that he has a just defense would stay away from the Court in which he had been sued and then attempt to restrain an execution if judgment went against him.

A recent case, *Active Mortgage Co. v. Ajax Building Co.* 146 At. 353 sets forth in the syllabus by the Court (Backes, V. C.) “Judgment of law Court in suit to enforce mechanic’s lien as to priority of mortgages was *res adjudicated* in suit to foreclose mortgages.”

The mechanic’s lien act reads. “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.”

**(3) There has been a Palpable Attempt to Work an Injustice Upon the Defendant-Appellant.**

The new \$20,000 mortgage is merely the same one as was on it before with the hope that the mechanic's lien claim of Varlese has been side-tracked.

The Court's statement to counsel for Varlese (page 43, lines 13, 16) "Let me see your authority showing that you have the right from the first \$20,000 mortgage, and I will give it to you from the second" should have guided him in advising a Decree; Varlese had right to be prior to the first mortgage and he should stand in identically the same position with reference to the second mortgage; he should be allowed to go ahead with his execution. The Court's statement should result in our having the same rights with reference to the second mortgage as with reference to the first and all that we ask is that our judgment be prior to the lien of the new \$20,000 mortgage as it was prior to the earlier one.

As an evidence of the bad faith complained of by Varlese let me cite the fact that a Notice of Motion (pg. 10) to strike out the answer of defendant Varlese was argued on May 1st, 1928, before Vice Chancellor Berry, and at the argument an affidavit bearing *date of April 25, 1928* was presented by Sydney Seidler, the Secretary of the Foundation Building and Loan Association, which reads in part "There is not, nor was there any money due or owing under the said mortgage to the Foundation Building and Loan Association, and said mortgage has been cancelled of record" (Pg. 15, lines 1, 4). When the motion to strike out was not granted, additional time

was given to reframe the answer and in the interim it was learned that on the same date as this affidavit the mortgage to the Foundation Building and Loan Association to Boyarsky & Gordon has been *receipted*, and cancelled (Pg. 47) by Mr. Marder and the new \$20,000 building and loan mortgage bearing date of April 17, 1928 placed on record by him on the following day (Ex. D-3 pg. 64). These transactions all occurred before the argument of the Motion but were artfully concealed from the Court in the affidavit.

I might also add that it is peculiar that the President of the complainant represented by the same solicitor as the Foundation Building and Loan Association, which had been sued in the District Court "did not know of the alleged lien claim of Enrico Varlese" (Pg. 13, line 10) "until sometime after his company procured the aforementioned deed from the Sheriff." More particularly since the complainant owned the premises, sold them and took back a construction mortgage (which was the one foreclosed) and which provided for payments as the work progressed; (Ex. D-5, pg. 72); provided for inspections by complainant during the construction; and provided that the complainant might make expenditures to complete the building and pay and satisfy all liabilities for materials and labor, and appointed the mortgagee agent of the mortgagor to make the above described expenditures (Par. 10 of amended answer, pg. 19 admitted in replication Par. 6, pg. 28).

The case of *William v. Denise* is pertinent. 26 At. 29. "Where information is casually obtained by an agent of the corporation, the corporation is not charged with notice, from the mere fact of its agent's knowledge; but if the

corporation act through such agent, in a matter where the information possessed by him is pertinent, the knowledge of the agent will be imputed to the principal." So in our case each corporation had knowledge.

**(4) Even if No Consideration had Passed for the Original Building and Loan Mortgage, the Mortgage Was a Lien on the Premises and Defendant-Appellant's Lien Attached to it and could Not be Voided by the Cancellation of the Building and Loan Mortgage, Particularly under the Circumstances Detailed above and Exposed by the Exhibits and Testimony.**

*Perkins v. Trinity Realty Co.*, 71 Equity 304, is very pertinent on the question of want of consideration, stating "It will be found that the Court of Chancery in dealing with the question of the defense of want of consideration has held that a 'bond and mortgage \* \* \* is good, if it is shown that none (consideration) was given. And neither courts of law nor courts of equity will allow the consideration to be inquired into for the sake of declaring the instrument void for want of consideration, but they will for the purpose of ascertaining what is due upon it.'" Here is cited:

*Farnum v. Burnett*, 21 E. 87, pg. 89;  
*Shotwell v. Shotwell*, 24 Eq. 378, pg. 385.

