

New Jersey Court of Errors and Appeals.

ROBERT T. McMURRAY, *et al.*,

PARTNERS, ETC.,

Defendants in Error.

vs.

SISTERS OF CHARITY OF ST.

ELIZABETH,

Plaintiffs in Error.

On Contract.

BRIEF OF COULT. HOWELL & TEN EYCK, OF COUNSEL WITH DE- FENDANTS IN ERROR.

This action was brought on December 15th, 1899, upon an order given to the plaintiffs by Smith Brothers, dated January 31, 1898 (Ex. P. 1, p. 88 of case), and claimed by the plaintiffs to have been verbally accepted by the defendants through their agent, Rev. John A. Shepard.

Smith Brothers were the general contractors for the mason work, carpenter work and structural iron work of a hospital in the City of Passaic for the defendants. The contract is shown at page 92 of the printed case.

Rev. J. A. Shepard, the person named in the order, was the general agent of the defendants for the construction of the hospital. A written power of attorney

had been given to him by the defendants (Ex. P 2, pages 88-89). There was also further evidence as to the scope of his agency.

The plaintiffs were sub-contractors for part of the iron work and the plumbing. Under their contract with Smith Brothers they became entitled, on January 31, 1898 (the date of the order), to eighty per cent. of their contract price. This eighty per cent. amounted to \$2,360. Mr. Robert T. McMurray, one of the plaintiffs, went to the office of Mr. Wakeley, the lawyer for Smith, expecting to be paid that amount in cash, knowing that Smith had collected the seventh payment under the contract a few days before. Smith told him the money from this payment was all gone, but gave him the order in question. McMurray went to Passaic a few days after, and saw Father Shepard, the agent, and presented the order. Father Shepard told him that he could not give him any money; that he had given Smith some money several days ago; and he held the order out as if to hand it back. McMurray said he did not expect the money to be paid at once, but wanted to have the money secured; that he was not particular about having it paid then; that the order did not represent all the money that was due, but only eighty per cent of it. Father Shepard then took the order back and kept it, and told Mr. McMurray he need have no fear, that he had ample funds, amounting to about \$13,000 on the Smith contract, and that McMurray should go ahead and finish his work, and that he would pay the order.

McMurray then proceeded to finish the work, and finished it about the latter part of February or the first of March (p. 11). Some time after the acceptance of this order, and before the eighth payment became due under the agreement, Smith Brothers failed to proceed with the work, and three days' notice was given them by the owners, under the fifth clause of the contract, requiring them to finish the work. The contractors not complying with that notice, the owners procured bids

for finishing the work, and awarded the contract for finishing to Frank A. Palen (who was the bondsman of the original contractor), he being the lowest bidder; Palen, under this contract, completed the work provided for in the Smith contract. There were other finishing contracts for other portions of the work, some of which were signed by Father Shepard for the defendants. After deducting from the balance still due under the Smith contract the amount paid to Palen for the finishing of the Smith contract (\$8,424), the defendants had in their hands a balance of \$4,549 (p. 117). At that time numerous notices under the lien law had been served by parties who had done work for and furnished materials to Smith Brothers for the building. All these notices had been served after the acceptance of the plaintiffs' order. The defendants paid this balance into the Court of Chancery upon a bill of interpleader, and made all the notice claimants, and also the plaintiffs, parties defendant. Plaintiffs were made parties on account of the order in question, and also on account of a notice for \$625 for the balance of twenty per cent. not included in the order.

McMurray and Brother, in their answer in that suit, set up the fact of the acceptance of their order, and the Court in the decree of interpleader, expressly reserved the right of McMurray and Brother to prosecute an action at law against the complainant, upon such acceptance; the Vice Chancellor, on the distribution of the fund, considered that McMurray and Brother had elected to rely upon their right to sue at law upon the acceptance by the owners, and disregarded their order for that reason.

Upon the trial of this cause at the Morris County Circuit, Mr. Justice Garretson, who presided, held that the question as to whether the order had been accepted or not was not in anywise affected by the decree made in the interpleader suit, and that it was a question of fact which should be decided by the jury in the present case. The jury found a verdict in favor of the plaintiff.

I.

The first assignment of error is upon the admission of the testimony of Benjamin Benas, a witness for the plaintiffs. This exception is shown on page 34. The sole ground of objection (page 33) was that even admitting that Father Shepard was the agent of the defendants for the purpose of accepting the plaintiffs' order, he was not such agent for the purpose of afterward making admissions to prove such acceptance. The defendants should be confined to the grounds stated at the trial, and upon which the Judge's ruling was based; considering the matter upon these grounds, the proof offered was clearly admissible, as it tended to show merely the fact that an agent who had authority to make the contract in question had actually made it, by his own admission to that effect.

II.

The second assignment of error is upon the admission in evidence of the contract made by Father Shepard with John Collins for finishing other works upon the building. (p. 38.)

The only ground of objection stated was that it simply showed his authority to sign contracts, and not to accept orders. It was offered, not for the direct purpose of proving the agency of Father Shepard to accept orders, as stated in the Assignment of Errors, but as the testimony shows, to show the character and extent of his general agency with respect to the whole work of construction; it is submitted that such evidence was admissible as showing an act on the part of the agent which was for the prosecution of the work being done under his general agency, and which act was done in the course of his employment as such agent, and thus tended to show the extent and character of his agency.

Mecham on Agency, Sec. 106.

III.

The third assignment of error is upon the refusal to non-suit.

The grounds of this motion appear at pages 42-46 Plaintiffs afterward, by permission of the Court, reopened their case and offered further evidence. (Pages 47-53.)

The grounds upon which the motion for non-suit was made were, shortly, as follows :

1. That the order was conditional, being conditioned upon the eighth payment becoming available, as such, for that purpose, and that it never became due but was consumed by stop notices under the Lien law.
2. That the order was addressed to Father Shepard and not to the defendants.
3. That there was no evidence of an agency of Father Shepard sufficient to authorize him to bind the defendants by a verbal acceptance of the order ; that the evidence showed no authority to him except to execute papers in writing.

As to the first of these grounds, that the order and acceptance were conditional, and the funds never became available to pay the order.

The defendants' construction of this order was that it amounted to a conditional assignment of a chose in action. Admitting that it was such, the defendants' acceptance bound them to pay the order, provided the condition was afterwards performed. An absolute acceptance of an order payable on a contingency is the same as if the instrument had all the requisites of a bill of exchange with a conditional acceptance. (*Parsons on Bills and Notes*, Vol. 1, 304.) The order is drawn against the funds in the hands of the acceptors which they held for the purpose of payment upon the contract,

and against the next payment to become due thereon, viz., the eighth payment. By the acceptance the owners admitted the validity of the order and the fact that they held funds in their hands, under the terms of the contract, available for payment of the order, subject only to the provisions of the contract. (*Daniel on Neg. Inst.*, 395.) They agreed to pay the order out of that eighth payment.

It is admitted that if the contractors had abandoned the work prior to the time when the eighth payment became due, and the defendants had properly spent the whole balance in their hands to complete the work, the condition would have failed of performance, but the plaintiffs insist that construing the order according to its terms, and under the evidence in the case as to its acceptance, no other circumstances could defeat the plaintiffs' right to recover on the acceptance. Leaving aside for this purpose the question as to possible rights of other claimants, and considering only the question as to whether the eighth payment should or should not be considered as exhausted by the amount spent for finishing, it is insisted that the moneys spent by defendants for finishing should be charged to the payments subsequent to the eighth payment, and that by the plaintiffs' order and acceptance they had a vested right in the eighth payment which could not be interfered with by the defendants unless there were no other funds available for the finishing of the contract. If the expense should be so charged to the latter payments, the eighth payment would be left intact. As between plaintiffs and defendants the defendants could not, by their own act, defeat the condition and prevent this eighth payment from becoming due, and thus defeat the plaintiffs rights under the acceptance.

Herter v. Goss & Edsall Co., 28 Vr., 42.

The facts in the above case as to the contract created by the order and acceptance are quite similar to this case. An order was there given and accepted,

"payable when the next payment will be due, according to my contract." The Court held, that there was but one condition in the acceptance, and that was that the next payment should become due under the contract; that no other condition could be imposed. That case differs from this in this respect—that it there appeared that the owner had paid directly to the contractor, but that case is precisely in point as to the effect of the order operating as a binding contract, subject only to the single condition expressed in it. The owners could have protected themselves further if they desired, by making the acceptance upon other conditions, *e. g.*, that it should be payable only in case the eighth payment should become due to the contractors and not become subject to the claims of other creditors; not having done this, they cannot now impose any new conditions upon their acceptance.

In *Fox v. N. Y. Wood Turning Co.*, 13 Daly (N. Y.), 153, it was held, that where the defendant accepted an order from the builder, payable on completion of the machine, which was the subject of the contract, and afterward paid to the builder's workmen, on orders from him, more than the balance payable on the contract, such payments being necessary in order to complete the machine, the builder being without means and unable to complete his contract, the defendant was nevertheless liable upon the plaintiff's accepted order.

The plaintiffs having shown that the building was completed under the provisions of the contract, and the contract price thereby becoming due to the contractors, subject only to deduction on account of the expense of finishing, and that after paying such expense there was a balance due to the contractors or their creditors, and no evidence being then in the case as to any diversion of the fund by any parties holding superior claims, or in any other way by operation of law, the refusal to nonsuit was proper.

The defendants afterward attempted to prove that the eighth payment was, by operation of law, diverted, and never became subject to the order. Their proof consisted of the record in the interpleader suit. Even if plaintiffs' rights might have been defeated by superior legal claims on the fund, it is submitted that the defendants' evidence was not sufficient to show any such claims, for the following reasons:

1. The decree of interpleader is not *res judicata* as to the rights of the plaintiffs in this suit, as the issue in the interpleader suit, so far as the complainants therein were concerned, was simply whether the defendants should be enjoined from suing at law on their several claims, and whether the complainants had brought into court the correct amount owing by them. The complainants had no concern with the rights of the defendants further than that they claimed to be entitled to an injunction to prevent their suits at law. The only adjudication as between complainants and defendants was on the matters above stated. In that decree (p. 135), the rights of McMurray & Brother were expressly reserved from the operation of the decree; the issue being entirely different, even if there had been no such reservation that decree would not have had any effect so far as the issues in this suit are concerned. When the Court came to make the decree of distribution among the defendants (which was not until January 4, 1900, after the beginning of this suit) it expressly excluded from consideration the claim of McMurray & Brother under their order, upon the ground that they had elected to proceed at law upon their acceptance. The opinion of Vice-Chancellor PITNEY on this point is as follows:

“The proofs show that before the bill was filed the claimants, McMurray & Brother, had brought an action at law against the complainants based on an alleged verbal acceptance of the order of January 31st, above set forth; and I understood the claimants to

“elect to stand by their action at law based on the alleged acceptance of that order, and to proceed in this Court for the balance of \$625, on the stop notice above set forth. In pursuance of that election a clause was inserted in the decree, which enjoined all the defendants from suing the complainants at law, expressly excepting the suit brought by McMurray & Brother against the complainants upon that order.”

The opinion of the Vice-Chancellor on the interpleader branch of the suit is reported in 46 *Atlantic Rep.*, 598. The opinion on the distribution of the fund among the defendants does not appear to be published; the foregoing is an extract from the opinion on file.

2. The defendants offered no original proof showing that the eighth payment was ever legally diverted and therefore never became due, but offered only the record of the interpleader suit. The record in that suit could have no effect as to plaintiff's rights to proceed at law on the acceptance, for the reasons above stated. The very object of the provision saving plaintiff's rights, was to give them the benefit of their election to sue at law without prejudice on account of anything that was adjudicated in the interpleader suit. If the complainants had not wished to have the decree so made they could have declined to proceed with their interpleader suit. This decree practically eliminated McMurray & Brother from that suit, so far as their order was concerned. It would be an injustice to hold that the Chancery decree had any binding effect as to the issues in this suit, for if McMurray & Brother had supposed that they would be so bound they would undoubtedly have asserted their rights in the interpleader suit, and apparently could have put in an effectual claim under their order, as it had been accepted in February, 1898; *the act giving priority to notices was not approved until June 14, 1898.*

3. The owners were never compelled to pay the eighth payment to anyone else by virtue of legal proceedings; they voluntarily paid into court the balance

in their hands, and so far as that balance and the rights of the litigants claiming in that suit was concerned, it should not be held that as to the plaintiffs' rights in this suit the decree in that suit operated to divert the fund referred to in the order. From all that appears, the complainants had not been sued by anyone; their action in paying into the Chancery Court was purely voluntary, and they accepted a decree which expressly reserved the rights of McMurray & Brother.

4. The plaintiffs succeeded, under their order, to the rights of the contractors. At the time this suit was brought the defendants had not made any payment to the notice creditors; nothing short of actual payment will give the owner any right to deduction; notices do not constitute a payment or operate as a credit. (*Wightman v. Brenner*, 11 C. E. Gr., 493.) Payment of the fund into court for the benefit of the defendants therein might be tantamount to actual payment, if their rights as against the complainants had been adjudicated in that suit, but certainly could not be so considered as to the rights of the present plaintiffs, whose rights were not so adjudicated but were expressly reserved.

As to the second ground for non-suit, that the order was addressed to Father Shepard and not to the defendants :

The evidence is clear that at the date of the order and acceptance, Father Shepard was acting as the general agent of the defendants in the construction of the hospital, and that the plaintiffs and all the other workmen, materialmen and contractors, in their performance of their work had recognized him as such. All the evidence in the case shows that so far as the work on the hospital was concerned, Smith Brothers and the plaintiffs had no dealings with Father Shepard personally, but dealt with him as the agent of the defendants. The order itself shows that it related to the matter of their contract for that work. Under this evidence it is clear

that if he accepted it at all it was understood by both parties that it was on behalf of the owners, his acceptance being made in the course of his principal's business.

Where an agent contracts in his own name parol evidence is admissible to charge the principal.

Evans on Principal and Agent (T. B. Series), 359.

Agency as a question of fact may be proved by the acts, declaration or conduct of the principal and agent, although the agent was appointed by power of attorney in writing.

Columbia Delaware Bridge Co. v. Geisse, 9 Vr. 39.

The principal is bound, not only by the actual authority of the agent, but by whatever is necessary to its performance, and also whatever appearance of authority he permits the agent to assume.

Law v. Stokes, 3 Vr. 249.

As Father Shepard was a general agent, as to the public his authority is to be measured, not by the actual power conferred upon him, but by the ostensible extent of his general employment. All his acts done in the prosecution of such business and which properly appertained thereto, are valid. This is the universal rule as to general agencies.

Gulick v. Holmes & Grover, 2 Vr. 182.

The rule is different as to a special agent. There the other party takes the risk of his want of power.

2 Beasley, 456; 4 C. E. Gr. 331.

In *Thomas v. Stewart*, 132 N. Y. 580, the evidence showed that the architect had also been constituted by the owner his agent, and represented him in the matter of the erection of the building. It was held, that he had

authority as such agent to consent to the substitution of an inferior article to that provided by the specifications, viz.: cotton wood window frames instead of pine, as specified. His powers were, therefore, superior to those of a mere architect, and permitted him to vary the contract, although there was no express authority to vary it. It necessarily followed from the fact of his general agency.

In addition to the other matters of evidence as to the agency, it appears from the bill of interpleader (p. 101) that notices of creditors were served upon him, and many of them were addressed to him personally. These were all recognized by the owners as valid.

The facts in this case showing the agency of Father Shepard were undisputed, and the Judge properly construed the agency as a matter of law. There was no request to charge on this subject on behalf of the defendants. Father Shepard executed some of the finishing contracts in the course of his employment; he was the general agent and had sole charge of the whole matter of construction, and had control of the funds; he paid the bills with his own checks. Evidence as to these facts were properly admissible.

Columbia Bridge Co. v. Geisse (supra).

As to the third ground for non-suit, that there was no evidence of agency to accept verbally, but the only authority was to execute papers in writing.

Admitting that the acceptance, if proper in form, was within the agent's power, it is apparent that even if there were no evidence other than the written power of attorney, the agent's power was not limited to the executing of written contracts. The power of attorney says the agent is to have power "to perform all necessary acts in the execution and prosecution of the aforesaid business in as full and ample a manner as it might do if it were personally present;" the "aforesaid busi-

ness" here mentioned must refer to the next prior clause (the only other place where the word "business" occurs), which states the business to be "the business of erecting and constructing of the St. Mary's Hospital;" the next prior clause, relating to execution of instruments in writing, cannot be construed to limit or affect the general clause at the end, first above quoted.

IV.

The fourth assignment of error is upon the refusal of the Court to direct a verdict for defendants.

The grounds of this motion being practically the same as the motion to non-suit, the same argument as above will apply to this assignment.

V.

The fifth assignment of error is that the Court left to the jury the sole question whether the order was accepted or not.

As the question of acceptance was a matter of fact, the Judge properly left it to the jury. The defendants' objection on this ground is not clear. If they mean to insist that the Judge should have left other questions in the case to the jury, there is nothing in their exception or in any request to charge which indicates what other matters they refer to.

VI.

The sixth assignment of error is to the charge of the Judge that if the order was accepted the jury must render a verdict for the plaintiff. The exception to this charge is shown on page 86. In the form in which the exception is taken, the defendants' objection was simply to the charge that if the order was accepted the verdict must be for the plaintiffs. This does not raise any question of lack of proper authority of the agent through whom the acceptance was made. In effect, this assignment raises the question whether, admitting that the or-

der was properly accepted, the defendants were bound by their acceptance, and became liable to pay it.

The only possible defence on this ground would be that the condition of the order and acceptance was never performed, and for that reason the defendants' liability never became absolute. This question has been discussed above.

VII.

The seventh assignment raises practically the same questions as the fifth and sixth assignments.

VIII.

The eighth assignment presents two questions :

(1.) As to the fact of acceptance, this is the same as the fifth and sixth assignments.

(2.) Whether Father Shepard had authority to accept the order on behalf of the defendants.

As to the latter, no exception was taken to that part of the Judge's charge ; the only exceptions to the charge are shown on pages 86 and 87 ; they do not show any exception to that part of the charge. Defendants cannot raise any question which was not included in their exceptions or brought to the attention of the Court below.

Trade Ins. Co. v. Barracliffe, 16 Vr. 543.

IX.

The ninth assignment is also to a part of the charge to which no exception was taken, so far as this assignment attempts to present any question as to the authority of Father Shepard.

X.

The tenth assignment is upon the refusal to charge that there was no evidence that Father Shepard had authority from the defendants to verbally accept the order.

The authority of Father Shepard, so far as it depended upon a written power of attorney or any other undisputed facts in the case, was a matter of law for the Court; if there was no evidence in the case to show such power the defendants were entitled to a non-suit, or the direction of a verdict in their favor, upon this ground. If there was no evidence other than the written power of attorney, the Judge was bound to construe that, and if his construction was that it conferred no power to accept the order, he should have non-suited the plaintiffs. But there was other evidence in the case. It was shown that Father Shepard executed some of the finishing contracts during the course of his agency; also, that he was the general agent of the defendants and had sole charge of the whole matter of construction, and had control of the funds; that he paid the bills with his own checks. (Pages 39-40.) These additional facts were shown without objection, and were properly admissible. (*Columbia Delaware Bridge Co. v. Geisse*, 9 Vr. 39.) As none of these facts were disputed, the Judge properly construed the agents authority as a matter of law. See also the discussion on this subject under the third heading above.

XI.

The eleventh assignment presents the question as to whether the conditions of the order and acceptance were complied with, so that the eighth payment became available for payment of the order. This is practically the same question as is presented by the third and fourth assignments, and is above discussed under those headings.

XII.

The twelfth assignment presents the same question as the fifth and sixth assignments

XIII.

