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Notice of Appeal.

Notice of Appeal.

Filed April 30, 1930.

In Chancery of New Jersey

Between

ELEVENTH WARD BUILDING &
LOAN ASSOCIATION,

Complainant,

and

CARLO CAMPAGNA, *et als.,*

Defendants.

On Bill, &c.

*Notice of
Appeal.*

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To Eleventh Ward Building & Loan Association,
the above-named complainant, and Scott
German, Esq., its solicitor.

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The defendants, Belleville Sash & Door Corp.,
H. B. Salmon Company and Channel Lumber
Company of Belleville, N. J., corporations of
New Jersey, hereby appeal from the final decree
made in the above entitled cause on the 17th
day of April, 1930, and from the whole and
every part thereof, to the Court of Errors and
Appeals in the last resort in all causes.

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Said decree was made by the Chancellor on
the advice of Vice-Chancellor Church.

Dated April 23, 1930.

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Notice of Appeal.

HARRY PHILLIPSON,
Solicitor for Defendants, Belleville
Sash & Door Corp. and H. B. Salmon
Company.

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MILTON J. FINKELSTEIN,
Solicitor for Defendant, Channel Lum-
ber Company of Belleville, N. J. and
of Counsel with Defendants, Belle-
ville Sash & Door Corp., H. B.
Salmon Company and Channel Lum-
ber Company of Belleville, N. J.

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

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HARRY PHILLIPSON,
MILTON J. FINKELSTEIN,
Solicitors for Defendants, Belleville
Sash & Door Corp., H. B. Salmon
Company and Channel Lumber Com-
pany of Belleville, N. J.

MILTON J. FINKELSTEIN,
Of Counsel.

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Petition of Appeal.

Petition of Appeal.

Filed May 15, 1930.

New Jersey Court of Errors and Appeals

Between

ELEVENTH WARD BUILDING &
LOAN ASSOCIATION,
Complainant-Respondent,

and

CARLO CAMPAGNA, MRS. CARLO
CAMPAGNA, wife of Carlo
Campagna, ENRICO BENAC-
QUISTA, CHANNEL LUMBER
COMPANY OF BELLEVILLE,
N. J., H. B. SALMON COM-
PANY and BELLEVILLE SASH
& DOOR CORP.,
Defendants-Appellants.

*On Appeal
from Court
of Chancery.*

*Petition of
Appeal of
Channel Lum-
ber Company
of Belleville,
N. J., H. B.*

*Salmon Com-
pany and
Belleville
Sash & Door
Corp.*

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*To the Honorable the Court of Errors and Ap-
peals, in the Last Resort in all Causes in the
State of New Jersey:*

The petition of Channel Lumber Company of
Belleville, N. J., H. B. Salmon Company, and
Belleville Sash & Door Corp., corporations of
New Jersey, the appellants in the above-entitled
cause, respectfully show that: 30

1. Petitioners find themselves aggrieved by a
final decree made in the Court of Chancery by
his Honor Edwin Robert Walker, Chancellor of
the State of New Jersey, upon the advice of his
Honor Alonzo Church, Vice-Chancellor, bearing
date April 17, 1930, in a certain cause in said 40

Petition of Appeal.

Court of Chancery wherein the said Eleventh Ward Building & Loan Association was the complainant, and Carlo Campagna, Mrs. Carlo Campagna, wife of Carlo Campagna, Enrico Benacquista, Channel Lumber Company of Belleville, N. J., H. B. Salmon Company and Belleville Sash & Door Corp., were defendants, in this respect, to wit:

That said final decree adjudged that the complainant's mortgage was a first lien on the mortgaged premises described in paragraph 4 of the bill of complaint and known as 163 North 15th Street, Bloomfield, New Jersey, and prior to the mechanics' liens of the defendants, Belleville Sash & Door Corp., H. B. Salmon Company, Channel Lumber Company of Belleville, N. J., upon said premises, and that said mortgaged premises be sold to raise and satisfy said sum of money due the complainant; that is to say, the sum of \$11,478.06 with interest thereon from January 20, 1930, and costs to be taxed and that a writ of fieri facias do issue for that purpose out of said Court of Chancery directed to the Sheriff of the County of Essex commanding him to make sale according to law of the said mortgaged premises and out of the money arising from such sale to pay to the complainant, or its solicitor, said debt, interest and costs; and that in case more money should be raised from the said sale than should be sufficient to answer such payments, that such surplus be brought into said court to abide the further order of the Court, unless otherwise previously disposed of by the order of said court; and further that the defendants, Belleville Sash & Door Corp., H. B. Salmon Company and Channel Lumber Company of Belleville, N. J., the appellants herein, and

Petition of Appeal.

each of them, stand absolutely barred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises when sold as aforesaid, by virtue of said decree; and further allowing a counsel fee of \$300 to the solicitor of the complainant.

2. And petitioners appeal from the whole and every part of said final decree of the Chancellor, which decrees as aforesaid; upon the ground that the same is erroneous, contrary to law, and contrary to the facts established at the hearing, in that:

(a) The Court should have found that the appellants, Belleville Sash & Door Corp., H. B. Salmon Company, and Channel Lumber Company of Belleville, N. J., furnished materials to the mortgaged premises, 163 North 15th street, Bloomfield, New Jersey, in the erection and construction thereof, between certain dates, more specifically set forth in the mechanics lien claims filed by such appellants respectively, in the Essex County Clerk's office, and that such materials were sold not only to Enrico Benacquista, who was the general contractor, but also to Raffaele Benacquista who was at the time of the furnishing of such materials, owner of said premises and who subsequently conveyed the same to Carlo Campagna.

(b) The Court should have found that even though a general contract was entered into between Raffaele Benacquista as owner, and Enrico Benacquista as general contractor, for the erection and construction of a building upon the mortgaged premises, 163 North 15th street, Bloomfield, New Jersey, which was duly filed with its specifications in the County Clerk's

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Petition of Appeal.

office of Essex County on November 22, 1928, the appellants, Belleville Sash & Door Corp., H. B. Salmon Company, and Channel Lumber Company of Belleville, N. J., were entitled to their respective mechanics' lien claims against the said premises, first—because the materials
10 sold by the appellants were sold to the owner in addition to being sold to the builder, both being primarily liable for the payment thereof, and secondly—because the general contract filed as aforesaid was a fictitious document (as the Court should have found), entered into between parties who were not actually contracting but who were merely pretending to do so.

(c) The Court should have found that the appellant, Belleville Sash & Door Corp., was
20 entitled to and had established its mechanics' lien claim against the said premises in the sum of \$894.14, together with interest from November 9, 1929; that the appellant, H. B. Salmon Company, was entitled and had established its mechanics' lien claim against the said premises in the sum of \$859.50, together with interest from November 7, 1929; and that the appellant, Channel Lumber Company of Belleville, N. J., was
30 entitled to and had established its mechanics' lien claim against the said premises in the sum of \$825.87, together with interest from October 7, 1929.

(d) The Court should have found that the complainant's mortgage upon the premises, 163 North 15th street, Bloomfield, New Jersey, was recorded after the commencement of the building upon the said mortgaged premises and that the funds actually advanced thereon were not paid by the complainant and applied to the erection
40 and construction of the new building thereon

Petition of Appeal.

within the purview of section 15 of an act entitled "An Act to secure to mechanics and others, payment for their labor and materials in erecting any building and in making certain improvements to land (Revision of 1898)" and the several acts supplemental thereto and amendatory thereof, and that by reason thereof the Court should have found that the mechanics' lien claims aforesaid of the appellants were superior in point of priority to the lien of complainant's mortgage upon the said premises described in paragraph 4 of the bill of complaint. 10

(e) The Court should have granted the prayer contained in the said counter-claims filed by appellants and should have decreed that the mechanics' lien claims of the appellants be first liens upon said premises concurrent in priority amongst themselves, and prior to the lien of complainant's mortgage thereon, and that said mortgaged premises be sold to raise and satisfy said sum of money due to the appellants as aforesaid, and costs to be taxed, in the first place; and in the second place, to raise and satisfy the sum of money due the complainant on its bond and mortgage, that is to say, the sum of \$11,478.06 with interest thereon from January 20, 1930, and costs to be taxed; and that a counsel fee of such sum as the Court will deem proper be allowed to the solicitors for the appellants herein. 20 30

3. Petitioners further pray that said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden, and that peti-

Petition of Appeal.

tioners may have such other relief in the premises as to this court shall seem proper.

HARRY PHILLIPSON,
Solicitor for Defendants, Belleville
Sash & Door Corp. and H. B. Salmon
Company.

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MILTON J. FINKELSTEIN,
Solicitor for Defendant, Channel Lum-
ber Company of Belleville, N. J. and
of Counsel with Defendants, Belle-
ville Sash & Door Corp., H. B.
Salmon Company and Channel Lum-
ber Company of Belleville, N. J.

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Answer to Petition of Appeal.

Answer to Petition of Appeal.

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

Between

ELEVENTH WARD BUILDING &
LOAN ASSOCIATION,
Complainant-Respondent,

and

CARLO CAMPAGNA, MRS. CARLO
CAMPAGNA, wife of Carlo
Campagna, ENRICO BENAC-
QUISTA, CHANNEL LUMBER
COMPANY OF BELLEVILLE,
N. J., H. B. SALMON COM-
PANY and BELLEVILLE SASH
& DOOR CORP.,
Defendants-Appellants.

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*On Appeal
from Court of
Chancery.*

*Answer to
Petition of
Appeal.*

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The answer of Eleventh Ward Building & Loan Association of Newark, N. J., complainant and respondent, to the petition of appeal of the above-named appellants.

This respondent, not admitting the truth of any or all of the matters in the said petition of appeal contained, for answers thereto, nevertheless, admit that a decree was on the 17th day of April, 1930, made and entered in the Court of Chancery of New Jersey, in the above-entitled cause, for the purpose, in said petition mentioned, and as therein set forth; but as to the substance and form of said decree, this respondent begs leave to refer thereto when the same shall be produced.

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Answer to Petition of Appeal.

This respondent is advised and believes that the said decree is agreeable to equity, and prays that the same may be affirmed with costs to be taxed in favor of this respondent.

SCOTT GERMAN,
Solicitor for and of Counsel
with Respondent.

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*Bill of Complaint.***Bill of Complaint.**

IN CHANCERY OF NEW JERSEY.

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

The complainant, ELEVENTH WARD BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., a corporation, with its principal office in the City of Newark, County of Essex and State of New Jersey, respectfully shows that:

1. On December 6, 1928, ENRICO BENACQUISTA being indebted to Eleventh Ward Building & Loan Association of Newark, N. J., in the sum of \$11,500 executed to it a bond of that date to secure that sum, payable with interest thereon and any fines which might thereafter accrue as provided for by the constitution of said Association and was thereby duly assented to by the said obligor and made a part thereof, to wit, by the payment of one dollar on each of said one hundred dollars of said loan, that is to say, by the payment of \$115 on the fourth Monday of each and every month thereafter, or such other time as might thereafter be appointed for that purpose, which said monthly payments of \$115 said obligor thereby agreed should be applied, first to the payment of any fines due from said obligor to complainant, then to the payment of interest on said loan, to be computed from the date thereof at the rate of 6% per annum, and the balance to be applied to dues on 115 shares of stock of complainant owned by said obligor standing in his name on the books of complainant, and assigned to it as collateral security for the payment thereof, and on which said loan was

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Bill of Complaint.

based, until the said shares should attain the par value of \$100 each.

10 2. To secure payment of the bond, said Enrico Benacquista and Emilia Benacquista, his wife, executed to said complainant a mortgage of even date with the bond, and thereby conveyed to it in fee, the land hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond, which mortgage having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon, was recorded in the Register's Office of Essex County in Book D 66 of Mortgages for said county, pages 544-546.

20 3. The mortgaged premises are described as follows:

All that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Town of Bloomfield, in the County of Essex and State of New Jersey.

30 BEGINNING at a point in the northwesterly line of North Fifteenth street, the said beginning point being distant northeasterly along the same five hundred seventy-five feet and seventeen one-hundredths of a foot from the point of intersection of the said northwesterly line of North Fifteenth street and the northeasterly line of First avenue; thence (1) north sixty degrees five minutes west one hundred feet; thence (2) north twenty-nine degrees fifty-five minutes east thirty-three feet and thirty-three one-hundredths of a foot; thence (3) south sixty degrees five minutes east one hundred feet to the afore-

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Bill of Complaint.

said northwesterly line of North Fifteenth street; thence (4) along the same south twenty-nine degrees fifty-five minutes west thirty-three feet and thirty-three one-hundredths of a foot to the point and place of BEGINNING.

According to a recent survey made by Watkins & Leach, surveyors, Bloomfield, N. J. 10

Being part of the same lands and premises conveyed to the said Enrico Benacquista, by deed recorded in Book F 78 of Deeds for Essex County, page 382.

4. On December 6, 1928, said Enrico Benacquista became further indebted to said complainant in the further sum of \$11,500 executed to it a bond of that date to secure that sum, payable with interest thereon and any fines which might thereafter accrue as provided for by the constitution of said Association which was thereby duly assented to by said obligor and made a part thereof, to wit, by the payment of one dollar on each of said one hundred dollars of said loan, at the time and in the manner as provided for and set forth in bond particularly hereinbefore mentioned and set forth in paragraph 1 of this bill of complaint and which said payments should be applied as therein set forth; and in order to secure said bond said Enrico Benacquista and Emilia Benacquista, his wife, executed to said Association a mortgage of similar date, conditions and terms as set forth in paragraph 2 hereof, which said mortgage having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon, was recorded in the Register's Office of Essex County in Book Y 66 of Mortgages for said county, pages 191-193, 20 30 40

Bill of Complaint.

and which said mortgaged premises are described as follows:

10 All that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Town of Bloomfield in the County of Essex and State of New Jersey.

20 BEGINNING at a point in the northwesterly line of North Fifteenth street, the said beginning point being distant northeasterly along the same six hundred eight feet and fifty one-hundredths of a foot from the point of intersection of the said northwesterly line of North Fifteenth street and the northeasterly line of First avenue; thence (1) north sixty degrees five minutes west one hundred feet; thence (2) north twenty-nine degrees fifty-five minutes east thirty-three feet and fifty one-hundredths of a foot; thence (3) south sixty degrees five minutes east one hundred feet to the aforesaid northwesterly line of North Fifteenth street; thence (4) along the same south twenty-nine degrees fifty-five minutes west thirty-three feet and fifty one-hundredths of a foot to the point and place of BEGINNING.

30 According to a recent survey made by Watkins & Leach, surveyors, Bloomfield, N. J.

Being part of the same lands and premises conveyed to the said Enrico Benacquista by deeds recorded in Book A 78 of Deeds for Essex County, on page 597; and F 78 of Deeds for Essex County, page 382.

40 5. Both of said bonds and mortgages and each and every of them contained an agreement that should any default be made in the

Bill of Complaint.

payment of said monthly payments of \$115 above mentioned or any or either of them, or of any other moneys therein agreed to be paid, or of any part thereof on any day whereon the same was made payable, as above expressed, or should any tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien be thereafter imposed or acquired upon the premises described in the mortgages accompanying said bonds, and become due and payable; and should any of such monthly payments or any part thereof, or any other moneys, 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 two months, then and from thenceforth, that is to say, after the lapse or expiration of said period, the aforesaid principal sums of \$11,500 or the balance thereof remaining unpaid with all arrearage of interest and fines thereon, and other moneys should at the option of complainant or its legal representative become and be due and payable immediately thereafter.

6. Any interest which the said Enrico Benacquista has in said lands is subject to complainant's mortgage.

7. On August 2, 1929, said Enrico Benacquista and Emilia Benacquista, his wife, conveyed said mortgaged premises by deed of that date to Carlo Campagna, in fee; which deed was on August 3, 1929, recorded in the Register's Office of Essex County in Book B 80 of Deeds for said county, page 107; and which said deed recited that it was subject to complainant's mortgages.

Bill of Complaint.

Any interest which the said Carlo Campagna has in said lands is subject to complainant's mortgages.

10 8. Said Carlo Campagna is married, but notwithstanding due inquiry has been made therefor, the Christian name of such wife of said Carlo Campagna cannot be ascertained. Any claim or interest she may have, by way of inchoate right of dower, or otherwise, is subject to complainant's mortgages.

20 9. On September 11, 1929, Channel Lumber Co. of Belleville, N. J., recovered a judgment against Carlo Campagna, Enrico Benacquista, *et als.*, in the Essex County Circuit Court for the sum of \$825.87 or some other sum, recorded in Book 108 of Circuit Court Judgments, page 317; by virtue of which said judgment, said Channel Lumber Co. of Belleville, N. J., claims or may claim to have some lien upon said mortgaged lands, but any such lien is subject to complainant's mortgages.

30 10. On October 7, 1929, Channel Lumber Co. of Belleville, N. J., recovered a judgment against Carlo Campagna, Enrico Benacquista, *et als.*, in the Essex County Circuit Court for the sum of \$788.09 or some other sum, recorded in Book 108 of Circuit Court Judgments, page by virtue of which said judgment, said Channel Lumber Co. of Belleville, N. J., claims or may claim to have some lien upon said mortgaged lands, but any such lien is subject to complainant's mortgages.

40 11. On August 16, 1929, or some other date, one H. B. Salmon Company, filed a Mechanics' Lien in the Clerk's Office of the County of Essex

Bill of Complaint.

for \$803.29 or some other sum, against premises hereinabove described and set forth in paragraph 4, making among others Carlo Campagna a party to said proceedings; by virtue of which said Mechanics' Lien said H. B. Salmon Company, claims or may claim to have some lien upon said mortgaged lands, but any such lien is subject to complainant's mortgages. 10

12. On August 16, 1929, or some other date, one Channel Lumber Co. of Belleville, N. J., filed a Mechanics' Lien in the Clerk's Office of the County of Essex for \$722.77 or some other sum, against premises hereinabove described and set forth in paragraph 4, making among others Carlo Campagna, as owner, a party to said proceedings; by virtue of which said Mechanics' Lien said Channel Lumber Co. of Belleville, N. J., claims or may claim to have some lien upon said mortgaged lands, but any such lien is subject to complainant's mortgages. 20

13. On September 9, 1929, or some other date, one Belleville Sash & Door Corporation, filed a Mechanics' Lien in the Clerk's Office of the County of Essex for \$872.33 or some other sum, against premises hereinabove described and set forth in paragraph 4, making among others Carlo Campagna, as owner, a party to said proceedings; by virtue of which said Mechanics' Lien said Belleville Cash & Door Corporation, claims or may claim to have some lien upon said mortgaged lands, but any such lien is subject to complainant's mortgages. 30

14. That said Enrico Benacquista and Carlo Campagna have failed and neglected to make said monthly payments of \$115 each, to said complainant at the time and in the manner here- 40

Bill of Complaint.

inabove set forth, as particularly mentioned and described in the bonds and mortgages given to said complainant as aforesaid, and so failed and neglected to pay the same for the space of more than two months after the said monthly payments became in arrears and due and payable, and
 10 which said monthly payments remain and are still due and unpaid.

15. Complainant has elected that the whole principal sums of said several mortgages, with all unpaid interest, dues, fines and other moneys remaining unpaid, shall be now due and complainant has adopted a resolution for the foreclosure of said mortgages.

16. That said Enrico Benacquista and Carlo
 20 Campagna, or some or one of them have always been in possession of said mortgaged premises.

17. That the sum of \$11,277.50 besides interest and fines from September 30, 1929, is due on the bond and mortgage given to complainant dated December 6, 1928, mentioned and set forth in paragraph 1 of this bill; and the further sum of \$11,277.50 besides interest and fines from September 30, 1929, is due on the bond and mortgage
 30 given to complainant dated December 6, 1928, mentioned and set forth in paragraph 4 of this bill; as agreed in said several bonds and mortgages to complainant, is the balance due on the complainant's bonds and mortgages. The complainant is without adequate remedy in the courts of law, and, therefore, prays:

1. That said Carlo Campagna and Mrs. Carlo Campagna, his wife; Enrico Benacquista; Enrico Benacquista; Channel Lumber Co. of Belleville, N. J.; H. B. Salmon Company, and Belleville
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Bill of Complaint.

Sash & Door Corporation, who are the defendants to this suit may answer this bill of complaint without oath and each statement therein made;

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

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

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

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

SCOTT GERMAN,
Solicitor for and of Counsel
with Complainant.

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Proof of Inquiry.

IN CHANCERY OF NEW JERSEY.

	<i>Between</i>	
10	ELEVENTH WARD BUILDING & LOAN ASSOCIATION OF NEW- ARK, N. J.,	} <i>On Bill, &c.</i> <i>Affidavit.</i> <i>Proof of</i> <i>Inquiry, &c.</i>
	<i>Complainant,</i>	
	<i>and</i>	
	CARLO CAMPAGNA, <i>et als.</i> , <i>Defendants.</i>	

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

20 SCOTT GERMAN, being duly sworn on his oath according to law, deposes and says:

1. I am the solicitor for and of counsel with the complainant in the above-entitled suit, and the person actually entrusted with the conduct of this suit on the part of the complainant.

2. I have made due inquiry for the Christian name of the wife of Carlo Campagna, one of the defendants herein, and notwithstanding such due inquiry, I have been unable to ascertain her
30 Christian name.

SCOTT GERMAN.

Sworn and subscribed to before
me this 23rd day of October,
1929.

ELIZABETH ANDERSEN,
Notary Public of New Jersey.

Answer and Counter-claim of Belleville Sash & Door Corporation.

**Answer and Counter-claim of
Belleville Sash & Door Corp.**

The defendant, Belleville Sash & Door Corp., one of the defendants in the above-entitled matter, a corporation of New Jersey with its principal office in the City of Newark, County of Essex and State of New Jersey, answering the bill of complaint herein, says: 10

1. This defendant admits the execution and delivery of the instruments referred to in paragraphs 1, 2 and 3 of the bill of complaint herein, but as to the allegations that at the time of the execution and delivery of said instruments the said Enrico Benacquista was indebted to the Eleventh Ward Building & Loan Association of Newark, N. J., in the sum of \$11,500.00, this defendant has not sufficient information or knowledge to form a belief. 20

2. This defendant admits the execution and delivery of the instruments referred to in paragraph 4 of said bill of complaint, but denies that at the time of the execution and delivery of the said bond and mortgage referred to in said paragraph 4 there was, or that at the present time there is, due to the said complainant thereon the sum of \$11,500.00. 30

3. This defendant neither admits nor denies the allegations contained in paragraph 5 of the said bill of complaint, but leaves the complainant upon its proof.