Thus our lien attached to and was prior to a valid mortgage and whatever, if anything, was due on the mortgage.

Continuing, the *Perkins* case holds "The mere fact that there was no consideration would not render the mortgage invalid" and cites *Campbell v. Tompkins*, 32 Eq. 170 and many other cases.

*Raymond v. Post*, 25 Eq. 447, relied on by complainant and defendant-appellee in a memorandum to the learned Vice Chancellor holds that "in examining a lien claim alleged to be a cloud upon the title the court will not admit extrinsic evidence in aid of the claim", (nor, it may be assumed in aid of the one against whom the claim is asserted) "but will examine the record evidence only." The records disclose that the property was sold by the Sheriff with a \$20,000 Building and Loan mortgage open of record, and that our lien on the premises had attached in priority to that mortgage.

*Marcy v. Larkin*, 99 Eq. 429, also relied on in that same memorandum by complainant and defendant-appellee, was a case in which "All parties were made defendants to said foreclosure *who were disclosed by the public records* to have any right, title or interest in the mortgaged premises." This is contrary to the facts in our case, as the public records showed the building and loan mortgage, yet the building and loan association was *not* made a party defendant.

### **Conclusion.**

It is respectfully contended that Varlese had a lien on the property in question; that a court having jurisdiction decreed priority for his lien over the lien of a building and loan mortgage placed on the property while Varlese was working on it; which mortgage was open of record long before the second mortgagee's foreclosure was started and long after the sale of and deed given

by the Sheriff; that the lien of this mortgage remained until cancelled and when cancelled after the Sheriff's deed was recorded, our lien still stood; that the property was sold by the Sheriff to the foreclosing second mortgagee, who bought it encumbered by the mortgage of record to which our lien had attached; and that the receipting and the cancellation of the old mortgage and execution of the new one for the *same amount*, on the *same premises* and to the *same building and loan association* under the circumstances set forth in the testimony and exhibits do not in any way destroy the lien of our judgment. Accordingly, it should be prior to the new mortgage.

It is respectfully submitted that the decree of the Court of Chancery should be reversed and that the Bill to quiet title with all the restraint should have been dismissed and the decree should have been entered in favor of and granting the prayer for relief of defendant-appellant and the defendant-appellant should be permitted to proceed with the Sheriff's sale.

Respectfully submitted,

GEORGE A. HENDERSON,  
Solicitor of and of counsel with  
defendant-appellant, Enrico Varlese.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

*Between*

BERWYN ESTATES, a New Jersey corporation,  
*Complainant-Appellee,*

*and*

ENRICO VARLESE,  
*Defendant-Appellant,*

FOUNDATION BUILDING AND LOAN ASSOCIATION, a corporation,  
*Defendant-Appellee.*

*On Appeal  
from Court  
of Chancery.*

### **BRIEF ON BEHALF OF APPELLEES, Berwyn Estates and Foundation Building and Loan Association.**

This is an appeal from the final decree advised by Vice-Chancellor Berry in favor of the complainant in a suit to quiet title, which decree also dismissed the counter-claim of the defendant Enrico Varlese against the complainant and the defendant Foundation Building and Loan Association (pp. 85-89).

#### **Statement of Facts.**

The facts are taken mostly from the testimony (pp. 37-43) and if otherwise, the reference will be given.