The thirteenth assignment presents practically the same question as the third assignment. If the order and acceptance were subject to a condition which was never fulfilled, defendants were entitled to a judgment of non-suit.

XIV.

The fourteenth assignment presents the same questions as are presented by the third and fourth assignments. If there was no evidence of acceptance, defendants were entitled to a non-suit, or to have a verdict directed in their favor.

COULT, HOWELL & TEN EYCK,

Attorneys for Defendants in Error.

New Jersey Court of Errors and Appeals

ROBERT T. McMURRAY AND
WILLIAM H. McMURRAY,
PARTNERS, ETC.,

Defendants in Error.

vs.

THE SISTERS OF CHARITY OF
ST. ELIZABETH,

Plaintiff in Error.

*On Writ of Error.
Upon Contract.*

Brief of John B. Humphreys

On Behalf of Plaintiff in Error.

The writ of error in this case brings up for review certain rulings of law by His Honor, Mr. Justice Garretson, on the trial of the cause at the October (1901) term of the Morris Circuit Court before said Justice and a jury.

While there are fourteen separate errors assigned with reference to the proceeding below, the 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 11th, 12th and 13th assignments of error practically present only one question, and will be so consid-

ered. The 1st, 10th and 14th assignments of error will receive separate discussion.

QUESTION OF LAW RAISED BY 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 11th, 12th AND 13th ASSIGNMENTS OF ERROR (pp. 144-146.)

A building contractor draws an order on the owner in favor of a sub-contractor. The contractor is indebted to the sub-contractor for work done on the owner's building. The order requires the owner to pay to the sub-contractor \$2,360 to be deducted out of the eighth payment to fall due by the owner to the contractor. The eighth payment amounts to \$3,000. The owner accepts the order. Before the eighth payment becomes due, materialmen, from whom the contractor has purchased materials, and sub-contractors serve stop notices under the Mechanics' Lien act on the owner. These stop notices consume all the eighth payment leaving no part of it available for the satisfaction of the accepted order. The owner files an interpleader bill in the Court of Chancery of New Jersey, making the payee named in the accepted order and the servers of the stop notices parties to the suit. The decree directs that the stop notices shall be paid out of the eighth payment in preference to the accepted order. It authorizes the consumption of the whole of the eighth payment in satisfying the stop notices, leaving no money available for the satisfaction of the order.

Query, is the owner bound *at law* to pay the

accepted order out of his own pocket, there being no portion of the eighth payment available for that purpose?

Undisputed Facts.

March, 1897. The Sisters of Charity of St. Elizabeth, a corporation of New Jersey, entered into a contract with Smith Brothers, of Rutherford, N. J., builders, for the latter to erect for said Sisters a hospital building to be known as "St. Mary's Hospital," in the city of Passaic, N. J. The contract was duly filed in accordance with the requirements of the Mechanics' Lien act. The contract price was \$39,987, payable in installments in the usual way, at different stages, as the building progressed. We are not concerned with the method of payment of the first seven payments, amounting to \$27,000.

The eighth payment amounting to \$3,000 was to be paid when the hard finish of plastering was done except patching, the standing trim up, all sash hung, slate stairs set and the tiling done.

The ninth and final payment (\$9,987) was payable when the entire work was completed to the satisfaction of the architects.

There was a proviso that before any payment should be made a certificate should be obtained from, and signed by the architects and that the contractors should have complied with the laws of New Jersey regarding release of liens, &c., (p. 96, ll. 23-27).

The release of all liens was thus specifically made a condition precedent to the making of any payment to the contractor.

The contract also contained the usual clause giving the owner (in case of default by the contractor) power to complete the work and deduct the cost of completion from the contract price (p. 98, ll. 5-14).

Contemporaneously with the execution of this contract the Sisters of Charity executed a power of attorney appointing Rev. John A. Shepard of Passaic, N. J., its agent to oversee the erection of the hospital. The exact language of this document was as follows :

“For it and in its name to exercise a general control and supervision of the erection and construction of St. Mary’s Hospital in said city of Passaic, and to give, execute and deliver in said corporate name, or in the name of its said attorney, all contracts, agreements, bonds, notes, releases, receipts, acquittances, discharges and *all other instruments in writing*, whether under seal or otherwise, of whatever nature, as to its said attorney might seem meet, for the carrying on of said business of erecting and constructing the said St. Mary’s hospital, and to do and perform all necessary acts in the execution and prosecution of the aforesaid business in as full and ample a manner as it might do if it were personally present.”

October, 1897. Smith Brothers made a sub-contract with McMurray Brothers, the plaintiffs below to supply a part of the iron work, viz: a portion of the stairs and elevator enclosure (p. 11). McMurray Brothers began work under this sub-contract November 25th, 1897, and continued to work until March 1st, 1898. Most of their work was done by January 25th, 1898 (p. 16).

The total amount of McMurray Brothers' contract with Smith Brothers was \$2,950.

January 31st, 1898. Smith Brothers gave to McMurray Brothers an order directed to Rev. J. A. Shepard in the following language :

“New York, January 31st, 1898.

Rev. J. A. Shepard,
Passaic, N. J.

Dear Sir :—We authorize you to pay to Robert T. McMurray and Brother the sum of \$2,360 (eighty per cent. of our contract with him for iron work on St. Mary's hospital at Passaic, N. J.), same to be deducted out of our eighth payment.

SMITH BROTHERS,
WILLIAM J. SMITH.”

The disputed *fact* in the case was whether this order was accepted by Father Shepard or not. McMurray Brothers affirmed, and Father Shepard denied, that this order was *verbally* accepted by Father Shepard when presented to him for payment. There was no written acceptance of the order.

Although the evidence was overwhelmingly in favor of the defendant's proposition that Father Shepard did *not* accept the order, the jury found otherwise, and I must therefore, I suppose, assume for present purposes that the order was in fact accepted.

The principal question which will be discussed

in this brief will be as to the *legal* result of such alleged acceptance under the further facts and circumstances hereinafter set forth.

February 21st, 1898. McMurray Brothers served a stop notice under the Mechanics' Lien act upon the Sisters of Charity of St. Elizabeth, in the following language :

"Brooklyn, N. Y., Feb. 21st, 1898.

To the Sisters of Charity of St. Elizabeth :

Take notice that there is due to us from Smith Brothers, Contractors, \$625 over and above their order for \$2,360, handed you on January 26th, 1898, for work done and materials furnished by us and used by you in the erection of your new building on Pennington avenue, Passaic, N. J., known as St. Mary's Hospital.

"That we have demanded from Smith Brothers payment of said sum and that they refused to pay us and we therefore notify you to retain the amount so due out of the money owing by you to said contractors, or to become due to said contractors, and pay the same to us.

Very truly yours,

ROBERT T. McMURRAY & BRO."

Note that this stop notice in referring to the \$2,360 order made no mention of that order having been accepted. This stop notice covered the balance due upon McMurray Brothers' contract (\$590) and evidently some extra work also (\$35).

March 12th, 1898. McMurray Brothers served a further stop notice under the Mechanics' Lien act on the Sisters of Charity of St. Elizabeth for

the identical \$2,360 for which the order had been previously given.

I submit that the service of these stop orders by McMurray Bros. was entirely inconsistent with the existence of any contract between the Sisters of Charity and McMurray Bros., whereby the former had agreed to pay McMurray Bros. directly for their work. If McMurray Bros. had substituted the liability of the Sisters of Charity for that of Smith Bros., if the Sisters had assumed personal responsibility to McMurray Bros. for their work, what possible reason had McMurray Bros. to attempt to stop moneys in the hands of the Sisters which were due to Smith Brothers?

I do not understand, however, that any claim is made by the plaintiffs that the defendant is under any personal obligation except such as may have been the legal result of the acceptance of the order. No case attempting to show any form of liability other than such as may have arisen by reason of the acceptance of the order, could be tolerated under the pleadings in their present form.

The suit is not based upon any alleged contract or promise by Father Shepard to pay McMurray Bros. the amount of their contract, if they would continue and finish the work. The suit is based on an alleged acceptance of the order of \$2,360 ; and the validity of the judgment

depends upon the correctness of the rulings of the trial judge as to the legal effect of such acceptance.

Smith Brothers commenced the erection of the building and proceeded with it until they had received the first seven payments amounting to \$27,000. There then remained unpaid under the contract only the eighth payment (\$3,000) and the ninth payment (\$9,987). That was the situation when the order in question was served on Father Shepard.

March 1, 1898. A notice was served by the owners on Smith Brothers in pursuance of one of the terms of the contract requiring them to complete the contract or the owners would do so for them at their expense.

Smith Brothers' default continuing, bids were taken from various contractors to finish the building and after due competition the contract for completing the building was awarded to Frank A. Palen. The contract price was \$8,428, or \$4,559 less than the amount remaining unpaid to Smith Brothers under their contract. There was, therefore, \$4,559, after the building was completed, available to be paid by the Sisters of Charity to Smith Brothers or their assigns.

At the time of the alleged acceptance of Mc-

Murray Brothers' order (January 31st, 1898) Smith Brothers had received the first seven payments due under their contract in full. The eighth payment had not become due to them and never did become due to them. After the alleged acceptance of the order in question the only sum of money that ever became due to Smith Brothers or their assigns was the sum of \$4,559, *part of the ninth payment*. Manifestly, the money which Palen received for completing the contract must have swallowed up the eighth payment, unpaid on the Smith Brothers' contract, before it commenced to devour any part of the ninth payment. The order was drawn on the eighth payment and was, by its terms, only payable out of that fund. After the building was completed by Palen the only fund available to be paid Smith Brothers or their assigns was a residuum of the ninth payment.

The order was expressly drawn payable out of the eighth payment, but there was no eighth payment which ever came into existence out of which the order could be paid.

I shall, however, for the purposes of my present argument, treat the surplus of \$4,559 which remained in the hands of the owners, available to be paid to Smith Brothers, not as if it represented (as in fact it did solely represent) a mere residuum of the ninth payment, but as if it represented the whole of the eighth payment and a portion of the ninth payment.

Between January 31, 1898, and the completion

of the contract by Palen, when this balance, \$4,559, became due to Smith Bros., or their assigns, numerous stop notices were served under the Mechanics' Lien act, some of which were in proper form, etc., and some of which were not, and several orders were also served on the owners (pp. 107-119).

In this situation the Sisters of Charity of St. Elizabeth filed its interpleader bill in the Court of Chancery of New Jersey, setting forth substantially the above facts and offering to pay into court the balance in question (\$4,559). The various claimants to the fund, including McMurray Brothers, were made parties defendant to the interpleader suit. An answer was filed by McMurray forming a part of the record, the whole of which was offered in evidence, by which answer they claimed in every conceivable shape and from every conceivable standpoint to be entitled to receive the amount of the order in question out of the money in court. They relied on the order as an equitable assignment, they relied on the alleged acceptance of the order, and they relied on their stop notices.

November 21, 1899. Decree was made in the interpleader suit. The complainant was released from all demands on the part of the defendants by this decree, and the defendants were directed to interplead among themselves. All the defendants, including McMurray Bros., were enjoined by this decree from suits against the

complainant for recovery of any moneys touching the matters set forth in said bill of complaint.

The decree, however, contained this "rider" to the restraining clause ; "But nothing herein shall be taken or held as in anywise affecting the right of the defendants McMurray Brothers from prosecuting their suit at law against the complainant so far as the same is based upon the acceptance by complainant of an order served by Smith Brothers upon complainant in their favor."

It will be observed that at the time this decree was made McMurray Brothers had commenced this present suit and that their prosecution of said suit was expressly excepted from the operation of the injunction. Manifestly this decree did not contain any deliverance on the part of the Court of Chancery as to any liability on the part of the Sisters of Charity of St. Elizabeth arising out of the alleged acceptance of the order in question. Nevertheless the learned trial judge (p. 82) seems to have concluded that the only question which the Court of Chancery had left to the law court to consider was the naked fact of the acceptance or of the nonacceptance of the order. The learned trial judge seems to have thought that the Court of Chancery in not restraining the action at law upon the alleged acceptance had expressly intimated that if the order was accepted as a matter of fact the Sisters of Charity of St. Elizabeth were for that

reason, unaffected by any other circumstance in the case, liable to pay the order regardless of its conditional character and regardless of the conditional character of the obligation resulting from the acceptance of such an order.

January 4, 1900. Decree of distribution was made in the presence of all parties (for form of decree see pp. 139-142). This decree adjudged that certain of the defendants and certain of the defendants only were entitled to the balance of \$4,559. The defendants decreed to be entitled to the fund were the servers of stop notices who had complied strictly with the act. McMurray Bros. were left out from any participation in the money in court. As their claim depended on the order, viewed as an equitable assignment of a portion of that fund, it was held that the stop notices which were properly served and were in legal form and had resulted from a strict compliance with the Mechanics' Lien act, were entitled to take precedence over said claim. And so far as McMurray Bros.' stop notices were concerned they were subsequent in time to the stop notices of the defendants who were adjudged to be entitled to receive the fund in question.

McMurray Brothers' stop-notices and each of them (if otherwise good) were too late in point of time to entitle them to participate in any part of the money in court.

The defendants, the Sisters of Charity of St.

Elizabeth, have, of course, respected the decree of the Court of Chancery and paid out every cent of the \$4,559, paid into court, thus exhausting the moneys due to Smith Brothers or their assigns under their contract and a judgment has now been recovered against them in this action at law (November 6th, 1901,) for \$2,790.93, the amount of said order, \$2,360, including interest and costs, thereby increasing, the cost of the building from \$39,987 to \$42,777.93.

I respectfully submit that the acceptance of the order in question did not create any liability on the part of the Sisters of Charity to pay the amount designated therein, except out of the eighth payment to fall due by the Sisters of Charity to Smith Brothers, and that the whole amount of that payment being both at law and in equity consumed by stop notices served under the Mechanics' Lien act, all liability under the "acceptance" ipso facto ceased.

That such was the effect in equity was plainly decided in the interpleader suit. (See the record, pp. 104-142).

Viewing the order in question according to the effect it would have, apart from its alleged acceptance, as if, for instance, it had in fact never been accepted, it clearly operated as an equitable assignment of a portion of the eighth payment. Undoubtedly in a Court of Equity, before the payee could recover on such an unaccepted order, he would have to establish that

the eighth payment, but for the order, could have been recovered by Smith Brothers.

Goldengay vs. Smith (Court of
Chancery of N. J., November 12, 1901)
50 Atl.Rep., 456.

Syllabus.

"A bill to enforce payment of a specified sum out of money claimed to be due from defendant to a person who had contracted with him to erect certain buildings, the complainant's right to which sum was charged to have arisen from an equitable assignment thereof by an order drawn by the contractor upon defendant, requiring him to pay complainant that sum from money due or to become due to the contractor in accordance with the terms of the contract and duly presented to the defendant, must show that the contractor had so performed his contract that but for the order he could recover the sum from the defendant."

Quotation.

"To support the claim made in this bill, its charges must disclose an order drawn upon a particular designated fund, which fund had become available, so that in the absence of an assignment, it could be recovered by the assignor."

(Quoting)

Bernz vs. Marcus Sayre Co., 52 N.
J. Eq., 275.

Bradley Currier Co. vs. Bernz, 55
N. J. Eq., 10, (q. v.)

Lakewood Gas Company vs. Smith,
(Ct. of Ch. of N. J., January 21st, 1902)
51 Atl. Rep., 152. 156, et seq.

Quotation.

"Orders which a contractor frequently gives upon the party for whom he is doing work for a payment of money which is due, or will become due, to the contractor in pursuance of his contract, have been held frequently to operate as equitable assignments upon funds which have not been earned, but which probably will be earned, and thus have a potential existence.
* * * * * If the money is earned the order may attach to it as an equitable assignment. But if no money is earned the equitable assignment becomes wholly inoperative."

No particular form of words is necessary to constitute an equitable assignment.

Bower vs. Stone Co., 30 N. J. Eq., 171.

Lyon vs. Bower, 30 N. J. Eq., 340.

Harlem Bank vs. City of Bayonne,
48 N. J. Eq., 253.

Lanigan's Administrators vs. Bradley, 50 N. J. Eq., 205.

Bernz vs. Marcus Sayre Co. (N. J. Ct. of E. & A., March term, 1894) 52 N. J. Eq., 275.

Syllabus.

"Assuming that the order given by the contractor was an equitable assignment, its effect

was simply to subrogate the assignee to the rights of the assignor under the contract. Such an assignment would not enure to deprive the other party to the contract of the benefit and advantage of the terms and conditions contained in it."

Bradley Currier Co. vs. Bernz (N. J. Ct. of Chancery, Oct. term, 1896) 55 N. J. Eq., 10.

Quotation.

"To support an action in equity for the purpose of enforcing payment of the money mentioned in the order, it must appear not only that the order was drawn upon a particular fund, but also that when the bill was filed such fund had become available so that in absence of the assignment it would be recoverable in an action by the assignors. The assignee takes their place and right as to the portion of the fund assigned, and cannot enforce the assignment before the assignors could have sued for the fund."

It would seem unnecessary at this date, the subject having been so thoroughly thrashed out by the authorities, to trace at length the history of the Mechanics' Lien legislation and its interpretation and to show how the act of 1895 as interpreted by the Court of Errors and Appeals in the case of Slingerland vs. Binns, has operated to make stop notices, served before the fund became due, take precedence of prior unaccepted

orders drawn on the fund sought to be sequestered by the stop notices.

Prior to the advance payment clause in the Act of 1895 (P. L. 1895, p. 315), to entitle a workman or materialman to an action against the owner under the third section of the Mechanics' Lien law there must have been a debt due from the owner to the contractor *at the time the notice was given*. If before that time the debt had been legally assigned so that the contractor had no control over or right of action for it, a notice given to the owner by the workman or materialman would create no obligation under the statute as against the owner.

Craig vs. Smith (Ct. of E. & A.,
March term, 1875) 37 N. J. Law, 549.

The Act of 1895, however, changed this rule of law.

Slingerland vs. Binns (Ct. of E. &
A. of N. J., Feb. 28th, 1898) 39 Atl.
Rep., 712.

Syllabus.

"Under the fifth section of the supplement to the Mechanics' Lien law, approved March 14th, 1895 (2 Genl. Sts., p. 2073) workmen and materialmen, creditors of the builder, who serve notices upon the owner in accordance with the statute, thereby secure, with respect to any money thereafter growing due upon the contract according to its terms, a right to payment in preference to the rights of persons to whom the contractor has assigned such money before the notices were served."

Smith et al. vs. Dodge & Bliss Company (Ct. of E. & A. of N. J., Nov. 21st, 1899) 44 Atl. Rep., 639.

Syllabus.

"The inchoate lien acquired by materialmen and workmen under the third section of the Mechanics' Lien law as amended by the second section of the act of March 14th, 1895, (2 Genl. Stats., p. 2073) cannot by force of the fifth section of the latter act be impaired or defeated by an advance payment on the contract price or by a secret arrangement between the contractor and owner unless such arrangement is authorized and provided for in the contract as filed."

Donnelly vs. Johnes (Ct. of Ch. of N. J., Aug. 5, 1899) 44 Atl. Rep., 180.

Syllabus per V. C. Grey.

1. Under the operation of Section 5 of the supplement of March 14th, 1895, to the Mechanics' Lien act (2 Genl. Stats. p. 2074, Par. 41) workmen and materialmen who furnish labor and material to the building acquire an inchoate lien which attaches from the beginning of the owner's liability to the contractor under the contract filed. This inchoate lien becomes perfect only on service of notice in conformity to the statute before that liability matures, and expires on such maturity, as to liens not so noticed. If an installment coming to be due next after the service of such notices satisfies them and leaves a residue, that residue is at the disposal of the contractor and liable to the attack of his outside creditors. If there be a deficiency, the unsatis-

fied notices will operate upon the next installment which comes to be due under the contract in the progress of the work and so on until the final installment has been disposed of in the same manner.

