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For Plaintiff.

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Harry Green,

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Elmer Stager,

Direct 61

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Vernon Ford,

Direct 65

Louis Harris, Recalled,

Cross 67

For Defendants.

Alfred H. Hinkle,

Direct 73

Ottomar Stange,

Direct 74

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New York State Library

Morris County Circuit Court

Notice of Appeal.

Filed July 30, 1930.

JOSEPH HARRIS & SONS,
Plaintiff,

vs.

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,
Owner, ANNA A. STANGE, ET
ALS.,
Defendants.

On
Mechanic's
Lien.

10

TO KING & VOGT, ESQUIRES,
Attorneys of Plaintiff,

20

Gentlemen:

YOU WILL PLEASE TO TAKE NOTICE that The Delaware, Lackawanna and Western Railroad Company and Anna A. Stange and Ottomar Stange, copartners trading as Stange Construction Company, defendants in the above entitled cause, herewith appeal to the New Jersey Court of Errors and Appeals from the judgment rendered and entered in the above court on the 16th day of December, 1929, and that said defendants herewith set out and specify their reasons and grounds for the reversal of said judgment:

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1. Because the order of the Honorable Charles W. Parker, sitting as a Justice of the Supreme Court, made on the 22nd day of October, 1929, allowing and permitting the above plaintiff to amend the lien claim, summons and complaint and other proceedings heretofore filed in said

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Notice of Appeal.

cause, as shown and set forth by said order of October 21, 1929, is and was improper, void and illegal.

10 2. Because said trial court refused to strike out the testimony of the plaintiff's witness Harry Green with respect to deliveries of materials as shown and appears by the record in said cause, because it was apparent that the said witness Harry Green was not able to refresh his recollection from any data that had a legal standing in court.

20 3. Because the trial court erred in permitting the plaintiff during the examination of the plaintiff's witness Vernon Ford to offer in evidence over the objection of the defendants, the tickets and carbon copy of the account and the ledger page of the plaintiff, because they formed no basis for showing the delivery of the goods and materials to the defendants or either of them.

4. Because the trial court refused to direct a non-suit against the plaintiff and in favor of the defendants for the reasons and upon the grounds set forth at length in the record of said cause.

30 5. Because the trial court refused to direct a verdict in favor of the defendants and against the plaintiff for the reasons and upon the grounds fully set forth and enumerated in the record of said cause.

6. Because the trial court submitted to the jury the question and matter of the plaintiff's alleged due diligence in prosecuting its lien claim to judgment.

Notice of Appeal.

7. Because the trial court in charging the jury, stated to said jury without support of fact or evidence in said cause, the following:

“So that there is a real question here, you see, as to whether the plaintiff company has shown any real excuse for not prosecuting its claim and having it reduced to judgment within a year after December 30, 1927. It does so happen that cases cannot be reached in their order each term upon the calendar; that the Court cannot try all cases on the calendar in a given term. So you have cases carried over from one term to another because they have not been reached in due course for trial.” 10

8. Because the trial court refused to charge the defendants' first request to charge, either in substance or form, as per said request to charge, which read as follows: 20

“1. The defendants request the Court to charge, and the Court does so charge you, that the clause in the Mechanics' Lien Law fixing one year period, contemplates the reduction of the lien to judgment within that time if diligent prosecution will accomplish that result. Until prosecuted to judgment, the lien is ex parte and arbitrary and in view of this extraordinary feature and of the disadvantage under which the owner naturally labors in defending against a stale claim, the one year limitation by the act should be strictly enforced unless the claimant is able to set up a most excellent demonstration that it was not only not because of any fault of its, but in spite of the exercise of at least 30 40

Notice of Appeal.

10 ordinary diligence on its part, that it failed in that time to reduce its ex parte lien to the litigated lien embodied in a judgment. The burden is on the claimant to excuse its failure to get its judgment within the year. If it allows the year to pass without judgment and without a Court extension of time order procured within the year, it does so at its peril.

20 “In view of the foregoing rule of law, unless the claimant-plaintiff satisfies you by a fair preponderance of the evidence, because the law casts that burden upon it, that it has exercised ordinary diligence to reduce said lien to judgment within one year after it was filed, your verdict must be for the defendants, because there is no evidence in this case that it obtained a Court order extending said time.”

9. Because the trial court refused to charge the defendants' second request to charge, either in substance or form, as per said request to charge, which read as follows:

30 “2. The defendants request the Court to charge, and the Court does so charge you that while it is immaterial to the validity of the lien whether the materials having been furnished for the building were used in the building or not, if you believe from the evidence in this case that the plaintiff knew or in the exercise of that judgment which reasonably careful and prudent business men would exercise, ought to have known that the materials ordered for said work were not of
40 such a character or kind as would be used in

Notice.

the kind of work that the Els Construction Company was doing for the defendant, the Stange Construction Company, General Contractor, or the defendant, The Delaware, Lackawanna and Western Railroad Company, then you have a right to find that there was fraud committed on the part of the creditor, the present plaintiff, in furnishing said materials, and if you do find that such a fraud was committed by it in the furnishing of said materials, your judgment must be against the plaintiff and in favor of the defendants.” 10

Yours truly,

FREDERIC B. SCOTT,
Attorney for Defendants. 20

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Lien Claim.**MORRIS COUNTY CIRCUIT COURT.**

(Also Exhibit P-7.)

10 JOSEPH HARRIS & SONS, a corpora-
tion of New Jersey,
Claimant,

vs.

20 THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,
Owner, ANNA A. STANGE, and
OTTOMAR STANGE, Copartners
trading as Stange Construc-
tion Company, Builder and
General Contractor, and ELLS
CONSTRUCTION COMPANY, Sub-
contractor,
Defendants.

30 BE IT KNOWN, THAT JOSEPH HARRIS & SONS, a
corporation of New Jersey, having its principal
office at Rockaway, County of Morris and State
of New Jersey, claims a lien upon the building,
bridge or viaduct and lands hereinafter described,
pursuant to the statute in such case made and
provided, for a debt contracted and owing to it,
for materials furnished and used in the erection
and construction of said building, and therefore
shows:

40 1. That said building, bridge or viaduct is on a
lot or curtilage upon which this lien is claimed,
which is situate in the Township of Denville,
County of Morris and State of New Jersey, and
more particularly described as follows:

Lien Claim.

BEGINNING at a point in Westerly side line of the main highway from Mount Tabor through Denville to Rockaway (State Highway No. 5), said point being twenty feet southerly along said side line from the most southerly corner therein of the abutment of the railroad bridge over said highway; thence (1) in a westerly direction at right angles to said highway twenty feet to point; thence (2) in a northerly direction parallel with said highway one hundred feet more or less to a point where this course would intersect a course parallel to the first course hereof drawn in a westerly direction twenty feet north of the most northerly corner of said railroad bridge in the westerly side line of said highway; thence (3) in an easterly direction parallel to the first line hereof one hundred feet more or less crossing said highway to a point twenty feet easterly from the easterly side line of said highway; thence (4) in a southerly direction and parallel to the second course one hundred feet more or less to the point where this course would intersect the first course hereof extended in a easterly direction; thence (5) the distance it may be and crossing said highway to the point or place of BEGINNING.

Excepting from the land above described any rights of the public therein.

2. The name of the owners of the land and of the estate thereon on which the lien is claimed, is THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

3. The name of the person who contracted the debt and for whom and at whose request the ma-

Lien Claim.

terials were furnished for which such lien is claimed, is Ells Construction Company, which is a subcontractor under Stange Construction Company the General Contractor of the owner.

- 10 4. Attached hereto, hereby referred to and made a part hereof is a bill of particulars exhibiting the amount and kind of all material furnished and the price at which and times when the same were furnished, and giving credit for all of the payments made thereon and deductions that ought to be made therefrom, and shows the balance justly due to JOSEPH HARRIS & SONS, claimant, from THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Owner, ANNA A. STANGE and OTTOMAR STANGE, Trading as Stange Construction Company, Contractor, and Ells Construction Company, Subcontractor, the defendants herein named. The amount due thereon is \$1,134.49, with interest.
- 20

5. All of the material was furnished between the 18th day of June, 1927, and the 31st day of August, 1927, which said last mentioned date is the date when the last material was furnished for which such debt is due.

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JOSEPH HARRIS & SONS, INC.,
Claimant.

Notice in Lien Suit.

TO THE WITHIN NAMED DEFENDANT:

TAKE NOTICE, that if the within Summons and Complaint be served upon you personally, and you intend to make defense, then you must file an affidavit of merits within ten days of such service and must file an answer within twenty days of such service; and that in default thereof, judgment will be entered against you. Lawful service upon a corporation is deemed personal service. 10

KING & VOGT,
Attorneys of Plaintiff.

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Summons and Complaint.

Filed Dec. 30, 1927.

THE STATE OF NEW JERSEY TO:

10 THE DELAWARE, LACKAWANNA & WESTERN
RAILROAD COMPANY, a Corporation,
Owner, and ANNA A. STANGE, and OTTO-
(L. S.) MAR STANGE, copartners trading as
Stange Construction Company, Builder
and General Contractor, and ELLS CON-
STRUCTION COMPANY, Subcontractor.

20 YOU ARE SUMMONED to answer the annexed com-
plaint of Joseph Harris & Sons, Inc., a Corpora-
tion, in an action at law, in the Circuit Court in
and for the County of Morris, in which said
Joseph Harris & Sons, Inc., claims a building lien
on a certain building, bridge or viaduct and lands
of said The Delaware, Lackawanna & Western
Railroad Company, described in said complaint.

AND TAKE NOTICE, that unless you file your an-
swer to said complaint with the Clerk of said
Court at Morristown, within twenty days after
service upon you of this writ and the annexed
complaint, the plaintiff may proceed in the suit
and judgment may be entered against you.

30 Witness, RULIF V. LAWRENCE, Esquire, Judge
of said Court, at Morristown, this 30th day of
December, nineteen hundred and twenty-seven.

E. BERTRAM MOTT,
Clerk.

By EDWIN W. ORR,
Deputy Clerk.

40 KING AND VOGT,
Attorneys.

Summons and Complaint.

MORRIS COUNTY CIRCUIT COURT.

JOSEPH HARRIS & SONS, Plaintiff,		
<i>vs.</i>		10
DELAWARE, LACKAWANNA & WEST- ERN RAILROAD COMPANY, Owner, ANNA A. STANGE and OTTOMAR STANGE, Co-partners trading as Stange Construction Com- pany, Builder and General Contractor, and ELLS CON- STRUCTION COMPANY, Subcon- tractor,	Action at Law On Mechanic's Lien.	
Defendants.		20

Plaintiff, a corporation of New Jersey, having its principal office at Rockaway, Morris County, New Jersey, says that:

1. At the times hereinafter stated, the defendant, The Delaware, Lackawanna & Western Railroad Company, was the owner of a lot or curtilage of land situate in the Township of Denville, in the County of Morris and State of New Jersey, described as follows:

BEGINNING at a point in the Westerly side line of the main highway from Mount Tabor through Denville to Rockaway, (State Highway No. 5) said point being twenty feet southerly along said side line from the most southerly corner therein of the abutment of the railroad bridge over said highway thence

Summons and Complaint.

10 (1) in a westerly direction at right angles to said highway twenty feet to point; thence (2) in a northerly direction parallel with said highway one hundred feet more or less to a point where this course would intersect a course parallel to the first course hereof drawn in a westerly direction twenty feet north to the most northerly corner of said railroad bridge in the westerly side line of said railroad; thence (3) in an easterly direction parallel to the first line hereof one hundred feet more or less crossing said highway to a point twenty feet easterly from the easterly side line of said highway; thence 20 (4) in a southerly direction and parallel to the second course one hundred feet more or less to the point where this course would intersect the first course hereof extended in an easterly direction; thence (5) the distance it may be and crossing said highway to the point or place of Beginning.

Excepting from the land above described any rights of the public therein.

2. Between June 18, 1927, and August 31, 1927, plaintiff furnished the following material to the 30 defendants or one of them, all of whom are or were engaged in the erection and construction of the building, bridge or viaduct on said premises, and for which defendants or one of them agreed and promised to pay plaintiff.

Summons and Complaint.

SCHEDULE A.

5/10	3384	6 Pes. 28x36 Bronze Wire			
		2 Pes. 20x84 Bronze Wire			
		3 Pes. 36x52 Bronze Wire			
		2 boxes carpet tacks			
		2 Lbs. 4 DF Nails			
		160 Lin. Ft. ½" Qt. Round Pine			
		175 Lin. Ft. 5/4x2 Round Pine			
		10 Lin. Ft. ¾ Round Fir.....	14.09		10
5/18	3722	50 Bolts	2.00		
5/24	3946	1 Hacksaw Frame (used)	.35		
		3 Hacksaw Blades	.15		
5/26	4036	2178 Ft. 2x6	.05	108.90	
		12 Balls 100' Chalk Line..	.15	1.80	
5/26	4062	1 Red Lantern	1.25		
5/31	4065	12 Bolts	.05	.60	
			\$129.14	\$129.14	
6/1	4228	1 Saw	2.75		
		1 Brace	1.50		
		3 Hatchets	.85	2.55	
		3 Hammers	.75	2.25	
		2 Bits		1.25	20
		4 Lbs. 4 DC Nails.....	.08	.32	
		3 Bdl. Mason Lath	1.05	3.15	
6/3	4359	3 Water Pails	.45	1.35	
6/4	4416	¼ Pt. Shellac (Orange).....		.15	
6/7	4512	2 Gal. No. 45 Silver Gray..	3.50	7.00	
		½ Gal. Oil		.70	
		1 Brush		1.25	
		1 Pt. Dryer		.35	
		3 Lb. Putty		.30	
6/7	4524	3 Red Lanterns	1.25	3.75	
		3 Red Globes	.35	1.05	
6/6	4272	12 Bolts	.10	1.20	
		1 Sledge Hammer 8-¾		1.35	
		1 Sledge Hammer Handle		.35	
		1 Cold Chisel		.75	
6/9	4636	4 Rolls Slatas Felt	1.50	6.00	30
		5 Lb. 4 DC Galv. Nails...	.15	.75	
		1 Bal. Mason Lath		1.05	
6/13	4788	6 ½x2 Bolts	.05	.30	
		6 ½x2-½"	.05	.30	
6/15	4871	1 Gal. No. 45 Silver Gray....		3.50	
		1 Box Glazier Points		.15	
6/18	4977	60 2x8x16 1280'	.35	64.00	
6/3	5149	1500 ft. shiplap	.35	52.50	
		20 2x4x8 107'	.45	4.82	
6/23	5171	½ Gal. Paint & Varnish remover		1.50	
6/24	5256	500 ft. shiplap	.42	21.00	
		50 2x6x18 900'	.49	44.10	
			\$233.29	233.29	40

Summons and Complaint.

10	7/5	5619	2000 ft. shiplap	84.00	
			1008 ft. 2x6 1008'	.49	49.39
	7/9	5843	1 Water Pail		.45
	7/14	6028	3 $\frac{3}{8}$ " Cable Clamps	.15	.45
	7/16	6132	154 2x8x16 N. C. 3285 $\frac{1}{4}$..	.25	82.13
	7/25	6351	6 Water Pails	.45	2.70
			3 Hoses		4.35
				<u>\$223.47</u>	223.47
	7/30	6810	1 $\frac{3}{4}$ x4 Bolt	.10	.10
20	8/2	6852	63 2x6x16 1018'	.49	49.88
			2000 ft. shiplap	.35	70.00
	8/2	6872	71 2x6x14 994'	.49	48.75
	8/6	7090	198 Lin. Ft. 4x6 Fir 96'...	.49	19.40
	8/8	7110	36 2x6x14 304'		
			32 2x6x16 512' 816'	.49	39.98
	8/9	7155	1640 Sq. ft. 4x6 3280'....	.49	160.72
	8/15	7469	500 2x6x16 800'	.49	39.20
	8/25	7893	200 Sq. ft. 1x6 T&G Spruce	.07	14.00
			1000 Ft. 1x6 Roofers.....		40.00
30	8/31	8112	40 2x6x16 640	.49	31.46
			1000 Ft. shiplap		35.00
				<u>\$548.49</u>	548.49
					<u>\$1134.49</u>

3. The balance of said account is long past due, no part thereof having been paid and said indebtedness is a lien upon said land and building as provided in a statute entitled "An act to secure for Mechanics and others, payment for their labor and material in erecting any building and in making certain improvements (Revision of 1898)" as amended and supplemented.

Judgment will be claimed for the sum of \$1134.49 together with interest and costs of suit.

KING AND VOGT,
Attorneys for Plaintiff.

Amended Answer of The Delaware, Lackawanna & Western Railroad Company.

Filed Dec. 17, 1929.

MORRIS COUNTY CIRCUIT COURT.

JOSEPH H. HARRIS & SONS, Plaintiff,	10
<i>vs.</i>	
DELAWARE, LACKAWANNA & WEST- ERN RAILROAD COMPANY, Owner, ANNA A. STANGE and OTTOMAR STANGE, Co-partners trading as Stange Construction Com- pany, Builder and General Contractor, and ELLS CON- STRUCTION COMPANY, Subcon- tractor,	Action at Law 20
Defendants.	

The Delaware, Lackawanna and Western Railroad Company answering the allegations contained in the plaintiff's complaint, says:

1. It admits the allegations contained in the first paragraph. 30
2. It denies the allegations contained in the second paragraph.
3. It denies the allegations contained in the third paragraph.

AND FOR A SPECIAL AND SEPARATE, DISTINCT DEFENSE this defendant, The Delaware, Lackawanna and Western Railroad Company, pursuant to the 40

*Amended Answer of The Delaware, Lackawanna
& Western Railroad Company.*

10 statute in such cases made and provided, says that the said plaintiff ought not to have or maintain their action against it for that the said building, bridge or viaduct referred to, mentioned and described in the plaintiff's complaint, are not liable for the debt claimed by the plaintiff in the above entitled action.

WHEREFORE it prays that judgment may be rendered in its favor and against the plaintiff for its taxed costs in the premises.

FREDERIC B. SCOTT,
Attorney of Defendant.

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Amended Answer of Anna A. Stange and Ottomar Stange, Co-partners Trading as Stange Construction Company.

Filed Dec. 17, 1929.

MORRIS COUNTY CIRCUIT COURT.

JOSEPH HARRIS & SONS, Plaintiff,	10
<i>vs.</i>	
DELAWARE, LACKAWANNA & WEST- ERN RAILROAD COMPANY, Owner, ANNA A. STANGE and OTTOMAR STANGE, Co-partners trading as Stange Construction Com- pany, Builder and General Contractor, and ELLS CON- STRUCTION COMPANY, Subcon- tractor, Defendants.	Action at Law On Mechanic's Lien 20

The defendants, Anna A. Stange and Ottomar Stange, co-partners trading under the name and style of Stange Construction Company, answering the allegations contained in the plaintiff's complaint herein, say: 30

1. They admit the allegations contained in the first paragraph.

2. Defendants say that they have no knowledge or information sufficient to form a belief as to whether the plaintiff furnished the materials mentioned in the complaint to the defendant, the Ells Construction Company, and they deny that said 40

*Amended Answer of Anna A. Stange and Ottomar
Stange, Copartners Trading as Stange Con-
struction Company.*

10 materials were furnished to any of the other de-
fendants herein. These defendants further deny
that the said materials or any part thereof were
used or employed in the erection or construction
of the buildings, bridge or viaduct on the prem-
ises described in the complaint or in the erection
or construction of any improvement on the said
premises.

20 3. These defendants have no knowledge or in-
formation sufficient to enable them to answer as
to whether the balance of the said accounts set
forth in the complaint is past due, and as to
whether the same or any part thereof has been
paid.

WHEREFORE they pray that judgment may be
rendered in their favor against the plaintiff with
its taxed costs.

FREDERIC B. SCOTT,
Attorney of Defendants.

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Notice of Application to Amend Lien Claim.

Filed Oct. 10, 1929.

MORRIS COUNTY CIRCUIT COURT.