On November 17, 1926, the complainant sold to Boyarsky & Gordon, Inc., a New Jersey corporation, the lands and premises in question and at the same time and as part of the same transaction took back from Boyarsky & Gordon, Inc.,

a Seventeen Thousand (\$17,000.00) dollars purchase money mortgage and a construction loan or advance money mortgage in the sum of Seven Thousand (\$7,000.00) dollars, under which the complainant was from time to time and in installments to advance said sum to Boyarsky & Gordon, Inc., in connection with the erection by Boyarsky & Gordon, Inc., of a one-story building, containing three stores, on the premises in question.

Complainant's title was made through the foreclosure of the aforementioned \$7,000.00 advance money mortgage in a suit wherein Berwyn Estates is complainant and Boyarsky & Gordon, Inc., *et als.*, are defendants. The bill of complaint in said foreclosure suit was filed on August 12, 1927 and the subpoenas and tickets annexed were served on August 18th, 19th and 23rd, 1927. The advertisement of sale by the sheriff, in the foreclosure suit, read in part as follows: "To be sold subject to 1927 taxes and subject to mortgage or mortgages aggregating the sum of \$17,000.00 by way of principal plus accrued and accruing interest"—so that the property was sold by the sheriff subject to the \$17,000.00 purchase money mortgage.

Complainant's deed from the sheriff in said foreclosure proceedings was dated January 9, 1928 and was recorded on February 16, 1928 in Book U-77 of Deeds for Essex County, on pages 358-360. (Par. 1 of bill of complaint, pp. 1 and 2.)

Some time in May or June, 1927, the Foundation Building and Loan Association granted a \$20,000.00 first mortgage loan to Boyarsky & Gordon, Inc., on the premises in question. The Foundation Building and Loan Association naturally expected a completed building and a first

lien. Said mortgage by Boyarsky & Gordon, Inc. to the Foundation Building and Loan Association was dated June 21, 1927 and recorded on June 29, 1927 in Book F-61 of Mortgages for Essex County, pages 486-487. This was before the foreclosure above mentioned. No moneys were paid out on this loan because of default of Boyarsky & Gordon, Inc., in connection with the completion of said building, etc., and consequently the Foundation Building and Loan Association had no interest in the premises in question at that time and because of said Foundation-Boyarsky & Gordon, Inc., mortgage.

Varlese, between April 27, 1927 and July 1, 1927 supplied certain labor and mason materials to Boyarsky & Gordon, Inc., in connection with the premises in question; and on September 28, 1927 Varlese filed a lien claim against the premises in question in the Essex County Clerk's office and in October 1927 instituted suit on said lien claim in the East Orange District Court against Boyarsky & Gordon, Inc., the Foundation Building and Loan Association and Berwyn Estates. Service was never made on Berwyn Estates. The Foundation Building and Loan Association not having any interest in said premises in as much as it did not pay out any moneys under the mortgage loan that was to be made to Boyarsky & Gordon, Inc. did not contest the suit, and as a result in said suit, which was not defended by either Boyarsky & Gordon, Inc. or the Foundation Building and Loan Association, general judgment was entered against Boyarsky & Gordon, Inc. and special judgment against the lands and premises in question and it was further adjudged that the judgment of Varlese be prior to the mortgage of the Foundation Building and Loan Association. Later, Varlese caused a state-

ment of his judgment to be docketed in the Essex County Clerk's office. (See also rule of Circuit Court correcting statement, pp. 68-69.)

Varlese was not made a party defendant in complainant's foreclosure suit above mentioned.

The complainant having acquired title to the premises, itself applied to the Foundation Building and Loan Association for a first mortgage loan of \$20,000.00 and this mortgage loan went through and the moneys paid out thereunder; this mortgage being dated April 17, 1928 and recorded on April 26, 1928.