2. Notices to retain, operate in succession, in the order of their time of service, to secure payment in full of the amount named in each notice to be retained.

3. Equitable assignments, as between themselves, also operate in the order of their presentation, *but their payment is postponed until the notices of the workmen and materialmen have first been satisfied in the manner above stated.*

Booth vs. Kiefer (Ct. of Ch. of N. J.,
Aug. 8, 1900,) 47 Atl. Rep., 12.

Syllabus.

"A stop notice served on an owner while a payment remains due under the contract takes precedence of a prior unaccepted order on that fund."

It was, therefore, correctly decided in the interpleader suit that the subsequent stop notices took precedence of McMurray Brothers' prior order on the fund, so far as that order operated as an equitable assignment of said fund.

The question, therefore, is whether this order when accepted has any different effect at law, as regards the liability of the Sisters of Charity of St.

Elizabeth, from what, in equity, it would have, if merely presented for payment to the Sisters of Charity of St. Elizabeth, but unaccepted?

FIRST OF ALL I SUBMIT THAT THE ACCEPTANCE OF THIS ORDER BY THE SISTERS OF CHARITY OF ST. ELIZABETH COULD NOT AT LAW OR IN ANY OTHER FORUM PREJUDICIALLY AFFECT THE RIGHTS OF THE SERVERS OF STOP NOTICES UNDER THE MECHANICS' LIEN ACT.

If the workmen and materialmen had *legal* liens on the 8th and 9th payments due, or to fall due, by the Sisters of Charity, to Smith Brothers—and it is clearly held by the cases above cited that they had such liens—then, manifestly, no acceptance of the order by the Sisters could deprive these workmen and materialmen of the benefit of their liens. It was so explicitly held in the case of *Smith et al. vs. Dodge and Bliss Co.* (*supra*).

“The inchoate lien acquired by materialmen and workmen under the third section of the Mechanics' Lien law cannot by force of the fifth section of the latter act be impaired or defeated by an advance payment on the contract price or by a secret arrangement between the contractor and owner unless such arrangement is authorized and provided for when the contract is filed.”

See also *Slingerland vs. Binns*, 39 Atl. Rep., 712.

McPherson vs. Walton, 42 N. J. Eq., 282.

SO THAT, IF THE ORDER IN QUESTION, AFTER ACCEPTANCE, HAS A DIFFERENT EFFECT AT LAW, AS REGARDS THE LIABILITY OF THE DRAWEE FROM WHAT IT WOULD HAVE IN EQUITY, IF MERELY PRESENTED FOR PAYMENT TO THE DRAWEE BUT UNACCEPTED, IT MUST BE BECAUSE THE MERE NAKED ACCEPTANCE OF AN ORDER IN THE FORM IN QUESTION CREATES AN ABSOLUTE LIABILITY ON THE PART OF THE ACCEPTOR, REGARDLESS OF WHETHER THE FUND UPON WHICH THE ORDER WAS DRAWN WAS IN FACT EVER AVAILABLE.

But the authorities are all to the contrary of this proposition, neither was there any claim on the part of the plaintiffs that the acceptance created an absolute liability on the part of the acceptor or that the acceptance was otherwise than a conditional agreement to pay. The court at page 47 said, "At present it seems to me that the order was accepted as it was expressed, and it was expressed to be payable out of the eighth payment; if there never was any eighth payment which became due I do not see how the defendant can be called upon to pay it."

Again at page 81 the court said, "It seems to me that all that the plaintiff can insist upon is that this order was a claim against Smith and against the eighth payment, perhaps, due to Smith under his contract, and should have been paid out of that balance; that is the claim, that this should be paid out of that balance; he could not have any claim ahead of Palen, who did the work, in order to make the eighth payment due.

Plaintiff's claim must be that this order should be paid out of the balance after Palen had been paid. After Palen was paid the defendants filed a bill of interpleader in Chancery for directions as to how this balance should be divided, making as parties all those who had filed stop notices against Smith's claim under his contract (there being a balance after Palen had been paid) and also these plaintiffs, making them defendants not only because of having filed a stop notice but because of this order. In adjudicating upon that case, as I understand, the Court of Chancery did not adjudicate upon the question of whether this order had been accepted by the defendant so as to make them liable to pay it out of the balance after the payment had been made, so it seems to me it is left to this court to determine whether the defendants incurred any liability under this order."

Mr. Humphreys :—That is a question of law.

The Court :—As a question of fact.

Mr. Coult :—A question of law and fact both.

The Court :—And it must be left to the jury to say whether they accepted the order or not.

Mr. Humphreys :—Your Honor, then, holds that the acceptance of the order would bind them, notwithstanding the fact that a stop notice under the Mechanics' Lien act takes precedence over the assignment effected by this order. Your Honor necessarily holds that the acceptance of this order has a greater effect than an assignment of this fund.

The Court :—I do not know about that. I must decline to direct a verdict and leave to the jury the question of whether the defendants accepted

this order ; that is a question of fact for the jury to determine."

The order in question was in the following form :

"New York, January 31st, 1898.

Rev. J. A. Shepard,
Passaic, N. J.

Dear Sir :—We authorize you to pay to Robert T. McMurray and Brother the sum of \$2,360 (80 per cent. of our contract with him for iron work on St. Mary's Hospital at Passaic, N. J.), same to be deducted out of our eighth payment.

SMITH BROTHERS,
WILLIAM J. SMITH.

This was a mere *authority* to pay \$2,360 out of the eighth payment. It was not an ordinary draft on Rev. J. A. Shepard for \$2,360 with a subsequent permission or instruction to reimburse himself out of the eighth payment. It was an authority from the contractors, Smith Brothers, to the owners to devote \$2,360 of the eighth payment to paying McMurray Brothers. All the cases hold that such an order or authority is not a bill of exchange but a mere assignment of a chose in action. In order to become binding *at law*, especially if it is splitting up one demand into several demands, it needs acceptance, but when once accepted, the liability *at law* does not differ one inch or one line from the liability in equity when presented to the drawee and acceptance refused. *The only difference between an unaccepted*

order of this kind and an accepted order is that the former operates as an equitable assignment and the latter also as a legal assignment.

Herter vs. Goss & Edsall Co. (N. J. Sup. Ct., June term, 1894) 57 N. J. Law, 42.

Syllabus.

1. "All that is necessary as between the acceptor and the drawer of a draft or order to constitute a good consideration for the acceptance is that there should be already in existence a fund in the hands of the acceptor upon which the draft is by the acceptance chargeable. If the fund be in existence at the time of the acceptance, the liability of the acceptor becomes at once fixed and absolute. *If the acceptance be conditional, and by the condition chargeable on a fund not yet in existence, but to be created, then the liability on the acceptance only ensues when the condition is complied with or performed.*

2. "*The condition may be contained within the terms of the draft or order so accepted, and when this is so the condition becomes a part of the acceptance and liability occurs only upon the performance of the condition.*

3. "Where C. enters into a written contract for the erection of a building for H., the owner, and C. gives an order on H. in favor of G. who was furnishing materials for the erection of the building in payment or security for such materials, payable *when the next payment on the contract becomes due*, which order was accepted by H., in order that C. might make such payment

or give such security, and also to obtain credit for a further supply of materials for the same purpose, and the facts being known to H.

“*Held*, that the object of the acceptance being to assure the further progress of the completion of the contract for the erection of the building, that it established a good consideration as between H., the acceptor, and G., the payee, for the acceptance, and that upon the completion of the contract to the next payment H. became liable to pay the order thus accepted and that it was immaterial whether the contractor performed the remainder of the contract or not.

4. “If the acceptor of such an order chose to pay the contractor for the erection of the building as if he had completed the contract to the next payment, he would be estopped from denying his liability in an action upon the acceptance when it became due and payable ; and so where an order is drawn upon a fund to be paid upon the happening of a condition, which order is accepted, the acceptor cannot, either *by his own act* or by acting in collusion with the drawer of the order, defeat the condition and then set up such deficiency as a defence to an action upon the acceptance.”

Quotation.

“The defendant, by his acceptance, set apart so much of that payment as would be sufficient to satisfy his acceptance. *It was an assignment of so much of this payment as was required to satisfy the order. He disregarded the terms of this order which he accepted and dispersed the fund out of which it was payable.*”

Note, that in the case last cited the order was not drawn, as in the case at bar, on the next payment, but was a general order, the only condition being that it should only become payable when the next payment under the contract should become due.

McPherson vs. Walton, 15 Stew., 282.

Syllabus.

"An order for a general debt of the contractor accepted by the owner is not entitled to priority of payment where the balance due the contractor is insufficient to satisfy all the subsequent lien claimants."

Hinds vs. Hinds. (N. J. Sup. Ct., Nov. term, 1873) 36 N. J. Law, 328.

Syllabus.

"In an action for the payment of money on a contingency, the pleader must aver, *and it must be proved*, that the contingency has happened, or that performance was prevented by the other party by some wilful or fraudulent act in violation of his own undertaking, express or implied.

Barrow vs. Bispham (N. J. Sup. Ct., Sept. term, 1829) 11 N. J. Law, 110.

Syllabus.

"The assignee of a bond takes it subject to all the equities which existed against it in the hands of the original obligee; and a fraud in obtaining

the bond by the original obligee may be set up in an action at law as a defence against the assignee though he purchased it for a valuable consideration and without notice of the fraud.

Rice vs. Porter's Administrators,
(N. J. Sup. Ct., Sept. Term, 1838) 16
N. J. Law, 440.

Syllabus.

"An order to pay \$100 on account of the drawer's share of rent for a fishery which will be due June 1st, 1831, and accepted by drawees *when due*, is not a bill of exchange, and if it be, the acceptance was conditional, not absolute which should be declared upon specially with an averment, *which must be proved*, that the condition has been performed.

Williamson vs. New Jersey Southern Railroad Co., 29 N. J. Eq., 311.

Syllabus.

"The assignee of a non-negotiable chose in action takes the same subject to all equities, burdens and off-sets existing between the original parties prior to the assignment or notice given of the assignment."

Note that in the case at bar the condition is contained within the terms of the order itself. The principle, therefore, exactly applies that, this being so, the condition becomes a part of

the acceptance and liability occurs only upon the performance of the condition.

Herter vs. Goss & Edsall Co., 57 N. J. Law, 42, *supra*.

Syllabus.

"The condition may be contained within the terms of the draft or order so accepted, and when this is so the condition becomes a part of the acceptance, and liability occurs only upon the performance of the condition."

THERE IS, MOREOVER, A CLASS OF CASES MORE DIRECTLY IN POINT THAN ANY OF THOSE I HAVE YET REFERRED TO, WHICH UPHOLDS THE PROPOSITION THAT WHERE THE FULFILLMENT OF THE CONDITION OR THE HAPPENING OF THE EVENT UPON WHICH A CONDITIONAL ACCEPTANCE IS TO BECOME ABSOLUTE IS RENDERED IMPOSSIBLE BY AN ACT OF LAW, THE LIABILITY OF THE ACCEPTOR IS DISCHARGED.

Browne vs. Coit, 1 McCord (S. Car) 408.

Syllabus.

"Where the defendant accepted a bill of exchange upon condition that he sold certain goods of the drawer before the bill became due, which goods, before the bill became due, were attached by a creditor of the drawer in the hands of the acceptor and before they were sold, the court

held that the defendant was not bound by the acceptance."

Quotation.

"The only question, then, is as to the liability of the defendant? His acceptance being conditional, he could only become liable on the performance of the condition. He agreed to pay the bill on the day it was due, if he could sell the goods; but before that day the goods were attached; and it was, *by operation of law*, out of his power to sell. * * * *The event then did not occur upon which he was to become liable and its non-occurrence was not the effect of his contrivance nor was it in his power to avoid it.* * * *

If a merchant accept on any condition the performance of which is prevented by the act of God he is not liable; *neither can he be liable when the condition is prevented by an act of the law.* (Chitty 199-200.)

Rawson vs. Beach, 13 R. I., 151.

Syllabus.

"An order was drawn by O on B, an attorney at law, and was accepted by him in the following terms: 'I will pay the within amount out of the money collected on O's judgment against N as soon as the same is collected by me.' B was O's attorney. At the time of the acceptance O had recovered a verdict against N which was afterwards set aside and in a new trial O recovered a much smaller verdict on which judgment was entered. The judgment was collected by B. In an action by the payee of the order against B, *Held* that B was not liable on the acceptance."

Newhall vs. Clark, 3 Cush., (Mass.),
376.

Syllabus.

“The acceptance of an order for the payment of money out of the amount to be advanced to the drawer, when the houses he was then erecting on the drawee’s land should be so far completed as to have the plastering done according to the contract between the parties is not absolute but conditional ; and the acceptor’s liability thereon is dependent on the contingency of the work being completed to a certain stage according to the contract ; nor will such acceptance become absolute and the acceptor liable thereon as such by a subsequent cancellation of the contract by the drawee and the assignee of the drawer. If the acceptor of a conditional order, dependent on the contingency of certain work being completed for the acceptor by the drawer, according to a contract between them, prohibit the drawer from proceeding to complete the work, or collude with the drawer to put an end to the contract, so as to prevent the acceptor from being liable on his acceptance, the remedy of the holder of the order, if entitled to any, which the court did not decide, is by a special action on the case for damages against the acceptor ; in such case the burden of proof would be on the plaintiff to show that the prevention of the completion of the contract had been caused by the defendant ; and any evidence on the part of the acceptor that the drawer had failed or been unable to perform his contract by reason of death, sickness, insolvency or other

inability would be competent to rebut the charge.

See also Phelps vs. Northrup, 56 Ill., 156.

Risley vs. Smith, 64 N. Y., 576.

Syllabus.

“Where a party for a valuable consideration gives to another an order payable out of a fund not then in existence such party cannot *by his own default* prevent the creation or realization of the fund and interpose the absence or failure of the fund as a defence to an action upon the order; so where an order is drawn upon a fund to be paid upon the happening of a certain condition, which order is accepted, the acceptor cannot, *by his own act* defeat the condition and then set it up as a defence in an action upon the acceptance.

In the case at bar the happening of the event upon which the conditional acceptance was to become absolute, viz. : the falling due to Smith Brothers or their assigns of the eighth payment under the contract was clearly rendered impossible by an act of the law, viz. : of the Mechanics' Lien law, which gave precedence to the servers of the stop notices. The prevention of the *happening of the event was in no sense due to any act or default on the part of the Sisters of Charity of St. Elizabeth.*

As to the insistment at the trial by counsel for

the plaintiffs that they were not bound by the decree in the interpleader suit there might be some force in that contention if the superiority of stop notices over voluntary assignments was merely *equitable* in its character, that is to say, a creature or creation peculiar to a Court of Equity. In that case we might be driven to a Court of Equity to obtain relief against this judgment recovered against us in a Court of Law, but manifestly the superiority of these stop notices over voluntary assignments is the result of the Mechanics' Lien act. The lien of the materialmen and laborers is a legal lien and their superior title is recognizable alike by a Court of Law as by a Court of Equity. It would be a very strange situation after the Court of Chancery had modified its injunction so as to permit this action at law to be prosecuted, to send us back to the Court of Equity to obtain relief against the judgment which it resulted in.

The decree in equity was a judgment in rem and obviously bound the fund between the parties to the interpleader suit in this action at law.

Note also that the contract provided that before any payment should become due the parties of the second part should comply with the laws of New Jersey regarding release of liens, etc. Manifestly it was the intention of the contracting parties that neither Smith Brothers nor their assigns should receive any part of the contract

moneys until all the laborers and materialmen were first satisfied.

Turner vs. Wells. (Ct. of E. & A. of N. J., March 5th, 1900), 45 Atl. Rep., p. 640.

Syllabus.

"A building contract provided that the final payment should become due on the completion of the work, and on the builders furnishing to the other party releases of all liens and claims that might arise in the performance of the contract. *Held*, that in a suit for the final payment the plaintiff must establish by evidence either that the releases were tendered, or that no such liens or claims existed when the suit was brought.

I therefore respectfully submit that the defendant, the Sisters of Charity of St. Elizabeth, became discharged from its alleged acceptance of the order in question when the fund upon which it was drawn was all consumed under the decree of the Court of Chancery by stop notices served under the Mechanics' Lien act.

II.

I further submit that the learned trial judge erred in admitting, against my objection, as evidence against the defendant, the Sisters of Charity of St. Elizabeth, testimony on the part of Benjamin Benas, a witness sworn on behalf of

the plaintiff, to the effect that Father Shepard, some time *after the alleged acceptance of the order referred to in said evidence had admitted the acceptance on his part of said order.*

(See assignment of Error No. 1, p. 143.)

Benjamin Benas was an employee of Philip Schwika (p. 27). Philip Schwika was a sub-materialman who supplied cast iron stairs and elevator enclosures to McMurray Brothers, the plaintiffs, who were Smith Brothers' sub-contractors.

February 2, 1898, Schwika served a stop notice on Father Shepard for \$1,097.50, claiming that the same was due to him by McMurray Brothers, and requesting Father Shepard to retain that amount for him from payments due or becoming due to Smith Brothers and McMurray Brothers as an order of payment had been given him by the parties mentioned (pp. 107-8). Manifestly this stop notice was ineffectual under the Mechanics' Lien act, having been given by a materialman who had furnished material, not to the contractor, but to a sub-contractor.

The alleged acceptance of McMurray Brothers' order was about January 31st, 1898. The witness, Benas, was interrogated as to an alleged admission made by Father Shepard in the month of March, 1898 (p. 36), that he had accepted the McMurray order. I insist that, admitting that Father Shepard was the agent of the Sisters of Charity, to accept the order on January 31st, 1898, the fact of his acceptance could not be proved by an admission made by Father Shepard to that effect in the following March.

We all know that a party is bound by his own admission and is not permitted to contradict it but it is absurd to say that a man is precluded from questioning or contradicting anything any person has asserted as to him, as to his conduct or agreement, merely because that person has been an agent of his. The following authorities clearly enunciate what the rule on this subject is:

Runck vs. Ten Eyck (Ct. of E. & A.,
June Term, 1853) 24 N. J. Law, 756.

"The admissions or declarations of an agent are admissible against his principal only, when they constitute part of a transaction within the scope of the agent's power. Declarations or admissions by an agent concerning a transaction within the scope of his power, *if made after* or forming no part of the transaction, are not admissible against his principal.

Calloway vs. Equitable Trust Co. (Sup. Ct. of
N. J., Jan. 10th, 1902) 50 Atl. Rep., 900.

Syllabus.

"An admission made by an agent in order to bind his principal must have been made within the scope of his authority and in the course of the negotiation to which it referred."

Mayor etc., of Baltimore vs. Lobe (Ct. of Ap-
peals of Md., Jan. 9, 1900) 45 Atl. Rep., 192.

Syllabus.

"Declarations of an agent to bind the principal must be made so as to constitute a part of the *res gestæ*."

Quotation.

"It is claimed the court committed error in so ruling because the statement of the young man to the officer, as to how the accident occurred, was made so near to the time of the happening, and sprang so spontaneously out of the incident itself that any idea of deliberate design in making it was impossible, and that therefore it was admissible as being contemporaneous with the main fact and a part of the *res gestæ*," * * *

* * * All the cases agree that to make the declaration a part of the *res gestæ*, it must be so connected with the transaction as to be reasonably a part of it ; it must not be the result of premeditation or design but the "immediate spur of the transaction"; and though it need not appear that it was spoken at the identical point of time when the principal fact happened, *yet it must have been made so soon thereafter as fairly to be a part of the transaction*, and therefore elucidating and explaining it. *But if the declaration was made after the main occurrence had ceased and there is no necessary connection between it and the principal event, it is then nothing more than a narrative of a past occurrence and is not admissible as a part of the res gestæ.*

See also *Westcott vs. Bradford*, 4 Wash. C. C., 492.