JOSEPH HARRIS & SONS, Plaintiff, <i>vs.</i> DELAWARE, LACKAWANNA & WEST- ERN RAILROAD COMPANY, Owner, and ANNA STANGE, ET ALS. Defendants.	}	10 On Mechanic's Lien
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TO THE DELAWARE, LACKAWANNA AND WESTERN 20
RAILROAD COMPANY, ET ALS., Defendants, and
FREDERIC B. SCOTT, their attorney:

TAKE NOTICE that on Saturday, the fourteenth day of September, 1929, at the hour of ten o'clock in the forenoon (Daylight Saving Time) or as soon thereafter as the same can be heard, at the Court House in Morristown, New Jersey, we will apply to the Honorable Charles W. Parker, Justice of the New Jersey Supreme Court, for an order amending the lien claim, summons and complaint, and other proceedings, heretofore filed and served in this suit, by amending the description of the curtilage upon which a lien is claimed so that the lands and premises upon which a lien is claimed are described as follows, to wit: 30

All those certain tracts or parcels of land and premises situate in the Township of Denville, in the County of Morris and State of New Jersey:

40

Notice of Application to Amend Lien Claim.

10 FIRST TRACT. BEGINNING at a point in the
Northwesterly side line of Franklin Road,
said point being twenty feet Northerly along
said side line from the most Northerly cor-
ner therein of the abutment of the Railroad
bridge over said highway; thence (1) in a
Westerly direction from said highway and
parallel with the tracks of the Delaware,
Lackawanna and Western Railroad Com-
pany twenty feet to a point; thence (2) in a
Southwesterly direction parallel with said
highway crossing the tracks of the said Rail-
road Company one hundred feet more or less
to a point where this course would intersect
20 a course parallel to the first course herein
drawn in a Westerly direction twenty feet
from the most Southerly abutment of said
Railroad bridge in the side line of said high-
way; thence (3) in an Easterly direction par-
allel to the first line hereof one hundred feet
more or less crossing said highway to a point
twenty feet Easterly from the Southeasterly
side line of said highway; thence (4) in a
Northeasterly direction and parallel to the
second course one hundred feet more or less to
30 the point where this course would intersect the
first course hereof extended in an Easterly
direction; thence (5) in a Westerly direction
the distance it may be, and crossing said high-
way to the point or place of BEGINNING. Ex-
cepting from the lands above described any
rights of the public therein.

40 SECOND TRACT. BEGINNING at a point in the
Westerly side line of the Rockaway Frank-
lin Road, said point being twenty feet North-

Notice of Application to Amend Lien Claim.

erly along said side line from the most North-
 erly corner therein of the abutment of the
 Railroad bridge over said highway; thence
 (1) in a Westerly direction from said high-
 way and parallel with the tracks of the Dela-
 ware, Lackawanna and Western Railroad
 Company twenty feet to a point; thence (2) in
 a Southerly direction parallel with said high-
 way crossing the tracks of said Railroad
 Company one hundred feet more or less to
 a point where this course would intersect a
 course parallel to the first course herein
 drawn in a Westerly direction twenty feet
 South of the most Southerly abutment of said
 Railroad bridge in the side line of said high-
 way; thence (3) in an Easterly direction par-
 allel to the first line hereof one hundred feet
 more or less crossing said highway to a point
 twenty feet Easterly from the Easterly side
 line of said highway; thence (4) in a North-
 erly direction and parallel to the second
 course one hundred feet more or less to a
 point where this course would intersect the
 first course hereof extended in an Easterly
 direction; thence (5) in a Westerly direction
 the distance it may be and crossing said high-
 way to the point or place of BEGINNING. Ex-
 cepting from the lands above described any
 rights of the public therein.

and annexed hereto and made part hereof is an
 affidavit upon which said application shall be
 based.

Dated July 15, 1929.

KING & VOGT,
 Attorneys for Plaintiff.

**Affidavit of Louis Harris in Support of
Application to Amend Lien Claim.**

Filed Oct. 10, 1929.

MORRIS COUNTY CIRCUIT COURT.

10

JOSEPH HARRIS & SONS,
Plaintiff,

vs.

THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
Owner, and ANNA STANGE, ET
ALS.,

Defendants.

On
Mechanic's
Lien

20

STATE OF NEW JERSEY, }
County of Morris, } ss.:

LOUIS HARRIS, of full age, being duly sworn according to law, on his oath, deposes and says that

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1. He is secretary and treasurer of Joseph Harris & Sons, the plaintiff above named, and is familiar with the account of the plaintiff against said defendants. During the progress of the construction work along the tracks of the Railroad Company through Morris County, the plaintiff supplied lumber and building materials to various contractors employed in connection therewith.

40

2. At the time of the filing of the lien and the issuance of the summons and complaint in this cause, deponent believed that the lumber and materials had been supplied to, delivered at and used in connection with the work carried on on the

Affidavit of Louis Harris in Support of Application to Amend Lien Claim.

property described in the plaintiff's lien claim and complaint.

3. Since that time, however, deponent has learned, and after investigation, now finds and is ready to prove, that the lumber and materials mentioned in the plaintiff's lien claim and complaint in this cause were delivered to and used in the building and construction of the bridges upon the lands of the defendant Railroad Company described in the notice annexed hereto. 10

4. Deponent further says that all of such lumber and materials were supplied with the full knowledge of the defendant Railroad Company and the defendants Stange, and are known by them and each of them to have been used at the locations aforesaid. Deponent prays that the proceedings in this cause should be amended so that the lands upon which the lien claim is based may be correctly described. 20

5. Deponent further says that he has only within the last month been able to get in touch with his former employee who had definite knowledge as to the items in suit and the places of their delivery, and for that reason this cause has not been prosecuted to judgment or this application made at an early date. 30

26th day of July, 1929. { LOUIS HARRIS,
Sworn and Subscribed to this { Sety.

SAMUEL SANKIN
Notary Public of N. J.

**Affidavits in Opposition to Motion to Amend
Lien Claim.**

Filed Oct. 10, 1929.

MORRIS COUNTY CIRCUIT COURT.

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JOSEPH HARRIS & SONS,
Plaintiff,

vs.

THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
Owner, and ANNA STANGE, ET
ALS.,

Defendants.

On
Mechanic's
Lien

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STATE OF NEW YORK, }
County of New York, } ss.:

ALFRED H. HENCKEL, of full age, being duly sworn, on his oath deposes and says:

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1. I am in the employ of The Delaware, Lackawanna and Western Railroad Company as a civil engineer, and at the times mentioned and referred to in the plaintiff's original complaint filed in the above entitled action, to wit, between June 18, 1927, and August 31, 1927, I was the resident engineer in charge of certain improvements being made by The Delaware, Lackawanna and Western Railroad Company under a contract with Anna A. Stange and Ottomar Stange, co-partners trading as Stange Construction Company, and known as the builder and general contractor in the above plaintiff's suit on a lien claim.

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2. I am familiar with the location of the lot or curtilage of land situate in the Township of Den-

Affidavits in Opposition to Motion to Amend Lien Claim.

ville, County of Morris, State of New Jersey, described in the plaintiff's original complaint in the above entitled action, and I am also familiar with those tracts or parcels of land situate in the Township of Denville, County of Morris, State of New Jersey, set forth in the above plaintiff's notice of its application for an order amending the lien claim, summons and complaint and other proceedings heretofore filed and served in the above entitled action. 10

3. This deponent further says that the "First Tract" or parcel of land and premises situate in the Township of Denville, County of Morris, State of New Jersey, particularly described in said notice, is seven thousand eight hundred (7,800) feet west of the original tract or parcel of land described by the plaintiff in its original complaint filed in the above lien suit, and that the railroad bridge mentioned and referred to in said lien so described, is and was in no way connected with or in any way appurtenant to the land or premises described in the plaintiff's original lien complaint or the plaintiff's lien filed in said cause. 20

4. I further state that the bridge referred to in the plaintiff's notice of its application for an order amending the lien claim, summons and complaint and other proceedings heretofore filed and served in the above entitled action, relative to the "Second Tract" is not a railroad bridge, but a highway bridge, carrying a highway over The Delaware, Lackawanna and Western Railroad Company's tracks. On the assumption that the said bridge referred to as a "railroad bridge" is the highway bridge in question, I further state 30 40

Affidavits in Opposition to Motion to Amend Lien Claim.

10 that I am familiar with the location of the said
 "Second Tract" so described and set forth in the
 plaintiff's notice for an order amending the lien
 claim, summons and complaint and other proceed-
 ings heretofore filed and served in the above en-
 titled suit, and I state that said tract of land is
 Three thousand four hundred (3,400) feet west
 of the "First Tract" of land set forth and de-
 scribed in the plaintiff's said notice, and that it
 is Eleven thousand two hundred (11,200) feet fur-
 20 ther west of the original tract of land mentioned
 and described in the plaintiff's original complaint
 filed in the above entitled cause, and that the said
 "Second Tract" of land is in no way connected
 with the tract of land described in the plaintiff's
 complaint and lien filed or the "First Tract" of
 land described in the said plaintiff's notice, and
 that said "Second Tract" of land is in no way
 appurtenant to or connected with the property
 and alleged lien described and set forth by the
 plaintiff in its complaint or lien filed in the above
 entitled cause.

Subscribed and sworn to before me } ALFRED H.
 this 3rd day of October, 1929. } HENCKEL.

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JOSEPH FIELL

A Foreign Commissioner of Deeds
 For New Jersey in New York

Commission expires June 3, 1931.

Seal

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*Affidavits in Opposition to Motion to Amend Lien
Claim.*

AFFIDAVIT.

Filed Oct. 10, 1929.

MORRIS COUNTY CIRCUIT COURT.

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JOSEPH HARRIS & SONS, Plaintiff, vs. DELAWARE, LACKAWANNA & WEST- ERN RAILROAD COMPANY, Owner, and ANNA STANGE, ET ALS., Defendants.	}	On Mechanic's Lien	20
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STATE OF PENNSYLVANIA, }
County of Philadelphia, } ss.:

OTTOMAR STANGE of full age, being duly sworn,
on his oath, deposes and says:

1. I am a co-partner in the partnership of Anna
A. Stange and Ottomar Stange, trading as the
Stange Construction Company, and a co-defend- 30
ant in the above entitled suit with The Delaware,
Lackawanna and Western Railroad Company.

2. I further state that I had the general con-
tract from The Delaware, Lackawanna and West-
ern Railroad Company to make certain improve-
ments on or within its right of way between East
Dover and Mountain Lakes, Morris County, New

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Affidavits in Opposition to Motion to Amend Lien Claim.

Jersey, part of which work the defendant, the Stange Construction Company, sublet to one, the Ellis Construction Company.

10 3. I further state from my own personal knowledge that the Els Construction Company had no work to do or perform upon the lands, buildings, bridge or viaduct described and referred to in the plaintiff's summons and complaint served upon the Stange Construction Company and filed in the above entitled cause, neither did the said Ellis Construction Company perform any work, or order or furnish any material or work upon the
20 plaintiff's summons and complaint served upon these defendants and filed in the above entitled cause.

4. This deponent further says that the goods, wares, chattels and materials set forth in "Schedule A" forming a part of the plaintiff's complaint filed in the above entitled cause, were not of such a character or nature as were or could be properly used in the construction work which
30 the said Ellis Construction Company was doing for the Stange Construction Company under the sub-contract hereinbefore referred to.

5. This deponent is of the opinion that none of said work was ordered by the Ellis Construction Company from the plaintiff for the purpose of being used in any construction which the Ellis Con-

*Affidavits in Opposition to Motion to Amend Lien
Claim.*

struction Company was doing for the defendant,
the Stange Construction Company, under its sub-
contract hereinbefore referred to.

Subscribed and sworn to before me } OTTOMAR
this 4th day of October, 1929. } STANGE. 10

PIERRE H. MICONI
Notary Public
My Commission Expires
April 12, 1931.

Seal

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**Memorandum Opinion on Application to
Amend Lien Claim.**

Filed Oct. 10, 1929.

MORRIS COUNTY CIRCUIT COURT.

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JOSEPH HARRIS & SONS

v.

DELAWARE, LACKAWANNA & WEST-

ERN R. R. Co., ET AL.

On
Mechanic's
Lien

PARKER, J.:

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Application is made to me to direct an amendment of the lien by substituting a different description of the curtilage to be affected. The amendment is material, because plaintiff in the filed lien described the wrong piece of land under the mistaken idea that the materials supplied by it had been used thereon; and now the time for filing lien having expired, plaintiff wishes to substitute the proper tract which is some distance away from the other.

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The particular section of the act bearing on an amendment of this character is Section 20. Whether its language is broad enough to cover the substitution of an entirely different curtilage may well be doubted; but in view of the power to amend in substance as well as in form, conferred by Sec. 19, and in view of the fact that plaintiff's mistake seems to have been an innocent one, and it will be out of court as respects the owner unless the amendment is allowed, I am disposed

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to allow it. The defendant is in no way con-

*Memorandum Opinion on Application to Amend
Lien Claim.*

cluded by this action, because by the very language of Sec. 20 the amendment is "in the form of a rule of court in the suit" and reviewable in error after final judgment. *American Brick Co. v. Dunkhouse*, 59 N. J. L. 462, 468; *Luce, Mech. Lien Law*, 3d ed. 226. 10

Counsel may present for signature a rule framed in accordance with these views.

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Order Amending Lien Claim.

Filed Oct. 22, 1929.

(Also Exhibit P-7.)

MORRIS COUNTY CIRCUIT COURT.

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JOSEPH HARRIS & SONS,
Plaintiff,

vs.

DELAWARE, LACKAWANNA & WEST-
ERN RAILROAD COMPANY, Owner,
and ANNA STANGE, ET ALS.,
Defendants.

On
Mechanic's
Lien

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Application being made to the Court by King and Vogt, attorneys for the plaintiff, upon notice to and in the presence of Frederic B. Scott, attorney for the defendants, for an order amending the lien claim, summons and complaint, and other proceedings heretofore filed and served in this suit, by amending the description of the curtilage upon which the lien is claimed, and the Court being of the opinion that said amendment should be permitted, and no cause appearing to the contrary,

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It is, on this 22nd day of October, 1929, ORDERED that the lien claim, summons and complaint and other proceedings heretofore filed in this suit be amended insofar as the description of the curtilage upon which the lien is claimed, so that the lands and premises upon which the lien is claimed in this suit are described as follows, to wit:

Order Amending Lien Claim.

All those certain tracts or parcels of land and premises situate in the Township of Denville, in the County of Morris and State of New Jersey:

FIRST TRACT. BEGINNING at a point in the Northwesterly side line of Franklin Road, 10
said point being twenty feet Northerly along said side line from the most Northerly corner therein of the abutment of the Railroad bridge over said highway; thence (1) in a Westerly direction from said highway and parallel with the tracks of the Delaware, Lackawanna and Western Railroad Company twenty feet to a point; thence (2) in a Southwesterly direction parallel with said highway 20
crossing the tracks of the said Railroad Company one hundred feet more or less to a point where this course would intersect a course parallel to the first course herein drawn in a Westerly direction twenty feet from the most Southerly abutment of said Railroad bridge in the side line of said highway; thence (3) in an Easterly direction parallel to the first line hereof one hundred feet more or less crossing said highway to a point twenty feet Easterly from the South- 30
easterly side line of said highway; thence (4) in a Northeasterly direction and parallel to the second course one hundred feet more or less to the point where this course would intersect the first course hereof extended in an Easterly direction; thence (5) in a Westerly direction the distance it may be, and crossing said highway to the point or place of BEGINNING. Excepting from the lands above 40
described any rights of the public therein.

Order Amending Lien Claim.

10 SECOND TRACT. BEGINNING at a point in the
 Westerly side line of the Rockaway Franklin
 Road, said point being twenty feet North-
 erly along said side line from the most North-
 erly corner therein of the abutment of the
 Railroad bridge over said highway; thence
 (1) in a Westerly direction from said high-
 way and parallel with the tracks of the Dela-
 ware, Lackawanna and Western Railroad
 Company twenty feet to a point; thence (2)
 in a Southerly direction parallel with said
 highway crossing the tracks of said Railroad
 Company one hundred feet more or less to
 a point where this course would intersect a
 course parallel to the first course herein
 20 drawn in a Westerly direction twenty feet
 South of the most Southerly abutment of said
 Railroad bridge in the side line of said high-
 way; thence (3) in an Easterly direction par-
 allel to the first line hereof one hundred feet
 more or less crossing said highway to a point
 twenty feet Easterly from the Easterly side
 line of said highway; thence (4) in a North-
 erly direction and parallel to the second
 course one hundred feet more or less to a
 point where this course would intersect the
 first course hereof extended in an Easterly
 30 direction; thence (5) in a Westerly direction
 the distance it may be and crossing said high-
 way to the point or place of BEGINNING. Ex-
 cepting from the lands above described any
 rights of the public therein.

Order Amending Lien Claim.

And it is further ORDERED that the notice of said application and affidavit attached thereto and the answering affidavits presented to the Court by the defendants in opposition to said application be filed with the Clerk of this Court.

CHAS. C. PARKER, 10
J. S. C.

I approve the above
Order as to form.

FREDERIC B. SCOTT,
Attorney of Defendants.

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Judgment.**MORRIS COUNTY CIRCUIT COURT.**

Entered Dec. 16, 1929.

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JOSEPH H. HARRIS & SONS

vs.

DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,
ANNA A. STANGE and OTTOMAR
STANGE, co-partners trading as
Stange Construction Company
and Ells Construction Com-
pany.

No. 2315

Action at Law

On Trial

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Judgment on Trial and verdict of Jury ren-
dered in favor of the plaintiff Joseph Harris and
Sons against the Delaware, Lackawanna and
Western Railroad Company, owner, and The
Stange Construction Company Builders for the
sum of One thousand two hundred and Seventy-
two dollars and thirty-two cents \$1272.32
and a General Verdict against the Ells
Construction Company, Subcontractor,
for the sum of Twelve hundred and

30

Ninety dollars and forty-six cents 1290.46

Costs taxed at Eighty-nine dollars and
Seventy-four cents

89.74

Whole amount of Damages and Costs \$2552.52

On Motion of King and Vogt,
Attorneys for Plaintiff.

Judgment signed December 16, 1929.

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Testimony.**MORRIS COUNTY CIRCUIT COURT.**

JOSEPH HARRIS & SONS, Plaintiff,	} Action at Law	10
<i>vs.</i>		
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, Owner, and ANNA STANGE, ET ALS.,		
Defendants.		

Morristown, N. J., December 16th, 1929.

Before HON. RULIF V. LAWRENCE, Judge, 20
and a Jury.

APPEARANCES:

KING & VOGT, ESQS., by ROBERT H. SCHENCK,
Esq., for the Plaintiff.

FREDERIC B. SCOTT, Esq., for the Defendants.

A jury having been found satisfactory, were
duly sworn.

Mr. Scott: I have amended the answer on be- 30
half of the Delaware, Lackawanna and Western
Railroad Company and the Stange Construction
Co. in accordance with the order of the Court
and filed it with the Clerk.

Thereupon Mr. Schenck opened to the jury in
behalf of the plaintiff.

Thereupon Mr. Scott opened to the jury in be- 40
half of the defendants.

Louis Harris, for Plaintiff, Direct.

LOUIS HARRIS, sworn on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Schenck.

10 Q. Mr. Harris, where do you live and what's your business? A. Rockaway; lumber business.

Q. And your firm name or corporation name is what? A. Joseph Harris and Sons.

Q. You are what officer of that corporation? A. Secretary and Treasurer.

Q. And did your company supply any lumber, building material or anything else to the Els Construction Company during the year 1927? A. Yes, sir.

20 Q. The Els Construction Company was who, if you know, a corporation? A. Corporation.

Q. And were they a local concern? A. No, from Garfield.

Q. And where were they operating at the time you supplied the material to them that you did supply? A. At Franklin Avenue and over at Wright's Crossing.

30 Q. And where were these particular roads or where is Franklin Avenue in connection with what sort of work? A. Building the railroad bridges there.

Q. For what railroad company? A. Delaware, Lackawanna and Western.

Q. And was there a contract filed in the County Clerk's office between the Els Construction Company and the Stange Company? A. No.

Q. Or between the Els Construction Company and the Delaware, Lackawanna and Western? A. No.

40 Q. And is a contract filed——

Louis Harris, for Plaintiff, Direct.

The Court: Maybe Mr. Scott will stipulate these contracts were not filed.

Mr. Scott: I will stipulate if Mr. Harris will tell us he don't know anything about it.

Mr. Schenck: No, he has looked in the County Clerk's office himself.