4. This defendant admits that if anything is due upon the said mortgage of complainant, referred to in paragraph 4 of the bill of complaint, any interest which the said Enrico Benacquista 40

Answer and Counter-claim of Belleville Sash & Door Corporation.

may have in said lands particularly described in said paragraph 4 is subject to complainant's mortgage; but as to any interest of Enrico Benacquista in the lands described in paragraph 3 of the said bill of complaint, this defendant
10 neither admits nor denies the same, not having sufficient information or knowledge to form a belief and not being concerned therewith in this answer.

5. It admits the allegations contained in paragraphs 7, 8, 9 and 10 of the said bill of complaint.

6. It neither admits nor denies the allegations contained in paragraphs 11 and 12 of said bill
20 of complaint, not having sufficient information or knowledge to form a belief.

7. As to paragraph 13 of said bill of complaint, it admits that on September 9, 1929, or some other date, the Belleville Sash & Door Corp., filed a mechanics' lien claim in the Clerk's office of the County of Essex for the sum of \$872.33 or some other sum, against the premises described and set forth in paragraph 4
30 of the bill of complaint, making among others, Carlo Campagna a party to said proceedings, by virtue of which mechanics' lien this defendant, Belleville Sash & Door Corp., claims, or any claim, to have some lien upon said mortgaged lands, but denies that any such lien is subject to complainant's mortgage.

8. It neither admits nor denies the allegations contained in paragraphs 14 and 15 of said bill of complaint, not having sufficient information
40 or knowledge to form a belief.

9. It admits paragraph 16.

Answer and Counter-claim of Belleville Sash & Door Corporation.

10. It neither admits nor denies that the sum of \$11,277.50, besides interest and fines from September 30, 1929, is due on the bond and mortgage given to complainant dated September 6, 1928, mentioned and set forth in paragraph 1 of said bill of complaint, not being concerned with the said mortgage in this answer; but it denies the allegations contained in paragraph 17 of the said bill of complaint that the sum of \$11,277.50, besides interest and fines from September 30, 1929, is due on the bond and mortgage given to the complainant dated December 6, 1928, mentioned and set forth in paragraph 4 of the said bill of complaint. 10

BY WAY OF COUNTER-CLAIM AGAINST THE COMPLAINANT, ELEVENTH WARD BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., CARLO CAMPAGNA, MRS. CARLO CAMPAGNA, wife of Carlo Campagna, CHANNEL LUMBER CO. OF BELLEVILLE, N. J., and ENRICO BENACQUISTA, THIS DEFENDANT ALLEGES: 20

11. On or about the 18th day of July, 1928, the defendant, Enrico Benacquista, became the owner in fee simple of the premises more particularly and fully described in paragraph 4 of the bill of complaint herein. 30

12. Thereafter the defendant, Enrico Benacquista, commenced the construction and erection of a one-family frame dwelling house upon the said lands and premises and for that purpose the defendant, Belleville Sash & Door Corp., sold and delivered to Raffaele Benacquista and the defendant, Enrico Benacquista, individually and as partners, trading as Benacquista Bros., 40

Answer and Counter-claim of Belleville Sash & Door Corporation.

10 certain building materials between the 28th day of October, 1928, and the 10th day of May, 1929, inclusive, at the special instance and request of the said Raffaele Benacquista and Enrico Benacquista, as individuals and partners, trading as Benacquista Bros., for the erection and construction of the said building upon said lands, and in consideration thereof the said Raffaele Benacquista and Enrico Benacquista, individually and as partners, trading as Benacquista Bros., agreed to pay the reasonable price for the said materials so sold and delivered. The amount due for such materials, charged in conformity with said agreement was and still is the sum of \$872.33, no part of said sum having been paid.

20 13. On or about August 2, 1929, and after the commencement of said building, the said defendant, Enrico Benacquista, and Emilia Benacquista, his wife, conveyed the said premises to the defendant, Carlo Campagna.

30 14. On the 9th day of September, 1929, the defendant, Belleville Sash & Door Corp., caused to be filed in the Essex County Clerk's office a mechanics' lien claim for the said indebtedness under and by virtue of the statute entitled "An Act to secure to mechanics and others, payment for their labor and materials in erecting any building and in making certain improvements to land (Revision of 1898)" and the several acts supplemental thereto and amendatory thereof, which said mechanics' lien claim, filed in the said County Clerk's office in Book ML-27, page 166, was filed against the lands and premises described in paragraph 4 of the bill of complaint herein. Summons and complaint was issued upon 40 said mechanics' lien claim on September 9, 1929,

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the issuance of which was duly endorsed upon said lien claim.

15. The suit in the said Essex County Circuit Court, based upon the mechanics' lien claim, joins as party defendant therein, among others, the complainant, Eleventh Ward Building & Loan Association of Newark, N. J., alleging that the lien claim of the plaintiff in that action, the defendant in this cause, is superior in point of priority to the mortgage of the Eleventh Ward Building & Loan Association set forth in paragraph 4 of the bill of complaint herein to the extent of the moneys not advanced thereon and/or not actually used in defraying the costs of the construction and erection of the building upon said lands. Answer has been filed by the said Eleventh Ward Building & Loan Association, but the question of priority has not yet been determined by the Essex County Circuit Court and this defendant believes that the hearing upon the said matter will come up in the Court of Chancery of New Jersey prior to trial in the Essex County Circuit Court.

16. As to the remaining defendants in the said cause pending in the Essex County Circuit Court, the defendant, Belleville Sash & Door Corp., says that it has entered a judgment in its favor for the sum of \$894.14 with costs to be taxed, against Raffaele Benacquista and Enrico Benacquista, partners trading as Benacquista Bros., generally and specially to be made of the lands and premises more particularly described in paragraph 4 of the bill of complaint herein.

17. On November 22, 1928, there was filed in the Essex County Clerk's office a purported con-

*Answer and Counter-claim of Belleville Sash &
Door Corporation.*

tract by and between Enrico Benacquista and
Raffaele Benacquista, which contract pretended
to be an agreement for the completion of the
building situated on the lands described in para-
graph 4 of the bill of complaint for the sum of
10 \$13,000. This defendant is informed and truly
believes, and therefore charges as a fact, that the
said purported contract was made not between
parties who were actually and bona fide con-
tracting for the erection of the said building upon
the said premises, but between parties who were
merely pretending to do so, and that said con-
tract, although seeming to be valid of record,
is not an actual contract between the parties
aforesaid, but is merely a fictitious document and
20 a meaningless paper filed of record and that pay-
ments therein specified to be made were never
actually made or intended to be made either at
the time of the making of the contract or at
any time thereafter; and that said contract was
filed fraudulently and solely for the purpose of
attempting to prevent lawful mechanic liens
from attaching to the said premises; and that
by reason of the fictitious and fraudulent
character of the said contract, said contract is
30 void and of no effect as against plaintiff or lien
claimants.

18. The amount due this defendant amounting
to \$894.14 aforesaid, is a lien upon the lands
and building particularly described in paragraph
4 of the bill of complaint by virtue of the pro-
visions of an act entitled "An Act to secure to
mechanics and others, payment for their labor
and materials in erecting any building and in
making certain improvements to land (Revision
40 of 1898)" and the several acts supplemental
thereto and amendatory thereof.

Answer and Counter-claim of Belleville Sash & Door Corporation.

19. Subsequent to the commencement of the building to be erected upon the said lands described in paragraph 4 of the bill of complaint herein, Enrico Benacquista and Emilia Benacquista, his wife, executed the bond and mortgage referred to in paragraph 4 of the said bill of complaint to secure the nominal sum of \$11,500. This defendant is informed and truly believes, and therefore charges as a fact, that no money was paid out or advanced by the complainant at the time of the making and execution of the said bond and mortgage aforesaid and that any moneys that may have been advanced by the said complainant thereafter upon said bond and mortgage, were not used or applied in the erection and construction of the building upon said lands and premises. This defendant further says that at no time did this defendant execute or sign or deliver any agreement or stipulation wherein and whereby the lien of this defendant was subordinated or postponed to the lien of complainant's mortgage. 10
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20. This defendant further says that its lien aforesaid is superior in point of priority to the lien of the said mortgage to the extent of the moneys not advanced thereon and/or not actually used in defraying the costs of construction of the building upon said lands. 30

21. On September 11, 1929, the Channel Lumber Co. of Belleville, N. J., recovered a judgment against Carlo Campagna, Enrico Benacquista, *et als.*, in the Essex County Circuit Court for the sum of \$825.87, which said judgment is docketed in Book 108 of Circuit Court Judgments on page 317. This defendant says that the lien of said judgment, which is a general judgment and 40

Answer and Counter-claim of Belleville Sash & Door Corporation.

entered subsequent to the commencement of the said building, is inferior in point of priority to the mechanic lien claim of the said defendant, Belleville Sash & Door Corp., and that the said Belleville Sash & Door Corp. is entitled to be
 10 paid on its lien claim prior to any payment that might be made to the Channel Lumber Co. of Belleville, N. J., and on account of said judgment.

22. On October 7, 1929, the Channel Lumber Co. of Belleville, N. J., recovered a judgment against Carlo Campagna, Enrico Benacquista, *et als.*, in the Essex County Circuit Court for the sum of \$788.09, recorded in Book 108 of Circuit Court Judgments, which said judgment is upon
 20 a mechanic lien claim filed by the Channel Lumber Co. of Belleville, N. J., against said property on August 16, 1929, in Book ML 27 on page 106.

23. The lien of the judgment or of the mechanic lien claim herein of the Channel Lumber Co. of Belleville, N. J., aforesaid, in the event said lien claim and judgment is declared by this court to be subject and subordinate to the lien of the mortgage of the Eleventh Ward Building & Loan Association, as stated in the bill of complaint herein, will be, by reason thereof, subject
 30 and subordinate to the lien of this defendant's mechanic lien claim. However, if the mechanic lien claim of the said Channel Lumber Co. of Belleville, N. J., aforesaid, is declared by this court to be superior in point of priority to the lien of the said mortgage of the Eleventh Ward Building & Loan Association to the same extent that the lien of the defendant, Belleville Sash & Door Corp., is superior to said mortgage, then
 40 and in that event the Channel Lumber Co. of Belleville, N. J., will be entitled to share pro

Answer and Counter-claim of Belleville Sash & Door Corporation.

rata in any funds realized from a sale of the said property with this defendant, Belleville Sash & Door Corp., as well as any other defendants establishing their lien claims in the same position aforesaid. This defendant further says that it has no knowledge, information or belief and therefore puts the defendant, Channel Lumber Co. of Belleville, N. J., upon its proof on the final hearing hereon as to whether or not the defendant, Channel Lumber Co. of Belleville, N. J., is entitled to a lien against the said lands or against any fund realized from a sale of said lands and as to proof with respect to priority over the mortgage of the Eleventh Ward Building & Loan Association aforesaid. 10

24. This defendant further says that by reason of its priority over the lien of complainant's mortgage, it is entitled as a matter of law to be paid out of any funds realized from a sale of the aforesaid property, prior to the payment of complainant's mortgage, or to the amount found due thereon. 20

THIS DEFENDANT IS WITHOUT ADEQUATE REMEDY IN THE COURTS OF LAW, AND THEREFORE PRAYS: 30

(a) That the complainant in this cause and all the defendants to this counter-claim may answer the allegations of this counter-claim and each statement therein made.

(b) That an account may be taken of the amount due this defendant in its lien claim aforesaid.

(c) That the complainant and/or the defendants, one or more of them, may be decreed to pay to this defendant the amount due to this 40

Answer and Counter-claim of Belleville Sash & Door Corporation.

defendant, and the amount to grow due to this defendant, on its lien claim aforesaid.

10 (d) That a determination of an adjudication may be made respecting the priority of the lien claim of this defendant with respect to the mortgage lien held by the complainant and the other defendants as may herein desire to establish their claims; and that it be decreed that the lien claim of this defendant is a lien specially against the lands and building in the bill of complaint described; that it be decreed that the said lien claim is paramount and superior to the mortgage held by the complainant; that it be decreed that the complainant by reason of its mortgage is entitled, if it so is entitled, to priority over this 20 defendant to not more than was disbursed by it or them and actually used in defraying the cost of erecting the building referred to herein; that the various equities and priorities of this defendant and the defendants to this counter-claim and the complainant herein should be settled, determined and decreed.

30 (e) That the complainant shall make discovery of, and disclose how, when and to whom, it advanced or paid the sums now claimed by it to be due on the aforesaid mortgage; and also with respect to each individual installment or advancement, of the total of such advancements, the names of the persons to whom, the dates whereon, the method by which (that is, whether by check, by cash, or otherwise) and if by check, the date of each check, the number of each check, the names of the drawee bank, the name of the payee or payees, the amount of each individual installment of payment, and also, for what item 40 of the cost of the erection of the building referred to in the complaint in this cause such payment is made.

Answer and Counter-claim of Belleville Sash & Door Corporation.

(f) That the complainant and/or the defendants to this counter-claim, or one or more of them, may be decreed to pay to this defendant the amount found due to it, with interest and costs by a short day to be appointed by this court, and that in default of such payment they and each of them be debarred and foreclosed of all equity of redemption in said lands. 10

(g) That it be decreed that the premises described in paragraph 4 of the bill of complaint herein should be sold to raise and satisfy the amount due to the complainant, this defendant, and such other defendants who may hereafter apply to this court and be admitted as party defendant in the action, and that from the proceeds arising from the sale of said premises the amounts due to the various parties be paid in the order, and to the extent to which they are equitably entitled; or 20

(h) That a decree may be made for the sale of the encumbered premises described in paragraph 4 of the bill of complaint herein to raise and pay, in the first instance, to this defendant, the amount found due to him on his claim aforesaid with interest and costs, and in the second instance to the complainant and/or to such other defendants herein as may be determined by this court. 30

(i) That this defendant may have such further and other relief as will be just and equitable.

HARRY PHILLIPSON,
Solicitor for Defendant
Belleville Sash & Door Corp.

HENRY W. LINN, 40
Of Counsel.

Answer and Counter-claim of H. B. Salmon Co.

**Answer and Counter-claim of
H. B. Salmon Company**

10 The defendant, H. B. Salmon Company, one of the defendants in the above entitled matter, a corporation of New Jersey with its principal office in the City of Newark, County of Essex and State of New Jersey, answering the bill of complaint, says:

1. This defendant admits the execution and delivery of the instruments referred to in paragraphs 1, 2 and 3 of the bill of complaint herein, but as to the allegations that at the time of the execution and delivery of said instruments the said Enrico Benacquista was indebted to the Eleventh Ward Building & Loan Association of Newark, N. J., in the sum of \$11,500.00, this defendant has not sufficient information or knowledge to form a belief.

2. This defendant admits the execution and delivery of the instruments referred to in paragraph 4 of said bill of complaint, but denies that at the time of the execution and delivery of the said bond and mortgage referred to in said paragraph 4 there was, or that at the present time there is, due to the said complainant thereon the sum of \$11,500.00.

3. This defendant neither admits nor denies the allegations contained in paragraph 5 of the said bill of complaint, but leaves the complainant upon its proof.

4. This defendant admits that if anything is due upon the said mortgage of complainant, referred to in paragraph 4 of the bill of complaint, any interest which the said Enrico Benacquista may have in said lands particularly described in

Answer and Counter-claim of H. B. Salmon Co.

said paragraph 4 is subject to complainant's mortgage; but as to any interest of Enrico Benacquista in the lands described in paragraph 3 of the said bill of complaint, this defendant neither admits nor denies the same, not having sufficient information or knowledge to form a belief and not being concerned therewith in this answer. 10

5. It admits the allegations contained in paragraphs 7, 8, 9 and 10 of the said bill of complaint.

6. As to paragraph 11 of said bill of complaint, it admits that on August 16, 1929 or some other date, the H. B. Salmon Company filed a mechanics' lien claim in the Clerk's office of the County of Essex for the sum of \$803.29 or some other sum against the premises described and set forth in paragraph 4 of the bill of complaint, making among others, Carlo Campagna a party to said proceedings by virtue of which mechanics lien this defendant, H. B. Salmon Company claims, or may claim, to have some lien upon said mortgaged lands, but denies that any such lien is subject to complainant's mortgage. 20

7. It neither admits nor denies the allegations contained in paragraphs 12, 13, 14 and 15 of said bill of complaint, not having sufficient information or knowledge to form a belief. 30

8. It admits paragraph 16.

9. It neither admits nor denies that the sum of \$11,277.50, besides interest and fines from September 30, 1929, is due on the bond and mortgage given to complainant dated September 6, 1928, mentioned and set forth in paragraph 1 of the said bill of complaint, not being concerned 40

Answer and Counter-claim of H. B. Salmon Co.

with the said mortgage in this answer; but it denies the allegations contained in paragraph 17 of the said bill of complaint that the sum of \$11,277.50 besides interest and fines from September 30, 1929 is due on the bond and mortgage given to the complainant dated December 6, 1928, mentioned and set forth in paragraph 4 of the said bill of complaint.

BY WAY OF COUNTER-CLAIM AGAINST THE COMPLAINANT, ELEVENTH WARD BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., CARLO CAMPAGNA, MRS. CARLO CAMPAGNA, wife of Carlo Campagna, CHANNEL LUMBER CO. OF BELLEVILLE, N. J., and ENRICO BENACQUISTA, THIS DEFENDANT ALLEGES:

10. On or about the 18th day of July, 1928 the defendant, Enrico Benacquista, became the owner in fee simple of the premises more particularly and fully described in paragraph 4 of the bill of complaint herein.

11. Thereafter the defendant, Enrico Benacquista, commenced the construction and erection of a one-family frame dwelling house upon the said lands and premises and for that purpose the defendant, H. B. Salmon Company sold and delivered to Raffaele Benacquista and the defendant, Enrico Benacquista, individually and as partners, trading as Benacquista Bros., certain building materials between the 12th day of December 1928 and the 20th day of April 1929, inclusive, at the special instance and request of the said Raffaele Benacquista and Enrico Benacquista, as individuals and partners trading as Benacquista Bros., for the erection and construction of the said building upon said lands,

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and in consideration thereof the said Raffaele Benacquista and Enrico Benacquista, individually and as partners trading as Benacquista Bros., agreed to pay the reasonable price for the said materials so sold and delivered. The amount due for such materials, charged in conformity with said agreement was and still is the sum of \$803.29, no part of said sum having been paid. 10

12. On or about August 2, 1929 and after the commencement of said building the defendant, Enrico Benacquista, and Emilia Benacquista, his wife, conveyed the said premises to the defendant, Carlo Campagna.

13. On the 16th day of August, 1929 the defendant, H. B. Salmon Company, caused to be filed in the Essex County Clerk's office a mechanics' lien claim for the said indebtedness under and by virtue of the statute entitled "An Act to secure to mechanics and others, payment for their labor and materials in erecting any building and in making certain improvements to land (Revision of 1898)" and the several acts supplemental thereto and amendatory thereof, which said mechanics' lien claim, filed in the said County Clerk's office in Book ML 27, page 104, was filed against the lands and premises described in paragraph 4 of the bill of complaint herein. Summons and complaint was issued upon said mechanics' lien claim on August 16, 1929, the issuance of which was duly endorsed upon said lien claim. 20 30

14. The suit in the said Essex County Circuit Court, based upon the mechanics' lien claim, joins as party defendant therein, among others, the complainant, Eleventh Ward Building & Loan Association of Newark, N. J., alleging that the 40

Answer and Counter-claim of H. B. Salmon Co.

lien claim of the plaintiff in that action, the defendant in this cause, is superior in point of priority to the mortgage of the Eleventh Ward Building & Loan Association set forth in paragraph 4 of the bill of complaint herein to the extent of the moneys not advanced thereon and/or not actually used in defraying the costs of the construction and erection of the building upon said lands. Answer has been filed by the said Eleventh Ward Building & Loan Association, but the question of priority has not yet been determined by the said Essex County Circuit Court and this defendant believes that the hearing upon the said matter will come up in the Court of Chancery of New Jersey prior to trial in the Essex County Circuit Court.

15. As to the remaining defendants in said cause pending in the Essex County Circuit Court, the defendant H. B. Salmon Company says that it has entered a judgment in its favor for the sum of \$859.50 with costs to be taxed, against Raffaele Benacquista and Enrico Benacquista, partners trading as Benacquista Bros., generally and specially to be made of the lands and premises more particularly described in paragraph 4 of the bill of complaint herein.

16. On November 22, 1928, there was filed in the Essex County Clerk's office a purported contract by and between Enrico Benacquista and Raffaele Benacquista, which contract pretended to be an agreement for the completion of the building situated on the lands described in paragraph 4 of the bill of complaint for the sum of \$13,000. This defendant is informed and truly believes, and therefore charges as a fact, that the said purported contract was made not between

Answer and Counter-claim of H. B. Salmon Co.

parties who were actually and bona fide contracting for the erection of the said building upon the said premises, but between parties who were merely pretending to do so, and that said contract, although seeming to be valid of record, is not an actual contract between the parties aforesaid, but is merely a fictitious document and a meaningless paper filed of record and that payments therein specified to be made were never actually made or intended to be made either at the time of the making of the contract or at any time thereafter; and that said contract was filed fraudulently and solely for the purpose of attempting to prevent lawful mechanic liens from attaching to the said premises; and that by reason of the fictitious and fraudulent character of the said contract, said contract is void and of no effect as against plaintiff or lien claimants.

17. The amount due this defendant amounting to \$859.50 aforesaid, is a lien upon the lands and building particularly described in paragraph 4 of the bill of complaint by virtue of the provisions of an act entitled "An Act to secure to mechanics and others, payment for their labor and materials in erecting any building and in making certain improvements to land (Revision of 1898)" and the several acts supplemental thereto and amendatory thereof.

18. Subsequent to the commencement of the building to be erected upon the said lands described in paragraph 4 of the bill of complaint herein, Enrico Benacquista and Emilia Benacquista, his wife, executed the bond and mortgage referred to in paragraph 4 of the said bill of complaint to secure the nominal sum of \$11,500. This defendant is informed and truly believes,

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and therefore charges as a fact, that no money was paid out or advanced by the complainant at the time of the making and execution of the said bond and mortgage aforesaid and that any moneys that may have been advanced by the said complainant thereafter upon said bond and mortgage, were not used or applied in the erection and construction of the building upon said lands and premises. This defendant further says that at no time did this defendant execute or sign or deliver any agreement or stipulation wherein and whereby the lien of this defendant was subordinated or postponed to the lien of complainant's mortgage.

19. This defendant further says that its lien aforesaid is superior in point of priority to the lien of the said mortgage to the extent of the moneys not advanced thereon and/or not actually used in defraying the costs of construction of the building upon said lands.

20. On September 11, 1929, the Channel Lumber Co. of Belleville, N. J., recovered a judgment against Carlo Campagna, Enrico Benacquista, *et als.*, in the Essex County Circuit Court for the sum of \$825.87, which said judgment is docketed in Book 108 of Circuit Court Judgments on page 317. This defendant says that the lien of said judgment, which is a general judgment and entered subsequent to the commencement of the said building, is inferior in point of priority to the mechanic lien claim of the said defendant, H. B. Salmon Company, and that the said H. B. Salmon Company is entitled to be paid on its lien claim prior to any payment that might be made to the Channel Lumber Co. of Belleville, N. J., and on account of said judgment.