Helyear vs. Hawke, 1803, 5 Esp. 72.

“A sends his servant, B to sell a horse. What B says at the time of the sale and as part of the contract of sale is deemed to be a relevant fact as against A but what B says upon the subject at some different time is not deemed to be relevant as against A, though it might have been deemed to be relevant if said by A himself.”

The admission must concern some act of agency which is part of the *res gestæ*.

Cliquot's Champagne, 3 Wall, 114.

Carnie vs. Hennessey, 74 Conn., 107.

Fairly vs. Hastings, 10 Ve., 126.

“What is said by an agent respecting a contract or other matter in the course of his employment is good evidence to affect the principal but not if said on another occasion.”

Peto vs. Hague, 5 Esp., 134.

What Father Shepard may have admitted on March 2nd, in a conversation with an employee of a materialman to whom McMurray Brothers were indebted is surely not evidence as against the Sisters of Charity of what their agent in fact did on January 31st. The alleged declaration was made long after the main occurrence had ceased and there was no necessary connection between it and the principal event. It was nothing more than a narration of a past occurrence and is not admissible as a part of the *res gestæ*.

III.

I further submit that the Court erred in refusing to charge the jury that there was no evidence in the case that Father Shepard had authority from the Sisters of Charity of St. Elizabeth to verbally accept said order (see Assignment of Error, No. 10, p. 145).

There is not a syllable in the Power of Attorney from which any such power could be inferred. The power which was given was "to exercise a general control and supervision of the erection and construction of St. Mary's Hospital in the City of Passaic, and to give, execute and deliver in said corporate name or in the name of its said Attorney all contracts, agreements, bonds, notes, releases, receipts, acquittances, discharges and *all other instruments in writing*, whether under seal or otherwise, of whatever nature, as to its said Attorney may seem meet for the carrying on of said business of erecting and constructing St. Mary's Hospital and to do and perform all other acts for the erection and prosecution of the aforesaid business in as full and ample a manner as the corporation might do if it were personally present." Manifestly, the contracts, agreements, bonds, notes, releases, receipts, acquittances and discharges which Rev. Father Shepard was thus authorized to give, execute and deliver were to be in writing. This is apparent from the use of the words immediately following: "and *all other instruments in writing*".

“When an authority is conferred upon an agent by a formal instrument as by a Power of Attorney, there are two rules of construction to be carefully attended to.

1. The meaning of general words in the instrument will be restricted by the context and construed accordingly.

2. The authority will be construed strictly so as to exclude the exercise of any power which is not warranted either by the actual terms used or as a necessary means of executing the authority with effect.

See also *Geiger vs. Bolls*, 1 *Thomp. and C.*, 129.

Billings vs. Morrow, 7 *Cal.*, 171.

I submit that it would be a very far-fetched construction of this Power of Attorney to hold that it authorized Father Shepard to extend by a verbal acceptance the liability of the Sisters by increasing the contract price of the building to the extent of \$2,360.

IV.

I submit further that there was no evidence in the case of any acceptance of said order on the part of the Sisters of Charity of St. Elizabeth. The order was directed to Father Shepard personally and the rule of law is well settled that the agent alone is liable where he accepts a negotiable instrument addressed personally to him-

self, even though he be acting in fact for his principal. There is no mention of the Sisters of Charity in the order. (See Assignment of Error 14, p. 146.)

If the bill is drawn upon an agent in a personal character he will be liable as acceptor although he accepts for or on behalf of his principal.

Thomas vs. Bishop, 2 Str., 955.

Nichols vs. Dramond, 9 Ex., 154.

Marc vs. Charles, 5 E. & B., 978.

This rule seems to be the result of the operation of two other rules, the first being that no one can be liable as acceptor but the person to whom the bill is addressed unless he is an acceptor for honor. Polhill vs. Walter, 3 B. & Ald., 164. The second that the words of an instrument must not be construed so as to make it void if they will reasonably bear an interpretation making it valid.

Marc vs. Charles, 5 E. & B., 978.

For the above reasons, I respectfully submit that the judgment should be reversed.

JOHN B. HUMPHREYS,
Of Counsel with the Plaintiff in Error.

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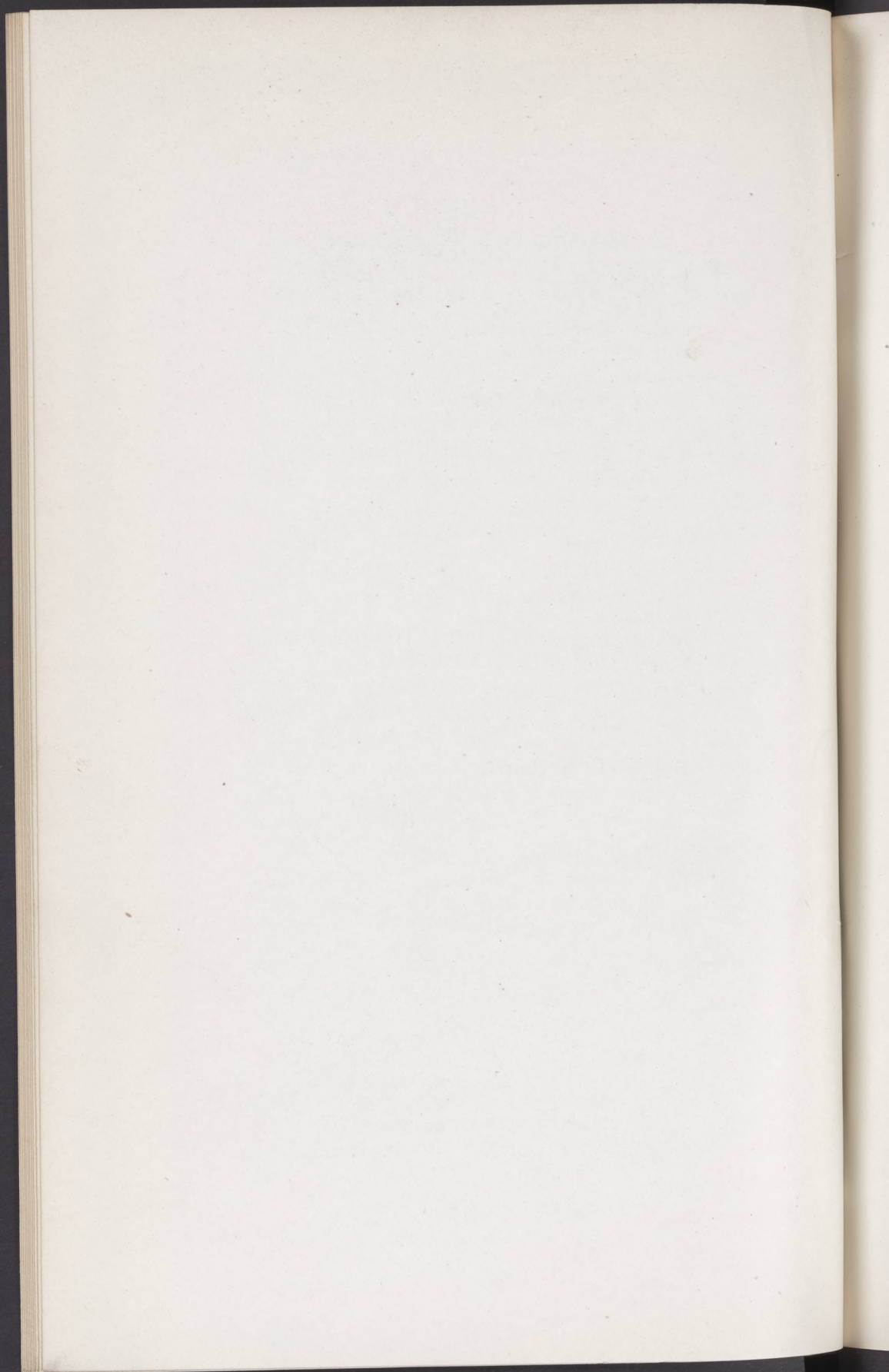
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N. J. Court of Errors and Appeals.

ROBERT T. McMURRAY AND
WILLIAM H. McMURRAY,
Partners, Etc.,

Defendants in Error,

vs.

THE SISTERS OF CHARITY OF
ST. ELIZABETH,

Plaintiff in Error.

In Error.

10

Writ of Error.

Returnable December 12, 1901.

JOHN B. HUMPHREYS,

Attorney for Plaintiff in Error.

20

Filed December 2, 1901.

GEORGE WURTS,

Clerk.

NEW JERSEY, SS.

The State of New Jersey to the Chief Justice
and other Justices of our Supreme Court of Judi-
cature,

Greeting:

For as much as in the record
and proceedings, and also in the
giving of judgment in a certain
plaint, which was in our said
Supreme Court of Judicature,
before you, between Robert T.

30

McMurray and William H. McMurray, partners,

trading under the firm name of Robert T. McMurray & Company, plaintiffs, and The Sisters of Charity of St. Elizabeth, defendant, in an action upon contract, manifest error hath intervened, to the great damage of the said The Sisters of Charity of St. Elizabeth, as it is said; we being willing that the error, if any there be, should, in due manner, be corrected, and full
 10 and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given and affirmed, then you distinctly and openly send under your seals, the record and proceedings aforesaid, with all things touching the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes at Trenton, on the twelfth day of December, next, together with this writ, that the record and proceedings aforesaid being inspected
 20 we may cause to be further done thereupon, for correcting that error, what of right, and according to the law and custom of the State of New Jersey, ought to be done.

Witness, our Chancellor and President, Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the twenty-second day of November, in the year of our Lord Nineteen Hundred and One.

JOHN B. HUMPHREYS,

Attorney.

GEORGE WURTS,

Clerk.

30

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and con-

cerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

WILLIAM S. GUMMERE,
C. J.

10

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NEW JERSEY SUPREME COURT.

10	ROBERT T. McMURRAY and WILLIAM H. McMURRAY, partners trading under the name of ROBERT T. McMUR- RAY & BRO.,	}	<i>On Contract.</i> <i>On Postea.</i>
	<i>vs.</i>		
	THE SISTERS OF CHARITY OF SAINT ELIZABETH.	}	

COULT & HOWELL, Attorneys.

Copy of Judgment.

As yet of the twenty-eighth day of December,
 Eighteen hundred and ninety-nine.

Witness, WILLIAM J. MAGIE, ESQ.,

Chief Justice.

20 WILLIAM RIKER, JR.,
Clerk.

MORRIS COUNTY, SS.

The Sisters of Charity of Saint Elizabeth, the
 defendant in this suit, was summoned to answer
 Robert T. McMurray and William H. McMurray,
 partners trading under the firm name of Robert T.
 McMurray & Bro., the plaintiffs therein, in an ac-
 tion upon contract, and thereupon the plaintiffs,
 by Coult and Howell, their attorneys, complain:

30 For that the defendant heretofore, to-wit: on
 the first day of December, Eighteen hundred and
 ninety-nine, at Morristown, in said county, was
 indebted to the plaintiffs in six thousand dollars
 for goods sold and delivered by the plaintiffs to

the defendant at its request; and in the like sum for work done and materials furnished by the plaintiffs for the defendant at its request; and in the like sum for money lent by the plaintiffs to the defendant at its request; and in the like sum for money paid by the plaintiffs for the use of the defendant at its request; and in the like sum for money received by the defendant for the use of the plaintiffs; and in the like sum for interest for the forbearance by the plaintiffs at the defendant's request of money due and owing from the defendant to the plaintiffs; and in the like sum for money due from the defendant to the plaintiffs on an account stated between them, and being so indebted, the defendant in consideration thereof, then and there promised the plaintiffs to pay them the said several sums of money on request. 10

Yet the defendant disregarded said several promises and has not paid the said several sums of money, nor any of them, or any part thereof, although often requested so to do, but to do so has hitherto wholly refused, and still does refuse, to the damage of the plaintiffs, six thousand dollars, and therefore they bring their suit, &c. 20

Notice is hereby given that this action is brought to recover the amount due on a certain acceptance of an order upon said defendant, which order was in form following, to wit:

NEW YORK, January 31, 1898.

REV. J. A. SHEPPERD, Passaic, N. J.,

30

Dear Sir:—

We authorize you to pay to Robert T. McMurray & Brother the sum of \$2,360.00 (eighty per cent. of our contract with them for iron work on

St. Mary's Hospital at Passaic, N. J.,) same to be deducted out of our eighth payment.

SMITH BROTHERS,

WM. J. SMITH.

Which order was accepted by said Shepperd as agent of said defendant, but said defendant has neglected and refused and still neglects and refuses to pay the amount due on said order.

- 10 Judgment will be claimed for two thousand three hundred and sixty (\$2,360.00) dollars, besides interest and costs of suit.

And the said defendant, by Eugene Stevenson, its attorney, comes and defends the wrong and injury, when &c., and says that it did not undertake or promise in manner and form as the said plaintiffs have above thereof complained against it, and of this it puts itself upon the country, etc.

And the said plaintiffs do the like.

- 20 Therefore let a jury thereupon come before the chief justice or some other justice of the Supreme Court of the state of New Jersey, at a Circuit Court to be holden at Morristown, in and for the county of Morris, on the second Tuesday of October, in the year of our Lord, one thousand nine hundred and one, by whom etc., and the same day if given to the parties aforesaid there, etc.

- 30 And now at this day, to wit: the sixth day of November, A. D., nineteen hundred and one, before our said Supreme Court at Trenton, come the said plaintiffs, by their attorneys aforesaid, and the Justice before whom, etc., having first sent hither his record had before him in these words, to wit:

Afterwards, to wit: at a Circuit Court holden at Morristown, in and for the county of Morris, before his honor, Abram Q. Garretson, one of the Justices of the Supreme Court, on the fifteenth day of October, in the year of Our Lord, one thousand nine hundred and one, according to the form of the statute in such case made and provided, come as well the said plaintiffs as the said defendant, by their respective attorneys 10 within mentioned, and the jurors of the jury between the parties aforesaid, in the plea aforesaid, being summoned also come, who to speak the truth of the matters and things within contained, being chosen, tried and sworn, say upon their oath that the said defendant, the Sisters of Charity of St. Elizabeth, did undertake and promise in manner and form as the said plaintiffs, Robert T. McMurray and William H. McMurray, partners trading under the firm name of McMurray Brothers, have in their said declaration alleged; and they assess the damages of 20 the said plaintiffs, by reason of the not performing said promises and undertakings, over and above the costs and charges by them about their suit in this behalf expended, at the sum of two thousand seven hundred and forty-nine dollars and forty cents (\$2,749.40.)

Therefore it is considered that the said plaintiffs do recover against the said defendant their said damages by the jury in form aforesaid found to two thousand seven hundred and forty-nine dollars and forty cents, and also forty-one 30 dollars and fifty-three cents, for their costs and charges aforesaid, by the court now here adjudged to the said plaintiffs, and with

their assent, which said damages, costs and charges in the whole amount to two thousand seven hundred and ninety dollars and ninety-three cents.

Judgment signed the sixth day of November, A. D., nineteen hundred and one.

DAVID A. DEPUE,
C. J.

10

I, WILLIAM RIKER, JR., clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

In testimony whereof I have set my hand and the seal of said Court at
[SEAL] Trenton, this twenty-ninth day of November, A. D., nineteen hundred and one.

20

WM. RIKER, JR.,
Clerk.

30

NEW JERSEY SUPREME COURT.

THE SISTERS OF CHARITY OF ST.

ELIZABETH

ads.,

ROBERT T. McMURRAY and
WILLIAM H. McMURRAY,
partners trading under the
firm name of ROBERT T. Mc-
MURRAY & COMPANY.

On Contract.

10

Order of Substitution.

Upon reading the consent at foot hereof, it is
on this eleventh day of September, 1901, ordered
that John B. Humphreys be and he hereby is
substituted as attorney of record for the above
named defendant in the place and stead of Eu-
gene Stevenson.

20

On motion of

JOHN B. HUMPHREYS,
Attorney of Defendant.

I hereby consent to the entering of the above
order.

EUGENE STEVENSON,
Former Attorney of Defendant.

30

NEW JERSEY SUPREME COURT.

ROBERT McMURRAY AND WIL-
LIAM McMURRAY, Partners,
etc.

vs.

THE SISTERS OF CHARITY OF ST.
ELIZABETH.

On Contract.

Bill of Exceptions.

Be it remembered that on the fifteenth day of October, in the year of our Lord nineteen hundred and one, at a Supreme Court Circuit holden at Morristown, in and for the County of Morris before his Honor, Abram Q. Garretson, Esquire, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, the issue joined in the above stated cause between the said parties (pro ut the pleadings) came on to be tried by a jury for that purpose duly impanelled ; and whereupon the attorneys of the said Robert T. McMurray and William McMurray, the plaintiffs, to maintain the issue on their part offered the following testimony:

MESSRS. COULT AND HOWELL for the plaintiffs.

MR. JOHN B. HUMPHREYS for the defendant.

ROBERT T. McMURRAY, sworn for the plaintiffs.

Direct Examination by Mr. TenEyck:

Q. Where do you live?

A. In the City of Brooklyn, Greater New York, Borough of Brooklyn,

Q. What is your business?

A. Architectural iron work.

Q. Did you have anything to do with furnishing iron work for St. Mary's Hospital? 10

A. Yes, sir; stairs and elevator enclosure, not all of it; I took up the work after somebody had started it.

Q. When was it that you did that work?

A. I began on about Thanksgiving Day, 1897.

Q. With whom was your arrangement for your work made?

A. Smith Brothers, of Rutherford.

Q. Who were Smith Brothers?

A. They were general contractors of the work.

Q. Did they have a contract for all the work? 20

A. No; I believe not, but they had a contract for building substantially the structure, the iron work; consisting of the iron work, plastering, wood work.

Q. And did you receive money for your work from Smith Brothers?

A. No, sir.

Q. When did you begin, the fall of 1897?

A. The fall of '97; yes, sir.

Q. Now, how long did you continue to work?

A. Oh, I continued until well on until the 1st of March, somewhere about the latter part of February or first of March, the bulk of the work was done between that and the end of January. 30

Q. (*The Court*) That is in '98?

A. January, 1898; yes, sir.

Q. (*Further Direct*) What was your arrangement with Smith Brothers about your compensation?

A. I had a contract with Smith Brothers that we were to do the work.

10

Mr. Humphreys:—Produce the contract—is it in writing?

Q. Was that a written contract?

A. Yes, sir; I think it was in writing.

Q. Have you got it here?

A. No.

Q. Did you receive any money for your work?

A. No, sir.

Q. Did you get any money from Smith Brothers at all?

20 A. No, sir.

Q. What did you get for your work, if anything?

A. I got an order for 80 per cent. of it.

Q. How much did that amount to?

A. \$2,360.

Q. Can you identify that as the order you received (showing witness paper)?

A. Yes, sir.

Q. When did you receive that order?

A. I received that order on the day it is dated,

30 I believe, it was drawn—

Q. Do you remember what day of the week it was?

A. What week?

Q. What day of the week?

A. It was either Friday or Saturday, I think; I am not positive about that.

Q. How did it happen you received this order instead of cash?

A. Well, I was called to Wakeley's office ostensibly to get cash, as I thought.

Q. (*The Court*) Whose office?

A. Wakeley's, that's the lawyer who drew that order, Mr. Smith's lawyer. I was called there expecting to get cash. When I got there Smith said he had collected a payment a few days before and he had used it and he supposed I was going to kick up my heels, but it was no use, the money was gone. 10

Mr. Humphreys:—I object to conversations between Smith and this witness.