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Q. You have looked in the County Clerk's office and failed to find any contract? A. Yes.

Q. And could not find a contract between the Stange Construction Comany and the railroad company? A. I couldn't find any.

Q. Now, have you here a record of your company of the items supplied by you? A. Yes.

Q. I show you here a group of papers clipped together and ask you what they are? A. All the deliveries and bills. 20

Q. And what is your system of bookkeeping at Rockaway? How do you keep track of the materials supplied? A. When an order goes out, we make out a ticket which is in triplicate. One copy remains in the office, two goes out with the delivery. One is signed and comes back.

Q. And the papers you have before you are what? A. These are the delivery tickets signed by whoever received the material. 30

Q. And did you keep the books yourself at your company office or done under your supervision? A. Under my supervision.

Q. And what is your system of bookkeeping? A. Well, we charge direct from this ticket to the bill and the total amount of the month is posted in the ledger.

Q. And is this the ledger page that you refer to? A. That's a sheet, yes, sir. 40

Louis Harris, for Plaintiff, Direct.

Q. Before you make out the delivery ticket and send the goods out you have to have an order from someone? A. Yes.

10 Q. Well, in this particular case, through whom and from whom did the orders come? A. The Els Construction Company. Two members of it; said they were members, came up and negotiated for materials, and the foreman did all the ordering as he wanted the stuff.

Q. Now, what material and when did you supply it? Can you give us the dates? A. It started in May 10th, 1927. That's the first delivery.

Mr. Schenck: I don't know how particular Mr. Scott wants to go in these items.

20 The Court: He can bring it out on cross examination of the witness.

Q. When was the first delivery? A. May 10th.

Q. And when was the last delivery? A. August 31st.

Q. Now, of what generally did this material consist, that you supplied the Els Company? A. Practically everything that went in the construction of forms and the like; except one delivery.

30 The Court: What was that?

The Witness: The first delivery was for screen wire and tacks.

The Court: Brass tacks?

The Witness: Yes, and material to make up a screen.

The Court: How much did you charge?

The Witness: Fourteen dollars.

The Court: This all went against the Construction Company?

40

Louis Harris, for Plaintiff, Direct.

The Witness: They rented a house to put their men in and boarded it up.

The Court: How much does your total bill amount to? Is there any claim that that item actually entered into the construction?

Mr. Schenck: No.

10

The Court: In other words, there was a vacant house rented on the right of way of the railroad they were constructing there for storage or men or something like that?

Mr. Schenck: Yes, sir.

Q. How much is your total bill? A. Eleven hundred and thirty-four dollars.

Q. Has any portion of that been paid you? A. No.

20

Q. And this material was all supplied during the year 1927? A. Yes, sir.

The Court: What was that construction?

The Witness: Two bridges.

Q. Well, as a matter of fact, during that period the railroad company was doing considerable work along its right of way through Denville, was it not? A. Yes, sir.

Q. And Mr. Scott in his opening made some mention of the fact that you first claimed a lien on one bridge and then applied to the Court to change the description of this property to another bridge or bridges? A. Yes.

30

Q. Now, can you tell us when that change was made?

Mr. Scott: I object on the ground that whatever change was made, was made after the statutory time.

40

Louis Harris, for Plaintiff, Direct.

The Court: I have just read Justice Parker's conclusion on the application to amend.

The Court: The objection to this question is overruled. You may have an exception.

(Exception allowed and sealed.)

10 The Court: You may state why it was you made the error and how it was made.

A. We got a railroad map and just got balled up on the bridges.

The Court: Got the wrong bridge?

The Witness: Got the wrong bridge. Our delivery and bill we claim was for the right place but was designated wrong, we had the wrong map.

20 The Court: So all the material you are now suing for, except the fourteen dollar item, went into bridge that is now included?

The Witness: Two bridges.

The Court: Two bridges included in the amended claim?

The Witness: That's right.

Q. You have made an analysis of your account, have you not, to indicate which material went to which bridge? A. Yes.

30 Q. And is that this analyses? A. Yes, sir.

Q. And has been made by you from the delivery tickets as you had them before you? A. Yes.

Q. And what does it indicate as to what quantities was actually supplied to—we will take first the Franklin Road bridge?

Mr. Scott: I object. I would like to examine Mr. Harris.

40 The Court: As to qualifications; I will allow you.

Louis Harris, for Plaintiff, Cross.

Cross examination by Mr. Scott.

Q. Mr. Harris, were you ever down to these various bridges between the month of May and June 10th, 1927, and August 31st, 1927? A. Yes.

Q. How many times? A. At least once a week; sometimes more often.

Q. What was the purpose of your going down there? A. I did that whenever we furnished material. 10

The Court: What for?

The Witness: To see that we are selling most of the material, or any complaints of any kind about service or anything like that.

Q. And was it at that time that you learned that these various items went in the various bridges? A. No, I knew every day where the deliveries would go at. At night I always looked over our deliveries. I knew from that. 20

Q. And you knew at the time that the deliveries were made where they went to? A. Oh, yes.

Q. And did you actually make these deliveries yourself? A. No.

Q. The only way that you know that these deliveries were made were from these tickets? A. From the tickets and from the driver. The men that makes the delivery. Ask them where they were going. 30

Q. Show me any one particular item out of that list of tickets that you followed specifically down to the work at either of the bridges? A. I don't just get what you mean.

The Court: Well, did you personally know that any item included in your account was actually delivered to the job? By that he means, did you go there and see it there? 40

Louis Harris, for Plaintiff, Cross.

The Witness: I didn't know every load that went out, no, sir.

Q. Well, can you out of that entire list of tickets pick any one item that you knew that came from Harris and Sons?

10

The Court: Have you the delivery men here?

The Witness: Yes, sir.

The Court: They will speak for themselves.

Q. You don't know anything about the delivery? A. I know material went out there. Often times I was there when the truck was there.

20

The Court: You were there and saw your material on the ground?

The Witness: Yes, I was there when the trucks were there unloading.

The Court: Your own trucks?

The Witness: Yes, sir.

Q. And out of all of these tickets you have there, can you pick out any particular one that you were down there when the truck was unloading? A. No.

30

Q. Not in particular? A. I can't tell that now, no.

Q. So that when you came to analyze this account as Mr. Schenck was just about to interrogate you about, you are analyzing it from a basis that you have no personal knowledge about? A. Well, I would not say that. I was there at times when the trucks were delivering material there. But to take one particular ticket out of the whole bunch, I can't do that.

40

Louis Harris, for Plaintiff, Direct.

Q. Take for instance in the schedule in the complaint of these various items, they, I assume, are the same you are endeavoring to testify about, there's the delivery apparently of June 4th of some orange shellac; do you know where that went? A. We often sell that to companies like this. Sometimes they use it on the boards. Sometimes they use it on their machinery. 10

Q. I say, you don't know where that item went? A. Went in this Els Construction, only at the two jobs there.

Q. You could go over the entire list and you couldn't point out any more specifically where any of these items went than you can about this orange shellac? A. No, I can't tell you right now. 20

Further direct examination by Mr. Schenck.

Q. Mr. Harris, is it not a fact that the analyses were made from the delivery slips?

The Court: That is perfectly obvious.

Q. Well, do these slips say anything——

The Court: You don't need to waste much time now. Let's call your drivers if you have them here. 30

Mr. Schenck: They can't remember anything more about it than the slips say.

The Court: I am not so sure. It becomes a question of fact for the jury. He says he saw his drivers there, but he could not identify any particular delivery. A prima facie situation is established in any event. In other words, these tickets were signed by drivers or someone representing them. 40

Louis Harris, for Plaintiff, Direct.

Q. And do any of the various delivery slips show where the various deliveries were made? A. Yes, sir.

Q. Well, have you gone through the delivery slips to ascertain where the various deliveries were made? A. Yes.

10

Q. As indicated by the slip? A. Yes.

Mr. Schenck: Now, I want to offer in evidence the delivery slips.

The Court: You can't do that yet. Bring your drivers.

Mr. Schenck: I would like this marked for identification.

(Paper marked P-1 for identification.)

20

Mr. Schenck: Also the ledger page.

(Ledger page marked P-2 for identification.)

Mr. Schenck: Also the bills.

(Bills marked P-3 for identification.)

Q. Can you point out on this map the location of the two bridges upon which a lien is claimed?

30

Mr. Scott: I offer the map.

Mr. Schenck: I will.

Mr. Scott: No objection.

(Map marked Exhibit P-4.)

Q. Now, Mr. Harris, will you please indicate on the map, first, the Franklin Road bridge you mention and also the Wright's Crossing? A. There's the Wright's Crossing (indicating).

40

Louis Harris, for Plaintiff, Direct.

Mr. Scott: Will you have him mark that?

Mr. Schenck: Yes. Is that Wright or Franklin?

The Witness: Wright. Here's the other one (indicating).

Q. What is that one (indicating)? A. That's the Franklin Avenue.

10

Mr. Scott: How did you mark Franklin?

Mr. Schenck: By the word there.

The Witness: That's called the Rockaway-Franklin Road.

The Court: You better mark that Wright with a "W".

(Witness marks map.)

20

The Court: You now offer the original contract between the Stange Construction Company and the Delaware, Lackawanna and Western Railroad dated April 1st, 1927.

(Contract marked Exhibit P-5.)

Q. Can you indicate on that map the bridge you first claimed a lien on? A. Yes.

Q. Which one was it? A. (Witness indicates.)

30

Q. Was it that one or the one near Denville Station, if you know? A. That one down here (indicating in the right hand corner). We furnished material to five different ones at the same time.

Q. Five different what? A. Different bridges.

Q. And to different people? A. Different contracts.

Q. As a matter of fact you were also supplying material to the Stange Company, were you not?

A. We were.

40

Louis Harris, for Plaintiff, Cross.

Cross examination by Mr. Scott.

Q. How did you come to have any dealings with the Els Construction Company? A. They came in the office.

10 Q. And I think you told us some members of the Els Construction Company came there? A. Yes.

Q. And who were they, do you know? A. I got the names down there some place in the file. I don't just recall their names right this minute.

Q. Can you tell us without refreshing your recollection? A. No.

The Court: Do you know them?

The Witness: I knew them at the time.

20 The Court: But you had no acquaintance with them?

The Witness: No, I had no acquaintance with them.

Q. Did they come to see you or what members of the partnership? A. The two men came in there the same time.

Q. And said—— A. Said they had the contract on the bridge.

30 Q. And what did they come there for? A. To get prices on material.

Q. And do I understand they established a credit with you? A. They did.

Q. In what way? A. That they were to be furnished material and we would get their payments for it just as soon as they put in each month; got a percentage of the material and labor from the Stange Construction Company.

Q. They didn't put up any security or anything? A. No, didn't ask for any.

40 Q. Whoever these men were, they just came

Louis Harris, for Plaintiff, Cross.

and told you they represented the Els Construction Company? A. They did.

Q. And they were doing some work for the Lackawanna Railroad? A. That's right.

Q. And did they tell you where they were doing the work? A. Yes.

Q. They told you they were doing it at Wright's Crossing? A. Yes.

Q. And at Franklin Crossing? A. Franklin.

Q. And on their mere say-so, you permitted them to order goods? A. No, we were looking them up. We called up about them down in Paterson, found out who they were.

Q. Then when you found out who they were, you permitted them to have a credit? A. Yes, sir.

Q. These men themselves didn't do any of the ordering of the goods, did they? A. No.

The Court: Who did?

The Witness: Their foreman.

The Court: Do you know who he was?

The Witness: The name is on the slip.

The Court: His name is on the slip?

The Witness: Burgie, I think it was. He was the foreman for the Stange Construction and the Stange loaned him to Els.

The Court: How did you get that information?

The Witness: From the foreman.

The Court: In other words, he was employed by Stange and loaned to Els?

The Witness: Yes. Els told us that too afterwards. I asked one of Els Construction men.

The Court: Which one of Els members was it, do you think?

Louis Harris, for Plaintiff, Cross.

The Witness: I don't know which one it was.

Mr. Schenck: Suppose I try to unravel this matter by a letter I have here.

The Court: Never mind. Finish your cross examination.

10

Mr. Scott: Let me have the letter.

Q. Look at this letter.

The Court: Do you recognize that letter?

Q. Now, from that letter, does that refresh your recollection? A. Yes, one Cole and one Cattermole.

Q. And they both came there to establish credit? A. Yes.

20

Q. When was that? A. June—a day or two previous to our first delivery.

Q. When was your first delivery? A. June 10th; it's on the ticket there.

Q. They told you that time they were doing work on the Wright's Crossing and the Franklin Crossing? A. That's right.

Q. And at that time they didn't introduce or bring with them this foreman they spoke to you about? A. No.

30

Q. That you spoke about? A. No.

Q. They never introduced you to him, did they? A. No.

Q. And his connection, as it were, with the Els Construction Company was what you learned from him? A. Yes.

Q. He came up there and said he represented the Els Construction Company? A. Yes.

Q. That he was an employee of the Stange and that Stange loaned him to Els? A. That's what

40

he said.

Louis Harris, for Plaintiff, Cross.

Q. Now, you have lived in Morris County how long? A. Thirty-four years.

Q. And you know where the State Highway is at Denville? A. Yes.

Q. What they used to call Route Five? A. I don't know which one is Route Five. I know where the State Highway is. 10

Q. You know where the State Highway is at Denville? A. Yes.

Q. And in November or December of 1927, did you consult Mr. Schenck of the firm of King and Vogt with respect to this claim of yours against the Railroad Company and Stange? A. It was around there somewhere. I don't just recall the date of it.

Q. And you told them that you had supplied these materials to the Els Construction Company? A. Yes. 20

Q. And that they hadn't paid you for it? A. Yes.

Q. And that you wanted Mr. Schenck's firm to get after the parties responsible? A. That's right.

Q. And do you remember at that time telling—which member of the King and Vogt did you confer with? A. Mr. Schenck. 30

Q. All the time? A. Yes.

Q. And do you remember at that time, at the time you conferred with Mr. Schenck, telling him that the lumber and materials were furnished in connection with the construction of the bridge over the State Highway, Number Five at Denville? A. We took it off a map.

Q. No, I asked you whether you remember telling Mr. Schenck that at the time? A. I don't remember whether I did or not. I may have. I didn't say I didn't. 40

Louis Harris, for Plaintiff, Cross.

Q. And at that time you told Mr. Schenck that the amount of the bill was eleven hundred and thirty-four dollars and forty-nine cents? A. Yes.

10 Q. And you also told him that time that you had repeatedly applied for the payments from the man in charge of the work but the same had not been forthcoming, is that right? A. That's right.

Q. Now, where is this State Highway? How far is this State Highway at Denville from Wright's Crossing? A. A mile or so at the time.

Q. And how far is it from the other crossing that you have indicated to the Franklin Crossing? A. About two and a half miles.

20 Q. And at the time you told Mr. Schenck as to what the materials—to what place or bridge the materials were furnished, you say you got that from a map? A. Yes.

Q. And now, as I understand it, or later on, as I understand it, you got a map from the Railroad Company; that's the map up there? A. Yes.

Q. And you now say that the material was furnished to these two other bridges at Wright's Crossing and Franklin? A. Yes.

30 Q. How many times did you go down there to the bridge at the State Highway in Denville? A. Quite often. Once a week, something like that. We were also supplying materials there too, to another company.

Q. But you didn't supply any to the Els Construction Company down there? A. No.

Q. Sure of that? A. Yes.

Q. Positive? A. Yes.

40 Q. And when was it that you first saw what you call the Railroad map? A. Mr. Schenck called me up and told me he had this map at the office

Harry Green, for Plaintiff, Direct.

there and I went in. I don't know what date it was.

Q. About when? A. It must be a year ago.

Mr. Scott: That is all.

(Witness excused.)

10

HARRY GREEN, sworn on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Schenck.

Q. Where do you live and what do you do? A. I live in Rockaway and work for the Borough of Rockaway.

Q. In 1927 were you working for Harris & 20
Sons? A. Yes.

Q. Doing what? A. Truck driver.

Q. And did you or did you not during that period deliver certain material for them down on Franklin Avenue and Wright's Crossing there?
A. I did.

Q. When you go out to deliver, do you take a ticket with you? A. Yes.

Q. To get signed up? A. Yes.

Q. Can you tell from the ticket itself whether 30
or not it's the ticket that you handled or is there anything on the ticket to indicate? A. If I see the ticket I know whether I had it or not.

Q. Did you get that signed at the time of delivery also? A. Yes.

Q. Well, I have here a group of tickets marked P-1 for identification and would ask you if you yourself delivered any of the materials shown on any of these tickets?

40

Harry Green, for Plaintiff, Direct.

The Court: Run through them and identify those that are yours, if they are.

The Witness: This one.

The Court: What's that date?

The Witness: June 9th.

10 The Witness: The next one.

Q. What is the date there? A. June 23rd.

Q. What's that date? A. August 2nd. That's all that I can see. I have taken more of these big orders, but these are the only ones I identify.

The Court: Where did you make delivery?

20 The Witness: Wherever the slip says. You mean just the particular crossing? Sometimes the office, they would tell you just where to go to.

The Court: How many deliveries do you recall making? There are three you indicate there. Any more?

The Witness: Well, I know I made more than three trips to both jobs. I don't know just how many trips I made to each job.

The Court: And what did you take there?

The Witness: Whatever the order calls for.

30 The Court: Whatever the order called for?

The Witness: Yes.

Q. And you delivered the goods and got these delivery slips signed the same time, did you not? A. Yes.

Q. On making delivery, after the delivery was made, you would get the slip signed? A. Yes.

The Court: Who signed your slips?

40 The Witness: Usually we have a foreman on the job.

Harry Green, for Plaintiff, Cross.

Q. Well, we will take this slip of June 4th, there's a name there, and will you tell us what name appears there? A. N. J. Bride.

Q. Is that Bride or Budd? A. Bride, I think.

Q. And you find that name on lots of the rest of these slips?

10

Mr. Scott: I object to what he finds on lots of the rest of these slips.

Mr. Schenck: All right, the jury will see.

Q. I ask you to look at slip June 23rd, do you identify the ticket, does the same thing appear on that slip as having receipted for goods? A. Yes.

Q. August 2nd, I don't see any name on that slip at all? A. No, sir.

20

The Court: Well, didn't you make that delivery?

The Witness: I must have made it. Lots of times you go to a job, like they ask for this thing or that and there's no one there to sign the ticket, who will sign the ticket and we take the duplicate slip and give it to the foreman.

The Court: Not what must have been. Did you make delivery of that?

30

The Witness: Yes.

Cross examination by Mr. Scott.

Q. Outside of looking at these papers, you haven't a real recollection of anything of this transaction? A. I know I took the lumber to the job.

Q. Yes, now, you drove a truck for Harris? A. Yes.

40

Harry Green, for Plaintiff, Cross.

Q. And during that time you went down to Wright's Crossing? A. Yes.

Q. And the other crossing? A. Franklin Avenue.

10 Q. Then without looking at the slips, you couldn't tell where you were on August 2nd or June 23rd or June 9th? A. No, I can't tell exactly which job I went to.

Q. And do these tickets show where you went? A. The job I went to?

Q. Yes? A. No; some is marked Wright's Crossing and some is marked Franklin Avenue.

Q. You find that right there? A. Yes.

Q. Take that August 2nd; that was made out before you left there? A. Before I left the office.

20 Q. And they give you two tickets? A. I bring this one back and give the foremen the other.

Q. And is any of this ticket here in your handwriting? A. No, sir.

Q. Is there anything on it that shows you marked it at all? A. No, sir, don't have anything to do with the ticket.

Q. You didn't have anything to do with this ticket? A. No.

Q. Your name is Green? A. Yes.

30 Q. Somebody else put that there? A. Yes; that means nothing but I took this load.

Q. You say you took that load because your name Green is on there and it says Green, truckman? A. Yes.

Q. And if you didn't have this paper before you, you couldn't tell us what you did on August 2nd, 1927, could you; on the date in which that is made out? A. No.

40 Q. And there's nothing on that paper there to show that you marked it at all? A. No, no marking at all.

Harry Green, for Plaintiff, Cross.

Q. And before you left the office, it was already marked as shown here, deliver to Wright's Crossing? A. Yes, this was all I have to go by to know what job to go to. I didn't know what job to go to if they didn't tell me.

The Court: That's the directions?

10

The Witness: Yes.