On January 21, 1928 Varlese sued out a general and special writ of Fi. Fa. on his docketed judgment directed to the sheriff of the County of Essex commanding the sheriff to cause to be paid \$530.60 to Varlese lately recovered by Varlese against Boyarsky & Gordon, Inc., owner and builder, and if sufficient goods and chattels of Boyarsky & Gordon, Inc., builder and owner, be not found, directed the sheriff to make said sum out of the lands and premises in question (this is alleged in paragraph 4 of the bill of complaint, p. 3, and is admitted in the amended answer of Varlese, p. 17). Thereupon, complainant filed its bill to quiet title to the lands and premises in question.

The original answer and counter-claim is not printed in the State of Case but is printed with this brief by way of addenda.

It was this answer and counter-claim that the Court below refused to strike out and permitted the defendant Varlese to amend (p. 16).

## POINT I.

The appellant's lien claim was cut off by the foreclosure sale; Appellant had no right to the money raised by the foreclosure sale.

It is respectfully submitted that the Varlese lien claim, having been filed after the institution of the foreclosure suit, the purchaser at the sheriff's sale, to wit, the complainant, took free and clear from said lien claim. See Section 58 of the Chancery Act, Vol. 1 (compiled Statutes of 1910, p. 432). In *Raymond v. Post*, 25 Equity, page 447, which was a suit brought by the purchaser at the sheriff's sale to quiet title and against a mechanic's lien claimant who filed his lien claim after the commencement of the foreclosure suit, held that the lien claim was cut off; held also that in examining a lien claim alleged to be a cloud upon title the Court will not admit extrinsic evidence in aid of the claim, but will examine the record evidence only. It will be noticed at this point, in the matter at bar, the lien claim could have been filed before the foreclosure suit was instituted. In *Stiles v. Galbreath*, 69 Eq. 222 (affirmed by this court per curiam in 71 Eq. 299) it is held that the filing of the bill concludes the holder of the non-recorded lien as far as the mortgaged property is concerned but does not determine the lien claimant's rights in the purchase money. See also *Marcy v. Larkin*, 99 Equity 429, dealing with an unacknowledged and unrecorded contract of sale.

The rights of the complainant to the moneys paid to sheriff for the purchase of the property at the foreclosure sale are superior to those of Varlese. Complainant's \$7,000.00 mortgage which was foreclosed was given under Section

14 of the Mechanic's Lien Act of the State of New Jersey, and is further protected by Section 28 of said Act. See also *Franklin Society v. Thornton*, 85 Eq. 525, in this court. It will be noticed that this last point was not raised or even intimated by the appellant either in his brief in this court or in the petition of appeal or anywhere in the case.

### POINT II.

**The appellant has no rights or equities against either of the appellees.**

Varlese (not anywhere denying knowledge of the complainant's mortgage and the foreclosure proceedings) in his *amended* answer <sup>and</sup> counter-claim (pp. 17-22) and but partly in his brief, claims some kind of right against both the complainant and the Foundation Building and Loan Association for the reasons that: (1) Foundation Building and Loan Association was not a party defendant in the foreclosure; (2) that the Boyarsky & Gordon, Inc.-Foundation Building and Loan mortgage was not cancelled until April 25, 1928; (3) that the Foundation Building and Loan Association made a loan to the Berwyn Estates on the same premises after Berwyn Estates procured title at the foreclosure sale; (4) Joseph Isaacs, president of the Berwyn Estates, was one of the incorporators of the Foundation Building and Loan Association (said Joseph Isaacs has not been a director of the association for at least six years); (5) in the motion to strike out the original answer and counter-claim the affidavit of the secretary of the Foundation made no mention of the loan made by the Foundation to the Berwyn Estates (this affidavit was put in for the sole purpose of showing that the Foundation-Boyarsky mortgage fell through and

no moneys were paid out thereunder and that the Foundation had no interest in the premises by reason of said mortgage); (6) the seven thousand dollar mortgage of the complainant provided (pp. 72-74) that the mortgagee, for its own protection, could pay out moneys directly to materialmen, etc.