The Court:—I suppose they are not competent. 20

Q. When you procured this order, what did you do with it; just state all the facts about it.

A. As soon as possible after that I went to Passaic.

Q. When was it you went to Passaic?

A. The following Monday, I think; I had intended to go the following day, but I heard Mr. Shepard was out of town and I went on Monday morning to Passaic. 30

Q. Well, what occurred?

A. I found him out.

Q. Found that he was not there?

A. Yes, sir; I went the next day.

Q. That was Tuesday?

A. Yes, sir, I think that was Tuesday.

Q. Well, proceed.

A. About the 1st of February, the 1st or 2nd of February, I think.

Q. Did you see Father Shepard?

A. Yes, sir.

Q. What occurred between you and Father
10 Shepard?

A. I went into the office there, the room that Mr. Shepard used as an office and presented the order; he said to me, "Why, I can't give you any money; I have given these folks money two or three days ago."

Q. Speak out.

A. And he held the order as if to hand it me back—that was after he had the order and read it. I said "I didn't come here purposely, expressly to get the money, but I have done the
20 work down at the hospital and these people have defaulted in their payment and have given me this order on you. What I want is security, I want the money secured, I am not particular about having it paid today." "Oh," Mr. Shepard says, and then he reached and took the order back. "I will pay you every cent of this money," he said.

Q. What is that?

A. He said, "I will pay you every cent of this money." I said, "That order does not represent
30 all the money that is due me for all that work, it is only 80 per cent. of it," and I says, "I am anxious to have the thing secured." "Well," Mr. Shepard said, "you need have no fear of your money, I have ample funds here, I have

about \$13,000; I have an architect who has made very careful payments, and besides that we have a bondsman, Mr. Palen, of Kingston, New York, and you go ahead and finish your work and I will pay you every cent."

Q. Did anything else occur during that conversation; is that substantially all of it?

A. That is substantially all of it, except that he lifted a card from his desk and told me another gentleman, sub-contractor of mine, had been there to see him; and asked me if I owed him some money; I said that I did. 10

Q. Did you proceed after that to finish your work, or didn't you?

A. I finished the work, yes, sir; went right away and finished that work, and then some other work for Smith.

Q. Did you see Father Shepard about the work up there?

A. Yes, sir. 20

Q. At the hospital?

A. Yes, sir.

Q. What was he doing there?

A. Generally—well, taking a walk through the building, taking a general look at things; not doing very much, but keeping pretty well posted about everything, I think.

Mr. Humphreys:—Are you speaking now of the time the order was signed, or after? 30

Q. Did you see Father Shepard there before or after, or only one time?

A. I saw him continually during my stay in Passaic.

Mr. Humphreys:—I object to any evidence of Father Shepard's connection with the building, after the acceptance.

10 Q. What did you observe before this order was accepted?

A. He was at the building there almost every day, generally about the building, sometimes in it, sometimes twice a day.

Q. From what you saw of it, was he there for any particular purpose?

A. Yes, sir; he seemed to be there generally for the purpose of keeping generally informed about the condition of the work, etc.

20 *Cross Examination by Mr. Humphreys:*

Q. How many times were you at the building, Mr. McMurray, before you say the order was accepted?

A. I was at the building from about the 25th or 26th of November, almost every day, at least four days of each week, the entire part of the day.

Q. You had done then the most of your work by the 25th of January?

30 A. Yes, sir.

Q. How much work remained to be done after then?

A. Well, the general finishing up of the work required to be done.

Q. About what value in money, would you say?

A. Well, I suppose \$600, in the neighborhood of \$600.

Q. Now when you took this order—

Mr. Ten Eyck:—I want to offer this order in evidence.

Said order marked Exhibit P No. 1. 10

Q. Who drew this order, Mr. McMurray?

A. A man named Wakely.

Q. A lawyer?

A. A lawyer, Smith's lawyer.

Q. Where was the order drawn?

A. At his office.

Q. And where is his office?

A. Pine street, New York.

Q. And that is the order, the acceptance of which you are now suing on? 20

A. Yes, sir.

Q. I will read this: "The Rev. J. A. Shepard, Passaic, N. J. Dear Sir: We authorize you to pay to Robert T. and William H. McMurray the sum of \$2,360, eighty per cent. of our contract with him for iron work at St. Mary's hospital at Passaic, N. J. Said sum to be deducted from our eighth payment, Smith Brothers, W. J. Smith." Did you see Smith Brothers sign that?

A. Yes, sir.

Q. You saw William J. Smith sign? 30

A. Yes, sir; William J.

Q. Now, when you took this to Father Shepard, will you tell me what language he used, exactly?

The Court:—This is not accepted in writing, is it?

Mr. Humphreys:—No, sir.

The Court:—And this conversation is in regard to the acceptance.

10 Q. Will you please state now what particular language Father Shepard used with reference to this order, upon which you rely as an acceptance of this order?

A. He said that—

Q. I want the very language that he used, upon which you rely as an acceptance of this order?

A. I presented that order to Father Shepard, as I have said before, and he told me that he could not give me any money for it—

20 Q. Well, you didn't regard that, did you, as an acceptance?

A. No, sir.

Q. I didn't ask you to tell me that; I only want the exact words that he used upon which you rely as an acceptance of that order?

A. You don't want the general conversation.

Q. No; I want the words that he used, which you say amounted to an acceptance of this order?

30 A. Well, I can give you Father Shepard's words that led up to that, and then—

Q. I don't want that, Mr. McMurray.

Mr. Coult:—If it is part of the same conversation.

Mr. Humphreys:—I would like the witness to answer the question, which I think is fair.

The Court:—He may regard the words that led up to it as proper—

A. It is pretty hard for me to frame a sentence in my mind, sitting here. 10

Q. I don't ask you to frame a sentence; I want your recollection of what Father Shepard said.

A. That would be framing a sentence.

Q. No, it would not; I want you to repeat what is in your own mind.

A. I want to frame it out of my own mind, what I consider the actual acceptance of it was, Father Shepard's statement to me that he would pay that order, and taking it after he had refused to give the money for it. I went there for the especial purpose of having that order accepted, 20 no other design in my mind.

Q. I don't care about designs in your mind; I want to know whether Father Shepard told you he would pay this order.

A. Yes, sir; he told me he would pay that order, and further said to go ahead and finish the work.

Q. Never mind. Tell me what language he used when he said he would pay this order.

A. He said—Those are the words he said.

Q. What? 30

A. "I will pay this order, you go ahead and finish up the work."

Q. Now, at last we have got it. You say he said, "I will pay this order;" is that right?

A. Yes, sir.

Q. "I will pay this order;" what else?

A. "Go ahead and finish up the work."

Q. "Go ahead and finish up the work." I don't think you stated that in your examination in chief, did you?

A. I should have said Father Shepard said he would pay the order.

10

Mr. Coult:—Refer to the notes, and find out.

Mr. Humphreys:—I simply want to get the language he relied on as the acceptance of this order; now I have got it.

Q. Why didn't you get Father Shepard to accept this order in writing?

20 A. Father Shepard took the order,—after I told him I didn't want the money that day he took the order from me, and took it saying he would see it paid, and put it to one side of his desk immediately.

Q. Well, you are a business man, aren't you?

A. Yes, sir.

Q. Well, don't you know it is customary when you have a paper which you want to have accepted to get the drawee to write "Accepted" across it, and then return it to you so that you
30 have evidence of the debt that is due you?

A. Well, I suppose it is customary.

Q. Why did you depart from that custom in the present instance?

A. Well, I was working a little out of my or-

dinary sphere of work; I received Father Shepard's direction—his position, and him keeping that order, I took it for granted it was an acceptance.

Q. Did Father Shepard refuse to sign an acceptance on the order?

A. No, sir.

Q. He did not?

A. No, sir.

10

Q. Did you ask him to?

A. I don't recollect if I asked him to or not; my impression is I didn't.

Q. Why didn't you?

A. Because I had a plain assurance from Father Shepard that he would pay that money.

Q. When did he first tell you that, how soon after you had given him the order?

A. Immediately; the whole conversation didn't take but seven or eight minutes.

Q. Don't you remember Father Shepard telling you that he didn't think the order was any good and he advised you to serve a stop notice on him? 20

A. No, sir; not at that time.

Q. And do you deny that Father Shepard at that time said anything of that kind?

A. Yes, sir; if he had I would have run for cover pretty quick, if I had been told that.

Q. Had you received any advice as to the law at that time?

A. No, sir.

30

Q. As to stop notices?

A. No, sir.

Q. Or their effect?

A. No, sir.

Q. And you say Father Shepard at that time did not make any reference at all to stop notices?

A. No, sir.

Q. Did he at any other time?

A. Yes, sir; in a subsequent visit when I stopped there.

Q. When was that?

10 A. That was long in about the 1st of March.

Q. How did that conversation arise?

A. Well, I met a man on Broadway one day who told me that there was considerable trouble down in Passaic and I better take a visit down there; I told him—we got talking about the general condition of the affair and I told him I had an order there that Father Shepard had accepted and guaranteed to pay, but I still had \$625 that Father Shepard had no direct memorandum of, only what was given in the conversation. He
20 said, “Well, you better go down there;” I said, “I will go down as quickly as possible.” I went down and filed a stop notice; I first went to Smith and demanded the money; I went from there and went down to Passaic, Father Shepard said to me “These are piling in pretty thick”—

Q. Now one minute. How much was that stop notice for?

A. \$625.

Q. Is this the instrument that you refer to (showing witness paper)?

30 A. Yes, sir.

Q. Well, go on, tell us how you came to have this conversation with Father Shepard?

A. I say that took me on another visit to his house.

Q. Yes.

A. And I think that is the document that I served on him.

Q. What did he say then?

A. Then he said—Well, I ain't sure at all he said much that time; I think he took it and significantly looked at me and said, "These are piling in pretty thick."

Q. Did you have any conversation with him at that time about the supposed accepted order? 10

A. No, sir,

Q. When did you first learn that Father Shepard or the Sisters of Charity of St. Elizabeth, didn't intend to pay that order?

A. Well, I have not got the date; I think it was in the neighborhood of the first of May I got a letter from another contractor who had undertaken to finish the work, to come down and give an order to finish the work.

Q. Then you say up to the first of May you were absolutely sure that Father Shepard would live up to this supposed contract? 20

A. Yes, sir.

Q. You had no reason to doubt him at all?

A. No, sir.

Q. Quite sure of that?

A. Quite sure.

Q. Up to the first of May?

A. Yes, sir.

Q. If that be so, Mr. McMurray, let me ask you why you served this instrument upon Father Shepard upon March 12, this stop notice for this identical sum of \$2,360. If you were so certain right up to May 1st that you were going to received this money on the acceptance, what 30

possible motive had you in serving a stop notice on him on March 12?

A. Well, Father Shepard had no memorandum of the money additional to this order, and I drew that stop notice as a precaution. That was a notion of my own, that was not done on advice, that was simply—

Q. That is the same debt as the acceptance?

10 A. Yes, sir.

Q. And why did you serve that on Father Shepard?

A. Because in the course of general conversation I was told that there was considerable trouble there.

Q. Oh. You have just said that up to the 1st of May you thought you were perfectly protected by this order?

A. I did; I thought so then.

Q. Why did you serve that?

20 A. As an additional precaution, if it was a precaution.

Q. That is the only explanation you can give of it?

A. That is the only explanation.

Q. All right, we will take that explanation. Now, then, McMurray, what was your expectations with reference to this acceptance, or supposed acceptance of Father Shepard's; was it your expectation to receive this sum of money out of the eighth payment, as the order reads?

30 A. I didn't know anything about that.

Q. You knew how the paper read?

A. Yes, sir; I didn't care what payment it came from, so long as I got the money. I had received that order and given a receipt on the

condition that it was accepted, and I expected it to be accepted when I went there,

Q. Had you, at the time you presented this order for acceptance, any knowledge of Father Shepard's power to represent the Sisters of Charity in accepting negotiable paper?

A. Through general channels I had that knowledge; yes, sir.

Q. Tell me what you mean; what general channels? 10

A. Oh, through knowing that he was the executive head of that piece of work that was going on.

Q. You inferred that he had power to accept negotiable paper of that kind?

A. Yes, sir; he never told me; I didn't make that calculation at all; I took that order to him; if he had told me he had no power that would have settled it; I would have known that he didn't have power. 20

Q. At the time you presented this order to Father Shepard, was not the work practically at a standstill?

A. No, sir.

Q. Hadn't Smith Brothers,—or shortly after then didn't they make default in the performance of the work?

A. After that they did.

Q. How long after?

A. There was no trouble,—so far as I knew there was no trouble when I took that order and served it; I went that day to Father Shepard— 30

Q. You were aware when you served this or-

der, that Smith Brothers had received the first seven payments on the contract?

A. No; I was informed by the Smiths that they had received the last payment; the seventh, I guess it was.

Q. I thought you said in your examination in chief that Father Shepard told you that Smith Brothers received—

10 A. He told me they had received a payment last week; he didn't go into particulars about it.

Q. You had no knowledge of how many payments they had received?

A. No, sir; I didn't have knowledge—

Q. You saw this paper was drawn, to be paid out of the eighth payment?

A. I supposed that was right, I didn't have any knowledge of it.

Q. You see by this document—who drew it?

A. Smith—or Smith's lawyer,

20 Q. And you read this paper?

A. Yes, sir.

Q. And you noticed it was to be paid out of the eighth payment?

A. Yes, sir.

Q. Well, now, don't you know, Mr. McMurray, that subsequently the work was taken out of Smith Brothers' hands and that Palen Brothers, or some firm of the name of Palen, completed the job?

30 A. I don't know, I didn't go into that particularly; I heard remarks to that effect.

Mr. Coult:—I object to this.

The Court:—I do not quite see how it is cross examination.

Mr. Humphreys:—Then I will withdraw it; I won't press it.

Q. Were you not a party to an interpleader suit in the Court of Chancery of New Jersey in which the Sisters of Charity of St. Elizabeth were complainants?

A. I will have to ask Mr. Coult to answer that.

10

Mr. Coult:—I object to it.

Mr. Humphreys:—Very well, I will withdraw it.

Q. That's all.

BENJAMIN BENAS sworn for the plaintiffs.

Direct Examination by Mr. Ten Eyck:

20

Q. By whom were you employed about the fall of 1897, and early part of the winter of 1898?

A. By Philip Schwika.

Q. Who is Philip Schwika?

A. Foundryman, having a foundry in Williamsburg.

Q. As his representative did you have anything to do with any work or materials in building St. Mary's hospital in Passaic?

A. Yes, sir; we furnished all the castings to Mr. McMurray during the work there.

30

Q. Did you see Father Shepard about matters in which your firm was interested?

A. Yes, sir.

Q. When was it you saw him?

A. It was about probably the middle of February, 1898.

Q. How did you come to see Father Shepard, what was the reason for your going there?

A. We didn't receive a payment from Mr. McMurray; Mr. McMurray told me that he could not get any money there, and he was satisfied to give an order on the money due to him on that job. He gave me an order to the contractor there, Smith Brothers; I went there to Passaic and saw Smith Brothers—

Mr. Humphreys:—I object.

The Witness:—They told me that they had nothing—

Q. No, never mind.

20 *Mr. Coult:*—They won't let you tell what they said. What did you do?

A. I went there to them and presented them with the order.

Q. (*Mr. Humphreys*) To whom?

A. Smith Brothers—met them in the hospital, I seen them in the hospital.

Q. (*Mr. Coult*) And presented the order?

A. Yes, sir.

Q. Did you get your pay?

30 A. No, sir.

Q. What did you do then?

A. They told me they had nothing to do with me, that I had to look for the payment to Mr. McMurray—

Mr. Humphreys:—I object.

The Court:—Strike that out.

Q. Well, what then did you do?

A. Why, they told me that Mr. McMurray had an order direct from Father Shepard.

Mr. Humphreys:—I object to this. 10

Q. Well?

A. I went to the residence of Father Shepard and I seen him there and spoke to him in his parlor.

Q. Just state when that was, as near as you can tell.

A. It was, as near as I can tell, about in February, about the 20th or sometime around that time; I don't know exactly the date.

Q. Well, what took place? 20

A. I told Father Shepard who I was, I told him that I heard and knew that there was an order to be paid by him to McMurray—

Mr. Humphreys:—I object to conversation between Father Shepard and this witness at the time stated. There is nothing whatever in the case so far to identify Father Shepard in such a way, that anything he might say subsequent to the alleged acceptance of this order could in any way bind the defendant or the corporation. 30

Mr. Coult:—I suppose the force of

the objection is that Father Shepard has not been shown to be in a position to bind the sisters; that is a mere order of proof.

10 *Mr. Humphreys:*—You cannot prove contracts against a corporation by mere statements of an agent that are made afterwards.

By Mr. Ten Eyck:

Q. Do you remember the date on which you saw him?

A. About the 20th of February; some time around that date anyhow.

Mr. Humphreys:—Well, I object.

20 *The Court:*—This is after the order; the order is dated the 31st of January.

Mr. Ten Eyck:—I may be able to show this witness does not remember the day of the month, if I may put another question.

The Court:—Then you withdraw the other question?

30 Q. When you first saw Father Shepard, do you know whether or not that was before this order had been presented to him, or after?

A. It was before the order had been presented to him.

Q. How do you know that ?

A. Because I know—I was present when this order was given; I had an appointment to meet Mr. McMurray to go with him and see Father Shepard personally on that very day; it was on a Tuesday morning; by some accident Mr. McMurray didn't meet me, and so I went myself direct to Paterson and saw Father Shepard.

Q. Did Father Shepard say anything about having seen an order at that time ? 10

A. No, sir; didn't say anything of that kind.

Q. What did he say ?

A. I told him what I came for; I told him there was money due us.

Q. What did you tell him ?

A. I told Father Shepard who I was; I told him we had delivered the iron work, the castings for this work at St. Mary's hospital, and that there was money due for this bill to us, and that I wanted him to retain from the money due to McMurray so much as was due to us. Father Shepard told me that he was very much astonished to hear that Mr. McMurray hadn't received any money. 20

Q. Now did you ever see him after that time?

A. I did.

Q. When?

A. Father Shepard told me—

Q. When?

A. Well, about pretty near three weeks after. 30

By Mr. Humphreys:—

Q. After the order?

A. Yes, sir.

Mr. Humphreys:—Then I object.

The Witness:—About probably the beginning of the first week of March.

Further Direct:

Q. Why did you go to see him again?

10 A. Well, when I seen Father Shepard first he told me that verbal information was not sufficient, that I should put the thing in writing and send him this by mail so that he would have something to show. I did do so; I sent him a registered letter to the post office, in Passaic, stating all the facts.

Q. Now, when you saw him again—

A. Well, I say this, what he told me at the time was, he told me further the money would be paid inside of a fortnight or two weeks; he told me that he had ample money to pay, about
20 \$13,000, that we should have no fears of not getting our money.

Mr. Humphreys:—I do not see the relevancy of this, your Honor.

The Court:—I do not either.

Q. Well, on this second occasion when you saw Father Shepard what did he say then?

30 *Mr. Humphreys:*—I object.

Mr. Coult:—That raises the question.

Mr. Ten Eyck:—We propose to

show that Father Shepard at that time did indicate that he had accepted the order when it was presented to him.

Mr. Coult:—Stated that he had done so.

Mr. Humphreys:—That is not evidence against the Sisters of Charity of St. Elizabeth. 10

The Court:—I do not understand how that is binding on the corporation that is sued.

Mr. Coult:—I don't know I get the exact point that the gentleman makes. He says this conversation, which occurred afterwards, was not binding on the corporation. We propose to show and I think will be able to show—that is a mere question of order of proof,—in addition to what has been shown, that Father Shepard was in fact the Sisters of Charity as far as this building was concerned; that he was constructing it; while it was built for them, he was their representative and agent for them in the construction and in the payments all the way through and that he was the person who was dealt with as the Sisters of Charity. That he had such authority, either in fact given to him by 20 30

them, or permitted to use such authority by them in the construction of that building; he had general power sufficient to contract for the work and to pay the contractors for work, and that he had the control of the fund for that purpose.