Answer and Counter-claim of H. B. Salmon Co.

21. On October 7, 1929, the Channel Lumber Co. of Belleville, N. J., recovered a judgment against Carlo Campagna, Enrico Benacquista, *et als.*, in the Essex County Circuit Court for the sum of \$788.09, recorded in Book 108 of Circuit Court Judgments, which said judgment is upon a mechanic lien claim filed by the Channel Lumber Co. of Belleville, N. J., against said property on August 16, 1929, in Book ML 27 on page 106. 10

22. The lien of the judgment or of the mechanic lien claim herein of the Channel Lumber Co. of Belleville, N. J., aforesaid, in the event said lien claim and judgment is declared by this court to be subject and subordinate to the lien of the mortgage of the Eleventh Ward Building & Loan Association as stated in the bill of complaint herein, will be, by reason thereof, subject and subordinate to the lien of this defendant's mechanic lien claim. However, if the mechanic lien claim of the said Channel Lumber Co. of Belleville, N. J., aforesaid, is declared by this court to be superior in point of priority to the lien of the said mortgage of the Eleventh Ward Building & Loan Association to the same extent that the lien of the defendant, H. B. Salmon Company, is superior to said mortgage, then and in that event the Channel Lumber Co. of Belleville, N. J., will be entitled to share pro rata in any funds realized from a sale of the said property with this defendant, H. B. Salmon Company, as well as any other defendants establishing their lien claims in the same position aforesaid. This defendant further says that it has no knowledge, information or belief and therefore puts the defendant, Channel Lumber Co. of Belleville, N. J., upon its proof on the final hearing hereon as to whether or not the 20 30 40

Answer and Counter-claim of H. B. Salmon Co.

defendant, Channel Lumber Co. of Belleville, N. J., is entitled to a lien against the said lands or against any fund realized from a sale of said lands and as to proof with respect to priority over the mortgage of the Eleventh Ward Building & Loan Association aforesaid.

10

23. This defendant further says that by reason of its priority over the lien of complainant's mortgage, it is entitled as a matter of law to be paid out of any funds realized from the sale of the aforesaid property, prior to the payment of complainant's mortgage, or to the amount found due thereon.

20

THIS DEFENDANT IS WITHOUT ADEQUATE REMEDY IN THE COURT OF LAW, AND THEREFORE PRAYS:

(a) That the complainant in this cause and all the defendants to this counter-claim may answer the allegations of this counter-claim and each statement therein made.

(b) That an account may be taken of the amount due this defendant on its lien claim aforesaid.

30

(c) That the complainant and/or the defendants, one or more of them, may be decreed to pay to this defendant the amount due to this defendant, and the amount to grow due to this defendant, on its lien claim aforesaid.

40

(d) That a determination of an adjudication may be made respecting the priority of the lien claim of this defendant with respect to the mortgage lien held by the complainant and the other defendants as may herein desire to establish their claims; and that it be decreed that the lien

Answer and Counter-claim of H. B. Salmon Co.

claim of this defendant is a lien specially against the lands and building in the bill of complaint described; that it be decreed that the said lien claim is paramount and superior to the mortgage held by the complainant; that it be decreed that the complainant by reason of its mortgage is entitled, if it so is entitled, to priority over this defendant to not more than was disbursed by it or them and actually used in defraying the cost of erecting the building referred to herein; that the various equities and priorities of this defendant and of the defendants to this counter-claim and the complainant herein should be settled, determined and decreed. 10

(e) That the complainant shall make discovery of, and disclose how, when and to whom, it advanced or paid the sums now claimed by it to be due on the aforesaid mortgage; and also with respect to each individual installment or advancement, of the total of such advancements, the names of the persons to whom, the dates whereon, the method by which (that is, whether by check, by cash, or otherwise) and if by check, the date of each check, the number of each check, the names of the drawee bank, the name of the payee or payees, the amount of each individual installment of payment, and also, for what item of the cost of the erection of the building referred to in the complaint in this cause such payment is made. 20 30

(f) That the complainant and/or the defendants to this counter-claim, or one or more of them, may be decreed to pay to this defendant the amount found due to it, with interest and costs by a short day to be appointed by this Court, and that in default of such payment they and 40

Answer and Counter-claim of H. B. Salmon Co.

each of them be debarred and foreclosed of all equity of redemption in said lands.

10 (g) That is be decreed that the premises described in paragraph 4 of the bill of complaint herein should be sold to raise and satisfy the amount due to the complainant, this defendant, and such other defendants who may hereafter apply to this court and be admitted as party defendant in the action, and that from the proceeds arising from the sale of said premises the amounts due to the various parties be paid to the order, and to the extent to which they are equitably entitled; or

20 (h) That a decree may be made for the sale of the encumbered premises described in paragraph 4 of the bill of complaint herein to raise and pay, in the first instance, to this defendant, the amount found due to him on his claim aforesaid with interest and costs, and in the second instance to the complainant and/or to such other defendants herein as may be determined by this court.

(i) That this defendant may have such further and other relief as will be just and equitable.

30 HARRY PHILLIPSON,
Solicitor for Defendant,
H. B. Salmon Company.

HENRY W. LINN,
Of Counsel.

Answer and Counter-claim of Channel Lumber Company.

**Answer and Counter-Claim of
Channel Lumber Co. of Belleville, N. J.**

The defendant, Channel Lumber Co. of Belleville, N. J., a corporation, answering the bill of complaint filed in the above-entitled cause, says that: 10

1. It has no interest in paragraphs 1, 2 and 3 of the bill of complaint.

2. It denies the allegation that Enrico Benacquista was indebted to complainant in the sum of \$11,500.00 on December 6, 1928, as set forth in paragraph 4 of the bill of complaint, and it neither admits nor denies the balance of paragraph 4 but leaves complainant to its proof. 20

3. It neither admits nor denies paragraphs 5 and 6 of the bill of complaint but leaves complainant to its proof.

4. It admits paragraphs 7 and 8 of the bill of complaint.

5. It admits those portions of paragraphs 9 and 10 of the bill of complaint reciting the judgment of the Channel Lumber Co. of Belleville, N. J., a corporation, but denies that the lien of the said Channel Lumber Co. of Belleville, N. J., a corporation, is subject to complainant's mortgages. 30

6. It has no interest in paragraph 11 of the bill of complaint.

7. It admits that portion of paragraph 12 of the bill of complaint reciting the lien claim of the Channel Lumber Co. of Belleville, N. J., a corporation, but denies that such lien is subject to complainant's mortgages. 40

Answer and Counter-claim of Channel Lumber Company.

8. It has no interest in paragraph 13 of the bill of complaint.

9. It neither admits nor denies paragraphs 14, 15 and 16 of the bill of complaint, but leaves complainant to its proof.

10. It denies that portion of paragraph 17 of the bill of complaint wherein it is recited that the sum of \$11,277.50, besides interest and fines, is due on the bond and mortgage set forth in paragraph 4 of the bill of complaint.

COUNTER-CLAIM.

At the trial of this cause, defendant, Channel Lumber Co. of Belleville, N. J., a corporation, will counter-claim as follows:

1. That Raffaele Benacquista and Enrico Benacquista are indebted to the Channel Lumber Co. of Belleville, N. J., a corporation, for materials sold and delivered to the said Raffaele Benacquista and Enrico Benacquista between the 15th day of January, 1929, and the 19th day of April, 1929, and the sum of \$722.77 became due to the Channel Lumber Co. of Belleville, N. J., a corporation, after the delivery of said materials, and due credits having been given. Attached hereto and marked "Schedule A" is a list setting forth the kind of materials furnished, the times when same were furnished, and the prices at which the same were sold, together with all credits. The amount of \$722.77, together with interest, due to the Channel Lumber Co. of Belleville, N. J., a corporation, is a lien upon the lands and building more specifically set forth in paragraph 4 of the bill of complaint, by virtue of the provisions of an act entitled "An Act to

Answer and Counter-claim of Channel Lumber Company.

secure to mechanics and others payment for their labor and materials in erecting any building and in making certain improvements to land," revision of 1898, as supplemented and amended.

2. The lien of the Channel Lumber Co. of Belleville, N. J., a corporation, is superior in point of priority to the lien of the mortgage held by the Eleventh Ward Building & Loan Association of Newark, N. J., covering paragraph 4 of the bill of complaint. 10

3. That the sums, if any, paid out by the Eleventh Ward Building & Loan Association of Newark, N. J., on the above mortgage loan, were not used for defraying the costs of the erection of the building sought to be foreclosed in this suit. 20

4. The Channel Lumber Co. of Belleville, N. J., a corporation, did, on or about August 16, 1929, file a lien in the Essex County Clerk's office and did start suit thereon in the Essex County Circuit Court, making the Eleventh Ward Building & Loan Association of Newark, N. J., a party defendant, together with Raffaele Benacquista, Enrico Benacquista and Carlo Campagna, claiming priority of the Channel Lumber Co. of Belleville, N. J., a corporation, by virtue of its lien in the sum of \$722.77 under an act entitled "An Act to secure to mechanics and others payment for their labor and materials in erecting any building and in making certain improvements to land," revision of 1898, as supplemented and amended. 30

5. On September 11, 1929, the Channel Lumber Co. of Belleville, N. J., a corporation, did enter judgment in the Essex County Circuit 40

Answer and Counter-claim of Channel Lumber Company.

Court specially against the lands and building described in paragraph 4 of the bill of complaint, and generally against Raffaele Benacquista and Enrico Benacquista, for the sum of \$739.74 in connection with its lien claim filed.

10 6. Thereafter, and on or about October 7, 1929, the Channel Lumber Co. of Belleville, N. J., a corporation, recovered a judgment specially against the same lands and building and specially against Carlo Campagna, the holder of the legal title at the time of the filing of the lien claim, to the effect that the lien of the Channel Lumber Co. of Belleville, N. J., a corporation, had priority over the claim of Carlo Campagna.

20 7. That the judgments recited in paragraphs 5 and 6 of the within counter-claim are but one judgment, recovered at two separate and distinct times against several defendants.

30 8. That there is now pending in the Essex County Circuit Court a suit between the Channel Lumber Co. of Belleville, N. J., a corporation, and complainant, for the purpose of determining the priority of this defendant's lien and complainant's mortgage.

Defendant, Channel Lumber Co. of Belleville, N. J., a corporation, respectfully prays therefore:

1. That the Channel Lumber Co. of Belleville, N. J., a corporation, be paid the sum of \$739.74 out of the lands and building mentioned in the bill of complaint in this cause.

40 2. That its claim of \$739.74 be declared as having priority over the mortgage given to the

Answer and Counter-claim of Channel Lumber Company.

Eleventh Ward Building & Loan Association of Newark, N. J., together with taxed costs, as against the lands and building described in the bill of complaint in this cause.

3. That the Eleventh Ward Building & Loan Association of Newark, N. J., be charged with the payment of \$739.74 and interest to the Channel Lumber Co. of Belleville, N. J., a corporation. 10

MILTON J. FINKELSTEIN,
Solicitor for and of Counsel with
Channel Lumber Co. of Belle-
ville, N. J., a corporation.

"SCHEDULE A"

TO CHANNEL LUMBER CO. OF BELLEVILLE, N. J.
DR. 20

Ticket No.	Date	Item	Total
#27228	Jan. 15, 1929:	2x4 250/20 3334 feet @ \$43.00	\$143.36
"	"	4x6 3/22 9/20 3/18 1/12	
"	"	624 feet 43.00	26.83
"	"	4x4 4/16 8/20 4/22 416 feet 43.00	17.89
"	"	6x8 2/22 1/10 216 feet 43.00	9.29
"	"	2x6 2/22 1/10 54 feet 43.00	2.32
#27231	Jan. 15,	2x10 16/18 79/22 3377 feet 43.00	145.21
"	"	2x8 20/22 587 feet 43.00	25.24
"	"	2x6 20/22 440 feet 43.00	18.92
#27237	Jan. 16,	1x10 Shiplap 36/10 88/12 76/14	
"	"	102/16 3427 feet @ \$38.00	130.22
"	"	2x6 38/18 684 feet 43.00	29.41
#27288	Jan. 28,	1x10 Shiplap 86/14 1004	
"	"	feet 38.00	38.15
#27267	Jan. 22,	1x10 Shiplap 66/16 54/14 48/12	
"	"	1990 feet @ \$38.00	75.62
#27288	Jan. 28,	2x4 30/20 400 feet 43.00	17.20
"	"	200 Lin. ft. 2x2 Bridging .02	4.00
"	"	900 " 1x2 Spruce .01	9.00
"	"	200 " 1x6 Pine 100 70.00	7.00
"	"	24 " 1x10 Pine 20 70.00	1.40
"	"	28 " 1x8 Pine 19 70.00	1.33
"	"	170 " 1½x2 Water Drip .04	6.80
#27307	Feb. 1,	2000 Sq. ft. ½x6 Siding 50.00	100.00
"	"	32 Lin. ft. 4" Crown Moulding	
"	"	128 1.00	1.28
"	"	80 Lin. ft. 1¼x3 Pine 25 80.00	2.00

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*Replication and Answer to Counter-claim of
H. B. Salmon Company.*

	#27344	Feb. 7,	1¼x3 Pine 5/16 25 feet	80.00	2.00
	"	"	1600 Sq. ft. NC B&B Flooring		116.00
			72.50		
	#27368	Feb. 11,	1500 Sq. ft. ½x6 Siding	50.00	75.00
	#27370	Feb. 11,	30 2x4 20 400 feet	43.00	17.20
	#27409	Feb. 15,	120 Sq. ft. ½x4 NC Ceiling		6.00
	"	"	2x4 10/20 134 feet	43.00	5.76
10	#27471	Mar. 5,	2x4 10/20 134 feet	43.00	5.76
	"	"	98 Sq. ft. 1x6 Pine Ceiling		6.86
			70.00		
	#27755	Apr. 9,	12 Sq. ft. NC B&B Flooring		.90
			75.00		
	#27775	Apr. 10,	12 Sq. ft. NC B&B Flooring		.90
	"	"	80 Sq. ft. Fir Ceiling	70.00	5.60
	#27820	Apr. 17,	1x10 Shiplap 70/12 700 feet		26.60
	"	"	38.00		
	"	"	2x6 26/12 312 feet	43.00	13.42
	"	"	2x4 15/20 200 feet	43.00	8.60
	"	"	6x8 1/20 80 feet	43.00	3.44
	"	"	4x4 3/20 80 feet	43.00	3.44
	"	"	40 Sq. ft. ½x6 Siding	50.00	2.00
	"	"	20 Lin. ft. 4" Crown Mldg.		
			80 feet 1.00		.80
20	#27834	Apr. 19,	14 Lin. ft. 3" Crown Mldg.		.42
	"	"	42 feet 1.00		1.10
	"	"	110 Lin. ft. 1x2 Spruce	.01	8.50
	"	"	170 Sq. ft. ½x6 Siding	50.00	
					Total: \$1122.77
			CREDIT		
		May 27,	Cash,		400.00
					Balance Due: \$722.77
					Interest from April 19, 1929: 16.97
					Total: 739.74

**30 Replication and Answer to Counter-claim of
H. B. Salmon Company.**

The complainant joins issue on the answer of the defendant, H. B. Salmon Company.

Answering the counter-claim of said defendant, complainant says:

1. It admits paragraph 10.
 2. It has no knowledge of the matters set forth in paragraph 11, and therefore leaves the
- 40

*Replication and Answer to Counter-claim of
H. B. Salmon Company.*

defendant to its proof, but says that if any of the matters therein contained are true and said defendant claims any lien or right of lien for any of the matters therein contained, any lien or right of lien set forth in said paragraph is subject to complainant's mortgage. 10

3. It admits paragraph 12.

4. It admits paragraph 13, but says that the defendant's lien claim is subject to the complainant's mortgage.

5. It admits paragraph 14.

6. It had no knowledge of the matters set forth in paragraph 15, and therefore leaves the defendant to its proof, but says that any judgment entered as therein stated, is subject to complainant's mortgage. 20

7. It admits that part of paragraph 16 which states that the contract therein mentioned was filed in the Essex County Clerk's office on the date therein stated and as mentioned in the first three lines of said paragraph, but denies the remaining portion of said paragraph; and complainant says that if said contract was not a bona fide contract and was fraudulent as set forth in said paragraph, the same was without the knowledge of complainant, and therefore any claim of the defendant by reason thereof is subject to complainant's mortgage. 30

8. It denies paragraph 17.

9. It admits the first six lines of paragraph 18 which sets forth this complainant's mortgage, but denies the remainder of said paragraph.

10. It denies paragraph 19. 40

*Replication and Answer to Counter-claim of
H. B. Salmon Company.*

11. It has no knowledge of the matters set forth in paragraphs 20, 21 and 22, but says as to any of the matters therein set forth or any liens or judgments therein recited, the same are subject to complainant's mortgage.

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12. It denies paragraph 23.

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13. It denies that the said defendant, H. B. Salmon Company, had any right of lien against said building and lands set forth in the complainant's bill of complaint, because said lien was not filed, if any lien was filed, within four months from the time such materials were claimed to have been furnished on said building and lands; and further because on or about November 22, 1928, and before any goods or materials were furnished or were alleged to have been furnished by the said defendant, for the building and premises in question, said defendant, Enrico Benacquista entered into a contract in writing with Raffaele Benacquista, whereby said Raffaele Benacquista agreed to furnish and complete all of the work and furnish all of the materials necessary for the completion of the building situate on said lands, agreeably to the plans and specifications thereto attached for the sum of \$13,000.00, which said contract with the specifications thereto attached were duly filed in the Clerk's office of the County of Essex being the county where said lands and building were situate.

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14. Further answering said counter-claim complainant says that defendant is estopped from claiming any priority by reason of its lien claim or by reason of its furnishing any goods in the erection of the building situate on said mortgaged lands, because the contract mentioned in

*Replication and Answer to Counter-claim of
Belleville Sash & Door Corporation.*

paragraph 16 of defendant's counter-claim appears on its face to be a fair and bona fide contract between the parties therein mentioned, is regular in form, as are the specifications thereto attached and filed in the Essex County Clerk's office, and that the said defendant, H. B. Salmon Company, had knowledge that complainant was making a construction loan to said Enrico Benacquista for the purpose of assisting him to erect a building on said mortgaged lands and that said complainant relied upon the fact that said contract was a fair and bona fide contract, but notwithstanding, said defendant neither notified complainant nor brought to its notice or attention that said defendant had furnished materials in the erection of said building and that there was any money due to it therefor, and therefore is in laches and cannot take advantage of the situation set forth by said defendant in its said counter-claim or in such paragraphs thereof as recites the same.

SCOTT GERMAN,
Solicitor of Complainant.

**Replication and Answer to Counter-claim of
Belleville Sash & Door Corporation.**

The complainant joins issue on the answer of the defendant, Belleville Sash & Door Corporation.

Answering the counter-claim of said defendant, complainant says:

1. It admits paragraph 11.
2. It has no knowledge of the matters set forth in paragraph 12, and therefore leaves the defend-

*Replication and Answer to Counter-claim of
Belleville Sash & Door Corporation.*

ant to its proof, but says that if any of the matters therein contained are true and said defendant claims any lien or right of lien for any of the matters therein contained, any lien or right of lien set forth in said paragraph is
10 subject to complainant's mortgage.

3. It admits paragraph 13.

4. It admits paragraph 14, but says that the defendant's lien claim is subject to the complainant's mortgage.

5. It admits paragraph 15.

6. It has no knowledge of the matters set forth in paragraph 16, and therefore leaves the
20 defendant to its proof, but says that any judgment entered as therein stated, is subject to complainant's mortgage.

7. It admits that part of paragraph 17 which states that the contract therein mentioned was filed in the Essex County Clerk's office on the date therein stated and as mentioned in the first three lines of said paragraph, but denies the remaining portion of said paragraph; and complainant says that if said contract was not a
30 bona fide contract and was fraudulent as set forth in said paragraph, the same was without the knowledge of complainant and therefore any claim of the defendant by reason thereof, is subject to complainant's mortgage.

8. It denies paragraph 18.

9. It admits the first six lines of paragraph 19 which sets forth this complainant's mortgage, but denies the remainder of said paragraph.

40 10. It denies paragraph 20.

*Replication and Answer to Counter-claim of
Belleville Sash & Door Corporation.*

11. It has no knowledge of the matters set forth in paragraphs 21, 22 and 23, but says as to any of the matters therein set forth or any liens or judgments therein recited, the same are subject to complainant's mortgage.

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12. It denies paragraph 24.

13. It denies that the said defendant, Belleville Sash & Door Corporation, had any right of lien against said building and lands set forth in the complainant's bill of complaint, because said lien was not filed, if any lien was filed, within four months from the time such materials were claimed to have been furnished on said building and lands; and further because on or about November 22, 1928, and before any goods or materials were furnished or were alleged to have been furnished by the said defendant, for the building and premises in question, said defendant, Enrico Benacquista entered into a contract in writing with Raffaele Benacquista, where said Raffaele Benacquista agreed to furnish and complete all of the work and furnish all of the materials necessary for the completion of the building situate on said lands, agreeably to the plans and specifications thereto attached for the sum of \$13,000.00, which said contract with the specifications thereto attached were duly filed in the Clerk's office of the County of Essex being the county where said lands and building were situate.

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14. Further answering said counter-claim complainant says that defendant is estopped from claiming any priority by reason of its lien claim or by reason of its furnishing any goods in the erection of the building situate on said mortgaged lands, because the contract mentioned in

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*Replication and Answer to Counter-claim of
Channel Lumber Co.*

paragraph 17 of defendant's counter-claim appears on its face to be a fair and bona fide contract between the parties therein mentioned, is regular in form, as are the specifications thereto attached and filed in the Essex County Clerk's office, and that the said defendant, Belleville Sash & Door Corporation had knowledge that complainant was making a construction loan to said Enrico Benacquista for the purpose of assisting him to erect a building on said mortgaged lands and that said complainant relied upon the fact that said contract was a fair and bona fide contract, but notwithstanding, said defendant neither notified complainant nor brought to its notice or attention that said defendant had furnished materials in the erection of said building and that there was any money due to it therefor, and therefore is in laches and cannot take advantage of the situation set forth by said defendant in its said counter-claim or in such paragraphs thereof as recites the same.

SCOTT GERMAN,
Solicitor of Complainant.

30 **Replication and Answer to Counter-Claim of
Channel Lumber Co. of Belleville, N. J.**

The complainant joins issue on the answer of the defendant, Channel Lumber Co. of Belleville, N. J.