As before pointed out, the sheriff's sale was subject only to the taxes and mortgage of \$17,000.00. Nobody was harmed by the Boyarsky & Gordon, Inc.-Foundation Building and Loan mortgage being open of record, although nothing was due thereunder. Although the Boyarsky & Gordon, Inc.-Foundation Building and Loan mortgage could have been cancelled of record earlier, the Foundation Building and Loan Association had no incentive to cancel it sooner because the new loan was not granted until about then. Moreover counsel represented both the complainant and the Foundation Building and Loan Association and felt that the mortgage could be cancelled at any time. Nobody was hurt by the neglect to cancel the Boyarsky & Gordon, Inc.-Foundation Building and Loan Association mortgage until April 25, 1928. As the learned court below in its opinion pointed out, the first mortgage of the Foundation Building and Loan Association was a lien only to the extent of moneys advanced thereunder and since no moneys were advanced it was no lien (pp. 82-84).

It is submitted that there is no valid reason why the Foundation Building and Loan Association could not make a loan to the Berwyn Estates in reliance upon title made by the Berwyn Estates at the foreclosure sale, which title was free from the Varlese lien, just as well as any other building and loan association might.

There was no contractual or any other obligation of any kind on the part of either complainant or Foundation Building and Loan Association to Varlese. The provisions in the \$7,000 mortgage of the complainant were for the benefit solely of the mortgagee, and for its protection, and not in any way intended for the benefit of Varlese. There is no provision in the first mortgage of the Foundation Building and Loan Association which even intimates it might have been intended for the benefit of Varlese.

In *Knapp v. Heidritter Lumber Co.*, 99 Eq. 381, the complainant, landowner, sought to enjoin prosecution of mechanic's lien in the sum of \$3,931.05 by a creditor of his contractor, it appearing that an agreement was made between the contractor and his creditors wherein all the creditors therein mentioned assigned their contracts to a trustee, wherein also the creditors agreed not to sue the contractor and wherein also all the creditors agreed to release their lien claims. The opinion by Mr. Justice Black for this Court, on page 383, reads partly as follows:

“But, even so, it is quite difficult to see how the complainant can succeed. He claims the benefit of the act (P. L. 1898, p. 481; P. L. 1903, p. 541, Par. 28), which provides that it shall be lawful for any person for whose benefit any contract may have been made to maintain an action upon the contract in his own name, at law or in equity, notwithstanding the consideration of such contract did not move from such person. The construction of that statute is not an open question in this court. Its meaning has been firmly settled. Also, its proper application indicated in several cases.

In the case of *American Malleables Co. v. Town of Bloomfield*, 83 N. J. Law 736, the rule is clearly and succinctly stated thus. In *Styles v. Long Co.*, 70 N. J. Law 301, affirm-

ing 67 N. J. Law 413, the court held, that one not a party to a contract has no status to sue upon it if he be a person with whom the contracting parties never meant to come into contractual relations, and that a possible benefit to such party by the performance of a contract is not enough to give him the right to maintain an action upon it. To have that effect, it must appear that the contract was made for his benefit. So, *Lawrence v. Union Ins. Co.*, 80 N. J. Law 135, 136; 13 Corp. Jur. 709; 6 R. C. L. 882, Par. 271.

From these cases it seems quite clear that the rule is well settled that before one not privy to a contract can maintain an action upon it, it must appear that the contract was made for his benefit and so intended. There is nothing in the agreement that indicates or even suggests that it was made for the benefit of the complainant. A benefit accruing to him is not enough."

It is respectfully submitted that the charges of conspiracy are absolutely without foundation and are scandalous.

Since there is no contractual obligation on the part of either the complainant or the Foundation Building and Loan Association to the appellant, the only basis for any liability at all by one or both of the appellees will have to be found in the Mechanic's Lien Act. It is respectfully submitted there is none.

Under Section 1 of the Mechanic's Lien Act, (Volume 3, Compiled Statutes of 1910, page 3291) the building and land itself is subject to a lien for the materials furnished in connection with the erection and construction of the building.