10

The Court:—It seems to me that ought to be shown before evidence is introduced—

20

Mr. Humphreys:—It is not the order of proof I object to. Assuming all my learned friend has stated is proved in the case, that Father Shepard is shown to be the representative of the Sisters of Charity of St. Elizabeth for the purpose of constructing this building; and for accepting the order, if you will, I submit he is not the agent of the corporation for the purpose of making admissions after the alleged acceptance, to prove the acceptance.

The Court:—Why? If he was their agent, why not? If you admit he accepted it—

Mr. Humphreys:—I do not admit it.

30

The Court:—If you admit in doing what he did he was acting as their agent—

Mr. Humphreys:—I don't admit any-

thing; I assume, for the purpose of the argument.

The Court:—Assuming then what he did he acted as their agent, certainly statements of his afterwards to the effect that what he did could be proven—

Mr. Coult:—We will take it subject to his objection. 10

The Court:—Yes.

Whereupon Mr. Humphreys, the counsel on the part of the said defendant interposed and insisted that the said evidence so offered to be given by the said plaintiff was not good or admissible in law upon the issue aforesaid, but His Honor, the said Justice, held and affirmed that the said evidence so offered to be given by the plaintiffs, as aforesaid, was good and admissible in law; to which ruling of His Honor, the said Justice, the defendant prayed a Bill of Exception, and His Honor, the said Justice, sealed the exception accordingly. 20

A. Q. GARRETSON, [SEAL]
Justice Supreme Court.

Mr. Coult:—It is the order of proof. We will show, I think, very clearly, Father Shepard had pretty broad authority. 30

By Mr. Coult:

Q. Just state what he said to you on the second visit.

10 A. I called there again about the beginning of March, because Father Shepard had told me that some money would be paid and that he would notify us; he had our price, and had our letter; we didn't get any notice; and that was the next time, the second visit, I met Father Shepard and he told me the money was not due yet, that we should have no fears—I asked him also whether Mr. McMurray had handed him the order; he said yes; I asked him when we could expect the money, or when McMurray would be paid; he said he could not tell me exactly, but we need have no fears, that the money was good and there was plenty in his hands to pay everybody, and that was about all.

20 Q. Did he say anything about the order then?

A. I asked whether he had received the order, and he said "Yes."

Q. Was that the whole conversation?

A. Yes, sir; the conversation didn't last about ten minutes. Then when he left me on the street, he went along with me when I went to the depot. Father Shepard assured me again the money would be paid, and I should have no fears at all, Mr. McMurray would pay every cent.

30

Mr. Coult:—Cross-examine.

Cross Examination by Mr. Humphreys:—

Q. You say Father Shepard assured you that you should have no fears?

A. That we should have no fears of not getting our money.

Q. From Mr. McMurray?

A. No, from him.

Q. Did Father Shepard promise to pay you the money?

A. No, Father Shepard told me he would notify us when the money would be paid to Mr. McMurray, and that we could be present and get our money right in his place, in his parlor. 10

Q. He told you to be present and he would see that you got paid too?

A. That we should be paid out of the money that was paid to Mr. McMurray.

Q. Didn't you serve a stop notice also on Father Shepard?

A. No, sir; I only requested him to retain so much money from Mr. McMurray to pay our bill.

Q. Did you ever get paid your bill?

A. Yes, sir; every cent. 20

Q. Who paid you?

A. Mr. McMurray.

Q. Well, that will do, that's all.

Re-direct Examination.

Q. When did you get your money?

A. Afterwards, long time afterwards Mr. McMurray paid us every cent due to us.

Q. That is after you could not get it any other way? 30

A. Of course not.

Mr. Coult:—I will read this power of attorney and offer it in evidence.

Mr. Humphreys:—You have not proved it.

Mr. Coult:—I understood you to admit it.

Mr. Humphreys:—All right; go ahead.

10

(Mr. Coult read said power of attorney.)

Said paper marked Exhibit P No. 2.

20

Mr. Coult:—We have here copies of contracts that were made for the construction and erection of this building with the different contractors, several of them signed by Father Shepard; we offer that in evidence, those that are signed by him particularly; one for plumbing, with John Collins, signed by Father Shepard.

Mr. Humphreys:—I object to this contract with John Collins.

30

Mr. Coult:—I propose to show that was part of the work done, and that his power was ample enough to sign contracts.

Mr. Humphreys:—The only one that is evidence is the one between the Sisters and the Smith Brothers.

The Court:—I understand they are not offered to prove the contracts themselves, but to prove the agency of Father Shepard?

Mr. Coult:—That was the reason; I was going to take those signed by him.

10

Mr. Humphreys:—I object to it on the ground it does not prove any agency; it simply proves an agency to sign contracts, not to accept orders.

The Court:—I think it may be offered.

Said paper marked Exhibit P No. 3. To which ruling of his Honor, the said justice, the defendant prayed a Bill of Exception, and his Honor, the said justice, sealed the exception accordingly.

20

A. Q. GARRETSON, [SEAL]
Justice Supreme Court.

Mr. Coult:—Here is another for plumbing and gas fitting, signed by Father Shepard with Barr & Company.

Said paper marked Exhibit P. No. 4.

30

REV. JOHN A. SHEPARD, affirmed, for the plaintiffs.

Direct Examination by Mr. Coult:

Q. I see, Farther Shepard, that you executed some of the contracts for the work done on St. Mary's Hospital?

A. Yes, sir.

Q. And you did that as agent and attorney of the Sisters?

10 A. I so felt. Yes, sir.

Q. Did you make the payments under these contracts?

A. I did, sir; until I left Passaic.

Q. Yes; until you left Passaic?

A. Until I left Passaic.

Q. What time did you leave Passaic?

A. The 6th of April, I think it was, I was appointed to Jersey City.

Q. Eh?

20 A. On the 6th of April I was sent by my Bishop to Jersey City, a new charge.

Q. The 6th of April of what year?

A. 1898,

Q. 1898?

A. 1898.

Q. What way did you make those payments?

30 A. If I remember rightly, we hadn't any money at all to build that hospital; we saw the agent of the Sisson estate, Mr. John W. Heck, a lawyer of Jersey City, and when payments became due he sent his individual check and I took his check and deposited it and drew against his check and paid bills; if my memory serves me right, it was that way; I don't know whether I endorsed Heck's check from the Sisson estate, or deposited his check and drew the money.

Q. Yes; do you mean you borrowed the money to build the hospital?

A. That is the idea.

Q. And as the work went on, money was furnished you?

A. By the mortgagee.

Q. Which checks were deposited by you and you gave your checks for the payment of the money to the several contractors? 10

A. I did.

Q. You superintended the entire construction, didn't you?

A. I did, sir.

Q. And did all the work of superintendence and payment?

A. In conjunction with the architect; I didn't pretend, of course, to superintend—

Q. Yes, of course, with the assistance of the architect.

A. Yes. 20

Q. In regard to the architect, that was simply to get his approval of the fact that the work had been properly done under the contracts?

Mr. Humphreys:—Don't lead.

A. Yes.

Q. Was that it?

A. That was it.

Q. Some of the contracts were signed by you, it seems? 30

A. I believe so, sir.

Q. And those were contracts under which the work was done?

A. Certainly.

Q. And the payments made?

A. The payments made.

Q. I think that's all.

Cross Examination by Mr. Humphreys:—

10 Q. Father Shepard, all that you did for the Sisters in a representative capacity, was done under this power of attorney up to the time that this order that has been referred to was brought to you by Mr. McMurray?

A. Yes, sir.

Q. Done under this; that's all.

Re-direct Examination:

Q. Just one minute. All the money that was paid on these contracts up to that time, were payments made by you?

20 *Mr. Humphreys:—*I object to the form of that question.

A. My impression is that was so; Mr. Heck may have made a payment direct himself—the mortgagee or the attorney for the mortgagee; the mortgagee was the Sisson estate.

Q. He could not have done it without your authority?

30 A. I might have given permission verbally; whether I did or not I cannot say. My impression is that the payments were made through me.

Q. That's all.

Re-Cross Examination:

Q. Had you any authority from the Sisters of

Charity of St. Elizabeth to charge them for any cost of this hospital in excess of the contract price?

A. Not one cent.

Mr. Coult:—One minute.

The Court:—We will have to interpret his power by the power of attorney. 10

Mr. Humphreys:—I am perfectly willing to go by the power of attorney.

Mr. Coult:—That is our case.

PLAINTIFF RESTS.

20

Mr. Humphreys:—I move to non suit in this case on the first ground which seems to me to be absolute that this alleged acceptance is an agreement to pay a conditional order, which is in this language: "The Rev. J. A. Shepard, Passaic, N. J. Dear sir: We authorize you to pay to Robert T. and William H. McMurray, the sum of \$2,360, eighty per cent. of our contract with him for iron work at St. Mary's hospital at Passaic, N. J.; same to be deducted out of our eighth payment." 30

10 That is a conditional order. It is an order requiring a sum of money to be paid out of a certain payment, and the authorities all hold in a case of that kind the acceptance of such an order is merely an agreement, an assignment; it is not a negotiable instrument; it is not an acceptance of a bill of exchange; it is an assignment of a chose in action.

20 Now, it was incumbent upon the plaintiff in this case to prove that the fund upon which this order was drawn was available for that purpose. There is no proof yet in the case that the eighth payment out of which this sum of money was to be paid, has ever fallen due. There is proof which indicates the possibility, which as a matter of fact was the fact in this case, that the eighth payment never became due, that it was consumed by the stop notices which were served under the Mechanics' Lien act, and therefore by operation of law the eighth payment was diverted from the purpose; and according to their story, assuming Father Shepard had accepted this order, he accepted it to be paid out of the eighth payment, and of course if

30 he had accepted it he could not by voluntarily paying the moneys over to Smith Brothers, have avoided the effect of his own acceptance. Any acceptance or assignment of choses in

action is to be done according to the law which exists, and if the effect of the law was to divert this money to another purpose outside of the control of Father Shepard, he certainly is not bound the same as he would be if this had been the acceptance of a bill of exchange.

There is no proof that the eighth 10
payment has ever fallen due.

Counsel further insisted that the obligation of the defendant, assuming that an acceptance had been shown, of the order, was to pay to Robert T. McMurray and brother the sum of \$2,360 out of the eighth payment due by the Sisters of Charity to Smith Brothers.

Counsel continued:

For the purposes of this motion (al- 20
though absolutely contrary to the fact) I may admit that the Sisters were liable to pay this \$2,360 out of the eighth payment referred to, provided such eighth payment actually became due and was lawfully available to the purpose to which Smith Brothers had assigned it. I fully admit that the Sisters or Father Shepard having accepted the order, could not by their own act avoid the condition and then 30
set it up as a defence in an action upon their acceptance, but the eighth payment in this case has all been consumed by stop notices, and was paid

out under an order of the Court of Chancery of New Jersey in an interpleader suit in which the priority of these stop notices was adjudicated.

10 To put the point briefly,—assuming that Father Shepard's acceptance is proved, and that it is binding on the defendant, nevertheless the acceptance was conditional upon the eighth payment becoming due, and liability would only arise in case and when the eighth payment should become due. As a matter of fact it never became due to the contractors. It was all consumed by notices, served on the owner, before the payment became due, and the owner was compelled, involuntarily, to make the whole payment to the servers of those notices; this by force of the decree of distribution.

20

I submit further that there is no evidence of any acceptance on the part of the Sisters of Charity of St. Elizabeth. This document is addressed to Father Shepard; there is nothing on the face of the document to identify the Sisters of Charity in any way with the order. The rule is that unless the principal for whom the agent acts appears upon the face of the instrument which the agent signs, the agent executing it may be held individually liable as upon his own contract, while the principal can-

30

not be held liable though he admits the agent's authority.

Now, I also submit to your honor that there is no evidence here of any agency on the part of Father Shepard which would justify him in accepting an order, by word of mouth, verbally. The only evidence we have of Father Shepard's authority is by this power of attorney which has been offered in evidence and reads as follows: 10

(Counsel read same.)

That does not give him any authority, except to execute such papers in writing. Therefore, I say, you cannot find in this power of attorney any authority on the part of Father Shepard by word of mouth to render the Sisters of Charity liable to pay a larger sum of money than was called for by the original contract. 20

On these grounds I respectfully ask for a non suit.

Mr. Coult replied.

The Court:—(after discussion) At present, it seems to me that the order was acceptd as it was expressed and it was expressed to be payable out of the eighth payment; if there never was any eighth payment which became due I do not see how the defendant can be called upon to pay it. 30

You may offer further evidence, if you choose, on that subject.

Mr. Coult:—Yes, sir; I will recall Father Shepard.

REV. JOHN A. SHEPARD recalled.

10 *Further Direct Examination by Mr. Coult:*

Q. Was the work under this contract finally completed?

A. It was, sir; not under that contract, under a new contract.

Q. Well, under the terms of this contract?

The Court:—Which contract?

Q. Under the terms of the original contract?

20 A. Mr. Smith did not complete the building.

The Court:—You have not got Smith's contract in, have you?

Mr. Humphreys:—I have a copy.

The Court:—It is not in the case I mean.

Mr. Humphreys:—Here is a certified copy.

30

Q. Look at the contract I show you and see whether that is the contract under which it was finally completed?

A. Who signed the contract?

- Q. This is the original contract.
 A. Mr. Palen completed the work.
 Q. (Another paper shown witness.)
 A. This was the original contract.
 Q. That is the original contract, is not it?
 A. Where are the signatures, please?

The Court:—Is that the original Smith contract? 10

Mr. Coult:—Original Smith contract.

Witness:—Is it signed?

The Court:—At the end, Father Shepard.

Witness:—These are the bondsmen, I believe; that is right. 20

- Q. That is the original contract, is it not?
 A. That is the original contract, sir.
 Q. Yes, sir. Now, this contract I show you now, a copy—certified copy, was that the subsequent contract made?
 A. This one which you have here?
 Q. Yes.
 A. A subsequent contract to finish up the work.
 Q. What work?
 A. Work on the hospital; carpenter and mason work principally. 30
 Q. (*Mr. Humphreys*):—What is that?
 A. Mr. Palen was the bondsman; the surplus money which was left—

Q. (*Further Re-Direct*): Was that contract entered into in pursuance to the provisions of the contract?

Mr. *Humphreys*:—This contract is not with Palen, this is Smith Brothers; we will get the record all mixed up. I have not got the contract with Palen.

10

Mr. *Coult*:—That is what I thought this was.

A. I can give you the history of the Palen contract, if you wish to hear it. Mr. Smith defaulted, he could not finish the work, and Mr. Palen was his bondsman; that is the only way we could hold him liable. He came there and volunteered to take the work and take the balance of the money; we would not allow him to do it, but we drew up a separate contract and he went in and bid with the others and was awarded the contract.

20

Q. Well, you did it under the provisions of this contract, didn't you?

Mr. *Humphreys*:—Oh, yes; we will admit that.

Q. Under the fifth provision, that should the contractor at any time during the progress of the work refuse, neglect, &c.; (read same) you should finish said work and the expense thereof shall be deducted from the amount of the contract?

30

A. I might say that I had legal advice; I don't

remember reading that particular clause of the contract. I had legal advice to do as we did, namely, throw this open to bidders rather than let Mr. Palen come in and take what was a big amount of money. We did it to protect people who had an interest in it. He came in and said, "I will finish it for the money you have on hand;" we said no; we would not permit that; we drew up a separate contract and Palen put in his bid. 10

Q. The work was finally completed?

A. Completed by the bondsman.

Q. (*The Court*) Under this Palen contract?

A. Not the original contract with himself, not under the original contract.

Q. I say with Palen?

A. With Palen.

Mr. Coult:—That's all.

20

Cross Examination by Mr. Humphreys:—

Q. Father Shepard, did the eighth payment under the contract between the Sisters of Charity and Smith Brothers, ever become due to Smith Brothers, so that you could have assuming that you wished to—you could have deducted out of that payment this order of McMurray and Brother?

A. It never became due.

Q. You say it never became due? 30

A. I received no authority from the architect to pay it.

Q. What became of the—after the building was completed—

Mr. Coult:—One minute; that is a question of law more than of fact.

10 *Mr. Humphreys:*—I am going to ask a question of fact. I want to show simply this: that Palen, when he took the contract, the money that was due to him consumed both the eighth and ninth payments, with the exception of some three or four thousand dollars. The Sisters of Charity then filed a bill of interpleader in the Court of Chancery.

Q. Now I ask Father Shepard whether, the amount that you had to pay Palen Brothers didn't consume all of the eighth payment and only leave a small balance of the ninth payment that was available for those entitled to it?

20 A. That order, I believe, was \$2,360 and the eighth payment was \$8,000, I think.

Q. The eighth payment was \$8,000, what was left?

A. About \$4,640 would be left.

Q. After you paid Palen Brothers, how much was left?

A. That matter passed into court, I know nothing about the sum; I was then out of Passaic.

30 Q. Was there ever any part of the eighth payment that became due to Smith Brothers?

A. The only way I knew when a payment became due was by a certificate from my architect. The certificate I never received; I would judge from that, it never became due.

Q. Did the architect ever give a certificate to Smith Brothers entitling them to the eighth payment?

A. I never saw it, if he did.

Further Direct Examination by Mr. Ten Eyck:

Q. The work was finally completed as specified in the original contract, was it not, the whole work? 10

A. I think so.

Q. Was finally done?

A. I think so; I was not there at the finishing of it; I had been removed.

Q. Was enough of the work done before your removal, which would have entitled Smith Brothers to their eighth payment if they had proceeded with it?

A. I have no way of knowing that, except from the architect.

Q. You knew, as a matter of fact, that the work was done? 20

A. Yes, sir.

Q. The contract says the eighth payment shall become due at a certain stage of the work; you don't deny that the work did proceed to a point where the eighth payment became due?

Mr. Humphreys:—I think it has been proved the building was finished, not under this contract.

30

Mr. Ten Eyck:—It was actually done, finally finished.

Mr. Humphreys:—Yes.

Q. That's all.

Mr. Humphreys:—I renew my motion.

The court thereupon refused to non-suit.

10

An exception to the ruling of the court is asked and allowed.

And His Honor, the Judge, seals the exception accordingly.

A. Q. GARRETSON, [SEAL]
Justice Supreme Court.

Mr. Humphreys opened for the defendant.

REV. JOHN A. SHEPARD recalled on behalf of the defendant.

20

Direct Examination by Mr. Humphreys:

Q. You recognize this order, Father Shepard? First, I will ask you, you are the rector of St. Michael's Church, of Jersey City?

A. Yes, sir.

Q. And you were formerly rector of—What was the name of the church?

A. St. Nicholas' Church, in Passaic.

Q. And you were in charge for the Sisters of Charity of St. Elizabeth?

30

A. Yes, sir.

Q. And you recognize this order as the order that Mr. McMurray presented to you?

A. Yes, sir; and I recognize my own handwriting on the back, the numbering.

Q. The words "No. 1" on the back?

A. No. 1.

Q. What does that No. 1 indicate?

Mr. Coult:—One minute. I object to that.

Q. Well, I will withdraw that question. Do you remember when this paper was first shown you, Father Shepard? 10

A. I do, sir.

Q. When with reference to its date?

A. I think a few days after it, the date I am not positive about; I simply got instructions when a shower of them commenced to come in, to number them.

Q. Well, that was objected to. What was the condition of the work at the time this order was presented to you? 20

A. We were between the seventh and eighth payments, and I really could not tell you just how much McMurray work was done.