Answering the counter-claim of said defendant, complainant says:

1. It denies paragraphs 1, 2 and 3.
- 40 2. It has no knowledge of the matters set forth in paragraphs 4, 5, 6 and 7 and therefore

*Replication and Answer to Counter-claim of
Channel Lumber Co.*

leaves the defendant to its proof, but says that if such lien was filed or judgment entered as set forth in said paragraphs or some or one of them, the same is subject to complainant's mortgage.

3. It admits paragraph 8.

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4. It denies that there is anything due from the defendant, Enrico Benacquista and Raffaele Benacquista, or either one of them, to said Channel Lumber Co. of Belleville, N. J.

5. It denies that the said defendant, Channel Lumber Co. of Belleville, N. J., had any right of lien against said building and lands set forth in the complainant's bill of complaint, because said lien was not filed, if any lien was filed, within four months from the time such materials were claimed to have been furnished on said building and lands; and further because on or about November 22, 1928, and before any goods or materials were furnished or were alleged to have been furnished by the said defendant, for the building and premises in question, said defendant, Enrico Benacquista entered into a contract in writing with Raffaele Benacquista, whereby said Raffaele Benacquista agreed to furnish and complete all of the work and furnish all of the materials necessary for the completion of the building situate on said lands, agreeably to the plans and specifications thereto attached for the sum of \$13,000.00 which said contract with the specifications thereto attached were duly filed in the Clerk's office of the County of Essex, being the county where said lands and building were situate.

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SCOTT GERMAN,
Solicitor of Complainant.

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**Replication to Answer of Counter-claim of
Channel Lumber Co. of Belleville, N. J.**

10 Defendant, Channel Lumber Co. of Belleville,
N. J., a corporation, replying to the answer of
complainant filed to the counter-claim of this de-
fendant, says that:

1. It joins issue with paragraphs 1, 2, 3 and 4.
2. It denies that portion of paragraph 5 up
to and including the word "lands"; and in reply
to the balance of said paragraph 5 says that
Enrico and Raffaele Benacquista did not enter
into a bona fide contract for the building and
premises in question, but that a writing was
entered into between the said parties and placed
on record for the purpose of cheating creditors.
20 That Enrico Benacquista and Raffaele Benac-
quista were co-owners of said property, although
the naked legal title was in Enrico Benacquista.
The materials of the defendant, Channel Lumber
Co. of Belleville, N. J., a corporation, were sold
jointly to Enrico Benacquista and Raffaele Benac-
quista, and its lien is not precluded by a
building contract. The writing described as a
building contract does not represent the true sit-
uation as between Enrico Benacquista and Raf-
faele Benacquista, but that the said Enrico
30 Benacquista and Raffaele Benacquista did jointly
contract with the Channel Lumber Co. of Belle-
ville, N. J., a corporation, for the furnishing of
materials.

MILTON J. FINKELSTEIN,
Solicitor for Defendant Channel
Lumber Co. of Belleville, N. J.

Replication of H. B. Salmon Company to Answer of Complainant to Counter-claim.

The defendant, H. B. Salmon Company, joins issue with the complainant upon its answer to this defendant's counter-claim.

HARRY PHILLIPSON, 10
Solicitor of Defendant,
H. B. Salmon Company.

Replication of Belleville Sash & Door Corp. to Answer of Complainant to Counter-claim.

The defendant, Belleville Sash & Door Corp., joins issue with the complainant upon its answer to this defendant's counter-claim. 20

HARRY PHILLIPSON,
Solicitor of Defendant,
Belleville Sash & Door Corp.

Replication of Complainant to Reply of Defendant, Channel Lumber Co. of Belleville, N. J.

Complainant, Eleventh Ward Building & Loan Association of Newark, N. J., joins issue on paragraph 2 of defendant's reply to complainant's answer to defendant's counter-claim, etc. 30

SCOTT GERMAN,
Solicitor of Complainant.

Memorandum of Vice-Chancellor.

Memorandum of Vice-Chancellor.

Filed March 27, 1930.

IN CHANCERY OF NEW JERSEY.

10 *Between*

ELEVENTH WARD BUILDING &
LOAN ASSOCIATION,
Complainant,

and

20 CARLO CAMPAGNA, RAFFAELE
BENACQUISTA, ENRICO BEN-
ACQUISTA, CHANNEL LUMBER
COMPANY OF BELLEVILLE,
N. J., H. S. SALMON &
COMPANY, BELLEVILLE SASH
& DOOR CORPORATION,
Defendants.

Memorandum.

*(Not for
print.)*

*This memorandum is not to be published in the
official or unofficial reports.*

Mr. Scott German, for complainant.

30 Mr. Milton J. Finkelstein, for Channel Lumber
Company and H. B. Salmon & Company.

Mr. Harry Phillipson, for Belleville Sash &
Door Corporation.

CHURCH, V.-C.

This is a bill to foreclose a building and loan
mortgage.

40 On December 6, 1928, Enrico Benacquista and
his wife gave a mortgage to complainant, in the
sum of \$11,500, in monthly installments. The
mortgage was a construction mortgage and was

Memorandum of Vice-Chancellor.

given to enable Benacquista to erect a building on lands at 163 North 15th street, Bloomfield, New Jersey. The mortgage was recorded in the Register's office of Essex County on February 7, 1929.

In July, 1928, the mortgagor and one Raffaele Benacquista acquired title to four lots on North 15th street, Bloomfield, New Jersey, of which the mortgaged premises were a part, and shortly thereafter Raffaele Benacquista and his wife executed a deed to Enrico Benacquista for their undivided half interest. 10

Raffaele Benacquista is a building contractor. In November, 1928, he entered into a contract with Enrico to erect two dwelling houses on premises, 161-163 North 15th street, and agreed to furnish all materials therefor, which contract, with its specifications, was filed in the County Clerk's office of Essex County on November 22, 1928. Raffaele had theretofore entered into a building contract with Enrico to build two houses on premises, 157-159 North 15th street, Bloomfield, which contract was also duly filed in the Clerk's office of Essex County, said premises being the four lots in question. 20

Before this time, Enrico and Raffaele were engaged in the cement block and stone business as partners under the name of Benacquista Brothers. The defendants had sold goods to them for some time prior to the transactions herein involved. 30

Default was made by Enrico in the payment of his monthly installments, and this bill was filed to foreclose, and also to foreclose another mortgage which was in default and which had been theretofore given by Enrico and his wife to complainant on premises, 161 North 15th street. 40

Memorandum of Vice-Chancellor.

The defendants herein were made parties by virtue of lien claims filed by them on premises, 163 North 15th street.

10 Defendants claim to have sold goods to the two Benacquistas individually and as co-partners trading as Benacquista Brothers, on the four houses, together with premises on North 4th street and Clifton avenue, Newark, New Jersey, and that the goods were charged in a general account, and after certain credits there was a balance due which they claim is due for goods furnished on premises, 163 North 15th street.

20 The contract filed with the specifications was in regular form. Defendants, however, claim that the contract, so far as it relates to 163 North 15th street, but not as to 161 North 15th street, is fraudulent and fictitious.

The statement produced by the Building and Loan Association shows that part of its moneys went to pay prior mortgages, taxes and premium, and that the last building and loan check of \$4,064.25 was paid to the contractor on May 17, 1929, which was the balance of the loan.

30 The defendants' liens were not filed until August 16 and September 9, 1929, several months after the last payment.

There is no evidence that the defendants having notice of the filing of the mortgage and contracts, notified the complainant that they were selling or had sold goods to the Benacquistas.

The transactions between the defendants and the Benacquistas were satisfactory with the exception of 163 North 15th street.

40 Complainant procured a postponement and release from the contractor, and an affidavit from the mortgagor that the postponement and release

Memorandum of Vice-Chancellor.

were signed by all persons who had furnished materials or performed labor in the erection of the building, before payment was made on account of the loan, and had no knowledge that the defendants or either of them were furnishing goods in the erection of the building.

Some of the pleadings of the defendants admit that Enrico Benacquista is the owner of the premises in question; others, that the premises were owned by the two Benacquistas. 10

The lien claim filed by Belleville Sash & Door Company includes goods sold for premises, 892 Clifton avenue, Newark.

The defendants claim that the contract is fraudulent and fictitious. It should be borne in mind that complainant produced its bond and mortgage at the hearing and proved its execution and the amount due thereon. This establishes a *prima facie* case. Fraud is never presumed, and none was proved. This objection, therefore, will be dismissed. 20

Defendants also claim that filing the written contract provided for by the second section of the Mechanics' Lien Act protects the building from liens for work or materials furnished by the contractor only, and that if the owner orders materials or employs mechanics on his own account, a lien attaches. In this case the materials sold by the respective lien claimants were sold not only to the contractor, Raffaele Benacquista, but also to the owner, Enrico Benacquista. 30

Defendants claim that as the goods were purchased by or charged to Enrico Benacquista and Raffaele Benacquista, individually and as partners trading as Benacquista Brothers, and as the contract provided that the goods were to be furnished by the contractor, Raffaele Benacquista, 40

Memorandum of Vice-Chancellor.

they have a lien on the premises prior to complainant's mortgage. They cite, in support of this, *Mechanics' Mutual Loan Association v. Albertson*, 23 N. J. Eq. 318. This case is entirely different from the one at bar. In the case cited, the contractor had neither money nor credit. The materialmen refused to sell him material, and he therefore directed the owner to purchase the goods, and the owner then went to the materialmen and directed them to furnish the materials on his account. In the instant case there is no evidence that defendants refused to give credit to the contractor, Raffaele, nor is there any evidence that he had neither money or credit. In fact, the evidence shows that he did have credit, and before that time, with Enrico, had purchased goods from the defendants. The goods, as I read the evidence, were furnished to Raffaele, the contractor, as provided by the contract; that is, they were sold to him individually, and he can be held personally liable for the entire amount of the goods. The fact that the goods were also charged to some other person or persons other than Raffaele, does not alter the situation. The defendants could demand other security in addition to the credit of Raffaele, but this does not necessarily mean that they have a prior lien on the building in question.

The defendants accepted the benefits of the filed contract so far as 161 North 15th street was concerned. The only complaint was as to 163 North 15th street. I think, therefore, that this objection is also without merit. That being so, the third objection, that is, that the disbursement of the funds by the complainant, without knowledge of the contractual obligation of the owner, or of the fictitious character of the filed

Memorandum of Vice-Chancellor.

contract, will not preclude lien claimants who have sold materials to the owner or who would otherwise be entitled to a mechanics' lien against the lands by reason of the fictitious character of the filed contract, from asserting and establishing such lien against the lands, nor from establishing priority to the lien of the mortgage, falls also. 10

Complainant has suggested several other points on which defendants' claim might be dismissed. I think, however, what I have said is sufficient to warrant me in finding that the complainant's mortgage should be declared to be a prior lien. I will so advise.

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Final Decree.

Final Decree.

Filed April 17, 1930.

IN CHANCERY OF NEW JERSEY.

10 *Between*

ELEVENTH WARD BUILDING &
LOAN ASSOCIATION of New-
ark, N. J.,

Complainant,

and

CARLO CAMPAGNA, *et als.,*

Defendants.

On Bill, &c.

Final Decree.

20 This cause coming on to be heard in the pres-
ence of Scott German, solicitor of complainant;
Milton J. Finkelstein, solicitor of defendant
Channel Lumber Co. of Belleville, N. J.; Harry
Phillipson, solicitor of defendants, H. B. Salmon
Company and Belleville Sash & Door Corpora-
tion, and

30 It appearing to the Court that the bill of com-
plaint filed herein was for the purpose of fore-
closing two certain mortgages held by the com-
plainant on premises described in paragraphs 3
and 4 of said bill, and that as to said premises
described in paragraph 3, a Decree *Pro Confesso*,
dated December 24, 1929, was entered against all
of the defendants mentioned in said bill, namely,
Carlo Campagna and Mrs. Carlo Campagna, his
wife; Enrico Benacquista; Channel Lumber Co.
of Belleville, N. J.; H. B. Salmon Company, and
Belleville Sash & Door Corporation, and that a
40 final decree was also entered January 11, 1930, in
said cause as against all of said defendants as

Final Decree.

to the premises described in said paragraph 3 of said bill; and also said Decree *Pro Confesso* was entered as to the premises described in paragraph 4 of said bill against Carlo Campagna and Mrs. Carlo Campagna, his wife; Enrico Benacquista, but not as to defendants, Channel Lumber Co. of Belleville, N. J.; H. B. Salmon Company, and Belleville Sash & Door Corporation, who filed answers and/or counter-claims to said bill so far as the same affects premises described in paragraph 4, which said defendants disputed the priority of complainant's mortgage as to said lands; and the pleadings having been read, the proofs having been taken and the Court having heard arguments of counsel and having considered the same, and being of the opinion that complainant's mortgage is a first and prior lien on the premises in question, that is to say, on lands described in paragraph 4 of said bill:

It is thereupon, on this 17th day of April, 1930, on motion of Scott German, of counsel with the complainant, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor doth by virtue of the power and authority of this court, hereby order, adjudge and decreed that the complainant's mortgage be and the same is hereby declared to be and is a first lien on the mortgaged premises described in paragraph 4 of said bill of complaint, and prior to the liens of said defendants, and that said mortgaged premises be sold to raise and satisfy said sum of money due to the said complainant, that is to say, the sum of \$11,478.06, with interest thereon from January 20, 1930, with costs to be taxed; and that a writ of *feri facias* do

Final Decree.

issue for that purpose out of this court directed to the Sheriff of the County of Essex, commanding him to make sale according to law of the said mortgaged premises, and out of the money arising from such sale to pay to the complainant or to its solicitor, said debt, interest and costs; and in case more money should be raised by the said sale than shall be sufficient to answer such payments, that such surplus be brought into this court to abide the further order of the Court, unless otherwise previously disposed of by order of this court, and that the Sheriff make report without delay of his proceedings by virtue of the said writ.

AND it is further ordered, adjudged and decreed that the said defendants Carlo Campagna and Mrs. Carlo Campagna, his wife; Enrico Benacquista; Channel Lumber Co. of Belleville, N. J.; H. B. Salmon Company; Belleville Sash & Door Corporation, and each of them stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises when sold as aforesaid, by virtue of this decree.

AND it is further ordered, adjudged and decreed that a counsel fee of \$300 be allowed and paid to Scott German, solicitor of the complainant, and that the same be included in the taxed bill of costs and collected with the other items of the said bill.

E. R. WALKER,

C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

April 16, 1930.

Final Decree.

We consent as to form only.

MILTON J. FINKELSTEIN,
Solicitor of Channel Lumber Co.

HARRY PHILLIPSON,
Solicitor for H. B. Salmon Co. and Belle-
ville Sash & Door Co. 10

20

30

40

Amelia Day, for Complainant, direct.

AMELIA DAY, called as a witness on behalf of the complainant, having been first duly sworn, testified as follows:

Direct examination by Mr. German.

Mr. German: I introduce in evidence contract No. 1489, Enrico Benacquista, owner, Raffaele Benacquista, builder, dated July 18, 1928, wherein Raffaele Benacquista agrees to erect on or before the 1st day of November, 1928—that he will well and sufficiently erect and finish two two and a half story frame buildings on premises known and designated as 149 North 15th street, Bloomfield, New Jersey. 10

Mr. Finkelstein: The contract that Mr. German is reading into the record covers property in connection with which we claim no lien. It is not in dispute. I do not see how that contract is relevant. 20

The Court: Let him put in anything he wants to.

Mr. German: The sum of \$13,000 in each building, and provides such good, proper and sufficient material of all kinds whatsoever, as shall be proper and sufficient for completing and finishing all the works of said building mentioned in the said specifications, the general specifications attached, including excavating, mason, carpenter, plumbing and heating, painting. The contract is signed Raffaele Benacquista, Raffaele Benacquista, in the presence of Charles P. Cerrato. The contract and specifications were filed in the County Clerk's office, Essex County, July 30, 1928. 30 40

Offer of Documentary Evidence.

10 I also offer in evidence contract No. 2050 between the same parties dated November 19, 1928, wherein the same builder agrees to erect for the owner, the same party, on or before April 15, 1929, and to furnish all the materials therefor, two two and a half story frame dwellings on premises known and designated as Nos. 161-163 North 15th street, Bloomfield, N. J., for the sum of \$15,000, and the same kind of specifications are attached. The contract is signed by the same builder and owner in the presence of Charles P. Cerrato; the contract with specifications attached, all filed in the County Clerk's office of Essex County, November 22, 1928.

20 Both contracts are N. J. contracts for buildings on forms 209, published by Karkus Brothers, Inc., law blank publishers, Perth Amboy, N. J.

(Two contracts marked Exhibits C. 1 and C. 2.)

30 Mr. Finkelstein: With reference to contract No. 2050, known as Exhibit C. 2, I call attention to the specifications attached to the contract and that the top of the specifications reads as follows: "For a two and a half story two family frame dwelling to be erected at lot blank, North 15th street, Raffaele Benacquista, owner," and so forth.

The contract provides for payments as follows: First payment, when house is enclosed, \$4,000; second payment, when brown coat is on, \$4,500; third payment, when job is completed and accepted by owner, the balance, \$4,500; total \$13,000.

40 In behalf of the Channel Lumber Company of Belleville, N. J., I offer in evidence

Offer of Documentary Evidence.

mechanics' lien claim, recorded on the 16th day of August, 1929, in the Essex County Clerk's office in Book 27 of Mechanics' Liens, page 106, setting forth a lien claim wherein Channel Lumber Company is complainant and Carlo Campagna owner and Enrico Benacquista and Raffaele Benacquista builders and former owners, defendants, which lien claim covers a two and a half story frame dwelling on North 15th street, Bloomfield, which property is described as commencing 608.50 feet from First avenue, and also known as 163 North 15th street; said lien claim is endorsed on the back as follows: "Summons issued on the within lien claim, August 16, 1929, John A. Scott, Clerk." 10

I also offer in evidence jacket 507-37 of the Essex County Clerk's records, which contains papers in connection with the suit of Channel Lumber Company *v.* Carlo Campagna, and others on the lien claim first mentioned. 20

Mr. German: Just offer those and I will agree your office copies are—(interrupted).

Mr. Finkelstein: I will be finished in a second. The summons and complaint describes the same premises as set forth in the lien claim. 30

It is consented by Mr. German that my office copies—(interrupted).

Mr. German: Yes, if you say they are office copies, I say, I will use the same as though they were originals.

Mr. Finkelstein: May be offered in substitute of the original. 40

Elizabeth Andersen, for Complainant, direct.

Mr. German: Yes. We introduce the contracts right now.

Mr. Finkelstein: Introduce the mortgage.

Mr. Phillipson: May I object to the contracts? Both Mr. Finkelstein's client and my own are in the same position legally. In the legal aspect of the case, may I ask that any objection made by either of us be noted in behalf of both?

The Court: All right.

ELIZABETH ANDERSEN, called as a witness on behalf of the complainant, having been duly sworn, testified as follows:

20 *Direct examination by Mr. German.*

Q You are employed in Mr. German's office, are you? A Yes.

Q And have been for some years last past? A Yes.

Q As Chief Clerk and Chief Stenographer? A Yes, sir.

Q You are a notary public? A Yes.

30 Q You have charge in the making of payments of the Eleventh Ward Building and Loan, isn't that so? A Yes.

Q I show you a bond and mortgage and ask whether that was executed in your presence? A Yes, it was.

Mr. German: I—

The Court: Any objection? No objection. Let it be marked.

40 Mr. German: Your Honor please, I introduce in evidence a mortgage dated Dec.

Elizabeth Andersen, for Complainant, direct.

6, 1928, made by Enrico Benacquista and Emilia Benacquista, his wife, to the Eleventh Ward Building & Loan Association; conditioned for the payment of \$11,500 in monthly payments of \$115, before the fourth Monday of each month, with a two months' default clause of interest, taxes—(interrupted). 10

The Court: It is usually within one month.

Mr. German: This is two months.

The Court: All right.

Mr. German: Covering premises in the Town of Bloomfield, Essex County, New Jersey, to the northwesterly line of 15th street, premises known as 163 North 15th street, accompanying bond conditioned for the payment of the interest I have stated, signed by Enrico Benacquista, mortgage recorded in the Register's office of Essex County, February 7, 1929, in Book Y-66, pages 191-3. 20

The Court: Do you want to offer it?

Mr. German: Yes, I offer it.

(Mortgage marked Exhibit C. 3.)

Q And I show you another instrument and ask you what that is? A That is the postponement and release, which is signed by Mr. Benacquista, the contractor, general contractor, Raffaele Benacquista. 30

Q Postponement signed by—made by Enrico Benacquista, wherein he—no—signed by Raffaele Benacquista, general contractor, it is a postponement of a release, too, wherein he releases any lien he may have—where he postpones any lien he may have to the lien of this mortgage in question, just introduced in evidence and 40

Elizabeth Andersen, for Complainant, direct.

covers premises 163 North 15th street, and release signed by him, releasing any lien he may have on the land, and his affidavit attached, signed by Enrico Benacquista, dated February 7th, and being sworn to May 17, 1929, wherein he says that this postponement has been signed
 10 by all persons herein who have done labor and furnished materials in the erection of the building in question or who have agreed to do so, whether by contracts in writing or otherwise, in order to entirely complete the building, except such as has heretofore been paid for.

(Paper marked Exhibit C. 4.)

Q Did you make any payment? A I did.

20 Q How was the money received from the Building and Loan, in how many checks? A There are five checks here.

Q From the Building and Loan? A It was made in four payments, and there were five checks.

Q And these checks were handed to who? Look on the back of the—(interrupted) A The first one was \$2,770. That is made payable to Enrico Benacquista.

30 Q He is the mortgagor? A He is the mortgagor.

Q Is that the practice of the Building and Loan, all payable to the mortgagor? A All payable to the mortgagor.

Q All right. A The second one was for \$230 and that is made payable to Enrico Benacquista and was endorsed back to the Building and Loan Association.

40 Q All right. A (Continuing.) For a bonus. The next payment was \$4,000 and that is made

Elizabeth Andersen, for Complainant, direct.

payable to Enrico Benacquista and endorsed by him. The next payment was \$4,300 and that is made payable to Enrico Benacquista and that was endorsed to the order of Raffaele Benacquista.

Q Who is the contractor? A Yes, sir; he is the contractor. 10

Q All right. A And the next payment was \$200. That is the final payment that was made by Enrico Benacquista and endorsed by him.

Mr. Finkelstein: And at the time you turned them over, did you get any receipt?

The Witness: Yes, there are receipts there.

The Court: Any objection to those? 20

Mr. Finkelstein: No.

Q Now, Miss Andersen—(interrupted).

The Court: Wait a minute. Do you want them in?

Mr. German: Yes.

The Court: I understood there was no objection.

Mr. Phillipson: Your Honor, I object to the offering of these checks to establish advances on the mortgages. The checks appear to have been endorsed back to the Building and Loan Association, rather to the attorney. 30

The Court: Very well. We will admit them and argue after.