Sections 10, 14, 15 and 28 deal with questions of *priority* as between lien claimants and mortgagees. An examination of the Mechanic's Lien

Act will disclose that nowhere does it give a lien claimant a right as against a mortgagee, personally; that nowhere does the act give a lien claimant a right to the mortgage moneys.

In *Dalrymple v. Ramsey*, 45 Eq. 494, it is held that the mechanic's lien given by statute extends to legal estates and interests only and does not embrace equitable estates or interests. The opinion by Vice-Chancellor Van Fleet reads in part, on page 496, as follows:

“The lien and the mode of enforcing it are creatures of the statute. *Ayers v. Revere*, 1 Dutch. 474-481. The lien is just what the statute makes it. The courts have no power either to enlarge or lessen it. Independent of the statute, a debt contracted in the erection of a building stands no higher, in point of natural justice, than many other debts, and the lienable quality of such a debt should, therefore, be rigidly restricted to just what legislature has made it. The question as to what estates or interests in lands the legislature meant to put within the grasp of this lien, can only be accurately determined by a full and careful examination and consideration of all parts of the statute.”

*Dalrymple v. Ramsey* was cited with approval by this court in *Davis v. Mial*, 86 Law 167, and *Franklin Society v. Thornton*, 85 Eq. 525.

In *Boynnton Lumber Co. v. Evans*, 101 Law 120, the following appears in the opinion by Mr. Justice Minturn for this court:

“The defense manifestly is constructed upon the legal theory that since Evans sustained no legal relation as builder, or otherwise, with the owner Tanner, and since the owner had performed his coventual obligations with his contractor, no right of action can arise by which the acts of Evans will impose an obligation upon Tanner, particularly in view of certain alleged dealings

between the plaintiff, Gallagher and Tanner, which it is contended should be subjected to the discussion and scrutiny of a jury for determination.

Our examination of the facts lead us to the conclusion that there was no jury question involved in the case, and that the answer was properly struck out at the Circuit. *Obviously, the contractual relationship of the parties is not the matter in issue, since the right of the plaintiff to recover is based entirely upon the statutory remedy provided for the purpose by the Mechanic's Lien Act.*" (Italics mine.)

In the case at bar, the Foundation Building and Loan Association had absolutely no dealings with Varlese; it made a mortgage loan to Boyarsky & Gordon, which fell through by reason of Boyarsky & Gordon's default in finishing the building and not because of any default by the Building and Loan Association. The Foundation's agreement to loan Boyarsky & Gordon money was conditioned upon its obtaining a first lien upon the completed premises in question and was not made with any intention, or for the purpose, of benefiting Varlese. Moreover, the Boyarsky & Gordon title was wiped out by the foreclosure and it is submitted that for this reason alone no one had any rights to mortgage moneys as against the Foundation Building and Loan under the Boyarsky-Gordon-Foundation mortgage.

It is submitted also that analogies may be drawn from the case of *Bernz v. Marcus Sayre Co.*, 52 Eq. 275, in this court. In that case the builder assigned certain moneys due and to grow due on his contract, which assignment was accepted by the owner, who agreed to pay same upon condition that the work was approved, etc., and upon said acceptance the assignee released

his lien claim; the builder abandoned his work before completion; a bill was filed by the assignee to compel the owner to account to the assignee for the difference between the cost of completing and the balance unpaid, under the provision in the contract which gave the owner a right to so complete; held that the right of the owner to complete could not be enforced against him by either the assignor or the assignee, whose rights are no higher than those of the assignor. The case at bar, it is submitted, is well within the *Bernz* case, for in the *Bernz* case there were actual dealings between the parties; there was an assignment by the builder to the complainant, who succeeded to assignor's rights; the owner accepted the assignment conditionally and upon such acceptance the assignee discharged his lien claim; it was held that since the provision for completion in the contract was for the benefit of the owner (*Bernz* case, pp. 285-286), same could not be enforced against him. In the case at bar, there were no dealings between the Building and Loan and Varlese; Varlese did not succeed to any rights of Boyarsky & Gordon; all he got was a general judgment against Boyarsky & Gordon and a lien claim and special judgment against the lands in question, prior to the first (Boyarsky & Gordon) mortgage of the Building and Loan Association, on which nothing was paid out and which fell through.