Q. Was the work being done then or was it suspended?

A. At the time that order came in, I am not positive whether it was suspended or not.

Q. Do you know whether it was suspended soon after?

A. I don't know it was suspended.

Q. What did Mr. McMurray—will you tell what took place between you and Mr. McMurray when this order was presented? 30

A. Mr. McMurray came to me with that order and I gave him some advice that I thought was

very practical, because I had seen two orders, one was Mr. Heck—

Mr. Coult:—I object.

10

Witness:—I simply said to him I did not pay this order,—or I could not; what he had better do was to send in a stop notice. He didn't take the advice; I repeated it two or three different times when I met him afterwards. Finally I received one from him.

Q. And did you tell Mr. McMurray on that occasion you would pay that order?

20

A. I never told him I would pay him anything; I had had too many buildings erected before not to know I could not make such a promise.

Q. Had there been trouble before this order was served on you, between the material men and the contractors?

A. Mr. McMurray and the other contractors were asking me what about the eighth payment and threatening to send in their notices—

Mr. Coult:—I object to that question.

30

Q. I will change the form of that question. Had any of the sub-contractors or material men been pressing you for payment or looking after their money, about the time this order was served?

Mr. Coult:—I object to that as immaterial.

The Court:—Sub-contractors under the Smith contract?

Mr. Humphreys:—Yes.

The Court:—I think it may be admitted. 10

A. Several of them; the man who furnished the brick—

The Court:—I understand the question refers only to the Smith contract.

Q. That is it.

A. Campbell & Company furnished the brick, inquired about this payment and whether I 20 thought they would be in it, and what the amount of it was, and so on, and Foster & Company, who had done all the roofing.

Q. Do you remember Mr. McMurray serving this paper upon you?

A. Very well; I told him I thought he was late, there were so many notices in.

Q. What did he say when he served it?

A. He said simply, "I have got that notice for you now that you have been asking for." I said, "I think, Mr. McMurray, you will be too 30 late, there are so many of them in."

Said paper offered in evidence and marked Exhibit D No. 1.

Q. And previous to his serving that paper on you, had he served that stop notice for the balance of his contract?

A. He had; I numbered it also and the date it was received.

Q. The order related to 80 per cent. of his contract, and this stop notice related to the balance, twenty per cent.

10

The Court:—That was served when?

Q. It was dated the 21st of February. Do you remember when it was served on you?

A. I think the same day, about the same day.

Q. Tell me when the notice D No. 1 was served on you?

A. This was served on me and I think it was the last I received, any of them?

20

Q. When?

A. I could not say when.

Q. Is there anything on it to indicate it?

The Court:—It is dated when?

Mr. Humphreys:—That is dated March 12th, 1898.

Q. Did you ever meet Mr. McMurray on the work after that?

30

A. I really could not say—Yes, I am positive I did. I was up there, as he stated here, once or twice a day.

Q. Did he at any time make the remark to you, or any demand upon you, or any sugges-

tion that he considered you had accepted this order?

A. When he gave it to me he asked me to write across the face of it "accepted." I told him no.

Q. You would not?

A. I didn't think his order was any good, when he presented it.

Q. You declined to accept it when he presented it? 10

A. I declined to accept it; I gave him the advice I thought he had better put in a stop notice.

Q. Now, Father Shepard, were you in charge of the building at the time the contract was taken out of Smith Brothers' hands and put into Palen's hands?

A. I think I was; but if I remember rightly, the architect took it up with the Sisters of Charity then; I was removed on the 6th of April, I don't know whether Mr. Palen had taken the work then or not; I am inclined to think he hadn't. 20

Q. Did you attend the trial of the interpleader suit?

A. I was there, yes, sir.

Mr. Humphreys:—At this point I will offer in evidence the entire record in the case of the Sisters of Charity of St. Elizabeth against William J. Smith and others, and will ask leave to refer to the bill of complaint of the Sisters of Charity. I am going to 30

show that McMurray Brothers are party defendants to this suit.

Mr. Coult:—I object to that.

The Court:—You object to the offer?

10

Mr. Coult:—Yes, sir.

The Court:—It may be admitted. Counsel may have an exception. Do you desire an exception?

Mr. Coult:—Yes sir; without argument?

The Court:—I will hear argument, if you wish.

20

Mr. Coult:—I don't know what the purpose is; I will be glad to hear.

30

Mr. Humphreys:—I am going to show the amount of money that was ascertained to be due on this contract and what was done with it, and how it was dealt with by the court. I am going to show by the bill of complaint the fact that the contract was taken out of the hands of Smith Brothers and put into the hands of Palen, and to show the amount that remained unpaid on the completion of Palen's contract, and the fact that that money was paid into the Court of Chancery,

and all the defendants, including Mc-Murray Brothers, were directed by the court to interplead. Then I shall show how that money was dealt with and ordered to be paid to the various party defendants who had served stop notices and there remained no sum to pay Smith anything, or to pay Mc-Murray Brothers on any supposed acceptance of this order. 10

The Court:—That seems to be competent on the question of whether there was any eighth payment out of which this order was to be paid. I will hear you, if you desire to be heard, Mr. Coult.

Mr. Coult:—Counsel asks to put this entire record in. After this building had gone, under the contract into the hands, practically back to the hands of the Sisters of Charity to finish it up under the terms of the contract, there remained some money in their hands due and there have been various notices served, a bill of interpleader was filed and all the parties made parties who had given notices, all who might have liens upon this fund, and they were brought into court for the purpose of having the fund distributed by the Court of Chancery according to law. Now I cannot see how we are in any 20 30

10

way affected by the record in this suit. Whatever fact may have to be proved in that case, would have to be proved again in this case, not by that record, but by testimony. It was a suit in which the parties are brought whether they are willing or not, and the record does not seem to me to be competent evidence in this case as against us. They can prove and have attempted to prove, as a matter of fact, by what method the contract was subsequently completed; that there was a default before the eighth payment fell due, and under the terms of the contract they went on and finished up the building. Now the settlement of that fund in the Court of Chancery will have nothing to do with this case, as far as I can see at all.

20

The Court:—(After further discussion) I think the record may be admitted.

30

Mr. Humphreys:—Then, your Honor, I don't think it is necessary to read the bill of complaint; I have already stated what the points are. They allege all the circumstances that have been detailed here of the contract between Smith Brothers and the Sisters and that all but the eighth and ninth payments had become due when default was made. Then Palen Brothers

were engaged and they completed the contract, and that at the time it was completed there was only remaining this sum of \$4,459, in the Sisters' hands, and that they paid the money into court and asked the various defendants to interplead. McMurray filed an answer in which he claimed on this order in almost every conceivable shape in which he could; of course that was the work of his counsel. 10

(Counsel read same.)

The court then made this final order of distribution in which it did not give to him any share of the funds, but reserved to him the right to go into a court of law and prove an acceptance, if he could, and that is what he has failed to do. 20

Mr. Coult:—The Court, of course, will allow us an exception to the ruling permitting this evidence in.

The Court:—Yes, you may have an exception.

Q. That's all.

Mr. Humphreys:—Is it necessary for me to prove this record by calling witness, or will you admit it is the record? 30

Mr. Ten Eyck:—Subject to the exception.

Mr. Humphreys :—Subject to the exception you admit that what I produce as the record is the actual record of the suit of the Sisters of Charity—

Mr. Coult :—We don't object to the form in which the offer is made.

10

Mr. Humphreys :—I have a gentleman here from the clerk's office.

Mr. Coult :—I presume he has got the record if he is here for that purpose ; if he is here he must have brought it.

The Court :—There is no objection to the form of the offer of the record ?

20

Mr. Coult :—No ; but to its competency and relevancy as testimony in this cause.

Cross Examination by Mr. Coult :

Q. You say Mr. McMurray came to see you ; where did he come, Father Shepard ?

A. He said that he came to the house ; my impression was that I received it on the field where the building was going up, that he handed it to me there.

30

Q. Well now, what do you say ?

A. My impression is that I received it there ; I had no desk in the room in which I could entertain Mr. McMurray. He talked about a desk ; there was no desk.

Q. Please give me an answer.

A. I will try to, categorically.

Q. Your impression is that you received it at the building. Did you have an office?

A. I had no office, except the place—

Q. The house?

A. No office at all ; a reception room for visitors.

Q. Well, you had a house? 10

A. Oh, yes ; I had a house.

Q. Did not Mr. McMurray often come to your house?

A. I have no recollection of it, sir.

Q. No recollection of it. Do you recollect this gentleman (indicating Mr. Benas)?

A. Yes, sir.

Q. Where did you see him ?

A. I think he called at my house.

Q. When, with reference to the time you say you saw Mr. McMurray ? 20

A. I really could not say whether it was before or after.

Q. Did you see him more than once ?

A. I have no recollection of seeing him but once.

Q. What did he want ?

A. He came I think, to notify me of the fact that Mr. McMurray was indebted to him ; I gave him to understand I had nothing at all to do with that.

Q. Eh? 30

A. I gave him to understand I had nothing at all to do with that.

Q. I didn't ask you that; I asked you what he wanted?

A. Yes.

Q. Yes. What did he say to you?

A. I have got an impression that he left me a stop notice.

Q. Eh?

A. I have an impression that he left me a stop notice too.

Q. He read you a stop notice?

10 A. Left me one.

Q. Left you one. Have you got one from him?

A. I have not it with me; it must be in the chancery proceedings. My impression is that he left me one stating the amount.

Q. (*Mr. Humphreys*) What is the name?

A. Switka.

Q. (*Further cross*) Did he tell you how much he was interested and why he came to see you?

20 A. Not particularly that I have any recollection of; simply that he was owed money and would like to get it.

Q. Eh?

A. Simply that he was owed money and would like to get it.

Q. He says that you told him that you would pay McMurray; is that so?

A. No, sir.

Q. He says that you told him to send you a statement of the amount that McMurray owed him; is that so?

30 A. No, sir.

Q. Eh?

A. No, sir;—do I understand the question right?

Q. Eh?

A. Do I understand the question right?

Q. Yes, I think so.

A. That he said—

Q. He said.

A. That I was to send him word?

Q. That he was to send you word—that you requested him to send a written—word in writing of the amount of his claim against McMurray?

10

A. I never promised—

Q. No—Did you get such a writing from him?

A. I have some writing from him.

Q. Eh?

A. I may have it, some writing.

Q. Oh, not “may.”

A. The recollection I have of the writing is that it was a stop notice.

Q. What do you say, did or did not you get such a notice from him?

A. Well, there is such a thing as doubt.

20

Q. Eh?

A. Is not there such a thing as doubt?

Q. I know there is.

A. My mind stands suspended. I think I got a notice, I said, stating the amount that was due to him.

Q. Did you receive that by registered letter?

A. I have no recollection of that.

Q. Do you know how you received it?

A. No, sir; I do not; I supposed it was like the others, by hand.

30

Q. Eh?

A. I would imagine it was like the others, by hand; I can't say positively how I did receive it.

Q. Did you see this gentleman, Mr. Benas, before or after you saw Mr. McMurray, in reference to McMurray presenting his order?

A. As I said in the beginning, I have no recollection whether it was before or after.

Q. Well, is your recollection clear about having seen him?

A. Very.

10 Q. Very clear?

A. That I have seen him, yes.

Q. Is your recollection of what took place between you and him clear?

A. Substantially.

Q. What is your recollection of what took place between you and he—I mean this gentleman?

A. I told him he would have to look to Mr. McMurray.

Q. That's all you said?

20 A. That's all; dispatched him as soon as possible.

Q. Eh?

A. Dispatched him as soon as possible.

Q. What did you say to McMurray, or what did McMurray say to you, when he came?

A. Mr. McMurray came and gave me this order—

Q. Now, you say he came, what do you mean by that—came where?

A. Came to Passaic.

30 Q. Eh?

A. Came to Passaic and met me at the hospital building; that is my recollection of it.

Q. And gave you that order?

A. Gave me the order.

Q. Well, what did he say?

A. He asked me to be kind enough to write my name across the face of it "accepted," which I declined to do; I demurred at the taking of it.

Q. Is that what he said—"I want you to write your name across the face of this 'accepted?'"

A. "Write accepted."

Q. How did he come to say that?

A. Well, I think he would be the proper judge, why he said that. 10

Q. Eh?

A. I don't know why he said it.

Q. What did you say?

A. I positively declined.

Q. Is that all that took place?

A. That is all I have any recollection of.

Q. Now, did you tell him in that conversation how much money there was still due under the contract?

A. I may have. 20

Q. Eh?

A. I may have, I don't remember.

Q. Of course you may have.

A. I don't remember having told him. McMurray and I were very friendly, talked several times about it.

Q. Did you tell him that you had abundant security for the performance of the contract?

A. I did; I said—

Q. Eh?

A. I told him that we had sufficient money there if Mr. Smith would finish the building. 30

Q. That—I didn't catch that.

A. We had sufficient money to fill—to pay Mr. Smith if he finished the building.

Q. Well, this all was a part of the conversation that you had with him at the time this order—

A. Oh, yes; he asked me when the payment was coming due, for instance, before the seventh he asked me, Mr. McMurray did, told me he hadn't received anything on the seventh, and so on.

10 Q. Now you are remembering more than he said?

A. These are conversations—I am not remembering any more—when this notice was handed me; these are conversations we had when we met nearly every day at the hospital while he was working there.

Q. You are not speaking of the same conversation to which I directed your attention at the commencement?

20 A. No, because the eighth payment was coming due then; conversations before the seventh payment would not be conversations before the eighth.

Q. I didn't ask you about any conversation relating to the seventh payment; I asked you what conversation took place at the time this order was presented?

A. Simply that I advised him to get—to send me a stop notice; a lawyer had told me that was the proper way.

Q. Send what?

30 A. A stop notice instead of an order; I thought I was looking after Mr. McMurray's interest.

Q. Did you at that time know that there was any difference between an order and a stop notice?

A. I did.

Q. Eh?

A. I did.

Q. At that time?

A. At that time.

Q. Did you tell him so?

A. I told him so.

Q. Eh?

A. I told him that I thought he had better put in a stop notice.

Q. That's all.

10

Re-Direct Examination:

Q. Father Shepard, I see in this bill of complaint, the record that has been offered in evidence, this clause, "that on or about the second day of February, 1898, by mail, dated on that day and addressed to John Shepard, St. Nicholas' church, Passaic" &c., (reading). Does that refresh your recollection so you can say that was the instrument?

20

A. I don't know how I received that.

Q. Did you receive such an instrument?

A. I said I received I thought a stop notice of Switka's, that is the only recollection I have.

Q. When I read this does not that refresh your recollection?

A. There is nothing more that I see, except it says it came by mail.

Q. It shows you were correct in your supposition?

A. That's all.

30

Re-Cross Examination:

Q. You have no such notice?

A. I think I filed it with the rest of the papers

when I went in the Chancery suit; it was put in there.

Q. Do you mean to say it was part of the proof in that case?

10

Mr. Humphreys:—Yes, sir; it was obviously a bad stop notice because it was given by a sub-contractor on a sub-contractor.

Q. That's all.

Mr. Humphreys:—That is the defense, your Honor.

DEFENDANT RESTS.

20

ROBERT T. McMURRAY recalled in rebuttal.

Direct Examination by Mr. Coult:

Q. Father Shepard says that the conversation which you had with him, according to his recollection was at the hospital building; is that correct?

A. No, sir.

Q. Where was it?

30

A. It was at the parsonage.

Mr. Humphreys:—This is only cumulative.

The Court:—You had already stated

in your direct examination where this conversation took place.

Q. Mr. McMurray, Father Shepard says that he told you in the conversation when you presented this draft, that you had better present a notice under the lien law; what is the fact about that?

Mr. Humphreys:—I object. I asked the same question on cross examination and he denied that Father Shepard had said it.

10

The Court:—I think you did. He was asked about it and then shown this notice.

Mr. Coult:—If the witness has already denied that—of course I can't carry all the testimony in my mind.

20

The Court:—I understood him to deny it. I have this: That he did not say that the order was not good; he did not advise me to serve a stop notice.

Q. Well, I am speaking now with reference to the time when you went to present the order. Did he at any subsequent time?

30

A. Yes, sir.

Q. When was that?

A. That was, oh, three or four weeks after, four or five weeks after when I met Mr. Shepard

at the building and we had a general talk about the matter; he told me then that that order was not any good. I said he promised to pay me; he said, "oh, no."

Q. Eh?

A. He said that order was no good, "Every lawyer in Paterson knows that now." Mr. Shepard's testimony refreshes my memory, that is
 10 what brought me around about drawing these other papers and putting them in.

Q. That's all.

Cross Examination by Mr. Humphreys:

Q. I thought you said, Mr. McMurray, that up to May 1st you considered your order perfectly good?

A. Well, up to the time I met Father Shepard.

20 Q. You swore positively in your cross examination; I gave you an opportunity of correcting yourself and nailed you right down; you said positively that up to May 1st you thought the order was absolutely good. So now how do you reconcile that with the statement that it was four or five weeks after, Father Shepard told you the order was no good?

A. It may have been longer than that; it was when they decided to have a new contract, when everybody knew; that was the time Father
 30 Shepard gave me the advice he says he gave me in the first place; if he had given me that advice then, I would have run; \$3,000 is a lot of money to me.

Q. Can you reconcile to the jury your state-

ment in your cross examination previously made, that up to May 1st you had every reason to believe your order was good, with the statement you make now that four or five weeks after the order was given Father Shepard told you it was useless?

A. Well, I am at a loss now to make an explanation, but it was a subsequent conversation after that, with Father Shepard himself; I went to Passaic that morning with the object of securing that money; that is why I went. 10

Q. You see the result now, don't you, of nailing yourself down to my first—

A. I hadn't got a cent on the work; I hadn't asked anybody for a cent; I performed all my contract and when the money was not forthcoming I ran for cover and was assured I would be paid.

Q. Didn't you try and play on Father Shepard's sympathy at that time and tell him you had been in a fix like that before and didn't want to be again? 20

A. No, sir; I never went near Father Shepard before the contract was fulfilled with Smith Brothers.

Q. Didn't you tell him that you had lost everything in a similar way and beg him to take care of you?

A. No, sir.

Q. That's all.

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TESTIMONY CLOSED.

Mr. Humphreys:—I renew my motion and would ask your Honor to direct the jury in this case to find a verdict for the defendant on the grounds on which I moved for a nonsuit.

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Mr. Coult:—I don't know that we can argue that question any more fully than we have already.

The Court:—We will take our recess now.

RECESS.

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AFTER RECESS.

Mr. Coult:—Before your Honor determines this question I would like to make one or two suggestions which have occurred to me since in thinking about it.

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The payments which were to be made under the original contract aggregated about \$40,000; the last payment, the ninth, was nearly \$10,000, while the others ranged from four to five thousand dollars.

The Court:—What was the eighth?

Mr. Coult:—\$3,000 and the ninth nearly \$10,000. Now it occurred to me that as between these parties in their different relations—assuming now that the fact is that the order was an accepted order, accepted payable out of the eighth payment, that because the contract contained a provision that the owner might finish it up at the expense of the contractor, for that is what it amounts to, if necessary— 10

The Court:—Let me ask a question. The fact was, I suppose, that this eighth payment had been earned?

Mr. Coult:—Almost every bit of it.

The Court:—That when Smith defaulted and the contract was made with Palen, the contract with Palen was not for the balance of the unpaid amount, it was for less? 20

Mr. Humphreys:—For less, leaving a surplus.

The Court:—And he was paid and there was still a surplus on the Smith contract? 30

Mr. Humphreys:—Yes, sir; but that was a small surplus—a surplus of \$4,500.

The Court:—That was more than enough to pay this order.

Mr. Coult:—Yes, sir; I was going to present two or three considerations which occurred to me.