Q. Here's the June 9th slip, Mr. Green; did you have anything to do with that? A. The stuff marked out we took to the boarding house or rooming house for the men to stay there.

Q. What did you have to do with this slip; did you make it out? A. No.

Q. There is nothing in your handwriting on this slip? A. No, sir.

20

Q. That doesn't say where it was delivered, does it? A. No, sir.

Q. That doesn't say who the truckman was? A. No.

Q. And if I should have a form like this and sat down and wrote down a ticket and made up a ticket, that would help your recollection just about as well as this will? A. This names the job I deliver the materials, I don't understand—I know I took them there.

30

Q. Well, will you tell the jury just how that slip there refreshes your recollection? You do not mean that, do you? Nothing to it but that particular job from looking at that slip, or even your name to it. Isn't any writing by you on it; wasn't made out by you; in other words, that doesn't refresh your recollection, does it? A. Yes, it does. I know naturally where they used that stuff. When I took it there, I took it to the job I went to before; I could say that they used it.

40

Harry Green, for Plaintiff, Cross.

Q. This slip doesn't say where you delivered it?

A. No.

Q. It doesn't say you were the truckman? A. No.

10 Q. And there's nothing on the slip to show that you had anything to do with that particular shipment? A. No, sir.

Q. I think there's another. Here's a slip of June 23rd, 1927. And did you ever see that slip before? A. Well, I delivered the stuff.

Q. Did you ever see the slip before? A. I must have, yes.

Q. Well, when did you see that slip before? A. On the day I delivered the material here.

20 Q. Now, you didn't add anything to this slip, did you? A. No.

Q. There's nothing in your handwriting on that slip? A. No, sir.

Q. There's nothing to indicate who the truckman was? A. No, sir.

Q. And there's nothing in your handwriting there? A. No.

30 Q. And this is the first time you have seen this slip since when? A. Whenever I turned it in to the office; as soon as I came back from making that delivery.

Q. Now, when you turned it in to the office, what did you put on the slip to show you were the one that made the delivery? A. I am supposed to mark it here. The driver has got to mark on it that day.

Q. You didn't touch it at all? A. No, if there was any change to be made, they would make that in the office.

40 Q. So that as a matter of fact, the only way you

Harry Green, for Plaintiff, Redirect.

know this here was a shipment of fifteen, what——

A. Fifteen hundred square feet of ship lapping, 22x48——

Q. You remember because you say fifteen hundred feet of ship lapping was delivered on June 23rd, 1927; whereabouts did you deliver that? A. Franklin Avenue. 10

Q. Franklin or Wright? A. Franklin Avenue.

Q. And if Mr. Schenck hadn't shown you this or if you hadn't seen it, you would not have known whether you delivered that ship lapping in June?

A. I delivered ship lapping on both jobs. I know I took material to both jobs. I didn't know which.

Q. That's the only thing that refreshes your recollection? A. Yes.

Mr. Scott: At this time I move to strike out the testimony of this witness with respect to delivery because it's apparent that he has not been able to refresh his recollection from any kind of data that has any real legal standing in Court. 20

The Court: I disagree with counsel. The witness testified he went to these two jobs, the Franklin Avenue and Wright's Crossing and delivered material. He testified he would not remember the exact date nor the particular quantities, but he remembers making the delivery of materials there. The objection is overruled and you may have an exception. 30

Redirect examination by Mr. Schenck.

Q. How many deliveries a day do you make, ordinarily? A. You mean on that job?

Q. No, any one.

40

Harry Green, for Plaintiff, Redirect.

10 The Court: I may add, the slips have been identified, but can only be used so far as to refresh his memory. He himself identified three of them under the dates indicated. No matter what might refresh his memory, from what particular source, the slips should not be marked as Exhibits; they are merely used by him to refresh his memory.

Q. How many deliveries did you make to the Crossing a day? A. It's only a short distance, four or five, sometimes two or three.

Q. You did that by automobile truck? A. Yes.

Q. How long had you worked for the Harris Company? A. About six years.

20 Q. You didn't keep any record of where you made deliveries yourself? A. No, just took the loads and came back.

The Court: Do you have independent memory of any certain places; for example, take the Wright Crossing; remember going there?

The Witness: Yes.

The Court: And that other crossing; Franklin Avenue; you remember that?

The Witness: Yes.

30 The Court: But when you come down to the feet of material you delivered or the exact date, you don't know? You do know you were in the employ of the concern on all the dates mentioned?

The Witness: Yes.

The Court: June 9th, June 23rd, and August 2nd, you were employed by them during that time and made deliveries?

40 The Witness: Yes.

Elmer Stager, for Plaintiff, Direct.

Mr. Schenck: I would like to have these slips marked for identification.

(Slips marked D-1 for identification, D-2 for identification and D-3 for identification.)

(Witness excused.)

10

ELMER STAGER, sworn on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Schenck.

Q. Where do you live and what do you do? A. I live in Rockaway and drive a truck for Joseph Harris & Sons.

20

Q. In 1927, were you one of Harris' drivers? A. I was.

Q. Did you deliver materials for them up at the Franklin and Wright's Crossings bridge job? A. I did.

Q. The Els Construction Company? A. I did.

Q. And how many deliveries a day did you make ordinarily? A. Ordinarily we make three or four deliveries a day; sometimes five. Short trips.

30

Q. You well remember making deliveries at these jobs, do you not? A. I certainly do.

Q. Do you remember times you delivered, without referring to any papers at all? A. Yes, I remember some.

Q. Tell me some of the deliveries up there?

Mr. Scott: I object to deliveries generally.

The Court: Oh, he is talking about deliveries on this job. That's not generally, he is talking about the D. L. & W. crossings.

40

Elmer Stager, for Plaintiff, Direct.

10 Q. What did you deliver at these jobs during the months of June and August, 1927, for the Els Construction job; to either of the bridges mentioned? A. Well, I tell you; I had a number of deliveries of shiplapping and 2 x 8. Now, what other stuff I have delivered, I can't recall.

The Court: When did you deliver that particular thing you speak of?

The Witness: I remember delivering 2 x 8 at the Wright's Crossing.

The Court: But when was that?

The Witness: I can't recall the day.

20 Q. You remember delivering shiplapping. Where did you deliver that? A. At Franklin Avenue.

The Court: And did you have delivery slips with you at the time?

The Witness: Yes.

The Court: Now, if you were shown them, would you recognize them?

The Witness: Possibly.

30 Q. Take a look at this bunch of slips and see if you recognize any of those? A. (Witness looks over slips.)

The Court: Now, you recognize these?

The Witness: Yes.

The Court: They are all yours?

The Witness: Yes.

The Court: Those you laid aside you can't recognize?

The Witness: Those I can't recognize.

40 The Court: How many are there?

The Witness: Five.

Elmer Stager, for Plaintiff, Cross, Direct.

Mr. Schenck: They are dated, August 2nd, August 6th, August 8th, August 15th, August 25th, 1927.

The Court: Let him tell what deliveries were made on these slips.

Mr. Scott: I think I should examine him primarily— 10

The Court: You may.

Cross examination by Mr. Scott.

Q. You got five slips here? A. Yes.

Q. And did you make up any of those? A. No.

Q. Is there anything on these slips—I see your name Stager? A. Yes.

Q. You put that there? A. Yes.

Q. That's how you recognize them? A. Yes. 20

Mr. Scott: No objection.

Further Direct examination by Mr. Schenck.

The Court: Just tell the delivery dates, starting with the earliest date and where you made delivery.

The Witness: On August 2nd, 1927, at Wright's Crossing, 2 x 6—14—

Q. You made that delivery? A. Yes. You want the man's name who signed that? 30

Q. Yes? A. T. Olsen.

The Court: Go ahead.

A. (Continued.) At Wright's Crossing; 198 lineal feet of 4 x 6 fir. T. Olsen signed this one.

The Court: You made that delivery?

The Witness: I did. 40

Elmer Stager, for Plaintiff, Direct.

A. (Continued.) On August 8th, Wright's Crossing. 36 2 x 6—14; 32 2 x 6—16. T. Olsen.

The Court: You remember making that delivery?

The Witness: I do; when it comes to me.

10

A. (Continued.) August 15th, Wright's Crossing, 500 feet of 2 x 6—16. Olsen signed this one.

The Court: You remember making that delivery, do you?

The Witness: Yes, sir.

20

A. (Continued.) On August 25th, at Franklin Avenue, 200 square feet of 1 x 6 tongue and grooved spruce. 1000 feet tongue and grooved ribs.

The Court: You remember that?

The Witness: Yes.

The Court: Who signed for it?

The Witness: Els Construction.

The Court: That's the only one?

The Witness: Only one signed by Els Construction Company.

The Court: Who was Olsen?

30

The Witness: Foreman.

The Court: For who?

The Witness: Els; he told me.

The Court: He admitted it?

The Witness: Yes.

Q. How many trucks did Harris have on the road at this time, if you remember? A. I think five or six trucks, that time.

40

Q. And did you ever see more than five or six

Vernon Ford, for Plaintiff, Direct.

trucks? A. I haven't been there more than five times.

Q. But it is a fact, these slips, you remember of having been actually handled by you? A. Yes.

Mr. Schenck: Cross examine.

Mr. Scott: No questions.

10

(Witness excused.)

VERNON FORD, sworn on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Schenck.

Q. Mr. Ford, you're bookkeeper for Harris & Sons? A. That's right.

20

Q. And do you know what system of bookkeeping in which this account was kept? A. Yes.

Q. And will you please tell us how the record of this account was kept? A. The original charge is made from the delivery ticket, just as we make them, and from there, a monthly bill. The monthly detail of that bill is posted in the ledger of the customer's account.

Q. The face copy of the bill goes to the customer, does it? A. Yes.

30

Q. And these papers are all copies of the account that you keep? A. Yes, carbon copies.

Q. In this ledger page? A. Yes.

Q. So these papers, the delivery tickets and the carbon copies of the account, the face copy of which you send out, and the ledger page is the total record of the account against the Els Construction Company? A. That's correct.

Q. And this account remains unpaid? A. Unpaid to date, yes.

40

Vernon Ford, for Plaintiff, Direct.

Q. And all you know about it is what the delivery tickets and billed pages show? A. Yes.

Mr. Schenck: I want to offer in evidence now the tickets and carbon copy of the account and the ledger page.

10 The Court: Is there objection?

Mr. Scott: Yes, sir. There's no objection to the bills which have been identified by the witness, Stager. Outside of that I object to these papers on the ground that none of them are evidential as against either of the defendants, the Railroad Company or the Stange Construction Company, and they form no basis as exhibits for showing the delivery of the materials in question outside of those by Stager and perhaps by Green, and therefore not binding upon the defendants.

20

The Court: I think I understand this circumstance, aside from this particular testimony of the drivers, coupled with Mr. Harris' statement, and I think it's material and I think it's enough to go to the jury. Under the circumstances I will allow them to be marked.

Mr. Scott: Exception.

30 (Slips marked P-1; ledger sheet P-2, bill P-3.)

Mr. Schenck: I also want to offer in evidence as against the defendant, Els Construction Company, their letter of October 14th, 1927.

(Marked as Exhibit P-6.)

The Court: Suppose you read it.

Thereupon Mr. Schenck reads Exhibit P-6.

40 Mr. Schenck: This is not in respect to the

Louis Harris, Recalled, for Plaintiff, Cross.

liability of the Railroad Company and the Stange Construction Company.

The Court: That's true. The jury will understand this letter treats with the liability against the Els Construction Company and them alone. It is no indication of liability in this suit of the D. L. & W. Railroad or the Stange Construction Company. 10

Mr. Scott: No questions.

(Witness excused.)

Mr. Schenck: That is our case.

LOUIS HARRIS, recalled:

Further Cross examination by Mr. Scott. 20

Q. Mr. Harris, in the papers there is a material known as ship lapping. Will you describe to the jury just what that is? A. Boards used for making forms.

Q. You saw it, I would just like to know what it looks like? A. A board 10 inches wide with grooves on each end.

Q. What's it used for? A. For making forms.

Q. Forms in concrete work? A. Yes. 30

Q. A board 10 inches wide with grooves? A. Yes.

Q. About how long is it? A. From 12 to 16 feet.

Q. And did you know at the time, any time after the Els Construction Comany came up to see you that they were doing work, other work aside from the Lackawanna, what you call the Wright's Crossing work. In other words, they were building houses? A. They were not building any houses. 40

Motion for Non-suit.

Q. But do you know—I want to know if you know whether they were building houses around different parts of the country? A. I don't know. They were not building any up there.

10 Q. But do you know whether they were building? A. In other places, no.

Mr. Scott: That is all.

(Witness excused.)

Mr. Schenck: That's our case.

Mr. Scott: Before Mr. Schenck closes, we have a stipulation and I think it ought to go in.

20 Mr. Schenck: I also offer in evidence the original lien claim and also the order of Justice Parker permitting the amendment to the proceeding.

(Lien claim marked Exhibit P-8. Order of Justice Parker marked Exhibit P-7.)

The Court: What is the stipulation?

30 Mr. Scott: I will put it in later. At this time I desire to make a motion for a non-suit, and the first motion I make is that a non-suit should be directed and an order entered by your Honor cancelling the lien upon which the action is based for the reason that the plaintiff failed to prosecute with its lien within one or two terms, as required by statute. The record in this case will show that the summons and complaint was served upon the defendant Railroad Company on January 4th, 1928, and the defendant filed the answer and notice for the April term 1928. Now, since that term, the following periods of Court have elapsed. The
40 October term of 1928, January of 1929; and

Argument on Motion for Non-suit.

the lien was filed in the office of the County Clerk on December 30, 1927. True it is, that Justice Parker made an order on October 22nd of this year and there is in the order granted by Justice Parker that your Honor extend the time as required by the statute, but there is no evidence in this case that the plaintiff has made no diligent effort to reduce its lien to a judgment within the time prescribed by law. There is no explanation whatsoever except, perhaps, and that, I don't know whether they appeared before Justice Parker or not, but they talk about an amendment to this lien claim; which Justice Parker amended; and Mr. Harris tells us this morning that he learned about this peculiar situation of the wrong bridge when they looked at a railroad map a year ago. Now, there is nothing so far as I know as attorney for the two defendants, that they ever called me before your Honor or before Justice Parker asking for the time of this lien claim to be extended.

The Court: Had the case been reached for trial?

Mr. Scott: The case was reached for trial.

The Court: When?

Mr. Scott: June, June 2, 1929.

The Court: Was it moved when reached?

The Court: Why didn't it move?

Mr. Scott: At that time Mr. Schenck wanted to amend the claim, amend the claim or something, Mr. Harris said that, that was a year ago.

Argument on Motion for Non-suit.

The Court: What have you got to say, Mr. Schenck?

10 Mr. Schenck: Well, the case was moved either last term or the term before and the reason I did not try it then was there was this application by me to Justice Parker to amend the proceedings and I didn't know it was at all objectionable to the other side that the case go over, and so the case did go over and then before the coming on of the next term, the application to Justice Parker was made and he ordered an amendment to the proceeding entered.

The Court: Is this the first term it has been reached since the amendment?

20 Mr. Schenck: Yes. And in addition to that, at about the same time that we gave notice to Mr. Scott of the formal application to Justice Parker to amend the proceeding, he in turn gave me notice that the year had expired and that he was going to comply with the terms of the proceeding because we had not been prosecuted to conclusion within the year limit.

The Court: What did he do then?

30 Mr. Schenck: That motion was not pressed as no advantage would be taken of their position and again time elapsed between the notice and the return date of my application before Justice Parker in September. So that's the explanation of why the time passed and I was not bound at all in going to Mr. Scott and note the application to Justice Parker or to you to extend the time that he had already noted, because the time had expired.

Argument on Motion for Non-suit.

Both the matters would naturally result, it seems to me, when the motion was pressed and request would be stated to the Court and an order made accordingly.

The Court: Let me see that stipulation.

Mr. Scott: Your Honor will recollect I made that motion before your Honor and your Honor said I could take that up at the time of trial. 10

The Court: When was it first actually reached for trial?

Mr. Schenck: Mr. Scott says in June.

The Court: At that time was this question actually up for amendment?

Mr. Schenck: Yes.

The Court: That was the first time it had been reached since it was on the calendar? 20

Mr. Schenck: Yes.

The Court: How did that happen?

Mr. Schenck: It was only down two terms before that—in fact it was only on one term before that.

The Court: The present motion will be denied. I think I will ask the jury to pass on the question of diligence.

Mr. Scott: I have another reason. I also ask for a non-suit on the ground that the plaintiff having conceded the lien on the property first set out in the original complaint was incorrect—that the description of the property was not the proper place. Having conceded that a lien on the property first set out in the original complaint was invalid, the plaintiff's cause of action failed because the order of Justice Parker of the Supreme Court on October 22nd, 30 40

Argument on Motion for Non-suit.

1929—in other words, Justice Parker had no authority to make that order.

The Court: You think the Court, a Circuit Judge, has the right to pass on that? I think you are right in putting this on the record.

10 Mr. Scott: By going to trial, I don't concede that Justice Parker was right in any particular.

The Court: It is your right to detect any legal impropriety of that order, if there be such. You have the right to keep the record straight and raise the propriety of that order.

20 Mr. Scott: We have another situation here, your Honor, the fact that Mr. Harris said he knew about this a year ago.

The Court: Well, I am going to let the jury pass on that question of diligence. Ordinarily, diligence is a question of law. What generally turns up in these cases is an application made for leaves of extension.

The Court: The motion is denied and you may have an exception.

Thereupon the Court adjourned until 1:05 in the afternoon.

30

40

Alfred H. Henkle, for Defendants, Direct.

AFTER RECESS.

ALFRED H. HENKLE, sworn on behalf of the defendants, testifies as follows:

Direct examination by Mr. Scott.

Q. Mr. Henkle, you are a civil engineer? A. 10
Yes.

Q. By profession? A. Yes.

Q. And employed by the Lackawanna Railroad and have been how long? A. Twenty-four years the first of next March.

Q. You are familiar with the maps on the stand, Exhibit P-4? A. I am.

Q. What is that map a print of? A. It's a map prepared for the construction of two additional tracks of the Delaware, Lackawanna and Western Railroad Company between Boonton and East Dover Junction. 20

Q. And you are familiar with that locality? A. I am.

Q. That was the locality that the Stange Construction Company had contracted to perform certain work? A. Yes.

Q. And I show you the original copy of the complaint in this suit, in the first paragraph of which is tract of land; you have seen this complaint before? A. Yes. 30

Q. Now, will you mark the limits of that tract of land described in that? A. It's going to be pretty small and hard, if you try to make it to scale. (Witness marks.)

Q. Will you mark with a yellow mark near that tract "A." Now, I show you a copy of an order made by Justice Parker in this matter on October 22nd, 1929, in which there are two tracts of land. 40

Ottomar Stange, for Defendants, Direct.

One known as the First tract and one known as the Second tract; and will you mark on that map designating the First tract described in the order as the First tract and the Second tract as the Second tract? A. (Witness marks.)

10 Q. The first tract? A. That's the first tract, yes.

Q. Will you tell the Court and jury how far what is known as the first tract is from tract "A."

A. The first tract is approximately 7800 feet or about a mile and a half southward to tract "A."

Q. And how far is tract two from the First tract? A. 3400 feet in a westerly direction.

Q. 3400 feet further? A. Yes, measured along the railroad.

20 Q. Now, will you point out as to which one of these tracts, "A," "one" or "two," the State Highway known as No. 5 in 1927 the bridge was located? A. Tract "A."

Mr. Scott: That is all.

Mr. Schenck: No questions.

(Witness excused.)

30 OTTOMAR STANGE, sworn on behalf of the defendants, testifies as follows:

Direct examination by Mr. Scott.

Q. Mr. Stange, you are a member of the co-partnership known as the Stange Construction Company? A. Yes, sir.

Q. And your company is one of the defendants in this suit? A. Yes, sir.

40 Q. And you had a certain contract with the

Ottomar Stange, for Defendants, Direct.

Lackawanna Railroad, which I think Mr. Schenck introduced in evidence as P-5? A. Yes, sir.

Q. And was that—did you sublet that contract or any part thereof to anybody? A. Yes, sir.

Q. Looking at that tract, known as "A," where Mr. Henkle said the State Highway, Route 5 in 1927 was located, to whom was that sublet? A. That was sublet to Northern Construction Com- 10
pany.