Q Those are the payments on account of this mortgage? A On account. 40

Elizabeth Andersen, for Complainant, direct.

The Court: No, no.

Mr. Phillipson: No.

The Court: These are checks; that is all.

Mr. German: These were checks given—

10 The Court: No; these are checks, that is all. You will have to ask what they were for.

Mr. German: I am going to prove what they were for.

The Court: All right.

Q What were these checks for? A Well, they were for payments on account of the loan that was granted to Mr. Benacquista.

Q You mean 163 North 15th street? A 163 North 15th street, Bloomfield.

20

(Two papers marked Exhibits C. 5 and C. 6.)

Q Now, were any of those checks turned over to Mr. German and disposed of by him, that you know of? A Yes. The first payment, the check of \$2,770 was endorsed.

30 Q Now, you have there a list showing how the funds were disbursed? A Showing how these funds were disbursed.

Q You have the checks there agreeing with the list? A I have the checks which agree with the list.

Mr. Finkelstein: I would like to examine those checks.

Mr. German: I introduce these checks and this statement in evidence.

40 The Court: Why? The statement is all right.

Elizabeth Andersen, for Complainant, direct.

Mr. German: I have the checks to support it.

The Court: No. The statement is admitted. Do not bother with the checks, then.

Mr. German: Except that the check of— well, all right.

(Paper marked Exhibit C. 7.)

10

Q Did the Eleventh Ward Building & Loan, the complainant, make any other loans to these same people on that same street? A Well, they made three other loans besides the one.

Q And that followed the same procedure?

Mr. Finkelstein: We will object. We are interested in the loans on this one property only.

20

Mr. German: In the first place, the bill of complaint recites two mortgages, No. 161 and 163. 161 which is in the bill of complaint and in the pleadings, there is no dispute about that, but, nevertheless, the fact is that it is in the bill. Now, then, during the course of the proceedings, your Honor will hear of 24 houses, and it might be just as well, if your Honor permits, to start right, and then we can go down the line and make it easier for your Honor.

30

The Court: This mortgage covers more than foreclosure, doesn't it?

Mr. Finkelstein: It covers two pieces of property, in one of which we are not interested at all. We have got a decree *pro confesso*.

The Court: Isn't it a blanket mortgage covering them?

40

Elizabeth Andersen, for Complanaint, cross.

Mr. Finkelstein: No.

Mr. German: No.

10 Mr. Phillipson: It is two separate mortgages on two separate parcels. As to one mortgage there is no dispute whatever. A decree *pro confesso* has been entered by Mr. German. But as to the other, there is a counter-claim filed by Mr. Nichols and his client and myself. It is that particular one we are interested in now. Now, I do not think it is relevant, your Honor, for the witness to testify, or for Mr. German to ask, concerning other parcels, other than the one against which the answering counter-claim is filed.

20 The Court: No, I don't think so. Confine yourself to the one in dispute, then.

Mr. German: I think your Honor will perhaps later on consider them, so I was just trying to save time for your Honor, but, if your Honor please—(interrupted).

The Court: Proceed.

Cross examination by Mr. Finkelstein.

30 Q Miss Andersen, these checks that were issued by Mr. German through a special account were endorsed by both Benacquistas in most cases and deposited in the People's National Bank & Trust Company?

The Court: No, the checks speak for themselves.

40 Mr. Finkelstein: Then I don't want to cross examine this witness except to note that the checks went through the People's

Elizabeth Andersen, for Complainant, re-direct.

National Bank & Trust Company of Belleville, N. J.

Re-direct examination by Mr. German.

Q When these payments were made, Miss Andersen, were the two Benacquistas there together? A Whenever they came in on any of the loans, they were always together. 10

The Court: Now, if there is any dispute about the endorsement, you will have to put the checks themselves in.

Mr. German: Naturally the checks show on the backs how they are. We cannot dispute it.

The Court: I thought you would put the statement in. 20

Mr. Phillipson: The statement has been introduced in evidence, and we are satisfied to have the statement in evidence, but we do want to show that these checks were deposited in the People's National Bank of Belleville.

The Court: Very well. And is that admitted?

Mr. Phillipson: That is admitted. 30

Mr. German: They were. It is all right with me. If the checks say that they were, whatever the checks show in the bank.

The Court: All right.

Arthur F. Smethurst, for Complainant, direct.

ARTHUR F. SMETHURST, called as a witness on behalf of the complainant, having been duly sworn, testified as follows:

Direct examination by Mr. German.

10 (Paper handed to stenographer marked Exhibit C. 8.)

Q You are secretary of the complainant? A I am.

Q And have been for a number of years last past? A I have.

Q And are familiar with this loan made to Enrico Benacquista for \$11,500 on premises known as 163 North 15th street, Bloomfield? A I am.

20

Q How much is due on the mortgage? A \$11,478.06 as of January 17th—or, as of January 20th.

Q As of January 20th. How many months are they in arrears? A Seven months in arrears at the present time, including this month.

Q Do you know whether the taxes are paid for 1929? A The 1928-1929 taxes are unpaid.

Q How much? A \$442.86.

30 Q With interest? A And interest.

Mr. German: With interest. That is all.

The Court: Any cross?

Mr. Finkelstein: No cross examination.

Mr. German: The complainant rests.

The Court: Does the mortgage require the payment of taxes within a certain time?

Mr. German: Yes, within two months.

40 The Court: That is all, sir.

Thomas J. Walker, for Defendants, direct.

Mr. German: Rest.

The Court: What is the defense?

(Discussion.)

THOMAS J. WALKER, called in behalf of the 10
defendants, having been duly sworn, testified as
follows:

Direct examination by Mr. Finkelstein.

Q Mr. Walker, you are employed by the
People's National Bank & Trust Company? A
Yes, sir.

Q In what capacity? A Bookkeeper.

Q Have you an account in your bank in the 20
name of Benacquista? A Just in the name of
Benacquista?

Q Have you an account in your bank in the
name of Raffaele and Enrico Benacquista? A
Yes, sir.

Q A joint account? A Yes, sir.

Q Have you that account with you? A Yes,
sir.

Q Will you let me have it, please? Is this 30
the ledger sheet of the joint account? A Yes,
sir.

Mr. Finkelstein: I offer it.

(Paper marked Exhibit D. 1.)

Mr. German: Is this the beginning of the
account?

The Witness: No, sir.

Mr. German: Where is the beginning of
it?

Thomas J. Walker, for Defendants, direct.

The Witness: I did not bring the beginning of the account.

Mr. German: I object to it. He has got part of an account here.

10 Mr. Finkelstein: I did not see any reason for bringing the account that had nothing to do with this case, two or three years back. I brought only within the time of the erection of this house.

The Court: All right. I will allow it.

Mr. German: Your Honor is getting just part of this case, of course.

(Paper already marked Exhibit D. 1.)

Mr. German: Will your Honor permit this statement?

20 The Court: Yes.

Mr. German: These two Benacquistas are cousins. They are in the stone business, cement block business, up at or near Belleville, and they had a bank account for several years, as Benacquista Brothers for the stone business, with the People's National Bank, which is admitted. Now, then, they can explain to you why this money was deposited, if it was, and the witnesses only brought out part of that thing. I do not deny any of this.

30 Mr. Finkelstein: Your Honor please, I want to show that these checks were deposited in this account.

Mr. German: Benacquista Brothers who had this—

Mr. Finkelstein: To the account of Benacquista Brothers.

40 The Court: Frankly, I think that Mr. German is entitled to the whole thing.

Thomas J. Walker, for Defendants, direct.

Mr. Finkelstein: I suppose we could easily get that, but I did not want to trouble the bank.

Mr. German: If they will produce, I will take whatever the bank bookkeeper says as produced in his statement. I will take that as true, naturally. 10

The Court: All right.

Mr. Finkelstein: Will you also admit that the checks issued from your office were deposited in this account?

Mr. German: If the checks show that, naturally.

The Court: All right. Let that be—

Mr. German: If they were, there is no dispute about it. If the endorsement on the back of the check shows that, I will admit it. 20
(Discussion.)

Q I show you this check payable to Enrico Benacquista for \$350. Can you tell me in what account that was deposited?

The Court: Are you going through these checks one by one? 30

Mr. Phillipson: The ledger sheet, your Honor, has the same entry as the date on the check, and the amount coincides. I cannot see why this ledger sheet cannot be admitted.

The Court: Mr. German, I understand, has admitted it.

Mr. German: I admit if the check shows the People's National Bank were the recipient of these checks and the bookkeeper 40

Thomas J. Walker, for Defendants, direct.

says they were deposited in the joint account, I believe him, and I admit it.

Mr. Finkelstein: We want the bookkeeper to say it.

Mr. Phillipson: He would have to see the checks if he were to say so.

10

The Court: The checks show.

Mr. Finkelstein: Here is a check for rent that was endorsed only by Enrico Benacquista, yet it was deposited to the joint account.

The Court: Well, pick those out, and those that went through the People's, why, you are satisfied with them, aren't you?

Mr. German: Yes, certainly.

20

Q Did these checks go through your bank?

A All of these checks here?

Q Read them, please, Mr. Walker? A Here is one for \$4,064.25, deposited on the 17th of May, 1929, of which only part of that was deposited.

Q How much of that was deposited? A \$3,064.25.

Q And is that referred to in your ledger sheet? A Yes, sir; on May 17, 1929.

30

Q Look at the other checks. A Here is one for \$1,194.63, deposited on February 23, 1929.

Q To what account was that check deposited? A The joint account.

Q Was the check I just referred to, the \$4,064.25— A To the joint account.

Q Was that to the joint account also? A To the joint account. Here is one for \$3,522.75, deposited on March 28, 1929.

Q To what account was that deposited? A
40 Joint account, that is all.

John Kossak, for Defendants, direct.

Cross examination by Mr. German.

Q These two Benacquistas had an account with your bank some years prior to this, did they?

A Yes, sir.

Q What is their business? A Nothing to do with me. I am a bookkeeper. 10

Q I say, do you know what their business was? A I don't know.

Q Do you know whether they were in the cement business in Belleville? A I don't know. Just bookkeeper, that is all.

Q But they had had an account with you prior to this? A Prior to that.

Mr. German: That is all.

The Court: That is all. 20

JOHN KOSSAK, called as a witness in behalf of the defendants, having been duly sworn, testified as follows:

Direct examination by Mr. Finkelstein.

Mr. Finkelstein: I offer in evidence a certified copy of the deed covering the premises involved from Raffaele Benacquista and wife to Enrico Benacquista. 30

Mr. German: I will admit it.

Mr. Finkelstein: Which deed is dated July 18, 1928, recorded in F-78—(interrupted).

The Court: What year?

Mr. Finkelstein: Recorded July 19, 1928.

The Court: 1928. 40

John Kossak, for Defendants, direct.

Mr. Finkelstein: In Book F-78, page 382. And, after the description, it recites as follows: "Being the same premises conveyed to the said Raffaele and Enrico Benacquista by deed dated July 17, 1928."

(Deed marked Exhibit D. 2.)

10

Mr. Finkelstein: I also wish to offer in evidence judgment recovered by the Channel Lumber Company on its lien claim against Enrico Benacquista, Raffaele Benacquista and Carlo Campagna, the present owner of the property, on its claim of \$739.42.

The Court: Any objection?

20

Mr. German: No objection, except I object to it on the ground of binding this complainant, it doesn't bind this complainant. But for what it is worth.

The Court: Admit it for what it is worth. (Papers marked Exhibits D. 3 and D. 4.)

Q Mr. Kossak, you were the bookkeeper of the Channel Lumber Company at the time that the Benacquistas called at your office? A I was.

30

Q Have you an account in your ledger with the name of Benacquista? A Ralph and Enrico Benacquista.

Q And does your account show materials sold to 163 North 15th street, Bloomfield? A It does, yes.

Q How much is due on that account? A The balance due is \$722.77.

Q Has that been paid? A No.

Q Was the material sold to Enrico Benacquista, Ralph Benacquista, or both? A Both.

Q Did you deliver the materials? A Yes.

40

Q Have you the delivery slips? A I have.

John Kossak, for Defendants, direct.

Q Showing the delivery of the material? A I have.

Q Those delivery slips, how are they entered?

A From the—after the lumber is delivered, the delivery slips are brought back signed by the owner, and they are entered into the sales book and from the sales book to the ledger. 10

Q Have you supervision of the delivery sheets, sales book and ledger? A I have.

Q And you have them in your hand? A I have.

Mr. Finkelstein: I offer the sales book.

Mr. German: Is that book a book of original entry?

The Witness: Yes, that is the book of original entry. 20

Mr. German: This book showing—

The Witness: The entry from the delivery slips.

Mr. German: From the time the order was given?

The Witness: First it is entered on the delivery slips, and from the delivery slips into the sales book, to the sales ledger.

Mr. German: I see. This is your book of original entry; that has these slips on it? 30

The Witness: This is the original entry of delivery of the lumber, and from there it is entered in the sales book, exact copies.

Mr. German: Where is the first book that you make entering this account?

The Witness: The sales book.

Mr. German: Turn to it. Turn to this account. 40

John Kossak, for Defendants, direct.

The Witness: Well, there are different accounts there.

Mr. German: Let us see the first one, the beginning of your account.

10 Mr. Finkelstein: Refer to the delivery of materials to 163 North 15th street.

Mr. German: I want to see the whole book for these deliveries.

Mr. Finkelstein: Your Honor please, Mr. German will have an opportunity on cross examination.

The Court: I thought you had finished, and I think Mr. German thought so, too.

20 Mr. Finkelstein: No. I want to introduce another paper.

The Court: All right.

Mr. Finkelstein: These papers are all admitted in evidence; is that right?

Mr. German: I have not seen them but I suppose—(interrupted).

Mr. Finkelstein: Have you any objection to the delivery ticket?

30 Mr. German: Is this what you showed me?

Mr. Finkelstein: Yes.

Mr. German: If it is what you showed me, I am satisfied.

Mr. Finkelstein: Mr. German has no objection.

Q Will you please tell me what this sheet is? A This is the original contract made between Ralph and Enrico Benacquista and the Channel Lumber Company.

40

John Kossak, for Defendants, cross.

Q When was it made? A In the office of the Channel Lumber Company.

Q When? A About November, 1928; November 16th.

Q Is it signed by both? A Signed by Raffaele Benacquista and Enrico Benacquista.

10

Q Did you see them sign? A I did.

Q Who was present at that time? A Mr. Adelman and Mr. Benacquista and myself.

Mr. Finkelstein: I offer an itemized list, signed by Raffaele Benacquista and Enrico Benacquista for the job, North 15th street, Bloomfield, New Jersey.

Q Can you tell from your records, Mr. Kossak, between what dates the materials were furnished to this 164 North 15th street? A Between—can I see that ledger sheet? The first delivery was made on January 15, 1929, and the last delivery was made on April 19, 1929.

20

Mr. Finkelstein: Take the witness.

Cross examination by Mr. German.

Q You have been a bookkeeper for some years, have you, up there? A I was. 30

Q For the Channel Lumber Company? A Yes.

Q And you knew Mr. Raffaele Benacquista, did you? A Yes.

Q He bought goods from your company before? A Yes.

Q And been very satisfactory— A Yes.

Q —in his dealings with him? And you sold him goods, sold him goods, or one or both of

40

John Kossak, for Defendants, cross.

them goods on 151 North 15th street, did you?

A Yes.

Q And on 153? A (Witness nods "yes.")

Q And on 161? A (Witness nods "yes.")

Q And 163? A Yes, sir.

10 Q In other words, the four houses you sold?

A We sold them four—(interrupted).

Q And you sold them for the 4th street house, you sold them for the Clifton avenue job? A Clifton avenue job; yes, sir.

Q Are all those in the account? A I have here the account running from July, 1928, 157-9.

Q Let me see whether I am correct. The goods you sold for 157, from July 21, 1928, to August, 1929, amounted to \$1,096.21; is that correct? A This was a running account.

Q Yes, running account. A Yes, from July.

Q July 21, 1928, to August 29, 1928, for 157, that amounted to \$1,096.21. Is that correct? A No, sir.

Q What about that, according to your book?

A \$2,100.

Q For \$2,100? A To August 31st?

Q To August 29, 1928. A Oh, I have an entry—here, up to August 31st, amounted to \$2,095.21.

30 Q That was on 157-9, the two houses? A That is right.

Q On the two houses? A That is right.

Q And then on the Fourth street house, August 29th was \$120; is that right? A That is right.

Q That is in the general account? A That is right.

40 Q And from August 29th to November 13, 1928, on the fourth, No. 59, that is \$1,163.42? A

John Kossak, for Defendants, cross.

I don't know just how much the amount is. It is all together here.

Q At any rate between July 31, 1928, and November 13, 1928, including No. 157—(interrupted)

The Court: What is that again? 10

Q Between July 31, 1928, and November 13, 1928—

The Court: I see, yes.

Q Including the Fourth street house and the 157-9, it was how much, do you say, two what?

A It was a total here, including November 13th delivery of \$2,538.91.

Q I see. All right. I see. Now, then, from November 21, 1928, to December 28, 1928, on 161, your bill was \$1,233.80? A I have balances here turned over on another sheet, balances after payments were made. 20

Q I am not talking about balance, I am talking about charge. A I can give you individual charges. I didn't add them up.

Q Add them up. A November 21st, one fifty-seven extra.

Q I mean, your total charges, excuse me. A I have a total here on December 31, 1928, of \$2,226.71. 30

Q I see. Go on. Then I say on No. 161 from November 21st—your books show it. I have seen it—November 21, 1928, to December 28th, the sale of goods amounted to \$1,233.80; is that right? A I believe so, if that adds up, I don't know.

Q All right. Now, then, from January 15th to April, 1929—to April 19, 1929, your books 40

John Kossak, for Defendants, cross.

show \$1,132.56; is that correct? A I have here a balance of \$1,122.77.

Q That is near enough. Then, June 28, 1929, Clifton avenue, \$153.55; is that right? A That is right.

Q That is all in that general account? A
10 That is right.

Q Now, we will take the payments on September 11, 1928, you had a check of \$300, didn't you? A September 11th, \$300.

Q Applied to general account? A Yes.

Q November 1, 1928, \$300? A That is right.

Q Applied to the general account? A November 7, 1928, \$800.

Q To general account? A That is right.

20 Mr. Finkelstein: December 15, '28, \$810.12.
The Witness: Not yet.

Q General account? A Yes.

Q January 15, 1929, \$126.08? A That is right.

Q On the general account? A January 26, 1928—1929.

Q \$300, general account? A (No answer.)

Q Yes, you say? A Yes.

30 Q April 1st, \$750, in the general account? A Yes.

Q May 27, 1929, \$400, in the general account; July 19th, \$103.55? A Fifty-five.

Q General account, is that right? A That is right.

Q Now, there were certain other allowances that you made? A Yes, on contract.

Q On these four houses, amounting for returned goods and goods that were not delivered but charged, of how much? A Well, different
40 items, see, on each item separate.

John Kossak, for Defendants, cross.

Q I see. How much altogether?

Mr. Finkelstein: He should permit the witness to answer that question.

Q How much was the allowance on each house, then? A There was an allowance on the first house of \$98 and one of \$48; and then there was an allowance on the third house of \$157.50—on the second house, \$157.50, and an allowance on the third house of \$25.20 and \$67.50. 10

Q All right. When you get all through, there is a balance of how much? A Balance due, \$722.77.

Q Now, where is the written contract you have? A (Paper produced by witness.)

(Paper handed to stenographer and marked Exhibit D. 4.) 20

Q I notice in this Exhibit D. 4 that the Ralph Benacquista is in typewriting and then above is written in ink "Enrico." A Enrico.

Q Why was that? A Well, Ralph and Enrico came in and gave us the list.

Q Ralph Benacquista came in the office? A Ralph and Enrico, the two of them.

Q I see. And gave you a manila sheet with a list on of goods they wanted to buy? A Yes, in the name of Ralph Benacquista. 30

Q Ralph alone? A And we figured to Ralph Benacquista.

Q And who was the contractor? A I don't know.

Q Well, I say, who was the contractor according to the—

Mr. Finkelstein: I object. Is Mr. German going to testify? 40

John Kossak, for Defendants, cross.

Q —according to the contract on file, your Honor. A I can explain that.

The Court: Let him explain.

10 The Witness: When they came in to sign the contract, we asked them who the owners were of the property and they told us that Ralph and Enrico were the owners, so we inserted Enrico and we had Ralph and Enrico sign it.

Q As a matter of fact, according to the record, only Enrico was the owner?

Mr. Finkelstein: I object.

20 The Court: Yes. No, the record speaks for itself.

Q And so you inserted—you wrote in the name of Enrico afterwards? A At the time when they signed the contract, yes.

Q I see. Now, then, these goods called for—this list calls for goods amounting to how much money? A \$879 for each house.

Q For each house? A This is the amount for—

30 Q What house did you mean? What do you mean by “each house”? A 161-163.

Q 161-163. Did you have something before that when they first came, when they first came? A What do you mean, did we have anything before that?

Q Well, on 149-51? A They were on the list, there was another list.

Q Yes, but have you got that list with you? A No, I have not.

40 Q This only relates to the last two houses? A Relates to the last two houses, yes, sir.

John Kossak, for Defendants, cross.

Q Where is the one for the first two houses?

A I haven't got it.

The Court: Are we only concerned with these? We are not concerned with the first two houses, are we?

Mr. Finkelstein: No, sir.

10

Mr. German: Your Honor please, excepting we—

The Court: No.

Mr. German: I think your Honor will probably be glad to hear this. There was a contract for the first two houses, 157-159 on record. These people sold, then they come along for the next two houses, 161-163, and they sold those, and, when they got all through, there is a balance. Now, they say that all three contracts before were all right, but half of this last contract, that is for 163, although the contract called for 161-163, was fraudulent, see? But the three they claim they got their money on, they were O. K., but the balance of 163, they say—

20

Mr. Finkelstein: Your Honor please—

Mr. German: —was fraudulent.

Mr. Finkelstein: We don't make any such claim whatsoever. We are here endeavoring to establish our claim against 163 15th street. We say nothing about the other houses at all. I don't see why Mr. German makes that statement.

30

Mr. German: It does on the record, your Honor please.

The Court: Is there anything in the papers to show that you claim any fraud on these—(interrupted).

40

John Kossak, for Defendants, cross.

Mr. German: Oh, yes. They say these people cheated to defraud—(interrupted).

The Court: It says so?

Mr. Finkelstein: Yes.

Mr. German: Yes.

10 The Court: All right.

Q Mr. Ralph Benacquista had done business with your company some years prior to that? A Ralph and Enrico.

Q Yes, the two of them? A The two of them.

Q And your business had been all satisfactory and you were willing to trust them? A (No answer.)