On page 286 of the *Bernz* case the opinion by Justice Depue also contains the following:

“The complainants have no ground for equitable relief under the provision in question, for the reason that that provision created no obligation or duty on the part of the defendant.”

In the case at bar there was no obligation or duty of any kind on the part of either the building and loan association or complainant to Varlese.

In conclusion it is respectfully submitted that the decree of the Court of Chancery should be affirmed with costs.

AARON MARDER,  
Solicitor for and of counsel with Berwyn Estates and Foundation Building and Loan Association, appellees.



(2) In due course, within a month judgment was entered generally against the defendant Boryarsky & Gordon, Inc., and specially against the land and building described in the bill. It was further ordered that judgment be entered that the mortgage of the Foundation Building and Loan Association covering the above premises, be subject to the plaintiff's lien claim. This judgment was docketed in the Essex County Circuit Court on December 5, 1927, twenty-two days before the mortgage foreclosure sale held at the instance of the complainant herein, at which complainant bid in the premises for two thousand dollars, and subsequently secured a deed from the sheriff therefor on January 9, 1928.

(3) The work was done and the materials were furnished by this defendant between the 27th day of April, 1927, and the first day of July, 1927, and at the time of the filing of the bill of complaint in this cause the said premises were subject to the right of the lien of this defendant for work and materials under the Mechanic's Lien Act.

(4) Complainant did not make the Foundation Building and Loan Association a party to the foreclosure proceedings, and at the sheriff's sale took title subject to the mortgage of the Building and Loan Association.

(5) This defendant was not made a party to this foreclosure suit and his right of lien remained unaffected thereby, and still so remains by virtue of the judgment obtained against said premises.

(6) The complainant herein had knowledge of the proceedings pending on behalf of Enrico Varlese, and took title from the sheriff with

full knowledge of the lien claim and the judgment above described.

(7) The mortgage of the building and loan association was made and recorded subsequent to the defendants said right of lien and is also subject thereto, and the said deed by the sheriff to the complainant was not only subject to Foundation Building and Loan mortgage, but also subject to this complainant's right of lien.

(8) Since the above lien claim was filed and judgment entered, defendant Enrico Varlese is informed and verily believes that the payments, upon the principal sum of the building and loan mortgage would suffice to pay off the District Court judgment obtained by defendant.

(9) Defendant, Enrico Varlese, is informed and verily believes that the balance of the sheriff's sale purchase price was delivered over to the complainant herein.

This defendant therefore prays:

(1) That a writ of subpoena be issued out of this court directed to the Foundation Building and Loan Association, commanding the said Foundation Building and Loan Association to answer this counter-claim and to abide by such decree as this court may make in the premises.

(2) That said complainants, Berwyn Estates and Foundation Building and Loan Association may answer this counter-claim and each statement herein made.

(3) That the said complainant may be decreed to account for all the moneys received by it out of the purchase price of the premises in question at the sheriff's sale, and out of

same pay and satisfy the judgment and costs of this defendant.

(4) That the said Foundation Building and Loan Association may be decreed to account for all moneys received by it as payments on account of the principal of the building and loan mortgage above referred to, or as payments on the loan on the certificates of stock pledged to it by Boyarsky & Gordon, Inc., as security for the payment of the said mortgage.

(5) That the said complainant and the said Foundation Building and Loan Association or either of them may be decreed to pay to this defendant the amount of five hundred dollars with interest and costs due on the judgment of the East Orange District Court.

GEORGE A. HENDERSON,  
Solicitor of Defendant, Enrico Varlese.