Q. And there are two other tracts, one known as tract one up at Wright's Crossing and another tract known as tract two at the Franklin Crossing; to whom were those sublet? A. The Els Construction Company.

Q. Both? A. Both.

Mr. Scott: That is all.

Mr. Schenck: No questions. 20

(Witness excused.)

Mr. Scott: I offer in evidence the stipulation.

(Stipulation marked as Exhibit D-4.)

Mr. Scott: We will not call Mr. Schenck to the stand. It's admitted these letters were sent by you?

Mr. Schenck: If they were signed by our firm name and on our correspondence. I don't 30
know what materiality they have. I might look at them before they are marked.

The Court: The question of diligence, I suppose.

Mr. Schenck: Yes, that's all right.

(Letter of December 10th marked as Exhibit D-5. Letter of December 14th offered in evidence and marked as Exhibit D-6.)

Mr. Scott: We rest. 40

Motion for Direction of Verdict.

10 Mr. Scott: At this time I renew my motion for a direction of verdict and without repeating at length the grounds of my motion for a non-suit, I incorporate those as one and two. And I also ask for a direction of verdict on the further ground that there is no proof that the person or persons who ordered the goods and materials in question involved in this suit had authority to order the goods for the Els Construction Company and that the plaintiff has failed to offer any proof that the goods were ordered to be used on a building or a viaduct or bridge to be built by the Els Construction Company.

20 The Court: The motion for the direction of verdict will be denied; the Court being of the opinion there are questions of facts here for the jury to determine. You may have an exception.

Thereupon Mr. Scott summed up to the jury in behalf of the defendants.

Thereupon Mr. Schenck summed up to the jury in behalf of the plaintiff.

Thereupon the Court charged the jury as follows:

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Charge of the Court.

LAWRENCE, J.:

Lady and gentlemen of the jury, this is what we know technically as a mechanic's lien suit, and briefly it may be said that it involves a claim made by a wholesale lumber concern, the plaintiff, known as Joseph Harris & Sons, Inc., to recover the price of certain lumber and materials claimed by the plaintiff to have been sold to the sub-contractor on some bridge work that was apparently being done at the time by the D. L. & W. R. R. Co. under a general contract with the Stange Construction Company. In other words, the plaintiff gives the history of the transaction in about this fashion. It alleges that the Stange Construction Company had a general contract with the Railroad Company for the purpose of doing some work along its right of way in connection with the construction or erection of two or more bridges. It further appears that the Stange Construction Company sub-let to the Els Construction Company some portion of the work with reference to the bridge construction. The plaintiff claims that representatives of the Els Construction Company came to it with an application for the extension of credit for certain lumber and supplies which apparently the Els Construction Company was required to use under the contract which it had with the Stange Construction Company. Thereupon the plaintiff alleges that it sold and delivered the materials in question, aggregating \$1134.49 in price to the Els Construction Company upon the site and within the boundary of the right of way of the Railroad Company where this work was being done. Now, the issues appear rather complicated, but it would seem that if you consider the relation

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Charge of the Court.

of these three corporations to each other, or the three concerns here involved, that perhaps you may arrive at that which otherwise might appear to be complicated.

- 10 Therefore, the plaintiff claims that it proceeded to deliver with its trucks the materials aggregating in amount that for which suit is brought; charged, of course, on its books to the Els Construction Company, which had sub-contracted with the Stange Company for the bridge work or some portion thereof. Now, that having been done, and the Els Construction Company not paying the plaintiff, it resorted to what we know as the mechanic's lien act; that is to say, a law which gives
- 20 the material men, such as the lumber concern the right to file a lien against a building or a construction, such as this, for example bridge work, where the person or concern that ordered the lumber had failed to pay, and it appears that such lumber and supplies were actually used in the construction? So here the plaintiff company alleges they delivered the materials in question on the ground or on the right of way, shall I say, of the Railroad Company to the credit of the Els Construction Company, charged to them, and it alleges
- 30 such materials were used by the Els Construction Company in the bridge work to which reference is made.

- Thereupon the plaintiff company filed a mechanic's lien in the County Clerk's office for the amount of its bill, basing it upon the detail setting forth the materials. Now, it was obliged to file the claim against the property into which the materials went or to which premises they were delivered. I do
- 40 not undertake to say that the plaintiff company was obliged to show that all of these materials were

Charge of the Court.

actually used in the bridge construction; if they show and satisfy you under the fair preponderance of the proof that the materials were delivered on the premises for that purpose, then I charge you the plaintiff company would have satisfied the rule of law that they were obliged to show delivery. It was not obliged to follow up stick after stick or nail after nail to see that they actually went into the bridge construction. That isn't the rule. The rule is that if the claimant shows under the fair preponderance of the proof or the greater weight of credible, legal evidence that the goods were purchased, under the circumstances alleged, by the sub-contractor and delivered to the premises where the construction was under way and work being done by the sub-contractor in question and at least it appears that the delivery was for the purpose of being used on that work, then I charge you that the plaintiff company would have the right to file a lien against the Railroad Company as owner of the premises where the construction was being carried on, and the Stange Construction Company as builder, to the end that if you find the amount due the plaintiff company as claimed, then that would be specially entered as a judgment against the land described in the claim with the construction thereon. So here the plaintiff company is now seeking to recover specially against the land described in the complaint referred to as the first tract and also that described in the second tract, there being apparently two bridges involved, one at Wright's Crossing and one at Franklin Road. And I may say that under ordinary circumstances if it appeared the claim had been filed within four months after the last item of delivery, assuming it to have been

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Charge of the Court.

10 proven, and summons issued within four months, then if it had been proven to your satisfaction, undoubtedly the plaintiff would be entitled to a special judgment against the described land of the Railroad Company and the contractor for the total amount, and a general judgment against the
15 Els Company, just as if it were being sued for in an ordinary action at law.

Now there are two or three questions which arise and which I think should be submitted to you in order for you to determine the questions of fact. For example, there is a provision in the mechanics' lien act, that no debt shall be a lien by virtue of this act, unless the lien claim is filed, as therein provided, within four months of the
20 date the last work was done or materials furnished for which the debt is due. Nor "shall any lien be enforced by virtue of this act unless the summons in the suit for that purpose shall have been issued within four months from the date the last work was done or materials furnished under such claim, and the time of issuing such summons shall be endorsed on the claim upon the receipt thereof, and if no such entry be made within four months from said date or any such claimant shall
30 fail to prosecute his claim diligently within one year from the date of issuing such summons or such further time as the Court may have ordered, such lien claim shall be discharged." Now, the question is raised here as a defense to the effect that the plaintiff company did not diligently prosecute its claim and the suit thereon within one year after it was filed. It appears to have been filed on December 30th, 1927, and the summons was issued thereon, and apparently the same
40 date, according to the endorsement on the claim,

Charge of the Court.

which you will have and examine. Now, you are to observe that substantially two years have elapsed since the filing of the claim and the issuing of the summons. Therefore, the defendant Railroad Company urges that the claim was not diligently prosecuted as required by the statute. That question is being submitted to you as a fact for the reason that the Appellate Court apparently takes the view that it is upon the plaintiff to show that there were reasons why the claim was not reduced to judgment within a year after the lien was filed. You see in due course this claim should have been prosecuted and would have been presented for trial and reduced to judgment by December 30th, 1928, it having been filed the previous year. And therefore the inquiry will be whether the plaintiff has shown you under the fair preponderance of the proof that after all they had exercised diligence in bringing this case to trial and that there were reasons which intervened which cannot now be charged against it in the claim of lack of diligence. One reason, as I recall the evidence, is that as a matter of fact the lien was filed and summons issued on December 30th, 1927. At that time the plaintiff company made the mistake of including a bridge on land outside of that described thinking that that particular bridge was one of the two under the construction in which the materials of the plaintiff had been used.

Apparently the case was noticed for trial at the January term. Then for a reason which is not clear to me, it was carried over to the April term, or whatever these terms may have been. You will recall what the testimony was. In any event, on July 2nd, 1929, as I now recall, the case was

Charge of the Court.

10 listed for trial, and then the plaintiff's counsel discovered that there had been an error in including the bridge, to which reference was made; that that was the wrong bridge. One of them, as I understand it, was correct. Thereupon they applied to Mr. Justice Parker for leave to amend the description in the lien claim for what we might say was the proper one. Mr. Justice Parker allowed the amendment to the claim. The result was the case did not come to trial that term. But you will understand that these cases are listed numerically; they each have a number, and it so happens mechanic lien cases are brought in the Circuit Court, not the Supreme Court, and so this case appears now as Number 114 on the Circuit cases. It is true it was advanced for trial today because counsel for the Railroad Company moved to have it advanced and upon permission from the Court to that end, and it is now being tried ahead of other cases, and you will determine, ladies and gentlemen, whether the plaintiff is entitled to a lien upon the lands described in the complaint or not.

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30 If you should find that the plaintiff Company did not diligently prosecute the suit on its claim within a year after it was filed, namely, between December 30, 1927, and July 30, 1929, then you may find for the Railroad Company and General Contractor, because the law is that unless the lien claim is diligently prosecuted within a year after the claim is filed, he cannot thereafter have it enforced against the land and construction involved. You will bear in mind the Railroad Company was not originally a party to the transaction between the Els Construction Company and the plaintiff, and there is no proof that the Railroad Company

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Charge of the Court.

owes anything to the Els Construction Company. No such proof at all. In other words, it's the third party's land that is sought to be encumbered with the lien, legally now, in this proceeding by reason of the failure of the Els Construction Company to pay what it owes the plaintiff lumber company, and so far as any evidence is concerned in the case, the Railroad Company had nothing to do with that at all. It's only because the lumber company had the right to file a lien against the owner of the land, in this case the Railroad Company, that it has the right to carry on, as it were, against the Railroad Company at all. Therefore, it is seeking a special lien or judgment against the land of the Railroad Company because of the failure of the Els Construction Company to pay the plaintiff. Now, the latter can do that under this mechanic's lien act, because the law makes the land and the construction involved liable for the debt of the lumber company incurred by the sub-contractor if the lumber company does certain things in the way of observing the law. For example, filing its claim within four months after the last material was furnished and then prosecuting diligently within a year.

Now, the lumber company in reply to the Railroad Company insists it did prosecute its claim diligently. As a matter of fact, there was a mistake made in the description of the land. That it was not discovered, although there is some evidence that Mr. Harris knew that there was an error sometime before he made application to Mr. Justice Parker to amend the description of the land. So that there is a real question here, you see, as to whether the plaintiff company has shown any real excuse for not prosecuting its

Charge of the Court.

claim and having it reduced to judgment within a year after December 30th, 1927. It does so happen that cases cannot be reached in their order each term upon the calendar; that the Court cannot try all cases on the calendar in a given term.

10 So you have cases carried over from one term to another because they have not been reached in due course for trial. The claim is made here by plaintiff company that in due course, and in due course only, this case was actually reached for trial on July 2nd, 1929, and the discovery of that error of the bridge then necessitated the applying to the Supreme Court Justice for the amendment; and now is the first time, so the plaintiff company claims, that the case has been able to be tried in

20 the normal and usual way during the sitting of the Circuit Court. So whether there are excuses here which appear reasonable to you, which will take the plaintiff company out of the criticism of not having diligently prosecuted its claim becomes a question of fact. You must be satisfied under the fair preponderance of the proof, however, that the plaintiff company has not been diligent. If you find it has not and it should have reduced this claim to judgment by being tried within one year

30 after December 30th, 1927, and through its negligence it didn't, then no special judgment can go against the Railroad Company and the Stange Construction Company. You can return a general verdict as you would in an ordinary suit against the Els Construction Company, however. And I say to you now that you can return a verdict in favor of the plaintiff and against the Els Construction Company for the amount of the bill with interest from the date of the last item, which

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Charge of the Court.

is August 30th, 1927. But whether you return a special verdict against the land and the construction company depends upon how you find the evidence to be, the question being one for the plaintiff company to answer for not prosecuting its suit within a year. If you say they were not diligent, then of course there would be a verdict in favor of the Railroad Company and the general contractor, the Stange Construction Company. On the other hand, if you find that the charge of lack of diligence is not to be made under the evidence against the plaintiff company, you finding from the fair preponderance of the proof that the materials in question were delivered to the premises of the Railroad Company for use by the Els Construction Company on the work which they had as sub-contractor of the Stange Construction Company, and you find that the claim was filed within four months after the last item for which a charge is made, and the summons issued within four months, as it appears to have been, then I charge you there could be a special verdict against the Railroad Company as owner, and the Stange Construction Company as builder. There is some claim made here that there is no proof in this case that there was any authorized person to enter into this contract in behalf of the Els Construction Company and the plaintiff lumber company. In other words, there is said to be a lack of proof that any person really authorized by the Els Construction Company had the right to order the materials of the plaintiff company. Well, I am leaving that to you to decide. The fact appears to be that there are two individuals named by the representative of the plaintiff as having negotiated with the lumber company for the materials in question, and a

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Charge of the Court.

letter has been offered which would tend to indicate that those negotiations had been ratified by the Els Construction Company by reason of its admission of liability for the materials in question and a promise to pay. So there should be evidence in the case which will satisfy you that some one with authority to speak for the Els Construction Company had ordered the materials from the plaintiff company.

I do not recall any other phase or features of the case that require special mention. I am requested by the defendants to charge you that while it is immaterial to the validity of the lien whether the materials having been furnished for the building were used in the building or not, if you believe from the evidence in this case that the plaintiff knew or in the exercise of that judgment which reasonably careful and prudent business men would exercise, ought to have known, that the materials ordered for said work were not of such a character or kind as would be used in the kind of work that the Els Construction Company was doing for the defendant, the Stange Construction Company, General Contractor, or the defendant, The Delaware, Lackawanna and Western Railroad Company, then you have a right to find that there was fraud committed on the part of the creditor, the present plaintiff, in furnishing said materials, and if you do find that such a fraud was committed by it in the furnishing of said materials, your judgment must be against the plaintiff and in favor of the defendants. Well, I have read that Request to Charge to you. I modify it with this statement, that the plaintiff company demands for a detailed bill here involving \$14.00 worth of materials that have been used in the construction

Charge of the Court.

of the improvements of the Railroad Company. Therefore, I would say if you find, in arriving at the amount due the plaintiff company, if you find nothing due, then of course you have been practically directed to bring a verdict in favor of the plaintiff against the Els Construction Company generally. You will deduct from any amount you find due in the nature of a lien upon the premises of the railroad and the general contractor these items, included in the \$14.00, said to have been ordered but not part of the lien against the land of the railroad company and the general contractor, the builder. 10

The case is therefore left with you with the direction that if you find the plaintiff company failed to diligently prosecute its lien, in other words, they had not reduced this claim to judgment within one year, then of course no verdict can go against the Railroad Company and the Stange Construction Company. If you find they did not reduce the claim within a year but the lien was filed and diligently prosecuted, having in mind what I have said heretofore about the other phases of this case, you would be justified in returning a verdict specially in favor of the lien as against the land as shown in the lien claim and in that event you will also return a general verdict against the Els Construction Company as if it was any ordinary collection suit. 20 30

Swear an officer.

Thereupon the jury retired.

EXCEPTIONS.

Mr. Scott: I take exception to the Court's refusal to charge the two requests as specifically requested.

10 I take exception to the Court submitting to the jury the matter of the plaintiff's due diligence in prosecuting the lien claim to judgment.

20 I take exception to the Court's statement wherein the Court says that on July 2nd, 1929, it was then that the plaintiff discovered that he liened the wrong bridge and that is the reason the case is being tried today, when, as a matter of fact, the case is being tried today on account of the application of the defendants, Lackawanna Railroad and Stange Construction Company to the Court on December 11th, 1929, to advance said case for trial, pursuant to a notice and petition presented to the Court.

I take exception to that portion of the Court's charge wherein the Court deals with the question of fact that the Court was not in session long enough to try the cases or whatever he said on that point.

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DEFENDANTS' REQUESTS TO CHARGE.

1. The defendants request the Court to charge, and the Court does so charge you, that the clause in the Mechanic's Lien Law fixing one year period, contemplates the reduction of the lien to judgment within that time if diligent prosecution will accomplish that result. Until prosecuted to judgment, the lien is ex parte and arbitrary and in view of this extraordinary feature and of the disadvantage under which the owner naturally labors in defending against a stale claim, the one year limitation by the act should be strictly enforced unless the claimant is able to set up a most excellent demonstration that it was not only not because of any fault of its, but in spite of the exercise of at least ordinary diligence on its part, that it failed in that time to reduce its ex parte lien to the litigated lien embodied in a judgment. The burden is on the claimant to excuse its failure to get its judgment within the year. If it allows the year to pass without judgment and without a Court extension of time order procured within the year, it does so at its peril.

In view of the foregoing rule of law, unless the claimant-plaintiff satisfies you by a fair preponderance of the evidence, because the law casts that burden upon it, that it has exercised ordinary diligence to reduce said lien to judgment within one year after it was filed, your verdict must be for the defendants, because there is no evidence in this case that it obtained a Court order extending said time.

2. The defendants request the Court to charge, and the Court does so charge you that while it is immaterial to the validity of the lien whether the materials having been furnished for the building

Defendants' Requests to Charge.

10 were used in the building or not, if you believe
from the evidence in this case that the plaintiff
knew or in the exercise of that judgment which rea-
sonably careful and prudent business men would
exercise, ought to have known that the materials
ordered for said work were not of such a character
or kind as would be used in the kind of work that
the Els Construction Company was doing for the
defendant, the Stange Construction Company,
General Contractor, or the defendant, The Dela-
ware, Lackawanna and Western Railroad Com-
pany, then you have a right to find that there was
fraud committed on the part of the creditor, the
present plaintiff, in furnishing said materials, and
20 if you do find that such a fraud was committed by
it in the furnishing of said materials, your judg-
ment must be against the plaintiff and in favor of
the defendants.

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Exhibit P-5.**CONTRACT.**

THE AGREEMENT, made this first day of April, in the year one thousand nine hundred and twenty-seven, By and Between the DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a corporation of the State of Pennsylvania, hereinafter called the "Railroad Company," party of the first part, and OTTOMAR STANGE and ANNA A. STANGE, his wife, co-partners, doing business under the firm name and style of "STANGE CONSTRUCTION CO.," with principal place of business at No. 1600 Arch Street, Philadelphia, Pa., hereinafter called the "Contractor," party of the second part, WITNESSETH:

That the Contractor, for and in consideration of the agreements hereinafter contained, to be kept and performed by the Railroad Company, agrees with the Railroad Company, as follows:

FIRST:—The Contractor agrees to do and complete, and to furnish all labor, materials, tools, equipment and everything else required to do and complete, for the Railroad Company, in the most substantial and workmanlike manner, in strict accordance with the specifications hereto attached and hereby made a part hereof and the drawings which are identified by the signatures of the parties and hereby made a part hereof, and to the satisfaction and acceptance of the Engineer, the following WORK (except in so far as this contract may expressly require any part of the WORK to be furnished or performed by the Railroad Company); that is to say, the construction of a new third and fourth track road-bed on The Morris and Essex Division of the

Exhibit P-5.

10 Railroad Company's railroad from a point approximately 4000 feet westerly of Mountain Lakes Station and extending westerly about five miles to a point approximately 1000 feet easterly of Mile Post No. 37, and designated on said drawings as Section No. 2. This WORK includes the required foundation excavations for the concrete work involved in the construction of a concrete arch ring with the necessary support to spring the arch across the railroad tracks at Pear Tree Road, abutments, wing walls, structural steel encasing, including slabs and sidewalks, parapets, walls, beams, piers, columns, culvert extensions, balustrades, reinforcing steel, waterproofing; removing old masonry; excavations for main line grading; ditching street grading, all in the manner and at the locations specified in said specifications and drawings.

20 For the reason that there is not sufficient room to build the entire structure without interfering with the existing tracks the undercrossing to be built for the road known as Wrights Crossing west of Estling Lake, as shown on said drawings, is to be built in two sections.

30 In the grading of the roadbed at the overlapping of Section No. 1. and Section No. 2., as shown upon the "Profile Showing Main Line Grading," dated January 31, 1927, the Contractor on Section No. 1. will make the fill of approximately 16,500 cubic yards on the north side of the present tracks as shown on said Profile, while the Contractor herein will make the remainder of the fill required on the north side of the present tracks and all the fill on the south side thereof.