20 Q Your company, did they take a trade journal at that time? A Did they take a what, trade journal?

Q Did they take a trade journal at any time?

A We might have several of them.

Q And on these contracts on file—

Mr. Phillipson: I object, your Honor pleases.

30 Q —in the clerk's office. Are they brought to your attention?

Mr. Phillipson: I object to that. If they are on record, whether they are called to his attention or not, or whether he knew about them, has no bearing in this case.

The Court: I will sustain the objection.

Mr. German: All right.

40 Q So that in your lien claim or any claim against these two Benacquistas, you claim that part of the account—the amount of how much

John Kossak, for Defendants, re-direct.

to you was the contract? A The balance, you mean?

Q No, I mean for the contract, this. A The contract is \$879, and there was about three hundred and some odd dollars extra.

Q I see. A The total \$1,122. And they paid us \$400 on account of this house. 10

Q Just give me the amount of that again. This contract is how much, you say? A \$879, and then there is some extras beside the contract.

Q You claim that the account you have against the Benacquistas of \$879 is according to the contract in Exhibit D. 4. Is that right? A \$879, that is for lumber to be delivered, which is stated on that contract—list of lumber which is stated on the list. 20

Q And you delivered this lumber? A With some changes. 20

Q Yes. And the balance is for extras? A Extras, yes.

Q And this covers 161— A 161-163.

Q 161-163? A Yes.

Q This covers two houses? A This list two houses, but they are two separate houses.

Mr. German: I see. This covers two separate houses. All right, that is all. 30

Re-direct examination by Mr. Finkelstein.

Q Now, this list Mr. German refers you to, is a list of each house separately; is that it? A Each house separately.

Q You delivered materials for 161 before that, before this time? A Yes.

Q You were paid for that, were you? A Yes. 40

John Kossak, for Defendants, re-cross.

Q And the balance is for a similar list? A Similar list, yes.

Q Which you signed? A Yes.

Q And for extras delivered to 163 North 15th street? A Yes.

10 Mr. German: Does your Honor care to look at this? It is very short.

Q Mr. Kossak, were materials of all the other houses referred to by Mr. German furnished before the materials at 163 North 15th street? A That is right.

Q Do you know whether the other houses were completed before you made delivery at 163 North 15th street? A Yes, sir.

20 Q They were completed? A Yes.

Q How do you know that? A I went up to the job to ask the Benacquistas for money on the third house, and I saw the other houses were about finished. They were painting in the third house.

Q And that started at 163 North 15th? A No.

Mr. Finkelstein: That is all.

30 The Court: That is all, sir.

Re-cross examination by Mr. German.

Q But before they started the third house, you had made a contract for the third house before that started? A Contract, yes.

Q At the time you made it for 161? A Yes.

Q Which was the third one? A Yes.

40 Q That is, you made the contract for the fourth house, at the time you made the contract for the third house? A Yes, sir.

Max Adelman, for Defendants, direct.

Q Meaning 161-163? A They said they would build two houses.

MAX ADELMAN, called as a witness in behalf of the defendants, having been duly sworn, testified as follows: 10

Direct examination by Mr. Finkelstein.

Q Mr. Adelman, you are the Treasurer of the Channel Lumber Company? A Yes, sir.

Q Do you know Ralph—Raffaele and Enrico Benacquista? A Yes, sir.

Q And did you furnish materials at 163 North 15th street? A Yes, sir.

Q Did Raffaele and Enrico Benacquista come to your office? A Yes, sir. 20

Q To make arrangements for the purchase of materials? A Yes, sir.

Q Do you remember when they came to your office? A Yes.

Q In connection with this job? A Yes, sir.

Q When? A I don't know; one morning before they started, and we made arrangements, and they signed for it.

Q Do you remember what month it was or what day? A Oh, friend, I couldn't tell you. 30

Q If I show you Exhibit D. 4, will that refresh your memory? A There was that time.

Q About what time? A November.

Q November, 1928? A Yes.

Q Who purchased the materials for 163 North 15th street, Bloomfield? A Both of them.

Q Enrico and Raffaele Benacquista? A Yes. They told me they are partners and they are going to build two-family houses there. 40

Max Adelman, for Defendants, cross.

Q Did they say who were the owners of the property? A No; they both of them owners.

Q They both told you that they both were?

A Owners.

Q Owners of the property? A Yes.

10 Q And was that lease, Exhibit D. 4, signed by— A Yes.

Q Enrico and Raffaele Benacquista? A Yes.

Q Are you familiar with the other houses erected by the Benacquistas? A Yes, sir.

Q Were those houses finished before 163 North 15th street? A They were near finished. The painters was inside yet.

20 Q When they were doing the paint work, is that the time you furnished the lumber for 163 North 15th street? A At the time they made the painting, I started to deliver lumber for the last house.

Q 163 North 15th street? A Yes, sir.

Q What was the condition of 161 North 15th street, Mr. Adelman? Was there painting work being done at 161? A At that time?

Q Yes. A Yes, sir.

Q And have you been paid for materials furnished to 161 North 15th street? A Yes.

30 Q And this is the balance of 163 North 15th street? A Yes, sir.

Cross examination by Mr. German.

Q Mr. Adelman, you have been in the lumber business for some time yourself? A Yes, sir.

Q And during the last few years the business, that is the general business has been somewhat of a chaotic condition; isn't it—is that right?

40 Mr. Finkelstein: I object.

Max Adelman, for Defendants, cross.

A I can't see what you ask me.

Q I say it has, hasn't it? A What?

Q The building business generally has been somewhat upset, in a chaotic condition?

Mr. Finkelstein: I object.

The Court: I will sustain the objection.

10

Q You are very careful—had you known these Benacquistas before? A I knew him before, yes.

Q You knew Raffaele, he was a builder? A I knew both of them.

Q You knew Raffaele, did you? A Both of them.

Q I say, you knew Raffaele, did you? A I know Raffaele, and the other.

20

Q He was a builder? A He claims he was a builder.

Q He claims he was a builder? A Yes.

Q And before you gave credit to him or to both—no—on the first house, you had sold him goods before that; is that right? A Yes.

Q And he paid? A Yes.

Q Seemed to be a good risk? A I thought so.

Q You thought so at the time, yes, and you—when they came in they brought you a manila sheet of paper with a list of goods? A Yes, sir.

30

Q That they wanted to buy for four houses they were going to build? The first time, I am talking about. A They didn't both the first time.

Q I am talking about the one when they first came; they had a list; is that right? A Yes.

Q And from that list you figured the job again for them? A Right.

40

Max Adelman, for Defendants, cross.

Q I am talking about the first two houses, 157-159, is that right? A Right.

Q And you figured that job? A Right.

Q And, when you got through figuring, you made out this statement? A Yes, figured out the statement.

10 Q And you took D. 4, and figured on another statement for 149, didn't you? A Right.

Q And that was the same as D. 4? A Approximately.

Q Yes. And you went on and you sold the goods for No. 157, 159, and they paid you? A Right.

Q According to the books? A Right.

Q And then you come along to the last two houses, 161-163, and you went through the same thing again, didn't you? A I did.

Q And when they got through there was a balance due you; is that correct? A There was a balance due the last one.

Q Yes. I say when you got through the transaction—when they got through the transaction, there was a balance due to you; is that correct? A There is a balance due.

Q I say, when you got through the last transaction, there was a balance due to you? A Pardon me. It is done for himself.

Q I didn't ask you that. I say, when you got through the last transaction, there was a balance due according to your books? A Right.

Q Do you take a trade journal?

Mr. Finkelstein: I object. I don't see what the trade journal has to do with the case.

The Court: Sustained.

(Discussion.)

Max Adelman, for Defendants, re-direct.

The Court: I will sustain the objection.

Mr. German: Your Honor will permit me—I want to prove actual knowledge on behalf of this defendant of these contracts between the Benacquistas on record. That is my offer.

The Court: How can you assume that he took the trade journal? Perhaps he never saw it. 10

Mr. German: All right. If they were mailed to him, it is his duty—(interrupted).

The Court: No.

Mr. German: And in this general account, as your bookkeeper testified, there were other jobs besides these four 15th street houses? 20

The Witness: What?

Mr. German: Well, he didn't say anything about contracts, so I don't suppose I can go into that.

Mr. Finkelstein: Are you through with the witness?

Mr. German: I was addressing his Honor. He didn't say anything about the contract being fraudulent. I had not started to prove that, so I will have to wait. 50

The Court: Then you need not defend it, if you do not care to.

Re-direct examination by Mr. Finkelstein.

Q The balance due was for materials sold 163 North 15th street? A Yes.

Q When you did business with the Benacquistas in connection with the other houses, were materials sold to both? A Yes, sir. 40

Earl W. Schoonmaker, for Defendants, direct.

Mr. Finkelstein: It is consented by Mr. German that I need not put the drivers on the stand, that materials were delivered. That is all now.

10 Mr. Phillipson: I must establish my case. There are two more defendants seeking to establish lien claims in the same case.

The Court: All right.

EARL W. SCHOONMAKER, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Phillipson.

20 Q Mr. Schoonmaker, are you an officer of the H. B. Salmon Company? A I am.

Q And are you familiar with the affairs of the H. B. Salmon Company? A I am.

Q In what capacity do you—what are your duties as such officer, Mr. Schoonmaker? A Vice-President and Manager.

Q And you supervise the general affairs of the corporation? A I do.

30 Q And do you know whether or not the H. B. Salmon Company sold materials to Raffaele Benacquista and Enrico Benacquista, trading as Benacquista Brothers, to 163 North 15th street, the mortgaged premises in this action? A We did.

Q And what is the amount due the H. B. Salmon Company for materials sold this job? A \$803.29.

Q Is that the total amount of materials sold or has there been a payment made on account?

40 A There has been no payment on account on this particular job.

Earl W. Schoonmaker, for Defendants, direct.

Q Have you there the books of original entry, Mr. Schoonmaker? A I have (producing).

Q Are these loose leaf sheets from your books of original entry? A They are from the books of original entry.

Q What book do you call that? A The sales book. 10

The Court: Now, you have put that into the statement, haven't you?

The Witness: Yes. We transferred our—

The Court: Well, do not, unless Mr. German wants to cross examine on all that.

The Witness: Your Honor, that is an itemized account.

Mr. Phillipson: Mr. Schoonmaker testified that—(interrupted). 20

The Court: The total is eight hundred something or other.

Mr. Phillipson: Yes. If you seek to cross examine him on the account, I will put the account in.

Mr. German: Just put the general account on the four houses the same as the other, and show your payment.

Mr. Phillipson: There is no general account on the four houses. 30

Mr. German: I have examined the account, and, according to the books, there is an account for all four houses which Mr. Schoonmaker has there.

The Witness: Kept individually.

Mr. German: I say you have it.

The Witness: On each job individually. No general account. 40

Earl W. Schoonmaker, for Defendants, direct.

Mr. German: All four houses on this sheet?

The Witness: Yes, sir.

Mr. German: All four houses—

The Witness: In fact, there is five
10 houses.

Mr. German: All right. Five houses, including the—(interrupted).

Mr. Phillipson: I will put it in, Mr. German.

Mr. German: All right.

Q What is this, Mr. Schoonmaker, showing to you a typewritten list of five sheets? A That is our sales book where entries are made direct
20 from the delivery tickets.

Q And is each account of the Benacquista Brothers separate on these sales sheet? A Each account, each job is kept separate.

(Five or six sheets handed to stenographer, marked D. 5.)

Q Now, Mr. Schoonmaker, I show you a sheet headed "Benacquista Brothers," having certain writing on it, and ask you what it is? A This
30 is our general ledger.

Q And what does that disclose, Mr. Schoonmaker? Have you the account of Benacquista Brothers on that general ledger sheet? A It is the general ledger sheet of our account for Benacquista Brothers, showing each individual job.

Q And does it show the job at 163 North 15th street? A It does.

Q And does it show that job separately? A Separately.
40

Earl W. Schoonmaker, for Defendants, direct.

Q And upon what are the items made up on that ledger sheet? A The items are taken monthly from our sales record.

Q And does your sales record disclose to which particular job the particular materials are delivered? A They do.

Q Do you know, of your own knowledge, Mr. Schoonmaker, whether or not the materials set forth in the ledger sheet as having been delivered to 163 North 15th street, the mortgaged premises, were actually delivered to that premises? A I do. 10

Q And between what dates? A Between—I will have to have my sales book to get the day of the month. It is December. Between December 12, 1928, and April 20, 1929.

Mr. Phillipson: I want to offer in evidence the ledger sheet. Any objection, Mr. German? 20

Mr. German: No.

(Ledger sheet marked Exhibit D. 6.)

Mr. Phillipson: I want to offer certified copy of the mechanics' lien claim filed by H. B. Salmon & Company, naming Raffaele Benacquista and Enrico Benacquista, partners trading as Benacquista Brothers, as the builders, and Carlo Campagna, as owner, upon the mortgaged premises in question, for the sum of \$803.29, filed in the Essex County Clerk's office on August 16, 1929, in Book 29 of Mechanics' Liens, on page 104, and upon which there is the following endorsement: "Summons was issued on the within claim this 16th day of August, A. D. 1929, at the suit of H. B. Salmon Company, claimant, against the builder, and Raffaele 30 40

Earl W. Schoonmaker, for Defendants, direct.

Benacquista and others. John H. Scott, Clerk."

Any objection, Mr. German?

Mr. German: No, I have no objection.

(Certified copy of mechanics' lien claim marked Exhibit D. 7.)

10

Mr. Phillipson: I also offer in evidence a certified copy of a judgment obtained in a suit in the Essex County Circuit Court, wherein H. B. Salmon Company is the claimant, plaintiff, and Raffaele Benacquista and Enrico Benacquista, partners trading as Benacquista Brothers, builders, and Carlo Campagna, owner, and Eleventh Ward Building & Loan Association are the mortgagee, which certified copy—which judgment is a general judgment against Raffaele Benacquista and Enrico Benacquista, partners, trading as Benacquista Brothers, for the sum of \$859.50 damages and \$85.37 costs, and a special judgment.

20

The Court: That is a judgment on the lien?

Mr. Phillipson: Yes, that is a judgment on the lien.

30

The Court: Why do you put in the lien? Why don't you put in the judgment?

Mr. Phillipson: Well, I want to put both in, your Honor.

The Court: Yes.

Mr. Phillipson: And a special judgment as against the mortgaged premises. Any objection to that?

Mr. German: The action, so far as the Eleventh Ward Building & Loan Associa-

40

Earl W. Schoonmaker, for Defendants, direct.

tion, which has put in a defense in this action that this judgment does not bind them in any way.

Mr. Phillipson: No. I will say this that the judgment contains a provision which reads as follows: "And it is further ordered that the determination of priority as to the lien of the claimant-plaintiff and the mortgage of the Eleventh Ward Building & Loan Association, mentioned in the complaint herein, be reserved pending trial on that issue and/or pending the further order of this court." Judgment is entered and signed November 7, 1929, recorded in Book 109 of Circuit Court Judgments on page 29.

(Judgment marked Exhibit D. 8.)

The Court: Is that all? 20

Mr. Phillipson: No. One other question. May I have your mortgage?

Q The mortgage made by Enrico Benacquista and Emilia Benacquista, his wife, to the Eleventh Ward Building & Loan Association, which mortgage is marked in evidence as Exhibit C. 8, was recorded on February 17, 1929. Do you know, Mr. Schoonmaker, of your own knowledge, whether or not the building upon the mortgaged premises was begun before or after that date? A What was the date? 30

Q February 7, 1929? A It was begun before that.

Q Do you know how long before? A Oh, yes, approximately two months.

Mr. Phillipson: All right. That is all. Just a minute.

Earl W. Schoonmaker, for Defendants, cross.

The Court: Any cross?

Mr. German: Yes.

Cross examination by Mr. German.

Q You have done business with Mr. Raffaele
10 Benacquista before the beginning of these houses,
haven't you? A Done business with the two of
them; never individually.

Q I say, you have done business with one or
both of them for some years? A Both of them,
yes.

Q And it has been a very satisfactory man-
ner? A I wouldn't say very satisfactory.

Q Well, satisfactory? A Satisfactory.

Q Satisfactory, that you were willing to give
20 them further credit and, before you give credit
to anyone now in a building, you know something
about as to whether they have a loan or not?

Mr. Phillipson: I object to this cross
examination.

The Court: I will sustain the objection.

Mr. German: All right.

Q Did you ever notify the Eleventh Ward
30 Building & Loan—

Mr. German: Oh, no. I withdraw it.

Q Where is your contract? A (Witness
produces paper.)

Q And during the course of the sale of these
four houses, which commenced in July, 1928,
from No. 107, 159, that came in July, didn't it?

40 Mr. Phillipson: I object, your Honor.

Earl W. Schoonmaker, for Defendants, cross.

The Court: I will sustain the objection.
That has nothing to do with it.

(Discussion.)

Q At any rate 161-163 came under the same contract? A No, it did not.

Q Have you anything in writing from these people? A No, sir. 10

Q You know Mr. Raffaele as a builder, as a contractor; at least, claimed to be?

Mr. Phillipson: I object to that. What difference does it make?

Mr. German: Let his Honor rule.

The Court: Read it.

(The question was read as follows):

“Q You know Mr. Raffaele as a builder, as a contractor; at least, claimed to be?” 20

The Court: Strike it out. How does this witness know what he claims to be?

Mr. German: Because he done business with him several years and if you knew what the material business was, your Honor, you would know they know what they are doing before they go into it. That is a matter of common knowledge among these men. Will your Honor permit it? 30

The Court: No, I won't.

Q Did you know that Benacquista—that these two Benacquistas were in the cement and stone block business? A I knew that.

Q Had been for a number of years, for some time? A For several years, yes.

Q Before they did business with you? A Yes. 40

Daisy Hipkiss, for Defendants, direct.

Mr. Phillipson: I object to that.

The Court: No, that is perfectly all right.

Q And, when they came to you, they were not
strangers, when they came to you and asked for
credit on these North 15th street houses, they
10 were not strangers to you? A No, we knew them
previous to that.

Q You knew them pretty well, is that right?

A (No answer.)

Mr. German: That is all.

The Court: Is that all?

Mr. German: Yes.

The Court: That is all, sir.

20

DAISY HIPKISS, called as a witness on behalf
of the defendants, having been duly sworn
testified as follows:

Direct examination by Mr. Phillipson.

Q Miss Hipkiss, are you a bookkeeper in the
firm, Belleville Sash & Door Company? A Yes.
30

Q And are you familiar with the affairs of
the Belleville Sash & Door Company and the
materials sold by the Belleville Sash & Door
Company? A Yes.

Q And can you tell me whether or not the
Belleville Sash & Door Company sold materials
to Raffaele Benacquista and Enrico Benacquista,
partners trading as Benacquista Brothers to 163
North 15th street, the mortgaged premises here-
in? A Yes, they did.
40

Daisy Hipkiss, for Defendants, cross.

Q And what is the amount due for the materials sold and delivered to that job? A \$872.43.

Q Have you the original books with you, that is the books of original entry of the Belleville Sash & Door Company, just the ledger sheet, if you have it? A (Witness produces sheet.) 10

Q And what is this that you show me? A This is the ledger sheet on the job, this account on job No. 4 and 163 North 15th street.

Q How much is due for materials sold that job? A \$872.43.

Mr. Phillipson: I offer this in evidence.

Mr. German: I object to it unless it shows all the account, unless there were more. 20

Mr. Phillipson: We are not interested in any other account.

The Court: I will admit it.

(Sheet marked Exhibit D. 9.)

Mr. German: I think we ought to have the original books of entry.

Q Between what dates were these materials sold and delivered, Miss Hipkiss? A October 23, 1928 and May 10, 1929. 30

Mr. Phillipson: All right.

Cross examination by Mr. German.

Q Do you know whether your company sold other goods to these same two Benacquistas? A I believe they did.

Q Have you the account there?

40

Daisy Hipkiss, for Defendants, cross.

Mr. Phillipson: I object to that, your Honor. The examination was confined to the materials sold this particular job.

The Court: I will sustain the objection.

10 Mr. German: Will your Honor allow me an exception on that?

The Court: Why?

Mr. German: It is a question of notice purely. Your Honor please, I appreciate this matter in one way has nothing to do— (interrupted).

The Court: Aren't we struggling with 161-163?

Mr. German: Yes; that is two houses.

20 The Court: Why do you want 57-59 or any other thing? Why, they might have sold things in Atlantic City or any other place. No, I won't allow it.

Q 161, have you your sheet here for 161?

Mr. Phillipson: I object.

A This is for 163.

30 Q Have you for 161 with you?

The Court: You didn't sell any to 163, did you—I mean, 161?

The Witness: We did, but that was cleaned up, that was settled.

The Court: That is all they owe you?

The Witness: That is all, 163 North 15th street.

40 The Court: That is all you can examine on.

Daisy Hipkiss, for Defendants, cross.

Q Will you produce your account and show your payments?

Mr. Phillipson: I object to that.

A We didn't receive payments on 163.

Q Your books don't show on 163 nor 161, but it shows No. 4, don't it? A Yes, it shows No. 4. 10

Q It shows No. 4. Just a minute. It shows No. 4? A Yes.

Q And you have got a job No. 3, haven't you? A Yes.

Q And you have got a job No. 2? You have one, and a job No. 1? A Yes.

Q And they are all on North 15th street, Bloomfield? A They are on North 15th street, Bloomfield. 20

Q How do you distinguish job No. 4 as this particular house number? A Because it was his last—the fourth job we delivered the materials to was 163 and we keep that for simplifying our records.

Q That is, you had delivered— A Our deliveries were not on 163.

Q Show me the credits, will you please, for these four jobs, if they were all together? 30

Mr. Phillipson: I object to that; we are not concerned with the credits.

The Court: No. Only on 163.

Mr. German: They have got them so intermingled, according to their books, it is hard to pick out.

The Witness: We have the whole thing.

Mr. German: (Continuing.) This particular one. 40

Daisy Hipkiss, for Defendants, cross.

The Witness: We have one sheet on one job.

The Court: This young lady has been trying to explain to you, Mr. German, that this is only 163.

10 Mr. German: Yes. But, your Honor please—(interrupted).

The Court: And that is all you can cross examine her on. That is all she has been put on the witness stand for.

Mr. German: Your Honor please, I examined these books and on the books there were four or five jobs all intermingled together.

20 Mr. Phillipson: I object to that statement, your Honor.

Mr. German: Now, then, they have picked out a certain job on the general account which relates only to this—

The Witness: No.

Mr. German: But the credits—

30 The Court: Now, wait a minute. They have a perfect right to do that, and you can only examine on what they have picked out. You cannot cross examine on all the rest of their books, if they only choose to put in 163. Can't you understand that?

Mr. German: I understand this, but I cannot understand, your Honor please, where a person has a lien on four houses, they cannot list one house and say, "That is what we have got a lien on."