40 Should the said drawings or specifications in any way conflict with or differ from the general

Exhibit P-5.

provisions of this contract, the latter shall govern.

Any work or materials which are not shown upon the drawings but which are mentioned in the specifications, or *vice versa*, or any incidental work or materials not expressly set forth in either, but which are reasonably implied or which are necessary for the full and proper completion of the WORK, must be performed, or furnished and installed by the Contractor the same as though specifically shown and mentioned in both the drawings and specifications.

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Detail drawings shall be followed in preference to general plans and figured dimensions shall be followed in preference to scale measurements. All lines, measurements, levels and dimensions must be checked and verified by the Contractor at the site of the WORK.

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Any additional drawings or specifications which may be required to illustrate or explain the WORK, shall be furnished by the Engineer, and the Contractor agrees to conform to and abide by the same, so far as they may be consistent with the original drawings and specifications above referred to.

It is understood and agreed that all statements and representations contained in this contract, or made at any time by the Engineer or other representative of the Railroad Company, relating to the amount or quality of the WORK, or any part or parts thereof, are approximate only and any inaccuracy or discrepancy therein shall in no way subject the Railroad Company to damages or relieve the Contractor from full responsibility and liability in fulfilling all the terms of this contract.

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Exhibit P-5.

The Railroad Company, when in the judgment of the Chief Engineer it shall become necessary, will permit crossing of its tracks at grade, to be used in moving excavated material from one side of the right of way to the other.

10 Where additional construction tracks, in the judgment of the Chief Engineer of the Railroad Company shall be necessary and shall be required by the Contractor, the Railroad Company will lay such additional tracks and the Contractor shall pay to the Railroad Company the actual cost thereof.

20 Should the Contractor desire to re-handle any material by work train after such materials are once delivered on side-tracks, the cost of such work train, in accordance with the Railroad Company's regular schedule, will be borne by the Contractor.

30 SECOND:—All materials furnished by the Contractor hereunder, shall be the best of their several kinds, and satisfactory to the Engineer who shall have the right to subject them to such tests as he may desire. Where particulars kinds or brands of materials are mentioned in the specifications or shown on the drawings, no substitutions shall be made for the kinds or brands so mentioned or shown, except upon the written approval thereof of the Engineer. All the work shall be done by skilled workmen, in the most substantial and workmanlike manner, in strict accordance with the specifications and drawings, and subject to the direction and approval of the Engineer, who shall have the right to subject the WORK, or any part thereof, to such tests as he may desire.

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Exhibit P-5.

The Contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the WORK by the Engineer, both at the site of the WORK and at the mills or shops where any materials or fixtures may be in the course of manufacture, construction or preparation.

The Engineer shall have the right to condemn and reject any materials furnished or work done by the Contractor hereunder, which shall in the opinion of the Engineer be improper or unsound, or fail in any way to conform to the drawings and specifications. The Contractor, within twenty-four (24) hours after receiving written notice so to do from the Engineer, shall proceed, at his own expense, to remove from the premises of the Railroad Company all materials, and replace or reconstruct all work, whether finished or unfinished, which the Engineer shall so condemn and reject. If the Contractor shall fail to remove such rejected materials, or to replace or reconstruct such projected work, in the manner and within the time fixed for so doing by the Engineer, the Railroad Company shall have the right to remove the said materials, or to replace or reconstruct the said work, or cause the same to be removed, replaced or reconstructed, as it may deem expedient, and to charge the expense thereof to the Contractor, and to deduct the amount of such expense from any moneys then due or that may thereafter become due to the Contractor hereunder.

Any omission on the part of the Railroad Company, the Engineer or any Inspector, to condemn or reject any unsatisfactory, improper or unsound materials or work at the time of making any inspection or estimate thereof or any payment hereunder, shall not be deemed a waiver

Exhibit P-5.

10 by the Railroad Company of its right to condemn and reject said materials or work hereunder; and the Railroad Company shall have the right thereafter to condemn and reject said materials or work, and the Contractor shall thereupon remove, replace or reconstruct the same, as hereinbefore provided.

20 THIRD:—The Railroad Company shall have the right at any time during the progress of the WORK to require the Contractor to make such alterations, omissions, additions or substitutions in or to the WORK as it may desire; and the Contractor agrees to accede to and carry the same into effect, as though originally contracted for hereunder and subject to all the terms and conditions hereof, so far as the same may be applicable.

30 No such alterations, omissions, additions or substitutions, however, shall be made or allowed, nor shall any payment be made by the Railroad Company on account thereof, unless the Engineer shall have given the Contractor a written order therefor, which order shall definitely describe such alterations, omissions, additions or substitutions, and state the amount of money (if any and if then agreed upon or determined as hereinafter in this Article provided), to be paid by the Railroad Company on account thereof, and the time within which any such work shall be completed. Such order shall be signed by both parties hereto and shall thereupon be deemed a part of this contract.

40 If the cost of the WORK to the Contractor shall be increased by reason of any such additions, alterations or substitutions, then the Railroad Company shall pay to the Contractor for and on account thereof, a reasonable sum to be

Exhibit P-5.

agreed upon by the parties, which shall be computed upon the basis of the unit prices (if any) specified in Article "Sixth" hereof, so far as the same may be applicable.

If the cost of the WORK to the Contractor shall be decreased by reason of any such omissions, alterations or substitutions, then the Contractor shall allow to the Railroad Company for and on account thereof, a reasonable sum to be agreed upon by the parties, which shall be computed upon the basis of the unit prices (if any) specified in Article "Sixth" hereof, so far as the same may be applicable.

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If the parties shall be unable to agree upon the amount or amounts to be paid by the Railroad Company or allowed by the Contractor for and on account of any such additions, omissions, alterations or substitutions, the question of the amount shall be submitted to two arbitrators, one to be chosen by each party. If these two arbitrators cannot agree, they shall select a third; and the decision of any two of said arbitrators as to the amount of any such payment or allowance shall be conclusive and binding upon both parties. The expense of such arbitration shall be divided equally between the parties hereto.

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If the Railroad Company, however, shall be unable to agree with the Contractor as to the amount to be paid for and on account of any such work or materials required hereunder, or as to the time within which the same shall be performed or furnished, it shall have the right, at its election, instead of submitting the question to arbitration as aforesaid, to do the said work or furnish the said materials itself, or to contract with any third party for the doing or furnishing thereof, the same as though this con-

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Exhibit P-5.

tract did not exist; and in such event the Contractor shall carry on the WORK embraced in this contract in such manner as not to hinder or interfere with the doing of such work or with the workmen or contractors employed by the Railroad Company in connection therewith.

10 The Contractor shall not have any claim or right of action against the Railroad Company for damages or anticipated profits by reason of any such additions, omissions, alterations or substitutions.

20 FOURTH:—The WORK shall be commenced promptly, and shall be prosecuted with such force of foremen, workmen and laborers as shall be necessary in the opinion of the Engineer to complete the same within the time hereinafter specified for the completion thereof.

30 If at any time in the opinion of the Engineer the Contractor shall refuse, neglect or fail to prosecute the WORK with a force sufficient for its completion within the time hereinafter specified, then the Railroad Company shall have the right upon giving to the Contractor forty-eight (48) hours' notice in writing of its intention so to do, and provided the Contractor shall not increase his force as required by the Engineer, to provide and to use and employ upon the WORK such labor, materials, tools and equipment as shall in the opinion of the Engineer be necessary to insure the completion of the WORK within the time hereinafter specified, and to deduct the amount of the cost and expense incurred by the Railroad Company in so doing from any moneys then due or that may thereafter become

40 due the Contractor hereunder.

Exhibit P-5.

The Engineer shall have the right, by notice in writing, to require the Contractor to do any particular work, next in order, included in this contract; and if such work shall not be commenced in place within forty-eight (48) hours after receipt of such notice by the Contractor, the Railroad Company shall have the right to do such work, and to provide such labor, materials, tools and equipment as shall in the opinion of the Engineer be necessary therefor, and to deduct the amount of the cost and expense incurred by the Railroad Company in so doing from any moneys then due or that may thereafter become due the Contractor hereunder. 10

Where any particular part of the WORK shall be carried on by the Railroad Company under the above provisions of this Article, the Contractor shall continue the performance of the remainder of the WORK in conformity with the terms of this contract, and in such manner as not to hinder or interfere with that part of the WORK so carried on by the Railroad Company, or with contractors or workmen employed by the Railroad Company in connection therewith. 20

If the Contractor shall at any time abandon the WORK, or shall in the opinion of the Engineer at any time refuse, neglect or fail in any respect to prosecute the WORK with diligence and promptness or in accordance with the drawings and specifications hereof, or to abide by and perform any of the provisions of this contract or any proper directions of the Engineer relating to the WORK, or if the Contractor shall be adjudged a bankrupt, or make a general assignment for the benefit of creditors, or if the tools, equipment or materials of the Contractor shall be levied upon or taken in execution or under attach- 30 40

Exhibit P-5.

10 ment or by any judicial process whatever, whereby the prosecution of the WORK shall be hindered, delayed or interfered with, then and in any such events the Railroad Company shall have the right, at its option, upon giving the Contractor written notice of its election so to do, to immediately terminate this contract and the employment of the Contractor hereunder, except as to the following provisions governing the adjustment of the rights and liabilities of the parties upon such termination.

20 Upon such termination of the contract, the Railroad Company shall complete the WORK and shall have the right, for that purpose, to enter upon the premises and take possession of and use all materials, tools and equipment of the Contractor thereon, and to re-let the WORK or otherwise arrange for the completion thereof upon such terms as it shall deem best for its interests. Upon such termination of the contract the Contractor shall not be entitled to receive any further payment hereunder until the WORK shall have been entirely completed by the Railroad Company. Upon the completion of the WORK the Engineer shall:

- 30 (a) Compute the total amount that would have been paid to the Contractor for the full performance and completion of the WORK hereunder, had the WORK been completed by the Contractor in accordance with the provisions of this contract, and shall then deduct from such total amount any sum or sums which shall have been paid to the Contractor hereunder in part payment for work done up to said termination of the contract.
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Exhibit P-5.

- (b) Compute the cost and expense incurred by the Railroad Company in completing the WORK.

If the amount of the cost and expense, computed under subdivision "(b)" shall exceed the remainder arrived at under subdivision "(a)," 10
then the Contractor shall pay such excess to the Railroad Company, and the Railroad Company, its successors and assigns, shall have a right of action to recover the amount thereof from the Contractor and his surety.

But if the remainder arrived at under subdivision "(a)" shall exceed the amount of the cost and expense computed under subdivision "(b)," then the Railroad Company shall pay 20
such excess to the Contractor.

The computations made by the Engineer as aforesaid, being just and impartial, shall be conclusive and binding upon both parties.

Upon the completion of the WORK, the Railroad Company shall return to the Contractor at the site of the WORK, the tools, equipment, etc., of the Contractor so appropriated by it, in as good condition as when appropriated, natural wear and tear and damage by the elements excepted, and all surplus materials of the Contractor so appropriated by it remaining unused 30
upon the completion of the WORK.

In case the Contractor shall abandon the WORK or shall refuse, fail or neglect to prosecute the WORK or shall in any way make default in the performance of this contract as aforesaid, the Railroad Company shall be under no obligation to complete the WORK under the provisions and conditions in this Article 40
"Fourth" contained; but the Railroad Company

Exhibit P-5.

shall have the right in such case, at its option, to proceed independently of the foregoing provisions and conditions of this Article and without being bound thereby, and to hold the Contractor liable for such damages as the Railroad Company may sustain by reason of such refusal, failure, neglect, abandonment or default on the part of the Contractor, and the Railroad Company shall be deemed to have elected to so proceed unless it shall have given the Contractor written notice of its election to complete the WORK under and in accordance with the provisions of this Article "Fourth."

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20 FIFTH:—The WORK shall be fully completed in accordance with the drawings, specifications and provisions hereof and to the entire satisfaction of the Railroad Company and the Engineer on or before January 1, 1928.

If the Railroad Company, pursuant to Article "THIRD" hereof, shall require any alterations, additions or substitutions in or to the WORK which shall necessitate the doing by the Contractor of a greater amount of work than originally required hereunder, the Contractor shall be allowed a reasonable time for the completion of said work in addition to the time above specified, which reasonable time shall be agreed upon by the parties at the time such extra work shall be ordered, and shall be specified in the order given for such work, and as so agreed upon shall be conclusive and binding upon the parties.

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40 Moreover, if the Contractor shall be delayed in the prosecution or completion of the WORK, or any part thereof, by the neglect or fault of the Railroad Company, or by acts of God, fire, strikes or other causes beyond the control of the

Exhibit P-5.

Contractor and which could not have been reasonably foreseen and avoided by the Contractor, then the time hereinbefore fixed for the completion of the WORK, or that part thereof so delayed, shall be extended for a period of time equal to the time lost by reason of any or all of the causes aforesaid. Such extended period of time shall be determined by the Engineer; but no extension of time shall be made or allowed unless a claim shall be made therefor in writing to the Engineer within forty-eight (48) hours after the commencement of such delay. 10

The Contractor shall not be entitled to recover damages from the Railroad Company for or by reason of delay in the completion of the WORK, due to or caused by any neglect or fault of the Railroad Company; and an extension of time for the completion of the WORK as above provided, shall constitute the sole right and remedy of the Contractor in the case of such delay. 20

SIXTH:—In consideration of the doing and completion of the WORK herein specified, and the proper performance by the Contractor of all the agreements herein contained on his part to be kept and performed, the Railroad Company agrees to pay to the Contractor, the following unit prices: 30

(Here follows typewritten list of items and prices)

Payments hereunder shall be made by the Railroad Company in current funds, in instalments, as follows:

On or about the first day of each month during the progress of the WORK, an estimate shall be made by the Engineer, or such assistant as he may designate, of the relative value of all the 40

Exhibit P-5.

10 work done hereunder during the preceding month and ninety per centum (90%) of the amount of said estimate shall be paid to the Contractor on or before the twentieth day of the month following the month in which said work shall have been done, at such place as the Treasurer or Disbursing Agent of the Railroad Company shall designate. Payment shall not be made for materials, whether delivered or not, until they shall have been put into the WORK.

20 When the WORK shall have been fully completed in accordance with the specifications, drawings and provisions hereof, and to the satisfaction and acceptance of the Engineer, a final estimate shall be made of the quantity, character and value of the WORK, according to the terms of this contract, and the balance then appearing to be due the Contractor hereunder shall be paid to him within thirty (30) days after the completion of said estimate, upon his giving to the Railroad Company a release under seal from all claims and demands whatsoever, growing in any manner out of this contract, and upon his furnishing the Railroad Company with satisfactory evidence that all persons who have done work or
30 furnished materials in connection with the WORK have been fully paid or satisfactorily secured.

No certificate given or payment made under this contract shall be conclusive evidence of the proper performance of the WORK, either wholly or in part, or be construed as conclusive acceptance by the Railroad Company or the Engineer of improper materials or imperfect work.

40 Upon the execution and delivery of this Contract, the Contractor shall deliver to the Railroad Company a good and sufficient bond, with sure-

Exhibit P-5.

ties to be approved by it, in the sum of One hundred and thirty-five thousand dollars (\$135,000.00), conditioned upon the due and proper performance and completion of this Contract in accordance with the terms and conditions thereof. The cost of procuring such bond shall be added to the cost of the WORK hereinbefore specified and shall be paid by the Railroad Company. 10

SEVENTH:—The Contractor agrees to indemnify and save harmless the Railroad Company from and against any and all liens which may be filed upon or against the property of the Railroad Company by sub-contractors, laborers or materialmen, for work done, labor performed or materials furnished in connection with the WORK, and from and against any and all claims by sub-contractors, laborers or materialmen for work done, labor performed or materials furnished in connection with the WORK, which are chargeable to the Contractor or any sub-contractor, and from and against any and all loss, damages, costs, expense or liability that the Railroad Company may sustain, incur or be subjected to by reason of any such liens or claims. 20

If at any time there shall be any evidence of any such liens or claims, the Railroad Company shall have the right, at its option, to retain out of any moneys then due or thereafter becoming due the Contractor hereunder, such an amount as it may deem necessary to indemnify and protect itself from and against any such liens or claims, and any costs or expense that it might sustain, incur or be subjected to in connection therewith, until said liens or claims shall be fully satisfied and discharged by the Contractor, or 30 40

Exhibit P-5.

the Railroad Company secured therefrom to its satisfaction.

10 The Contractor agrees to file with the Railroad Company from time to time, when so required by the Railroad Company, an affidavit stating the names of all sub-contractors, laborers and materialmen, at any time employed in connection with the WORK, and the amounts then due or thereafter to become due to each of them for work done, labor performed or material furnished.

20 The Contractor also agrees to furnish and deliver to the Railroad Company, whenever so required by the Railroad Company, official searches, or a search and certificate of a Title Guaranty and Abstract Company, showing that the WORK and premises of the Railroad Company are free from liens and claims arising out of the WORK.

30 EIGHTH:—The Contractor shall not sub-let or transfer the WORK, or any part thereof (materials excepted), to any person, firm or corporation, without the consent in writing of the Engineer. If the WORK, or any part or parts thereof, shall be sub-let or transferred to any person, firm or corporation with the consent in writing of the Engineer, the Contractor shall still be responsible for the proper construction and performance of the WORK, or the part or parts thereof, which shall be so sub-let or transferred, and shall be responsible and liable for the failure of any sub-contractor to comply with all the agreements and conditions herein contained, applicable to the WORK, or to the part or parts thereof, sub-let or transferred to such sub-contractor.

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Exhibit P-5.

The Contractor shall give the WORK all necessary personal attention and shall have at all times at least one competent and responsible representative upon the WORK, who shall be satisfactory to the Engineer, and all instructions and notices given to such representative shall be of the same effect as if given to the Contractor directly. 10

The Contractor shall remove from the WORK any foreman or workman who shall, in the opinion of the Engineer, be incompetent, careless, or for any other reason whatsoever, unsatisfactory to the Engineer.

NINTH:—The WORK, and all materials furnished by the Contractor, whether the same shall have gone into the WORK or not, and all tools and equipment of the Contractor, shall be in full charge of the Contractor, and the Contractor hereby assumes all risk of loss, destruction or damage thereto, or to any part or parts thereof, until the WORK shall have been finally completed by the Contractor and accepted by the Railroad Company as evidenced by the final certificate of the Engineer, and thereafter, as to all tools, equipment and surplus materials of the Contractor, until the same shall have been removed from the premises of the Railroad Company, except such loss, damage or destruction as may result from the acts of the Railroad Company, its servants or employes; and the Contractor agrees, at his own cost and expense, to replace, repair or reconstruct and make good any part or parts of the WORK that may be lost, damaged or destroyed except as aforesaid. 20 30

TENTH:—Particular care shall be taken by the Contractor of all finished work, which work 40

Exhibit P-5.

must be covered when necessary and thoroughly protected from injury or defacement during the progress of the WORK.

10 All refuse material and rubbish that may accumulate during the progress of the WORK shall be removed by the Contractor from the premises of the Railroad Company, from time to time as may be directed by the Engineer; and upon the completion of the WORK the Contractor shall clean up the WORK and adjoining premises as soon as it is practicable so to do and remove therefrom all surplus materials, tools, equipment and rubbish resulting from the WORK and leave the WORK and premises in a clean and neat condition.

20 ELEVENTH:—The Contractor agrees to obtain and pay for all necessary municipal or state permits for carrying on the WORK.

30 The Contractor agrees to observe all state and municipal laws, ordinances and regulations in any way bearing upon the WORK, the performance thereof, the protection of persons or property from injury or damage arising therefrom, or sanitary conditions in connection therewith; and agrees to safely erect and maintain all scaffolding, employ all necessary watchmen, provide all necessary lights, and to take, use, provide and employ all other protection, safeguards and precautions to prevent loss of life or property or injury or damage to person or property during the progress of or in connection with the WORK; and hereby assumes all risk of and responsibility for, and agrees to indemnify and save harmless the Railroad Company from and against any and all loss of life or property of, or injury or
40 damage to the person or property of any person

Exhibit P-5.

or persons (including corporations), whomsoever, whether such person or persons be the Railroad Company, the Contractor, an agent or employe of the Railroad Company, a sub-contractor employed by the Contractor in or about the WORK, an agent or employe of the Contractor or of any such sub-contractor, a shipper or passenger on or over the railroad of the Railroad Company, or any third person in nowise connected with the parties hereto or the performance of the WORK, which loss of life or property, or injury or damage to person or property, shall be due to, arise out of, result from or be in any way connected with the WORK or the performance or lack of performance thereof, or any act or omission of the Contractor or of any sub-contractor or of any agent or employe of the Contractor or any sub-contractor in connection therewith, and whether such loss of life or property, or injury or damage to person or property, shall be due to or caused by the negligence of the Contractor or of any sub-contractor or of any agent or employe of the Contractor or any sub-contractor, or otherwise; and agrees to indemnify and save harmless the Railroad Company from and against any and all claims, demands, actions, damages, losses, costs, fines, penalties, expenses and liability of every name and nature (including all reasonable expenses incurred by the Railroad Company in defending any such actions, claim or demands), which may arise or result, directly or indirectly, from or by reason of any such loss of life or property, or injury or damage to person or property, or from or by reason of the failure of the Contractor to fully keep. perform and fulfill each and every clause, agreement and condition hereinbefore in this

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Exhibit P-5.

Article "Eleventh" contained, on his part to be kept, performed and fulfilled.

10 The Contractor agrees to indemnify and save harmless the Railroad Company from and against any and all infringements of any patent right or rights in any article, device or process used in, upon or in connection with the WORK, and from and against any and all claims, demands, actions, damages, costs, penalties, expenses and liability of every name and nature (including all reasonable expenses incurred by the Railroad Company in defending any such actions, claims or demands), which may arise or result, directly or indirectly, from or by reason of any such infringement.

20 TWELFTH:—The Railroad Company agrees to transport over its lines for the Contractor, free of freight charges, to point or points at or near the site of the WORK, where the Railroad Company or the Contractor shall have available side-tracks for unloading carload freight, and there deliver to the Contractor on cars, all materials, tools and equipment of the Contractor intended to be used in connection with the WORK. Less than carload shipments may, at the option of the Railroad Company, be delivered
30 through its freight house nearest the site of the WORK.

The Railroad Company also agrees to transport and return over its lines for the Contractor, free of freight charges, from the site of the WORK to the point or points on its lines from which the same shall have been shipped to the site of the WORK (but not otherwise), and there deliver to the Contractor on cars, the equipment and tools (but not surplus materials)
40 of the Contractor that shall have been transported

Exhibit P-5.

to the site of the WORK by the Railroad Company, with the *bona fide* intention on the part of the Contractor of using the same in connection with the WORK, provided, however, that the return movement of such equipment and tools, and every part thereof, shall be commenced within thirty (30) days after the completion of the WORK, as evidenced by the final certificate of the Engineer. All such returned tools and equipment must be loaded in the presence of a representative of the Engineer. 10

The decision of the Engineer as to whether such tools, equipment and materials shall have been in fact transported to the site of the WORK with the *bona fide* intention on the part of the Contractor of using the same in connection with the WORK, shall be conclusive and binding upon the parties. 20

The Contractor shall pay full tariff rates of freight, both to and from the site of the WORK, upon all materials which shall be condemned and rejected by the Engineer as being unsound or improper. Condemned materials shall not be loaded upon the same car with shipments entitled to transportation hereunder.

All materials, tools and equipment transported hereunder, must be billed in the name of and consigned to the Contractor, or as otherwise directed by the Railroad Company; and if not so billed and consigned, all freight charges must be paid thereon. 30

The Contractor agrees to pay all demurrage charges that shall accrue on cars containing materials, tools or equipment transported by the Railroad Company hereunder, in accordance with the Demurrage Rules of the Railroad Company in force at the time. 40

Exhibit P-5.

10 The Railroad Company also agrees to transport over its lines to and from the site of the WORK, free of tariff charges, Ottomar Stange and one Superintendent and one Timekeeper to be nominated by him when such persons shall travel over its said lines in furtherance of or in connection with the proper performance of this contract, subject, however, to such limitations and conditions as the Railroad Company may from time to time prescribe.

20 It is hereby agreed by and between the parties that as to the transportation of the materials, tools and equipment of the Contractor or the transportation of persons, as hereinbefore provided, the Railroad Company shall not be deemed to be or to be acting as a common carrier; but such transportation of materials, tools, equipment and persons shall be considered as a part of the WORK included in this contract, which the Railroad Company has assumed.

30 The Contractor hereby releases the Railroad Company, and all Companies whose lines are leased or operated by it, from any and all claims, demands actions, causes of action or liability for or by reason of loss, damage, injury or delay to the materials, tools or equipment of the Contractor transported as hereinbefore provided, whether such loss, damage, injury or delay shall be due to or caused by the negligence of the Railroad Company, or of any of the said Companies whose lines are leased or operated by it, its or their or any of their agents or employees or otherwise.

40 The Contractor agrees to release, indemnify and save harmless the Railroad Company, and all Companies whose lines are leased or oper-

Exhibit P-5.

ated by it, from and against any and all loss of life or property of or damage or injury to the person or property of persons transported as hereinbefore provided, whether such loss, damage or injury shall be due to or caused by the negligence of the Railroad Company, or of any of the said Companies whose lines are leased or operated by it, its or their or any of their agents or employees or otherwise, and from and against any and all claims, demands, liability, actions, damages, losses, costs and expense of every name and nature (including all reasonable expenses incurred by the Railroad Company) in defending any such actions, claims or demands, which may arise or result, directly or indirectly, from or by reason of any such loss, damage or injury. 10 20

THIRTEENTH:—If the WORK (including any additional work performed under Article THIRD hereof) or any part thereof, shall be carried on in proximity to existing operating tracks of the Railroad Company, the Contractor shall perform said WORK in such manner and with such care as not to interfere in any way with such operating tracks or the passage of trains cars or engines thereover, in accordance with regular schedule time, and will provide and pay a sufficient number of qualified watchmen to protect the tracks at such points. The Contractor further agrees that he will perform said WORK in such manner and with such care as not to interfere in any way with telephone or telegraph lines along said operating tracks, or with any underground conduits, pipes, sewers and cables. 30

The Railroad Company shall furnish a flagman to protect grade crossings of the tracks of the 40

Exhibit P-5.

Railroad Company used in moving excavated material from one side of the right of way to the other in accordance with Article FIRST of this agreement.

10 In case there shall, in the opinion of the Engineer, be any unnecessary interference by the Contractor with such tracks or telephone or telegraph lines, or with any underground conduits, pipes, sewers and cables, the Railroad Company shall have the right to forthwith summarily terminate and cancel this Contract (except with respect to the provisions governing the adjustments of the rights and liabilities of the parties upon such termination) without other notice to the Contractor of its election so to do than a written notice to that effect; and upon such termination and cancellation of the Contract, the rights and liabilities of the parties hereto shall be determined and adjusted upon the basis of and in accordance with the provisions contained in Article FOURTH hereof.

20 The Contractor shall under no circumstances use, or caused to be blocked, any operating track of the Railroad Company unless specifically authorized by a written permission of the Engineer. When the use of any operating track is desired, a notice shall be given the Engineer forty-eight (48) hours in advance. The use of an operating track will not be allowed unless, for some unforeseen reason, due to the nature of the Work, it is impossible to carry on the Work without the use thereof. Movements of cars or equipment (belonging to the Contractor) on an operating track will be permitted only when handled by an engine and crew of the Railroad Company, for which the Railroad Company will charge the Contractor in accordance with the prevailing

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Exhibit P-5.

schedule of rates as filed in the office of the General Superintendent of the Railroad Company, and the Contractor agrees to pay such charges promptly upon the receipt of the Railroad Company's bills therefor.

FOURTEENTH:—The Railroad Company shall have the right at all times to retain out of any moneys due the Contractor hereunder, such sum or sums as it shall deem necessary to protect and indemnify itself against any liens, claims or suits for damages against the Railroad Company for which the Contractor shall be liable or from and against which the Contractor has hereinbefore agreed to indemnify and save harmless the Railroad Company, until such liens, claims or suits shall be settled by the Contractor, or the Railroad Company secured therefrom to its satisfaction, and further to retain out of any such moneys the amount of any loss, damage or expense which the Railroad Company shall have sustained or incurred by reason of the failure of the Contractor to perform any of the agreements herein contained on his part to be kept and performed.

FIFTEENTH:—The parties hereto agree that in the event of any dispute between the Contractor and the Railroad Company as to the meaning or construction of the drawings or specifications of this contract, or with reference to the WORK, or any part thereof, the decision of the Engineer, being just and impartial, shall be conclusive and binding upon both parties, and each of the said parties does hereby waive any right of action or remedy, in law or otherwise, in connection with any such matter or thing which shall have been so passed upon and decided by the Engineer.

Exhibit P-5.

S I X T E E N T H :—Wherever the word “WORK” is used in this contract it is understood and agreed to mean and include all the materials, work and construction of every kind, nature and description to be furnished, done or performed by the Contractor under this contract.

10 Whenever the word “Engineer” or “Chief Engineer” is used in this contract, it is understood and agreed to mean the Chief Engineer for the time being of the Railroad Company, or his duly authorized agent, limited to the particular duties assigned to him.

Wherever the word “Architect” is used in the specifications of this contract, it is understood and agreed to mean the Architect for the time
20 being of the Railroad Company, or his duly authorized agent, limited to the particular duties assigned to him.

The pronouns “his” and “him” are used in this contract to refer to the Contractor, whether the Contractor be one or more individuals, a co-partnership or a corporation.

SEVENTEENTH:—This agreement shall bind and inure to the benefit of the parties hereto, their successors and assigns.

30 IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed, in duplicate, the day and year first above written.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

By G. J. Ray
Chief Engineer.

O.K.

J.L.S.

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Ottomar Stange (L. S.)
Anna A. Stange (L. S.)

Exhibit D-4.**MORRIS COUNTY CIRCUIT COURT.**

JOSEPH HARRIS & SONS, Plaintiff, <i>vs.</i>	10
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Owner, ANNA A. STANGE, OTTO- MAR STANGE, Copartners, trad- ing as Stange Construction Company, Builder and General Contractor, and ELLS CON- STRUCTION COMPANY, Subcon- tractor, Defendants.	On Mechanic's Lien. Stipulation. 20

The above entitled cause having been duly listed for trial on the 2nd day of July, 1929, and notice of an application for an order to discharge the mechanic's lien of the above plaintiff, and for the dismissal of the above plaintiff's complaint for failure to diligently prosecute said lien claim to judgment, being returnable on the same day, and the said plaintiff not being ready or prepared to try said cause on the said 2nd day of July, 1929, it being desirous first of endeavoring to secure an order from the Honorable Charles W. Parker, Justice of the Supreme Court, permitting it to amend or alter the description of the curtilage as set forth in its lien claim filed in the County Clerk's Office of Morris County on December 30, 1927;

Exhibit D-4.

10 It is hereby stipulated and agreed by and between the attorneys of the plaintiff and The Delaware, Lackawanna and Western Railroad Company and Anna A. Stange and Ottomar Stange, copartners, trading as Stange Construction Company, that if the said plaintiff will bring on its application to amend or alter the description of the curtilage as set forth in said lien claim so filed as aforesaid, before the Honorable Charles W. Parker on the 2nd Saturday of September, 1929, or at such other time as shall be agreed to by the attorneys of the parties to this stipulation, then and in that event the defendants The Delaware, Lackawanna and Western Railroad Company, owner, and Anna A. Stange and Ottomar Stange, copartners, trading as Stange Construction Company, builder and general contractor, agree not to raise the question or count the time between July 3, 1929, and the Second Saturday of September, 1929, or such other time agreed upon by the attorneys of the respective parties hereto, as part of the time during which is claimed by The Delaware, Lackawanna and Western Railroad Company and Anna A. Stange and Ottomar Stange, copartners, trading as Stange Construction Company should have diligently prosecuted its lien to judgment as provided by the statute in such cases made and provided; and

30 It is further stipulated that the said defendants The Delaware, Lackawanna and Western Railroad Company and Anna A. Stange and Ottomar Stange, copartners, trading as Stange Construction Company, by entering into this stipulation do not waive any other or further defense or part of any other or further defense which they

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Exhibit D-4.

may have been entitled to raise on the 2nd day of July, 1929, if said cause had actually been tried, not expressly waived by this stipulation.

KING & VOGT,
Attorneys of Plaintiff.

FREDERIC B. SCOTT, 0110
Attorney of Defendants,

The Delaware, Lackawanna
and Western Railroad
Company, and Anna A.
Stange and Ottomar
Stange, copartners, trad-
ing as Stange Construc-
tion Company.

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Exhibit D-5.

KING and VOGT
COUNSELLORS AT LAW
Morristown, N. J.

10 Washington St. Telephone 1011

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December 10, 1927.

D. L. & W. Railroad Co.
90 West Street
New York City

Attention: Mr. Ray, Chief Engineer.

Dear Sir:

20 We represent Joseph Harris & Sons at Rockaway which has supplied bill of lumber and materials in connection with the extension of the Bridge over State Highway No. 5 at Denville.

The amount of the account is \$1134.49. Mr. Harris has repeatedly applied for payment to the men in charge of the work, but the same has not been forthcoming.

Will you advise as to when check therefor may be expected.

Yours very truly,

30

KING & VOGT.

R.H.S.:R.D.

Received

Dec. 18 1927

Stange Const. Co.

Exhibit D-6.

KING and VOGT

COUNSELLORS AT LAW

Morristown, N. J.

10 Washington St. Telephone 1011

December 14, 1927.

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D. L. & W. R. R.

Hoboken, N. J.

Attention: Mr. G. J. Ray, Chief Engineer.

Dear Sir:

In reply to your letter of the 13th instant, you are advised that the materials furnished by Joseph Harris & Sons, Rockaway in the extension of the bridge over the State Highway at Denville, were ordered by Ells Construction Company and delivered to the persons in charge of the work and used therein.

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Yours very truly,

KING & VOGT.

R.H.S.:R.D.

Received

Dec. 18, 1927

Stange Const. Co.

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DRIVER'S SLIPS.

P-1.

Phone 160

JOSEPH HARRIS & SONS

Lumber, Building Material, Masons' Supplies

10 Plumbing and Steamfitting Supplies

Yard and Office, Main Street

Rockaway, N. J., 5/10, 1927.

Sold to Els Construction Co., 106 Somerset St.,
Garfield, N. J.

Delivered at Mrs. W. Logan job, Denville, N. J.

20 Truckman P. B. Loaded by..... Checked by
P. B.

	Description	Price	Amount
	6 Pcs. 28x36 Bronze Wire		
	2 " 30x84 "		
	3 " 36x52 "		
	2 Boxes Carpet Tacks		
	2 No. 4D Fin. Nails		
	160 L. Ft. 1/2" 1/2 Rd. Pine		
	175 " 5/4x2 "		
	10 " 3/4x4 Fir		\$14.09
30	C 3384		

CHARGED

Folio Total

All Claims Must Be Reported Immediately

Received by Mrs. W. Logan

Sign and Return. Driver's Signature.

40 NOTE: Above slip is agreed to be similar in form to balance
of slips.

LEDGER ACCOUNT.

P-2.

Terms	Name Els Construction Co.
Rating	Address 106 Somerset Street
Credit Limit	Garfield, N. J.

Date					10
1927	Items	Debits	Credits	Balance	
May 31	Mdse.	129.14		129.14	
June 30	"	233.29		362.43	
July 31	"	223.57 {	S 223.47	585.90	
31	"		S 10	586.00	
Aug. 31	"	S 548.49		1,134.49	
Dec. 31	Bad Debt J 101 J		1,134.49		

20

30

40

BILL.

P-3.

May 31, 1927.

Els Construction Co.
106 Somerset Street
Garfield, N. J.

Mrs. W. Logan
Denville, N. J.

10

1927

5/10	3384	6 Pcs. 28x36 Bronze Wire	
		2 " 30x84	"
		3 " 36x52	"
		2 Boxes Carpet Tacks	
		2 Lbs. 4 DF Nails	
		160 L. Ft. 1/2" Qt. Round Pine	
		175 " 5/4x2	"
20		10 " 3/4" Qt. Round Fir	14.09
5/18	3722	50 Bolts	2.00
5/24	3946	1 Hacksaw Frame (Used)	.35
		3 " Blades	.15
5/26	4036	2178 Ft. 2x6	.05 108.90
		12 Balls 100' Chalk Line	.15 1.80
5/26	4062	1 Red Lantern	1.25
			128.54
5/31	4165	12 Bolts	.05 .60
30			129.14

ENTERED

NOTE: The balance of four sheets are agreed to be similar in form to above first sheet except being dated, respectively, June 30, July 31, July 31, August 31, 1927.

40

New Jersey Court of Errors and Appeals

JOSEPH HARRIS & SONS,
Plaintiff-Respondent,
vs.
THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
ET ALS.,
Defendants-Appellants.

ACTION AT LAW.
On Appeal from
the Morris County
Circuit Court.

BRIEF OF DEFENDANTS-APPELLANTS.

Statement.

This is an appeal by the owner and also the general contractor from a judgment entered in the Morris County Circuit Court in an action on December 16, 1929, by Joseph Harris and Sons, a corporation, dealing in lumber and building material, against the landowner, The Delaware, Lackawanna and Western Railroad Company, the Stange Construction Company, general contractor, and the Ells Construction Company, subcontractor of the general contractor.

The respondent brought this action under the Mechanics' Lien Law of New Jersey.

Although the amount due under the lien filed is shown by the lien to be \$1,134.49, with interest, the record shows that judgment was entered in the total amount of \$2,552.52.

Because of the order of a Justice of the Supreme Court amending the lien claim, summons and complaint, and other proceedings filed in said

suit,—the refusal of the trial court to non-suit and direct a verdict in favor of the appellant's appeal,—because the trial court submitted to the jury because of the liening plaintiff-respondent's alleged due diligence in prosecuting its claim to judgment,—because of the failure of the trial court to strike out certain testimony of a witness named Harry Green,—because the trial court permitted certain exhibits to be offered in evidence by plaintiff-respondent,—because the trial court erroneously charged the jury, and because the trial court refused to charge certain requests of the defendants appealing, the appellants claim prejudicial error.

Abstract of Pleadings.

After filing its lien claim the respondent caused to be served upon the appellants appealing a summons and complaint upon which was endorsed the usual statutory notice in lien suits.

The respondent's complaint alleged:

(a) That the Delaware, Lackawanna and Western Railroad Company was the owner of a certain curtilage of land situated in the Township of Denville, Morris County, New Jersey, and described the same.

(b) That between certain dates the respondent furnished material to the defendants or one of them, all of whom are or were engaged in the erection and construction of a bridge or viaduct and premises of the Railroad Company, one of the appellants.

(c) Annexed to the complaint was a schedule setting forth the materials alleged to have been furnished, amounting to \$1,134.49.

(d) The general allegation that the detailed claim was past due and had not been paid and that said indebtedness was a lien upon the land and building, as provided by the statute, "an Act to secure for mechanics and others payment for labor and material in erecting any building and in making certain improvements (Revision of 1898)."

The appealing appellants admitted the allegations with respect to the ownership of the curtilage by the appellant, The Delaware, Lackawanna and Western Railroad Company.

The appellant, The Delaware, Lackawanna and Western Railroad Company, denied the allegations as to furnishing materials for the erection of the bridge or viaduct referred to in the second paragraph of the respondent's complaint, while the appellant, The Strange Construction Company, answering the second paragraph of the plaintiff's complaint, denied knowledge or information as to the plaintiff's furnishing of materials to their co-defendant, the Ells Construction Company, and further denied that the materials or any part thereof were used or employed in the erection or construction of the bridge described in the plaintiff's complaint.

The Delaware, Lackawanna and Western Railroad Company denied the allegations that the account was due and a Lien was proper against its premises, while the Stange Construction Company pleaded it had no knowledge or information sufficient for them to answer whether the respondent had been paid by their co-defendant, The Ells Construction Company.

Appellants' Grounds of Appeal.

1. Because the order of the Honorable Charles W. Parker, sitting as a Justice of the Supreme Court, made on the 22nd day of October 1929, allowing and permitting the above plaintiff to amend the lien claim, summons and complaint, and other proceedings heretofore filed in said cause, as shown and set forth by said order of October 21, 1929, is and was improper, void and illegal.