40 The Court: If they want to identify the liens on the other houses, I don't see any reason why they cannot.

Alexander E. Abramson, for Defendants, direct.

Mr. German: And just go for one—all right.

Mr. Phillipson: That is all.

The Court: That is all.

10

ALEXANDER E. ABRAMSON, called as a witness in behalf of the defendants, having been duly sworn, testified as follows:

Direct examination by Mr. Phillipson.

Q Are you an officer of the Belleville Sash & Door Company and do you supervise the affairs of the company? A Yes, sir.

Q And do you know, of your own knowledge, whether or not materials were delivered by the Belleville Sash & Door Company to 163 North 15th street, the mortgaged premises herein? A Yes, I do. 20

Q And, showing you Exhibit D. 9, can you tell me between what dates materials were delivered?

The Court: That has already been testified to.

Mr. Phillipson: All right. 30

Q Do you, of your own knowledge, know whether or not those materials were actually delivered? A Yes, I do.

Q And can you tell us, Mr. Abramson, of your own knowledge, whether or not the building was begun before or after February 7, 1929?

A Oh, yes; we made deliveries to the premises long before that. 40

Alexander E. Abramson, for Defendants, cross.

Q Can you tell me whether or not, of your own knowledge, the building was begun on the mortgaged premises before or after February 7, 1929? A Before.

The Court: Cross examination?

10 Mr. German: Except I offer to prove—
(To the witness.) You have sold—(inter-
rupted).

The Court: Wait a minute. Have you finished?

Mr. Phillipson: I am finished with the witness, but I want to introduce at this time—

The Court: Wait a minute. Mr. German, perhaps, wants to cross examine. Do you?

20 Mr. German: Yes.

Cross examination by Mr. German.

Q Have you done business with the Benacquistas before this? A Both of them.

Q Satisfactorily?

Mr. Phillipson: I object.

30 A They were a little slow in meeting their account.

Mr. Phillipson: I object. Just a minute.

The Court: No. I think that is all right. I will admit it.

Mr. German: Yes. This is all on the books. Well, I think that is all—

40 Q And at the time you were selling on this particular house, you had a general account on

Offer of Documentary Evidence.

other houses with them. For instance, on the Clifton avenue and Fourth street? A No, we didn't sell anything on the Clifton avenue job.

Q On Fourth street you did? A Yes, on Fourth street.

Mr. Phillipson: I offer in evidence at this time certified copy of mechanics' lien filed by the Belleville Sash & Door Company against Raffaele Benacquista and Enrico Benacquista, partners trading as Benacquista Brothers, as builder, Carlo Campagna, as owner, against the mortgaged premises, in the sum of \$872.33, which mechanics' lien claim was recorded in the Essex County Clerk's office in Book 27 of Mechanics' Liens, page 166, on September 9, 1929, and which mechanics' lien claim has the following endorsement: "Summons issued on the within lien claim the 9th day of September, A. D. 1929, John A. Scott, Clerk." 10 20

Mr. German: I object to it, your Honor please.

The Court: Well, why?

Mr. German: On the ground that in the statement—(interrupted). 30

The Court: Isn't this a certified copy?

Mr. German: Yes, but I want to call you Honor's attention—

The Court: Well, you cannot object to a certified copy. I shall have to receive it.

Mr. German: For what it is worth?

The Court: Why, you can complain on the argument.

Mr. German: All right, let it go in. 40

Offer of Documentary Evidence.

The Court: As to contents, but you cannot—(interrupted).

Mr. German: All right.

The Court: All he introduces this for is—(interrupted).

10 Mr. German: Yes.

The Court: —because it is a certified copy of a record.

Mr. German: I have no objection to it.

(Certified copy marked Exhibit D. 10.)

20 Mr. Phillipson: I also offer in evidence certified copy of a judgment entered in the Essex County Circuit Court by the Belleville Sash & Door Company against Raffaele Benacquista—strike it out—in the case wherein the Belleville Sash & Door Company was claimant-plaintiff, Raffaele Benacquista and Enrico Benacquista, partners trading as Benacquista Brothers, Carlo Campagna and Eleventh Ward Building & Loan Association are the defendants, which judgment contains the same provisions as to the general and special judgment as the judgment, certified copy of which was offered in evidence on behalf of H. B. Salmon & Company, and which judgment—and this judgment is recorded in Book 109 of Circuit Court Judgments, page 44.

30

The Court: It will be received.

(Certified copy of judgment marked Exhibit D. 11.)

The Court: Now, is there anything else, gentlemen?

40

Mr. Phillipson: No. I have one other witness.

Discussion.

(Discussion.)

Mr. Phillipson: Mr. German admits that at the time the mechanics' lien—

The Court: Now, you assure us that this is so?

Mr. Phillipson: Yes, sir, your Honor, I assure you that—I represent that to the Court—that at the time the lien claim of H. B. Salmon Company and of the Belleville Sash & Door Company was filed Carl Campagna was the record owner of the mortgaged premises. 10

The Court: Now, is that the end of the case?

Mr. German: No. your Honor please, there is one thing I want to— I have got something in my mind here, I don't want to—annexed to the complaint in the case of the Belleville Sash & Door Company on which they base their lien claim is an itemized statement of the account which states the job 892 Clifton avenue, Newark, N. J., on which there is alleged to be a balance of \$55.50, in other words, according to their complaint which they have filed and served a copy on us, part of the claim they are seeking against 163, according to their own paper, to the extent of \$55.50 is on job 892 Clifton avenue. 20 30

The Court: Is that in evidence?

Mr. German: I want to—

Mr. Phillipson: No, that is not in evidence, your Honor. I have not offered in evidence a certified copy of it, of the summons and complaint.

The Court: I will admit it. 40

Discussion.

Mr. German: I offer in evidence a copy of the complaint which was served on the defendant, with the summons attached.

(Copy of complaint marked Exhibit C. 9.)

10 The Court: Now, as far as any other witnesses are concerned, I set this case down specially for the convenience of counsel because Mr. German is going away. Now, if this man, your witness, is not here, I don't see any reason why I should continue the case. What do you expect to prove by him?

Mr. Finkelstein: He will testify that he and his brother purchased materials from my people.

The Court: Is he your client?

20 Mr. Finkelstein: No, he is not my client. I went up there with a subpoena, and while I served it on him, I talked with him. He said, "Yes, that he and his brother had purchased these materials from the Channel Lumber Company."

The Court: Of course, I don't want to cut any counsel off from the proper presentation of his case, but you all agreed to try it today.

30 Mr. German: I am here and taking my medicine.

The Court: So am I.

Mr. Finkelstein: I did everything I possibly could to him. I served a subpoena on him. If your Honor directs me to, I will have an order drawn to have him held in contempt for failure to comply.

The Court: That won't help out.

40 (Discussion.)

Discussion.

Mr. German: I will admit that if the books show that they wanted Enrico Benacquista on the contract with the contractor, that I don't object to it.

Mr. Finkelstein: We make no application for Mr. German to put any such thing on record. 10

The Court: Very well. Strike it from the record.

Mr. Finkelstein: I would like to have it taken off the record.

The Court: Yes.

Mr. Finkelstein: Yes.

The Court: Very well, the case is closed. Now, what have I to decide?

Mr. German: Well— 20

The Court: Whether these loans take precedence over the mortgage?

Mr. Finkelstein: Yes, sir.

Mr. German: Pardon me just a minute. The pleadings show, they say that these two Benacquistas, in order to cheat and defraud their clients, material men, that this contract is void as to them.

The Court: You are simply foreclosing your mortgage? 30

Mr. German: Mortgage. And I have produced the regular postponement signed by the general contractor on record, which, according to the section of the statute is—(interrupted).

The Court: It seems to me that I ought to grant the motion to foreclose. I do not see that you have established anything very much, frankly. 40

Discussion.

Mr. Finkelstein: Your Honor please, our pleadings in addition to stating that they entered into this contract to defraud creditors also states that materials were sold to both of them and, having been sold to both of them—(interrupted).

10

The Court: What difference does it make? The contract is on file.

Mr. Finkelstein: It doesn't make any difference whether the contract is on file.

The Court: I am not so sure about that. However, I do not want to be hasty about it.

20

It seems to me, if I am not mistaken, here is a mortgage being foreclosed, the contract is on file, lienors under the contract, come in and try to claim that they have rights superior to the contract.

Mr. Finkelstein: But, your Honor please, we are not lienors under the contract. Our rights—(interrupted).

The Court: If you are not lienors under the contract, you have no right in court at all, have you?

30

Mr. Finkelstein: Yes, we have. We are doing business direct with the owners.

Mr. Phillipson: I think I can clarify this situation.

The Court: Never mind. I will allow you to file briefs.

Mr. German: When will you ask defendants to serve me with a copy of their briefs?

The Court: Well, suppose I say the first week in March?

40

Mr. German: All right.

Complainant's Exhibits.

The Court: That, I think, would be convenient for you.

Mr. German: Yes, fine, very good. Thank you.

10

Exhibit C. 1.

Contract for the erection of building between Enrico Benacquista, owner, and Raffaele Benacquista, builder, dated July 18, 1928, wherein Rafaele Benacquista agreed to erect on or before November 1, 1928, two, 2½ story frame buildings on premises at 149 North 15th Street, Bloomfield, New Jersey, for the sum of \$13,000.00 on each building. (This contract does not cover mortgaged premises against which liens are claimed.)

20

Exhibit C. 2.

Contract made between Enrico Benacquista, owner, and Raffaele Benacquista, builder, wherein Raffaele agrees to erect for Enrico Benacquista, owner, two, 2½ story frame dwellings on premises at 161-163 North 15th Street, Bloomfield, New Jersey, for the sum of \$15,000.00 each. The specifications filed with contract contained on top of specifications the following notation: "For a two and a half story two family frame dwelling to be erected at lot—North 15th Street, Raffaele Benacquista, owner"

30

List of payments contained in contract:

First payment, when house is enclosed \$ 4,000.00

40

Complainant's Exhibits.

	Second payment, when brown coat is on	4,500.00
	Third payment, when job is com- pleted and accepted by owner, the balance	4,500.00
10	Total	\$13,000.00

Exhibit C. 3.

20 Bond accompanied by mortgage made by En-
rico Benacquista and Emilia Benacquista, his
wife, to the Eleventh Ward Building & Loan
Association, dated December 6, 1928 and re-
corded in the Essex County Register's Office on
February 7, 1929 in Book Y-66 of Mortgages for
said County, on page 191-3, in the sum of \$11,-
500.00, covering the mortgaged premises herein,
#163 North 15th Street, upon which the re-
spective liens are claimed.

Exhibit C. 4.

30 Written agreement by which Raffaele Benac-
quista releases any lien he may have against
the mortgaged premises #163 North 15th Street,
and wherein he postpones any lien he may have
to the lien of Complainant's mortgage marked
in evidence as "Exhibit C 3"; also affidavit
attached signed by Enrico Benacquista, dated
February 7 and sworn to May 17, 1929, wherein
he says that the said postponement has been
signed by all persons therein who have done
40 labor and furnished material for the erection

Complainant's Exhibits.

of the building in question or who have agreed to do so, whether by contracts in writing or otherwise, in order to entirely complete the building, except such as has heretofore been paid for.

Exhibits C. 5, C. 6 and C. 7.

10

DISPOSITION OF MONEYS

ELEVENTH WARD BUILDING & LOAN ASSOCIATION OF NEWARK, N. J.—
LOAN TO ENRICO BENACQUISTA PREMISES—163 North 15th St., Bloomfield, N. J. Re: Mortgage dated December 6, 1928—\$11,500.

1928

20

Dec. 6. Amount of Loan.....\$11,500.

1929

Feb. 21 Mortgagee's check to order of Enrico Benacquista for \$2770. drawn on Mutual Bank of Roseville, endorsed by Enrico Benacquista to Scott German, and deposited by him in his account as Trustee for Eleventh Ward B & L Association in the Franklin Washington Trust Company, Roseville Branch, and disbursed by him from said account on said date as follows:—

30

Check to Hyman Kalnitzky to pay mortgage on premises in question dated July 17, 1928, recorded in Book T 64-410—\$ 726.65

40

Complainant's Exhibits.

	Weiss & Wolman, attorneys of said mortgagor for can- cellation fee—	10.00
	To mortgagee for dues due from Benacquista	235.75
10	Scott German, legal fees and expenses in connection with the loan	193.35
	William Budd—premium on insurance on premises in question	59.62
	Withheld for unpaid taxes and assessments on premi- ses in question, and later paid	350.00
20	Check to Enrico Benacquista for balance of \$2770. B & L check; this check was endorsed by Enrico Benac- quista, and prior endorse- ments guaranteed by Peoples National Bank and Trust Company of Belle- ville, N. J.	1,194.63
		—————\$ 2,770.00
30	Feb. 21 Mortgagee's check to Enrico Benacquista on Mutual Bank of Roseville, endorsed by Enrico Benac- quista back to Association for bonus on said loan.	230.00
40	Mar. 28 Mortgagee's check to Enrico Benacquista for \$4000. on Mutual Bank of Roseville, endorsed by En- rico Benacquista to Scott German, and deposited by	

Complainant's Exhibits.

him in his Trustee account
in the Franklin Washington
Trust Company, Roseville
Branch, as above, and dis-
bursed by him from said
account as follows:

To Mortgagee for B & L dues due from mortgagor.....	\$ 477.25	10
Check to Enrico Benacquista for balance	3,522.75	
	<hr/> 4,000.00	

This check was endorsed by
Enrico Benacquista, and
prior endorsements guaran-
teed by Peoples National
Bank and Trust Company
of Belleville, N. J.

Carried Forward—.....	\$ 7,000.00	20
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#2

Brought Forward—.....	\$ 7,000.00	
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1929

May 17 Mortgagee's check to Enrico Benacquista for \$4300., drawn on Fidelity Union Trust Company, City Trust Branch, endorsed by Enrico Benacquista to Raf- faele Benacquista and by Raffaele Benacquista to Scott German, and deposit- ed by him in his Trustee account in the Franklin Washington Trust Com- pany, Roseville Branch, as aforesaid, and disbursed		30
		40

Complainant's Exhibits.

by him from said account
as follows:

	To Mortgagee for B & L dues due from Enrico Benac- quista	\$ 235.75	
10	Check to Enrico Benacquista endorsed by him to Raf- faele Benacquista for	4,064.25	
		<hr/>	4,300.00
	This check was also endorsed by Raffaele Benacquista, and prior endorsements guaranteed by Peoples Na- tional Bank and Trust Company of Belleville, N. J.		
20	June 14 Mortgagee's check to Enrico Benacquista, drawn on Fidelity Union Trust Company, City Trust Branch, endorsed by him, and prior endorsements guaranteed by Peoples Na- tional Bank and Trust Com- pany of Belleville, N. J....		200.00
			<hr/>
30			\$11,500.00

*Complainant's Exhibits.***Exhibit C. 8.**

Statement of the amount due upon the mortgage marked in evidence as "Exhibit C3", showing the advance made and the interest computations, arrearages, taxes unpaid, etc., disclosing that there is due upon complainant's mortgage (C3) the sum of \$11,478.06 as of January 20, together with interest thereon. 10

Exhibit C. 9.

A carbon copy of summons and complaint served upon the Eleventh Ward Building & Loan Association by the Belleville Sash and Door Co., upon the lien claim, to which summons & complaint is annexed an itemized statement of an account of Raffaele Benacquista and Enrico Benacquista to a job located at 892 Clifton Avenue, Newark, N. J., upon which there shows a balance due of \$55.50. Summons and complaint is otherwise regular claiming the sum of \$872.33 for materials to job 163 No. 15th St. 20

30

Exhibit D. 1.

Ledger sheet from the Peoples National Bank and Trust Co. showing a joint account in the names of Raffaele and Enrico Benacquista, to which the checks referred to in "Exhibit C5-C6 and C7" as well as other checks, were deposited.

40

*Defendants' Exhibits.***Exhibit D. 2.**

10 Certified copy of Deed to mortgaged premises upon which liens are claimed made by Raffaele Benacquista and Mary Benacquista, his wife, to Enrico Benacquista, dated July 18, 1928 and recorded July 19, 1928, in the Essex County Register's Office in Book F-78 of Deeds for said County, page 382, wherein Raffaele Benacquista conveys his one-half undivided interest in and to said premises to Enrico Benacquista.

Exhibit D. 3.

20 Certified copy of Judgment recovered by Channel Lumber Co. against Enrico Benacquista, Raffaele Benacquista, Carlo Campagna (the said Carlo Campagna being the present owner of property) upon its lien claim in the sum of \$739.42, and mechanics lien claim recorded August 16, 1929, filed by Channel Lumber Co. in the Essex County Clerk's Office in Book 27 M L, page 26, upon which is the following notation:
30 "Summons issued on the within lien claim August 16, 1929. John H. Scott, Clerk". Also jacket 507-37 of the Essex County Clerk's Records containing all papers in connection with suit at law and Channel Lumber Co. against Carlo Campagna, et als, upon the said lien claim.

*Defendants' Exhibits.***Exhibit D. 4.**

Contract made between Channel Lumber Co. as seller, and Raffaele and Enrico Benacquista as buyers, dated November 16, 1928, signed by both Raffaele Benacquista and Enrico Benacquista for materials sold to 161-163 North 15th Street, against which latter property lien is claimed. 10

Exhibit D. 5.

Five sheets from sales book of H. B. Salmon Company, headed Benacquista Brothers, exhibiting materials furnished and amounts due on each of several jobs. 20

Exhibit D. 6.

Ledger sheet of H. B. Salmon Company headed "Benacquista Brothers" showing materials delivered to 163 North 15th Street, against which liens are claimed, and showing statement of materials as set forth in lien claim filed by H. B. Salmon Company. 30

Exhibit D. 7.

Certified copy of mechanics' lien claim filed by H. B. Salmon Company, naming Raffaele Benacquista and Enrico Benacquista as partners trading as Benacquista Brothers, as builders and Carlo Campagna as owner, against mortgaged 40

Defendants' Exhibits.

premises 163 North 15th Street, in the sum of \$803.29, filed in the Essex County Clerk's Office August 16, 1929, in Book 29 M L, page 104, and upon which there is the following endorsement:
"Summons was issued on the within claim this 16th day of August, A. D., 1929, at the suit of
10 H. B. Salmon Company, claimant, against the builder, and Raffaele Benacquista and others. John H. Scott, Clerk."

Exhibit D. 8.

Certified copy of Judgment obtained in the Essex County Circuit Court in a suit wherein
20 H. B. Salmon Company is the claimant-plaintiff, and Raffaele Benacquista and Enrico Benacquista, partners trading as Benacquista Brothers, builders, and Carlo Campagna, owner, and Eleventh Ward Building & Loan Association is the mortgagee, which Judgment is a general Judgment against Raffaele Benacquista and Enrico Benacquista, partners trading as Benacquista Brothers, for the sum of \$859.50 damages and \$85.37 costs, and a special Judgment against
30 the mortgaged premises, and which said Judgment rule contains the following provision:
"And it is further ordered that the determination of priority as to the lien of the claimant-plaintiff and the mortgage of the Eleventh Ward Building & Loan Association, mentioned in the complaint herein, be reserved pending trial on that issue and/or pending the further order of this Court."
This Judgment was entered and signed November 7, 1929, and recorded in Book 109 of Circuit Court Judgments, on page 29.

*Defendants' Exhibits.***Exhibit D. 9.**

Ledger Sheet of Belleville Sash & Door Company showing account of materials delivered to 163 North 15th Street, to the account of Raffaele Benacquista and Enrico Benacquista, partners trading as Benacquista Brothers, upon which is due \$872.43. 10

Exhibit D. 10.

Certified copy of mechanics' lien claim filed by Belleville Sash & Door Company against Raffaele Benacquista and Enrico Benacquista, partners trading as Benacquista Brothers, as builders and Carlo Campagna, as owner, against premises 163 North 15th Street, in the sum of \$872.33, recorded in the Essex County Clerk's Office in Book 27 M L, page 166, on September 9, 1929, and which mechanic's lien claim has the following endorsement: "Summons issued on the within lien claim the 9th day of September, A. D. 1929. John A. Scott, Clerk." 20

Exhibit D. 11.

Certified copy of Judgment entered by Belleville Sash & Door Company in a case wherein Belleville Sash & Door Company was claimant-plaintiff, Raffaele Benacquista and Enrico Benacquista, partners trading as Benacquista Brothers, Carlo Campagna and Eleventh Ward Building & Loan Association, are the defendants, and which Judgment contains the following provision: 30
40

Defendants' Exhibits.

“And it is further ordered that the determination of priority as to the lien of the claimant-plaintiff and the mortgage of the Eleventh Ward Building & Loan Association, mentioned in the complaint herein, be reserved pending trial on that issue and/or pending the further order of this court.”

10 This Judgment was entered and signed November 9, 1929, and recorded in Book 109 of Circuit Court Judgments on page 44.

20

30

40

New Jersey Court of Errors and Appeals

Between

ELEVENTH WARD BUILDING &
LOAN ASSOCIATION,
Complainant-Respondent,

and

CARLO CAMPAGNA, MRS. CARLO
CAMPAGNA, wife of Carlo
Campagna; ENRICO BEN-
ACQUISTA, CHANNEL LUMBER
COMPANY OF BELLEVILLE,
N. J.; H. B. SALMON COM-
PANY, and BELLEVILLE SASH
& DOOR CORP.,
Defendants-Appellants.

On Bill etc.

*On Appeal
from Court
of Chancery.*

BRIEF OF DEFENDANTS-APPELLANTS, CHANNEL LUMBER COMPANY OF BELLEVILLE, N. J., H. B. SALMON COM- PANY AND BELLEVILLE SASH & DOOR CORP.

Statement of Facts.

On July 17, 1928 Raffaele Benacquista and Enrico Benacquista acquired title to a tract of land on North Fifteenth street, Bloomfield, New Jersey, including the parcels known as 161 and 163 North Fifteenth street, by deed recorded July 18, 1928. On the same day (July 18, 1928) Raffaele Benacquista and wife conveyed to Enrico Benacquista their undivided one-half interest in the property. On November 22, 1928 a building contract for the erection of two two-and-one-half-story frame dwelling houses was filed in the Essex County Clerk's office with the specifica-

tions thereto attached, describing Enrico Benacquista as owner and Raffaele Benacquista as contractor, although in the heading of the specifications annexed thereto is a recital that said plans and specifications were drawn for Raffaele Benacquista, owner (see Exhibit C. 2, State of Case, p. 125). Thereafter two buildings were commenced upon the two parcels, 161 and 163 North Fifteenth street, respectively, and subsequent to the commencement of said buildings Enrico Benacquista and wife made and executed to the respondent two bonds and mortgages upon the respective parcels sought to be foreclosed.

As to one of the mortgages upon 161 North Fifteenth street, included in the foreclosure bill of the respondent, Eleventh Ward Building & Loan Association, the appellants claim no lien thereon and respondent was entitled to its decree in the Court of Chancery.

But as to premises 163 North Fifteenth street, appellants are lien claimants who has furnished materials in the erection of said building and who have sought to establish their respective liens as prior to the mortgage of the Eleventh Ward Building & Loan Association, the respondent herein. The mortgage of the respondent upon 163 North Fifteenth street is commonly known as a construction loan mortgage, the funds having been advanced thereon in the course of the erection of the building.

On August 2, 1929 Enrico Benacquista and wife conveyed the property under foreclosure to Carlo Campagna.

On August 16, 1929 the appellant Channel Lumber Company of Belleville, N. J., filed a mechanics' lien claim against 163 North Fifteenth

street for materials sold to Raffaele Benacquista and Enrico Benacquista and used in the erection of the building thereon. Said lien claim was filed within four months of the furnishing of the last materials, and the suit upon said lien claim commenced in the Essex County Circuit Court, named Carlo Campagna, Enrico Benacquista, Raffaele Benacquista and Eleventh Ward Building & Loan Association as party defendants. On the 7th day of October, 1929 judgment was entered in this suit against Enrico Benacquista and Raffaele Benacquista generally, and specially against Carlo Campagna, to be made of the land and building described as 163 North Fifteenth street.

On the 16th day of August, 1929, the appellant, H. B. Salmon Company, filed a mechanics' lien claim in the Essex County Clerk's office against the premises 163 North Fifteenth street, for certain materials sold to Enrico Benacquista and Raffaele Benacquista and used in the erection and construction of the building thereon. Said lien claim was filed within four months of the furnishing of the last materials, and suit upon said lien claim, which was duly endorsed thereon, was commenced in the Essex County Circuit Court, naming Raffaele Benacquista, Enrico Benacquista, Carlo Campagna and Eleventh Ward Building & Loan Association as party defendants. On the 7th day of November, 1929, judgment was entered against Raffaele Benacquista and Enrico Benacquista generally, and specially against Carlo Campagna to be made of the land and building described as 163 North Fifteenth street.

On the 9th day of September, 1929, the appellant, Belleville Sash & Door Corp., filed a mechanics' lien claim in the Essex County Clerk's

office against the premises 163 North Fifteenth street, for certain materials sold to Enrico Benacquista and Raffaele Benacquista and used in the erection and construction of the building thereon. Said lien claim was filed within four months of the furnishing of the last materials; and suit upon said lien claim, which was duly endorsed thereon, was commenced in the Essex County Circuit Court, naming Raffaele Benacquista, Enrico Benacquista, Carlo Campagna and Eleventh Ward Building & Loan Association as party defendants. On the 9th day of November, 1929, judgment was entered against Raffaele Benacquista and Enrico Benacquista, generally, and specially against Carlo Campagna to be made of the land and building described as 163 North Fifteenth street.

Respondent's mortgage was recorded after the commencement of the building. Respondent advanced under its mortgage various funds after deducting premiums, search fees, insurance, interest and dues, to the owner (see disposition of moneys advanced under mortgage, Exhibits C. 5, C. 6, C. 7, State of Case, p. 127). All checks payable to Enrico Benacquista were deposited in the Peoples National Bank & Trust Co. of Belleville, N. J., to the joint account of Enrico Benacquista and Raffaele Benacquista (see Exhibit D. 1, ledger sheet of Peoples National Bank & Trust Co., State of Case, p. 131).

Both Raffaele Benacquista and Enrico Benacquista worked on said building in the course of its construction.

All materials sold by the appellants for the erection of 163 North Fifteenth street *were sold to Enrico Benacquista and Raffaele Benacquista jointly.*

Testimony discloses that the appellants filed their respective lien claims and commenced suits thereon within the time prescribed by law and that there is due to each of them upon such lien claims the following sums: Channel Lumber Company of Belleville, N. J., \$825.87; H. B. Salmon Company, \$859.50, and Belleville Sash & Door Corp., \$894.14, said sums being the amounts of the judgments as entered in the Essex County Circuit Court.

Respondent joined as party defendants in its foreclosure of the mortgage upon 163 North Fifteenth street, these appellants who filed answers and counter-claims thereto, claiming prior liens over that of the mortgage, and upon final hearing before Honorable Alonzo Church, Vice-Chancellor, a final decree was advised, decreeing among other things that respondent's lien is prior to the lien claims of these appellants.

The two questions involved in this appeal are:

First, whether the written contract between Enrico Benacquista and Raffaele Benacquista, marked in evidence as Exhibit C. 2, State of Case, page 125, bars appellants from asserting their mechanics' lien claims against the lands.

Second, if appellants are entitled to their mechanics' lien claims, whether or not their liens are prior to the mortgage of respondent.

ARGUMENT.**POINT ONE.**

Filing the written contract provided for by the Second Section of the Mechanics' Lien Act protects the building from liens for work or materials furnished by contractor only; if the owner orders materials or employs mechanics on his own account, a lien attaches for the same.

In the case *sub judice* all the materials sold by the respective lien claimants were sold not only to the contractor, Raffaele Benacquista, but also to the owner, Enrico Benacquista. This is indisputable and was naturally so found by the learned Vice-Chancellor in his memorandum opinion, where he says:

“In this case the materials sold by the respective lien claimants were sold not only to the contractor, Raffaele Benacquista, but also the owner, Enrico Benacquista” (State of Case, p. 61, ll. 31-34).

The respondent contends that inasmuch as there was a general building contract on file, all persons who furnished materials under that contract are precluded from the lien against the lands and buildings, relying upon the second section of the Mechanics' Lien Act of this State, which reads as follows:

“Whenever any building shall be erected in whole or in part by contract in writing, such building and the land whereon it stands shall be liable to the contractor alone for work done or materials furnished in pursuance of such contract; provided, said contract, or a duplicate thereof, together with the specifications accompanying the same, or a copy or copies thereof, be filed in the office of the clerk of the county in which such building is situate before such work done or materials furnished; provided further, that it shall not be necessary to file the plans

for such building in said clerk's office, whether such plans are referred to in said contract or not." P. L. 1898, p. 538, as amended P. L. 1910, p. 472. C. S. 3293, par. 2.

But the case of *Mechanics Mutual Loan Assn. v. Albertson*, 23 N. J. E. 318, decided by the Chancellor, definitely holds that the filing of the written contract provided by the second section of the Mechanics' Lien Law printed *supra* only protects the building from a lien for work or materials furnished by the contractor and that *if the owner orders materials or employs mechanics a lien attaches for the same*.

In *Mechanics Mutual Loan Assn. v. Albertson*, cited *supra*, the facts are as follows: Albertson, owner, entered into a contract with Farrel, contractor, for the erection of eight buildings. Farrel did not have sufficient credit to obtain the materials from the materialmen and Albertson went to the materialmen in Trenton and directed them to furnish materials on his account, which they did. Albertson subsequently procured a loan from the complainant in that suit, secured by mortgage (as in this case). The mortgagee complainant and their solicitor at the making of the loan knew of the contract and that it was filed and knew that Farrel erected the buildings, and supposed that he furnished the materials and that there could be no lien on them for any work or materials provided for in the contract on file. The Court held:

"But the materials were not furnished pursuant to the contract. That required Farrel to furnish them. They were furnished by Albertson. It is clear that the object of the provision in question was to protect the owner, who, by filing his contract, was freed from all claims by mechanics or materialmen, and could thus safely make his

payments according to contract. Mechanics and materialmen must take notice of such filing, and that by it they are deprived of their lien on the building, and must see to it that the contractor pays or secures his indebtedness to them. The object of it was not to secure a mortgagee or purchaser, and its construction cannot be guided by such supposed intention. If its provisions, by their proper and natural meaning, have that effect, the mortgagee and purchaser are entitled to the benefit of it, because they must be held to have acted on the faith of such provision.

There is nothing here that requires a construction different from the proper and usual meaning of the words of the act. They only protect it from a lien for materials furnished in pursuance of the contract. When the contractor furnished such materials, and the owner pays him for them, it is right that the owner and the building should be free. When the contractor does not furnish them, but a stranger does, it is not right or equitable that the building should be freed from the lien of the materialmen. It would be against the policy of the act, as well as the object and intention of this section. If no effect is given to the words 'in pursuance of the contract,' then the section would make the building liable to the contractor for the materials furnished by another, on the credit of the owner. The construction which gives effect to the words of the section in their usual import, rejecting none, comports best with the object of the act and if this section, and is not inconsistent with any other provision.

The counsel of the complainants chiefly urge that such construction would be unjust to mortgagees and purchasers, who rely on the recording of the contract, and cannot be expected to inquire whether the buildings erected were erected according to the filed contract, or by a new arrangement in disregard of it.

This act was not intended for the protection of mortgagees or purchasers as a part of the system of the registry law, so long part of the state policy, but, in utter disregard of it, makes lands liable for debts which need not be registered for a year after contracted, without any possibility of a purchaser or mortgagee finding out with certainty whether there are such claims. The mechanics and material-men could not be efficiently protected without some risk to the mortgagee and purchaser, and the legislature, when one must suffer, have chosen to protect the former at the expense of the capitalist. It has, in this case, thrown the burden of inquiring whether the work is done or materials furnished in pursuance of the contract upon the mortgagee or purchaser, as in the other case it has required the mechanic and materialmen to ascertain whether a contract is filed before each day's work is done and each load of material delivered.

A wise and more just law than the mechanics lien law can be imagined, even if its enactment could not be procured. But it is the duty of the court to administer the law as it exists, and to construe it as its intention is shown by its provisions.

In these cases the claims of the defendants for materials must be paid before the amounts due to the complainants on their mortgages."

It is the appellants' contention herein that the case *sub judice* is analagous to *Mechanics Mutual Loan Assn. v. Albertson*, above cited. In that case, Albertson was the owner who contracted the obligations; in this case, it is Enrico Benacquista. In that case, it was the Mechanics Mutual Loan Assn. who claimed priority for the very reasons claimed by the Eleventh Ward Building & Loan Association in this case.

It is respectfully submitted that the doctrine laid down in the Albertson case has never been

overruled and is the law in this State; and that the facts in this case being similar to the Albertson case, the facts in the Albertson case are controlling and should be dispositive of the matters herein.

The Vice-Chancellor, in his memorandum, attempted to differentiate the Albertson case from the one at bar, by stating in his memorandum opinion (found in State of Case, p. 62, ll. 2-31):

“They cite, in support of this, *Mechanics Mutual Loan Association v. Albertson*, 23 N. J. Eq. 318. This case is entirely different from the one at bar. In the case cited, the contractor had neither money nor credit. The materialmen refused to sell him material, and he therefore directed the owner to purchase the goods, and the owner then went to the materialmen and directed them to furnish the materials on his account. In the instant case there is no evidence that defendants refused to give credit to the contractor, Raffaele, nor is there any evidence that he had neither money nor credit. In fact, the evidence shows that he did have credit, and before that time, with Enrico, had purchased goods from the defendants. The goods, as I read the evidence, were furnished to Raffaele, the contractor, as provided by the contract; that is, they were sold to him individually, and he can be held personally liable for the entire amount of the goods. The fact that the goods were also charged to some other person or persons other than Raffaele, does not alter the situation. The defendants could demand other security in addition to the credit of Raffaele, but this does not necessarily mean that they have a prior lien on the building in question.”

Appellants submit that the test laid down by the Albertson case in determining whether or not a claimant is entitled to his lien against the lands is not whether or not the contractor had money

or credit, but whether the claimant sold his materials to the owner. We believe the Vice-Chancellor erred in his distinction.

It is therefore submitted that the filing of the written contract, marked in evidence as Exhibit C. 2, State of Case, page 125, between Enrico Benacquista, as owner, and Raffaele Benacquista, as contractor, protected the building from liens for work or materials furnished to Raffaele Benacquista alone and that the filing of the contract did not protect the building from liens for materials furnished by the appellants herein to the account of the owner, Enrico Benacquista.

POINT TWO.

The Court should have found from the evidence submitted, that the contract so filed was fraudulent and fictitious, and made between parties who were not actually contracting but who were merely pretending to do so; and that by reason of the fictitious character of the filed contract the same would not bar lien claimants from establishing their liens against the lands.

The materials sold and delivered by the lien claimants herein were sold to Raffaele Benacquista and Enrico Benacquista, jointly and severally, under the express representations by the two Benacquistas that they were co-owners (see testimony of Max Adelman, State of Case, p. 99, l. 36, to p. 100, l. 8):

Q Who purchased the materials for 163 North 15th street, Bloomfield? A Both of them.

Q Enrico and Raffaele Benacquista? A Yes. They told me they are partners and they are going to build two-family houses there.

Q Did they say who were the owners of the property? A No; they both of them owners.

Q They both told you that they both were? A Owners.

Q Owners of the property? A Yes.

Delivery tickets were signed by both Benacquistas and on some occasions by either of them.

The bank account with which both Benacquistas did business was in the name of both (see Exhibit D. 1, State of Case, p. 131, and testimony of Thomas J. Walker, bookkeeper of Peoples National Bank & Trust Co., State of Case, pp. 81-85).

It is evident from the foregoing that both Benacquistas erected the structure thereon and that both were engaged on the job, it appearing that shortly before the erection of the premises in question both Raffaele Benacquista and Enrico Benacquista were co-owners of record and that on the day following the conveyance of the one-half interest of Raffaele Benacquista to Enrico Benacquista a building contract between them as parties was filed. It will also be noted that the specifications annexed to the contract contained the following notation: "For a two and a half story two family frame dwelling to be erected at lot—North 15th Street, *Raeffaele Benacquista*, OWNER, * * *" (Exhibit C. 2, State of Case, p. 125), although at the time this contract was made *Enrico Benacquista was the owner and not Raffaele Benacquista*, as stated in said specifications.

For the foregoing reasons it should have been clear to the Court, and the Court should have found, that the building contract filed as aforesaid and signed by the two Benacquistas was a

fictitious document which was never performed or intended to be performed, and that said contract was entered into not between parties who were actually contracting but who were merely pretending to do so, and that said contract was purely a blind in an endeavor on the part of the Benacquistas to forestall bona fide mechanic lien claimants from asserting their liens against the lands, conceived apparently by the Benacquistas upon the belief that a building contract, regardless of its veracity or bona fideness, precluded and bars the filing of lien claims.

In the case of *Young v. Wilson*, 44 N. J. Law, p. 157, the Court held that the contract, the filing of which under the lien law protects against the lien of other creditors, must be between parties who in verity, and not in form merely, hold towards each other the relation of contracting parties; and that it must be a real, not a fictitious bargain; and that it is a perversion of the act to use it as a scheme to protect the contractor (or the owner) from the payment of his debts due materialmen. (See also *Improved Association v. Larkin*, 88 N. J. Law, p. 52.)

In the case of *Earle v. Willets*, 56 N. J. Law, p. 334, the Court said:

“It did not appear that there existed any fraudulent intention to cheat workmen or materialmen by this manner of executing the contract. Nothing appeared in the case to bring it within the influence of the doctrine announced by the Supreme Court in the case of *Young v. Wilson*, 15 Vroom 157.”

It is apparent from this quotation in the case of *Earle v. Willets*, which is an opinion of Justice Reed of the New Jersey Supreme Court, that the doctrine laid down in the case of *Young v. Wilson* aforesaid was approved.

It is therefore submitted that the Court should have found from the evidence submitted that the contract between the Benacquistas, marked in evidence as Exhibit C. 2, was fraudulent and fictitious and made between parties who were not actually contracting but who were merely pretending to do so, but that by reason of the fictitious character of the contract appellants herein were entitled to their respective liens against the lands and building.

POINT THREE.

The appellants, having established the validity of their lien claims against the lands, should have been entitled to a decree adjudging their lien claims as prior to respondent's mortgage.

The proofs in this case establish that the respondent's mortgage was recorded on February 7, 1929, after the commencement of the building upon the lands in question (see testimony of Earle W. Schoonmaker, State of Case, p. 109, ll. 23-37), which is as follows:

Q The mortgage made by Enrico Benacquista and Emilia Benacquista, his wife, to the Eleventh Ward Building & Loan Association, which mortgage is marked in evidence as Exhibit C. 3, was recorded on February 17, 1929. Do you know, Mr. Schoonmaker, of your own knowledge, whether or not the building upon the mortgaged premises was begun before or after that date? A What was the date?

Q February 7, 1929. A It was begun before that.

Q Do you know how long before? A Oh, yes, approximately two months.

as well as testimony of Alexander E. Abramson, State of Case, p. 117, ll. 35-40; p. 118, ll. 1-4, which is as follows:

Q And can you tell us, Mr. Abramson, of your own knowledge, whether or not the building was begun before or after February 7, 1929? A Oh, yes; we made deliveries to the premises long before that.

Q Can you tell me whether or not, of your own knowledge, the building was begun on the mortgaged premises before or after February 7, 1929? A Before.

This testimony is uncontradicted.

Section 15 of the Mechanics' Lien Law of this State provides (P. L. 1898, p. 543; C. S. 3303, par. 15):

"Every mortgage given or to be given upon lands in this State shall have priority over any claim that may be filed in pursuance of this act to the extent of the money actually advanced and paid by the mortgagee and applied to the erection of any new building upon the mortgaged lands or any alterations, repairs or additions to any building on said lands; provided, such mortgage be registered or recorded before the filing of such claim."

In the case of *Thirteenth Ward B. & L. Assn. v. Kanter*, 105 N. J. Eq. 338, Vice-Chancellor Backes said:

"A mortgage executed after the commencement of a building is not entitled to priority over mechanics' liens, for money advanced on the mortgage, unless it is actually applied to the erection of the building. The proofs must trace the money from the mortgagee into the hands of labor or materialmen. *Young v. Haight*, 69 N. J. Law 453, 55 Atl. 100."

and further in said opinion said:

"To displace the statutory priority of mechanics lien by a mortgage given for money

to be used for the construction of a building, the proof must be clear, certain, and convincing that the money was actually used for labor or material in the structure."

This doctrine was also laid down by Vice-Chancellor Backes two days later in a case decided by him; *Fischgrund v. Eriksen Real Estate Co.*, reported in 147 Atl., page 811, where the Court said that mechanics' liens have statutory priority as of the commencement of the building; to subordinate the lien to a mortgage subsequently executed and recorded, the burden rests with the mortgagee to establish by clear, certain and convincing evidence that the mortgage money was actually used in the erection of the building.

The opinions of Vice-Chancellor Backes, *supra*, follow the case of *Young v. Haight*, 69 N. J. Law 453.

In the case at bar there is no question but that the mortgage was recorded after the commencement of the building. But not only does the respondent fail to establish that the funds advanced by it were used in the erection and construction of the building, but it does not even attempt to do so; the only proof before the Court is that the funds were advanced on the mortgage and were all payable to the mortgagor and deposited by the mortgagor to the account of Enrico Benacquista and Raffaele Benacquista in the Peoples National Bank & Trust Co., and that there was due on said mortgage \$11,478.06 as of January 20, 1930 (see testimony of Arthur F. Smedhurst, State of Case, p. 80; also Exhibits C. 5, C. 6 and C. 7, State of Case, p. 127).

But the complainant herein contends that it had no notice of the fictitious character of the building contract if any there was, nor that the

lien claimants herein furnished materials to the owner in the erection of the building. The recording alone of the deeds to both Benacquistas and then the conveyance to Enrico Benacquista alone and immediately thereafter the filing of the building contract between the parties creates of record a suspicion. An inspection, had it been made, of the specifications annexed to the building contract on record, would have disclosed that said specifications were made by the architect for Raffaele Benacquista, owner, although the legal title at that time of record was in Enrico Benacquista. (See building contract, Exhibit C. 2, State of Case, p. 125.) The complainant here could easily have ascertained such discrepancy which was indicative of the conspiracy between the Benacquistas.

But even if the complainant herein had no knowledge whatsoever of the fictitious character of the contract, or of the fact that the lien claimants herein furnished materials to the owner as well as to the contractor under the direct obligation of the owner, yet such innocence of the true situation cannot be set up by the complainant to bar the appellants herein from either establishing their lien claims against the lands and premises or from showing that their lien is superior in point of priority to the lien of the mortgage.

In the case of *Mechanics Mutual Loan Assn. v. Albertson*, cited *supra*, the Court is urged to consider the opinion of the Chancellor wherein he says:

“The counsel of the complainants chiefly urge that such construction would be unjust to mortgagees and purchasers, who rely on the recording of the contract, and cannot be expected to inquire whether the buildings erected were erected according to the filed

contract, or by a new arrangement in disregard of it.

This act was not intended for the protection of the mortgagees or purchasers as a part of the system of the registry law, so long part of the state policy, but, in utter disregard of it, makes lands liable for debts which need not be registered for a year after contracted, without any possibility of a purchaser or mortgagee finding out with certainty whether there are such claims. The mechanics and materialmen could not be efficiently protected without some risk to the mortgagee and purchaser, and the legislature, when one must suffer, have chosen to protect the former at the expense of the capitalist. It has, in this case, thrown the burden of inquiring whether the work is done or materials furnished in pursuance of the contract upon the mortgagee or purchaser, as in the other case it has required the mechanic and materialman to ascertain whether a contract is filed before each day's work is done and each load of material delivered.

A wiser and more just law than the mechanics lien law can be imagined, even if its enactment could not be procured. But it is the duty of the court to administer the law as it exists, and to construe it as its intention is shown by its provisions."

It is therefore submitted that the mechanics' lien claims of appellants should have been decreed to be prior and paramount to the mortgage of the respondent.

Conclusions.

It is therefore submitted that the Court should have found that appellants had established their lien claims against the lands and premises known as 163 North Fifteenth street, Bloomfield, New Jersey, in the following amounts: Channel Lumber Company of Belleville, N. J., \$825.87; H. B.

Salmon Company, \$859.50; Belleville Sash & Door Corp., \$894.14 (said sums being the amounts of the judgments as entered in the Essex County Circuit Court) and that such lien claims are superior in point of priority to the lien of the respondent's mortgage, upon which there was due the sum of \$11,478.06, plus interest, and that a Final Decree should have been entered directing the Sheriff to make sale of the lands and premises aforesaid to satisfy in the first place, the mechanics' liens of the appellants, Channel Lumber Company of Belleville, N. J., H. B. Salmon Company and Belleville Sash & Door Corp., said appellants to share pro rata in said funds; and in the second place, the respondent's mortgage.

Respectfully submitted,

HARRY PHILLIPSON,

Solicitor for H. B. Salmon Company and
Belleville Sash & Door Corp., Appellants.

MILTON J. FINKELSTEIN,

Solicitor for Channel Lumber Company of
Belleville, N. J., Appellant; and
Of Counsel with Belleville Sash & Door
Corp., H. B. Salmon Company and Channel
Lumber Company of Belleville, N. J.,
Appellants.