2. Because said trial court refused to strike out the testimony of the plaintiff's witness Harry Green with respect to deliveries of materials as shown and appears by the record in said cause, because it was apparent that the said witness Harry Green was not able to refresh his recollection from any data that had a legal standing in court.

3. Because the trial court erred in permitting the plaintiff during the examination of the plaintiff's witness Vernon Ford to offer in evidence over the objection of the defendant, the tickets and carbon copy of the account and the ledger page of the plaintiff, because they formed no basis for showing the delivery of the goods and materials to the defendants or either of them.

4. Because the trial court refused to direct a non-suit against the plaintiff and in favor of the defendants for the reasons and upon the grounds set forth at length in the record of said cause.

5. Because the trial court refused to direct a verdict in favor of the defendants and against the plaintiff for the reasons and upon the grounds fully set forth and enumerated in the record of said cause.

6. Because the trial court submitted to the jury the question and matter of the plaintiff's alleged due diligence in prosecuting its lien claim to judgment.

7. Because the trial court in charging the jury, stated to said jury without support of fact or evidence in said cause the following:

"So that there is a real question here, you see, as to whether the plaintiff company has shown any real excuse for not prosecuting its claim and having it reduced to judgment within a year after December 30, 1927. It does so happen that cases cannot be reached in their order each term upon the calendar; that the Court cannot try all cases on the calendar in a given term. So you have cases carried over from one term to another because they have not been reached in due course for trial."

8. Because the trial court refused to charge the defendants' first request to charge, either in substance or form, as per said request to charge, which read as follows:

"1. The defendants request the court to charge, and the court does so charge you, that the clause in the Mechanics' Lien Law fixing one year period, contemplates the reduction of the lien to judgment within that time if diligent prosecution will accomplish that result. Until prosecuted to judgment, the lien is *ex parte* and arbitrary and in view of this extraordinary feature and of the disadvantage under which the owner naturally labors in defending against a stale claim, the one year limitation by the Act should be strictly enforced unless the claimant is able to set up a most excellent demonstration that it was not only not because of any fault of its, but in spite of the exercise of at least ordinary diligence on its part, that it failed in that

time to reduce its *ex parte* lien to the litigated lien embodied in a judgment. The burden is on the claimant to excuse its failure to get its judgment within the year. If it allows the year to pass without judgment and without a court extension of time order procured within the year, it does so at its peril.

"In view of the foregoing rule of law, unless the claimant-plaintiff satisfies you by fair preponderance of evidence, because the law casts that burden upon it, that it has exercised ordinary diligence to reduce said lien to judgment within one year after it was filed, your verdict must be for the defendants, because there is no evidence in this case that it obtained a court order extending said time."

9. Because the trial court refused to charge the defendants' second request to charge, either in substance or form, as per said request to charge, which read as follows:

"2. The defendants request the Court to charge, and the Court does so charge you that while it is immaterial to the validity of the lien whether the materials having been furnished for the building were used in the building or not, if you believe from the evidence in this case that the plaintiff knew or in the exercise of that judgment which reasonably careful and prudent business men would exercise, ought to have known that the materials ordered for said work were not of such a character or kind as would be used in the kind of work that the Ells Construction Company was doing for the defendant, the Stange Construction Company, general contractor, or the defendant, The Delaware, Lackawanna and Western Railroad Company, then you have a right to find that there was fraud committed on the part of the creditor, the present plaintiff, in furnishing said materials, and if you do find that such a fraud was committed by it in the furnishing of said materials, your judgment must be against the plaintiff and in favor of the defendants."

History of the Case.

For reasons which will hereafter appear to be obvious, the appellants set out, in the first instance, a chronological table of the history of the instant litigation so far as it is applicable to the present appeal.

CHRONOLOGICAL TABLE.

- 1927, Dec. 30, Lien claim filed.
- 1927, Dec. 30, Summons tested.
- 1927, Dec. 30, Summons and complaint filed.
- 1929, July 2, Stipulation tolling time pending application to amend.
- 1929, Aug. 5, Notice to amend lien claim, summons and complaint and other proceedings, served.
- 1929, Sept. 14, Notice to amend lien claim, summons and complaint and other proceedings, returnable but adjourned to October 10, 1929.
- 1929, Oct. 10, Notice of application to amend lien claim, summons and complaint and proceedings filed.
- 1929, Oct. 10, Affidavits in opposition to above motion to amend filed.
- 1929, Oct. 10, Memoranda opinion by Supreme Court Justice on application to amend, filed.
- 1929, Oct. 22, Order to amend filed.
- 1929, Dec. 16, Trial.
- 1929, Dec. 16, Judgment entered.

From the foregoing table it will be observed that judgment was entered on a lien claim in the

above suit one year, eleven months and six days from filing of the Lien Claim, the stipulation tolling a certain amount of the above running time reducing the time when judgment was entered to one year, seven months and twenty-six days.

No agreement was made between the respective parties nor was any order obtained from the Court extending the time to reduce said Lien Claim to judgment. One year, seven months and twenty-six days actually elapsed from the time the Lien Claim was filed until judgment was entered.

One year, nine months and ten days after the Lien Claim was filed the respondent having taken steps by notice to amend said Lien Claim, summons and complaint, and other proceedings, and on October 27, 1929, procured from the Justice of the Supreme Court, presiding over the Morris Circuit, an order amending the Lien Claim and proceedings thereunder, which caused the substitution of an entirely different description of the curtilage or land to be affected, the newly described properties alleged to be affected by said Lien being a tract about a mile and a half southward of the tract described in the original Lien, and the second tract some thirty-four hundred feet further away from the first tract permitted to be included under the order allowing the amendment.

ARGUMENT.

POINT 1.

The Supreme Justice, presiding at the Morris Circuit, erred in permitting the Lien Claim, Summons and Complaint, and other proceedings in the cause to be amended. Ground of Appeal No. 1 (P. 1, ll. 35, etc.; P. 2, ll. 1, etc.).

Over a year and seven months after the Lien Claim was filed the Honorable Justice Parker, presiding over the Morris Circuit, upon application of the lienor-plaintiff made an order permitting the plaintiff to amend the lien claim, summons and complaint, and other proceedings theretofore filed and served in the above suit by amending the description of the curtilage upon which the lien was claimed (P. 31, ll. 20, etc.), although it is apparent, from one of the uncontradicted affidavits in opposition to the motion to amend said Lien Claim, that the property originally liened, designated as A on the map exhibit P-4 offered at page 46 of the record and printed in a separate book, was 7,800 feet west of the tract originally described in the lien; that the other tract permitted to be added in the amended Lien Claim was 3,400 feet further west than the first tract substituted in the Lien Claim by said Justice's order; and that both of said tracts permitted to be substituted for and in the place of the tract originally described in the Lien Claim were in no way connected with the tract of land first described in the original Lien Claim (pages 24 to 26).

From the affidavits of both the lienor-plaintiff and those in opposition thereto (pages 19 to 29) the learned Justice found and came to the con-

clusion that his order contemplated and embraced "the substitution of entirely different curtilage" (P. 30, ll. 33, etc.).

The learned Supreme Court Justice, in his opinion (P. 30), himself expressed his doubt as to the validity of the amendment for in that opinion he said:

"The particular section of the Act bearing on amendment of this character is Section 20. Whether its language is broad enough to cover the substitution of an entirely different curtilage may well be doubted; but in view of the power to amend in substance as well as in form, conferred by Section 19, and in view of the fact that plaintiff's mistake seems to have been an innocent one, and it will be out of court as respects the owner unless the amendment is allowed, I am disposed to allow it. The defendant is in no way concluded by this action, because of the very language of Section 20 the amendment is 'in the form of a rule of court in the suit' and reviewable in error after final judgment" (P. 30, ll. 30, etc.; P. 31, ll. 1, etc.).

American Brick Co. v. Dunkhouse, 59 N. J. L. 462, decided by this Court, sets forth in one of its syllabi No. 4, that "under our statute a lien claim may be amended in any particulars which do not enlarge the claim, either in the amount of the debt, in the estate to be charged, or in the person to be affected even though the time for filing a new claim has expired, provided judgment has not been entered on the claim," and the late Justice Dixon, speaking for this Court upon the subject matter of said syllabi, said:

"Bearing in mind the primary rule of statutory construction to give effect to all the words of the Act when they are not contra-

dictory and will not lead to great inconvenience or injustice, we think the solution of the question now in hand is not difficult. The amendments did not enlarge the claim either in the amount of the debt, in the estate to be charged, or in the persons to be affected; they were not even necessary to appraise the parties of the exact demand set up. They simply added the details of debts to the other details previously given, which were sufficiently explicit for all practicable purposes, that such a change is embraced within the terms of a statute authorizing an amendment 'in matter of substance, as well as of form,' is too clear to be elucidated by discussion" (P. 466).

* * * * *

"The power of deciding when such amendments can justly be made is entrusted to a Justice of the Supreme Court, whose decision may, by proper proceedings, be reviewed in the court of last resort" (P. 467).

From the record, reference to which has already been made, it is apparent that the order of the Honorable Justice, presiding at the Supreme Court, as to the validity of which he expressed a grave doubt, was such as not only substituted not only one but two entirely different estates, curtilages, to be affected by the amended lien; two curtilages, one of which was over a mile away from the original lien-affected land and the other a mile and a half away.

POINT 2.

The learned Trial Judge erred in refusing to direct a non-suit, as well as a verdict for Appealing Defendants. Grounds of Appeal 4 and 5 (P. 2, ll. 26, etc.).

Bearing in mind that the Lien Claim was filed on December 30, 1927, and that said Lien Claim was not reduced to judgment until December 16, 1929, a period of over one year, eleven months, out of which, by reason of the stipulation entered into between the attorneys of the respective parties, Exhibit D-4, pages 117-19, there seems to be a period of three months and eight days, the lien claim forming the basis of the instant suit was not perfected by judgment until over one year, seven months and twenty-six days after the filing of the original Lien Claim.

At the end of the plaintiff's case the appealing appellants, besides raising the question of the validity of the Honorable Justice Parker's order permitting the Lien Claim and so forth to be amended (discussed under Point 1, *ante*), moved for a non-suit because the lienor-plaintiff had failed to reduce or perfect his Lien Claim within one year from the filing of the same as required by Section 18 of the Mechanics' Lien Law (pages 68 to 72) and the same reason was urged for the direction of a verdict at the end of the entire case, besides the additional reason on the motion for the direction of a verdict:

“that there is no proof that the person or persons who ordered the goods and materials in question involved in this suit had authority to order the goods for the Ells Construction Company—and that the plaintiff has failed to order any proof that the goods were ordered

to be used on a building or a viaduct or bridge to be built by the Ells Construction Company" (P. 76, ll. 1, etc.).

The legality of the reasons thus urged are herein discussed separately.

A

The record can be searched in vain to find one single word of evidence to excuse the lienor-plaintiff from diligently prosecuting his lien to judgment within the statutory period and similar search also discloses not one word of evidence either in excuse or explanation of the lienor-plaintiff's lack of diligence to comply with the statute with reference to the entry of judgment on the Lien within the statutory period.

The record further shows that the evidence on behalf of the appealing defendants added not one scintilla of aid or assistance to the lienor-plaintiff to excuse or palliate his lack of diligence.

There being no evidence in the entire case, either explaining or showing the reason for the lienor-plaintiff's failure to comply with the statute, the situation being of such a character as to be error on the part of the Trial Court in refusing to grant either the appealing appellant's motion for non-suit or direction of a verdict.

Speaking for this Court, the late Judge White, in *Buchanan and Smock Lumber Company v. Dougherty*, 88 N. J. L. 356, said:

"The clause in the Mechanics' Lien Act fixing the one year period contemplates reduction of the Lien to judgment within that time if diligent prosecution will accomplish that result. Until prosecuted to judgment the Lien is *ex parte* and arbitrary and, in view of this extraordinary feature and of the disadvantage under which the owner naturally

labors in defending against stale, unjust claim founded upon a contract to the terms of which he is usually an entire stranger, the one year limitation prescribed by the Act should be strictly enforced unless claimant is able to set up an excellent demonstration that it was not only not because of any fault of his, but in spite of the exercise of at least ordinary diligence on his part, that he failed in that time to reduce to judgment his *ex parte* lien to the litigated lien embodied in the judgment. The burden is on the claimant to excuse his failure to get a judgment within a year. If he allows the year to pass without judgment and, without a court extension-of-time order procured within the year, he does so at his peril. If he is afterwards able to convince the trial judge upon adequate evidence that the lien was diligently prosecuted on his part, the Court may make an extension-of-time order or permit a trial and, if there was evidence to support such action, it will not be disturbed by this Court (cases cited), but to permit the year to expire without either a judgment or extension-of-time order from the Court is a most dangerous proceeding. *Prima facie*, such a lien should be discharged upon application to the Court" (P. 357-358).

* * * * *

"The delay of over a year after the expiration of the first year seems to be absolutely without explanation, and would of itself be abundant cause for discharging the Lien even if there had been diligent prosecution within the year. The diligent prosecution duty does not end with the year, but continues at all times until the Lien shall be reduced to judgment; and the Lien claimant who has permitted his year to expire without judgment, or an extension order, in order to defeat an application for the discharge of the Lien, must show diligent prosecution on his part, not only within the year but up to the time the application is made" (P. 360).

As in the *Buchanan et al. Dougherty* case, *supra*, we think this Court should say, as did the late Justice White in that case—The judgment should be reversed and the cause remanded to the Supreme Court in order that a judgment may be entered discharging the mechanics' lien.

B.

On the motion for the direction of a verdict by the appealing appellants, as hereinbefore referred to, a further ground was urged for the reason:

“That there is no proof that the person or persons who ordered goods and materials in question involved in this suit had authority to order the goods for the Ells Construction Company * * *” (P. 56, ll. 10, etc.).

An examination of the Lien Claim (P. 7, ll. 38, etc.; P. 8, ll. 1, etc.) will show that it was alleged that the person who contracted the debt and for whom and for and by whose request materials were furnished for which the Lien was claimed was the appealing appellants' co-defendant, the Ells Construction Company, sub-contractor under the Stange Construction Company, the general contractor of the owner, The Delaware, Lackawanna and Western Railroad Company.

It is the present intention of the appealing defendants to argue before this Court somewhat at length the validity of this particular reason urged upon the Trial Court from what appears in the record of the cross examination of Harris, secretary-treasurer of the lienor-plaintiff, at pages 48 to 52 of the record, and if a stronger reason for reversal exists and is needed than that urged under subdivision A on this point, the appellants feel convinced it exists under this subdivision designated as B.

POINT 3.**Ground of Appeal No. 7 (P. 3, ll. 1, etc.).**

This ground of appeal was taken by exception to the Court's charge (P. 88, ll. 23, etc.), wherein the Trial Court said:

"So that there is a real question here, you see, as to whether the plaintiff company has shown any real excuse for not prosecuting its claim and having it reduced to judgment within a year after December 30, 1927. It does so happen that cases cannot be reached in their order each term upon the calendar; that the Court cannot try all cases on the calendar in a given term. So you have cases carried over from one term to another because they have not been reached in due course of trial" (P. 83, ll. 37, etc.; P. 84, ll. 1, etc.).

One of the issues which the learned trial court submitted to the jury was the question of due diligence of the lienor-plaintiff in prosecuting the Lien Claim to judgment within the statutory period. Under Point 2-A we have discussed the lienor-plaintiff's lack of diligence and the fact that there was no evidence in the entire case of any diligence on its part, and the appealing appellants contend that, where there was no such evidence in the case with respect to the plaintiff's diligence, the learned trial court erred in instructing the jury as to—what happens in court about its inability to try all the cases on a calendar in a given term, and—when there was no evidence offered by anyone as to the condition of the calendar of the Morris County Circuit Court at any time from the time the instant case was at issue and noticed for trial up until the

time it was actually tried on December 16, 1929.

This error of the Trial Court, we think, is of the character referred to in the case of *Gerety v. N. Y. & N. J. R. R. Co.*, 89 N. J. L. 175, where the present Chancellor referring as authority therefor to the case of *Smith & Bennett v. State*, 41 N. J. L. 370, said:

"It is error in law if in the charge of a Judge in a criminal case, a fact of moment clearly connected with the merits is stated to be in proof when no such fact has neither testimony nor color of testimony to support it. It must not be understood that the doctrine thus enunciated is confined to criminal causes" (p. 177).

POINT 4.

Ground of Appeal No. 8 (P. 3, ll. 20, etc.)

The foregoing Ground of Appeal is based upon the refusal of the Trial Court to charge the first request of the Appealing Appellants (P. 89, ll. 1, etc.; P. 3, ll. 20, etc.).

This request, it will be observed by the Court, contains almost verbatim the law as laid down by this Court in *Buchanan and Smook Lumber Co. v. Dougherty*, 88 N. J. L. 356, at pages 357-8, and wherein this Court particularly refers to the character of a lien as being "*ex parte* and arbitrary"—a very "extraordinary feature and of the disadvantage under which the owner naturally labors in defending against a stale, unjust claim"—that "the one year limitation prescribed by the Act should be strictly enforced unless claimant is able to set up an excellent demonstration that it was not, not only because of any fault of his,

but in spite of the exercise of at least ordinary diligence on his part that he failed within that time to reduce to judgment his *ex parte* lien to the litigated lien embodied in the judgment,"—and "The burden is on the claimant to excuse his failure to get a judgment within the year," *ib. supra*, at page 358.

An examination of the Court's charge shows that, while it dealt with the matter of the lienor-plaintiff's diligence with some particularity, it failed to cover, or explain, the extraordinary character of the lien in mechanics' liens suits.

For, on account of the trial court's failure so to do, to which exception was duly taken, it is urged that the judgment should be reversed.

POINT 5.

Ground of Appeal No. 2 (P. 2, ll. 4, etc.)

The Trial Court erred in refusing to strike out the testimony of the witness, Harry Green, because it was apparent that he had no recollection and was not able to refresh his recollection from any kind of data that had any legal standing in court.

An examination of the witness Green's cross examination (Pp. 55 to 59) shows, conclusively, that he had no recollection as to making delivery for the lienor-plaintiff of materials upon the curtilage or to the lands of the appellant, The Delaware, Lackawanna and Western Railroad Company, and the motion to strike out this witness' testimony (P. 59, ll. 20, etc.) should have prevailed.

Meyers vs. Weger, 62 N. J. L. 432.

That the appellants do not desire to abandon this ground of appeal, but privilege themselves to argue the same at length to the court, this ground of appeal is specifically called to the court's attention.

POINT 6.

Ground of Appeal No. 3 (P. 2, ll. 16, etc.)

The Trial Court erred in permitting the Plaintiff during the examination of the witness, Vernon Ford, to offer in evidence the tickets and carbon copy of the account and ledger of the Plaintiff.

During the examination of the lienor-plaintiff's witnesses, Green (P. 53, etc.) and Ford (P. 65, etc.), the make-up and character of the lienor-plaintiff's exhibits P-1, P-2, and P-3, offered at page 66 and printed in the record at pages 122-3-4, was explained, and it is contended by the appellants that they had no validity in building up, as it were, the lienor-plaintiff's case to show the character and value of the materials alleged to have been furnished by the lienor-plaintiff, let alone show the delivery of the materials in question to and upon the lands and curtilage of the land owner, The Delaware, Lackawanna and Western Railroad Company. Exhibit P-1, known as the driver's slips, had absolutely no standing in the case whatsoever as exhibits. The main purpose of them (and that purpose, with the exception of one or two slips, having signally failed) was for use in refreshing the recollections of the lienor-plaintiff's drivers as to whether said drivers ever delivered any of the materials alleged to have been furnished by the lienor-plaintiff and the day

delivered and placed upon the lands, curtilage, of the owner, The Delaware Lackawanna and Western Railroad Company.

This ground of appeal, the appellants desire to argue more at length orally before the court, but that it should not be considered as abandoned the appellants specifically make note of this particular ground of appeal.

Conclusion.

Because the trial court committed substantial error to the prejudice of the appealing appellants, the judgment of the Circuit Court for the reasons hereinbefore urged should be set aside as judgment against them.

Respectfully submitted,

FREDERIC B. SCOTT,
Attorney of The Delaware,
Lackawanna and Western
Railroad Company, owner,
and Stange Construction
Company, General Contractors.