10 *The Court:*—Perhaps my mind has been running in the same directions as yours, Mr. Coult.

Mr. Coult:—Of course, that is a question which presents another view which I will consider later.

20 Now, the owner undertook to finish up under the contract the balance of the contract work to be done; he performed some little that was to have been done when the eighth payment become due and finished it up for less than the entire amount that was due on the eighth and ninth payments, by about \$4,500.

30 Now, as between a person who had a fixed right payable out of the eighth payment, and the owner, could it be said that he hadn't a right to look to the fund out of which that was to be paid, if that fund was not exhausted in the finishing of the contract? That is my point. If it did become due, not all of it but part of it became due at least because he had still money in his hand applicable to the payment of the original contract. He says, of

course, he was notified by other persons who hadn't been paid that he must retain this money and pay it to them; but we say that our rights became fixed before that time. If we had any right at all it was on the acceptance of our order.

Now, whether as a matter of fact we depend on that are questions to go to the jury—my friend has raised some question about it and we would like to argue that before the jury; but, as a matter of fact, I take it we had a right on the strength of our accepted order, if it was, to have whatever was due on the eighth payment at any time, while the owner reserved the right to finish it up at his expense; if he had any money over, it was applicable to our order.

Mr. Humphreys:—My point is simply this, that this order operated both at law and in equity as an assignment of so much of the eighth payment as would be necessary to pay \$2,360. The assignment of that contract was subject to the law of the land existing at that time, and if, as has been shown by the record here, stop notices were served which under the decree of the Court of Chancery took precedence over this order, why then there was in fact no eighth payment available for the purposes of this assignment.

I think that embraces the point, your Honor.

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The Court:—I think I understand. If I make a mis-statement of the facts in this case, I would like you to correct them. As I understand it, Smith defaulted on his contract after this order was given and presented, and accepted, as the plaintiff claims.

Mr. Humphreys:—There is no evidence as to that, whether it was after or immediately before.

Mr. Coult:—Oh, yes; the evidence is clear.

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The Court:—At any rate, no subsequent contract was made to carry out this work until after this order was presented.

Mr. Humphreys:—No, that is right.

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The Court:—And before the eighth payment became due a new contract was entered into with Palen to complete this work, which he did for a less sum than remained due on the Smith contract.

Mr. Humphreys:—That is right.

The Court:—When Palen was paid,

there was a balance for distribution among those who had claims against Smith.

Mr. Humphreys:—Yes, sir.

The Court:—It seems to me that all that the plaintiff can insist upon is that this order was a claim against Smith and against the eighth payment, perhaps, due to Smith under his contract, and should have been paid out of that balance; that is the claim, that this should be paid out of that balance; he could not have any claim ahead of Palen, who did the work in order to make the eighth payment due. Plaintiff's claim must be that this order should be paid out of the balance after Palen had been paid. After Palen was paid the defendants filed a bill of interpleader in chancery for directions as to how this balance should be divided, making as parties all those who had filed stop notices against Smith's claim under his contract (there being a balance after Palen had been paid) and also these plaintiffs, making them defendants not only because of having filed a stop notice, but because of this order. Am I correct about that ?

Mr. Humphreys:—Yes, sir.

The Court:—In adjudicating upon

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that case, as I understand, the Court of Chancery did not adjudicate upon the question of whether this order had been accepted by the defendants so as to make them liable to pay it out of the balance after the payment had been made, so it seems to me it is left to this Court to determine whether the defendants incurred any liability under this order.

Mr. Humphreys:—That is a question of law.

The Court:—As a question of fact.

Mr. Coult:—A question of law and fact both.

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The Court:—And it must be left to the jury to say whether they accepted the order or not.

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Mr. Humphreys:—Your Honor then holds that the acceptance of the order would bind them, notwithstanding the fact that a stop notice under the Mechanics' Lien act takes precedence over the assignment effected by this order. Your Honor necessarily holds that the acceptance of this order has a greater effect than an assignment of this fund.

The Court:—I do not know about

that. I must decline to direct a verdict and leave to the jury the question of whether the defendant accepted this order; that is a question of fact for the jury to determine.

Counsel for the defendant may have an exception to the refusal to direct.

To which ruling of his Honor, the said Judge, the defendant prayed a bill of exception, and his Honor, the said Judge, sealed the exception accordingly. 10

A. Q. GARRETSON,
Justice of the Supreme Court.

Mr. Humphreys:—Yes. The question then is whether the order was accepted.

The Court:—Whether the order was accepted. 20

Counsel summed up.

The Charge.

The Court (Garretson, J.)

Gentlemen of the jury. This is an action brought by the plaintiffs, Robert T. McMurray and William H. McMurray, against the Sisters of Charity of St. Elizabeth, to recover the sum of \$2,360, being the amount contained in an order bearing date the 31st of January, 1898, signed by Smith Brothers, which order it is claimed was accepted by the defendant.

The form which this case has taken leaves for the jury to determine but one question, and that is whether the order which has been offered in evidence, made by Smith Brothers, was accepted by the defendant. If it was, then the plaintiffs are entitled to recover the amount of it with interest for the time which I will indicate; if the order was not accepted, then your verdict should be for the defendant.

The circumstances leading up to this order seem to have been these, as disclosed by the evidence.

Smith Brothers had entered into a contract with the Sisters of Charity of St. Elizabeth to do certain work about a building, a hospital; they had sub contracted a portion of that work to the plaintiffs in this case and the plaintiffs had performed part of the work called for by their sub contract. They demanded payment of Smith Brothers, who were their debtors; Smith Brothers had no money to pay them, and instead of paying them in cash, they said "We will give you an order upon the defendant in this case, the Sisters of Charity of St. Elizabeth, to pay out of

moneys which are coming due to us, the amount that we owe you," and the plaintiffs, the McMurrays, were willing to accept this order.

Of course, that was not binding upon the defendant, the Sisters of Charity, unless they agreed to it; they could not be called on to pay Smiths' debt to the McMurrays, unless they were willing to pay it.

The plaintiff Robert McMurray, took the order 10
which he had received from Smith Brothers, to Father Shepard, who was acting for the Sisters of Charity, to have it accepted, and right here arises the question for your determination. Did he accept it? If he did, then the defendant is bound to pay, and your verdict should be for the plaintiffs; if he did not, your verdict should be for the defendant. You are to determine that from the testimony and the papers in this case.

You have here the order, which bears date on the 31st of January, 1898; Mr. McMurray has testified to the circumstances under which he took 20
it to Father Shepard, and what transpired. If his statement is true, Father Shepard accepted it. Father Shepard on the other hand, says it is not true, that he did not accept it; that it was handed to him, he made some mark on it "No. 1" and at the time he told Mr. McMurray he had better serve a stop notice; and it appears subsequently Mr. McMurray did serve a stop notice as to this very sum, having previously served a stop notice dated 21st of February, 1898, for \$625, 30
being for other work which he had performed for Smith under his contract.

These papers will be presented to you for your consideration and may furnish some light on the

subject. The notice of February 21, 1898, for the \$625, makes reference to the order for \$2,360. The notice for \$2,360 is dated on the 12th of March. It will be for you to determine under all the evidence in the case whether Father Shepard, acting for the defendant, accepted this order or not. If he did, the verdict should be for the plaintiffs; if he did not, the verdict should
 10 be for the defendant. The amount of the verdict, if for the plaintiffs, should be for \$2,360, and interest from the 1st of February, 1899, to the 1st of November, 1901, substantially, the first day of the Supreme Court; that is thirty-three months. You will figure that, gentlemen, if you find for the plaintiffs; if you find for the defendant, of course there is no figuring to be done. If you find for the plaintiffs your verdict should be for \$2,360, with interest from the 1st of February, 1899, to the 1st of November, 1901.

20 I have been requested to charge by the defendant that there is no evidence in this case that Father Shepard had authority from the Sisters of Charity to verbally accept this order. I decline to charge that.

I am also requested to charge that if you believe Father Shepard accepted this order the effect of such acceptance was an agreement to pay the amount of such order out of any funds, which if no stop notices had been served, would have been due to Smith Brothers under the contract.
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I have no objection to charging that. That will not affect your action at all. I think that is a question of law and is covered already by

the ruling of the court, as well as the second request to charge.

The second request is, "The defendant or its agent, Father Shepard, could not by voluntarily paying these moneys to Smith Brothers or their assignees, defeat the effect of the acceptance. But if under the effect of the Mechanics' Lien act, the servers of stop notices were entitled to this fund by operation of law as seems to have been the case, in preference to McMurray Brothers,—the acceptance being conditional on a fund being available for the payment of the order, failed of any legal effect."

I decline to charge that.

So that the question left for you to determine is still whether this order was accepted or not. If it was not, your verdict should be for the defendant; if it was accepted, then your verdict should be for \$2,360 and interest for thirty-three months at six per cent., making a total of \$2,749.30, if there is any sum found for the plaintiff.

Counsel for the defendant then asked an exception to so much of the charge of the court in which the court left to the jury that one question whether the order was accepted or not, and charged the jury that if the order was accepted, then the verdict must be for the plaintiffs; and to the same effect repeated several times throughout the charge.

And it is sealed accordingly.

A. Q. GARRETSON,
Justice of the Supreme Court.

Counsel for the defendant also prayed a bill of exception to the court's refusal to charge respectively each request to charge on the part of the defendant as requested, and it is sealed accordingly.

A. Q. GARRETSON,
Justice of the Supreme Court.

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Exhibits.**EXHIBIT P 1.**

New York, January 31, 1898.

Rev. J. A. Shepard,
Passaic, N. J.

Dear Sir:—

We authorize you to pay to Robert
T. McMurray & Brother the sum of 10
\$2,360.00 (80° of our contract with
him for iron work on St. Mary's hos-
pital at Passaic, N. J.,) same to be de-
ducted out of our eighth payment.

SMITH BROS.,
WM. J. SMITH.

EXHIBIT P 2.

Know all men by these presents, that "Sisters 20
of Charity of St. Elizabeth," a body corporate of
the state of New Jersey, does hereby make, con-
stitute and appoint Rev. John A. Shepard, of the
city and county of Passaic and state of New
Jersey, its true, sufficient and lawful attorney, for
it and in its name to exercise a general control
and supervision of the erection and construction
of "St. Mary's hospital," in the city of Passaic
aforesaid, and to give, execute and deliver in
said corporate name, or in the name of its said
attorney, all contracts, agreements, bonds, 30
notes, releases, receipts, acquittances, dis-
charges, and all other instruments in writing,
whether under seal or otherwise, of whatever
nature as to its said attorney may seem meet,

for the carrying on of said business of erecting and constructing of the said "St. Mary's Hospital," and to do and perform all necessary acts in the execution and prosecution of the aforesaid business in as full and ample a manner as it might do if it were personally present.

In witness whereof, the said corporation has caused its corporate seal to be hereto affixed and
 10 attested by its secretary, and these presents to be signed by its president, the day of March, eighteen hundred and ninety-seven.

[SEAL]

CATHERINE MEHEGAN,
President.

Signed, sealed and delivered in the presence of

MARY KELLIGAR,
Secretary.

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

Be it remembered, that on this day of March, in the year of our Lord, one thousand, eight hundred and ninety-seven, personally appeared Mary Kelligar, who being by me duly sworn, doth depose and make proof to my satisfaction, that she well knows the corporate seal of "Sisters of Charity of St. Elizabeth," the grantor named in the foregoing instrument ; that the seal thereto affixed is the proper corporate seal of said corporation, and that the same was
 30 so affixed thereto, and the said deed signed and delivered by Catherine Mehegan, who was at the date and execution thereof, president of said corporation, in the presence of said deponent, as the voluntary act and deed of said corporation,

and that said deponent signed the same as subscribing witness.

MARY KELLIGAR,
Secretary.

Sworn and subscribed before me, at Madison, N. J., the date aforesaid.

EXHIBIT P 3.

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Contract for plumbing work on hospital with John Collins. This contract was signed by Father Shepard.

EXHIBIT P 4.

Contract for plumbing and gas fitting with Barr & Co., also signed by Father Shepard.

(These exhibits are not copied, by consent, their only significance being the fact that they were signed by Father Shepard as agent for the defendant, and that fact being here admitted.)

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EXHIBIT D 1.

PASSAIC, N. J., March 12, 1898.
To the Sisters of Charity of St. Elizabeth.

Take notice that there is due to us from Smith Brothers, contractors the sum of twenty-three hundred sixty and no-100 dollars (\$2360 no-100) for work done and material by us furnished and by you used in the erection of your new building on Pennington avenue, Passaic, New Jersey, known as St. Mary's hospital.

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That we have demanded of Smith Brothers payment of said sum and that they refused to pay us and we therefore notify you to retain the

amount so due out of the money owing by you
to said contractor or to become due to said con-
tractor and pay the same to us.

ROBT. T. McMURRAY & BRO.,
United Charities Building,
Fourth Ave., and 22nd St.,
N. Y. City.

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Stop Notice for Balance of Contract Price.

BROOKLYN, N. Y., Feb. 21, 1898.

To the Sisters of Charity of St. Elizabeth.

Take notice that there is due to us from Smith Bros., contractors, six hundred twenty-five and no-100 dollars over and above their order for twenty-three hundred sixty and no-100 dollars handed you on January 26, 1898, for work done and materials furnished by us and used by you in the erection of your new building on Pennington avenue, Passaic, N. J., known as St. Mary's Hospital. 10

That we have demanded from Smith Brothers payment of said sum, and that they refused to pay us, and we therefore notify you to retain the amount so due out of the money owing by you to said contractor, or to become due to said contractor, and pay the same to us.

Very truly yours,

ROBT. T. McMURRAY AND BRO. 20

**Contract Between Sisters of Charity of St.
Elizabeth and Smith Brothers.**

C-1 Oct. 19, 1899.

Articles of Agreement made this seventeenth day of March in the year one thousand eight hundred and ninety-seven between the Sisters of Charity of St. Elizabeth a corporation existing under the laws of the State of New Jersey party of the first part, and Smith Brothers, of Rutherford, New Jersey, parties of the second part.

First—The said parties of the second part do hereby for themselves, their heirs, executors and administrators, covenant, promise and agree to and with the said party of the first part its executors, administrators or assigns, that they the said parties of the second part their executors and administrators, shall and will, for the consideration hereinafter mentioned, on or before the time hereinafter mentioned well and sufficiently erect and finish the mason, carpenter and other works required for the erection and completion of a new building for St. Mary's hospital to be erected on Pennington avenue near Ayerigg avenue, in the city of Passaic, New Jersey, agreeably to the drawings and specifications made by Schickel & Ditmars, architects, and signed by the said parties, within the time aforesaid, in a good workmanlike and substantial manner, to the satisfaction and under the direction of said architects, to be testified by a writing or certificate under the hand of the said architects, and also shall and will find and provide such good, proper and sufficient materials,

of all kinds whatsoever, as shall be proper and sufficient for the completing and finishing all the mason work, carpenter work and other works of the said building mentioned in the work, and material specifications for the sum of thirty-nine thousand nine hundred and eighty-seven dollars (\$39,987.00).

And the said party of the first part does hereby for itself, its heirs, executors and administrators, 10
covenant, promise and agree, to and with the said parties of the second part, their executors and administrators, that it, the said party of the first part, its executors and administrators, shall and will, in consideration of the covenants and agreements being strictly performed and kept by the said parties of the second part, as specified, well and truly pay, or cause to be paid unto the said parties of the second part, their executors, administrators or assigns, the sum of thirty-nine 20
thousand, nine hundred and eighty-seven (\$39,987.00) dollars, lawful money of the United States of America, in manner following :

1st payment.—When all walls and piers of cellar and basement are built, and the beams of first story floor laid throughout.....	\$4,500	
2d payment.—When all walls of first story are up and second floor beams laid	4,000	
3d payment.—When all walls of second story are up and third floor beams laid.....	4,000	30
4th payment.—When all walls of third story are up and fourth floor beams laid.....	4,000	

	5th payment.—When the roofs are set up and planked, all walls and chimneys topped out, and the structural iron work of piazza set.	4,000
	6th payment.—When all roofing and metal work is completed, leaders run down and the inside all furred, ready for plastering and deafening, and underfloors laid.	3,500
10	7th payment.—When the brown coat of mortar is on throughout and the iron and wooden stairs are set except slate steps.	3,000
	8th payment.—When the hard finish of plastering is done except patching, the standing trim up, all sash hung, slate stairs set, and the tiling done.	3,000
20	9th payment.—When the entire work under this contract is completed in accordance with the plans and specifications and to the satisfaction of the architects, the final balance of.	9,987

Provided that in each of said cases, a certificate shall be obtained from and signed by the said architects, and that the parties of the second part comply with the laws of New Jersey regarding release of liens, etc.

And it is hereby agreed by and between the said parties: The party of the first part being hereinafter designated as the owner, and the parties of the second part as the contractors:

First—The specifications and drawings are intended to co-operate, so that anything exhibited in the drawings and not mentioned in the specifications, or vice versa, is to be executed the

same as if it were mentioned in the specifications and set forth in the drawings, to the true meaning and intention of the said drawings and specifications, without any extra charge whatsoever.

Second—The contractors, at their own cost, are to provide all manner of materials and labor, water, scaffolding, implements, moulds, models and cartages of every description, for the due performance of the work, and everything required for the proper execution and completion of any parts of the same as directed by the architects is to be furnished without extra charge. 10

Third—Should the owner, at any time during the progress of said work, request any alteration, deviation, addition to or omission from said contract, it shall be at liberty to do so, and the same shall in no way affect or make void the contract, but shall be added to or deducted from the amount of the contract, as the case may be, at a fair and reasonable valuation. 20

Fourth—If changes are made which increase the cost of the work, the contractors shall obtain a written order from the architects, before such work is commenced. No verbal orders or explanations given by the architects or the superintendent shall be considered to involve any extra expense to the owner, and the contractors herewith waive all claim for any additional compensation if a written order is not obtained. In all cases where possible, the price of extra work is to be stated in the order; but, where no price can be stipulated, the contractors are to receive the net cost of such work plus ten (10) per cent. 30
Payments for extra work are to be made with

the payments on account of the general contract, and in the same proportion and the final settlement for any work done in addition to the contract is to be made with the final payment of the contract.

10 Fifth—Should the contractors, at any time during the progress of the said works, refuse or neglect to supply a sufficiency of material or workmen, the owner shall have the power to provide materials and workmen, after three days' notice in writing being given, to finish the said works, and the expense thereof shall be deducted from the amount of the contract.

20 Sixth—Should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by the said architects, and their decision shall be final and conclusive; but should any dispute arise respecting the true value of the extra work, or of the works omitted, the same shall be valued by two competent persons, one employed by the owner and the other by the contractors—and these two shall have power to name an umpire, whose decisions shall be binding on all parties.

30 Seventh—The contractors are to afford the architects or their representatives safe and proper facilities for the inspection of the work, at all times during the progress of same, and work or materials rejected by the architects are to be moved from the premises within twenty-four (24) hours after written notice to that effect.

Eighth—No certificate or payment shall be construed as an acceptance of defective work or materials.

Ninth—The owner shall not in any manner be answerable or accountable for any loss or damage that shall or may happen to the said works, or any part or parts thereof respectively or for any of the materials or other things used and employed in finishing and completing the same (loss or damage by fire excepted).

Tenth—The contractors agree to hold the owner free from any responsibility for loss or damage to life, limb or property, caused in consequence of the execution of the work under this contract. 10

Eleventh—The contractors agree not to use any patented article or device, without having acquired the right to do so from the patentee, and agree to defend any suits or actions which may be brought against the owner for infringements.

Twelfth—The work under this contract is to be executed in a prompt and diligent manner. 20
and must be finished and delivered to the owner on or before November 1, 1897.

If the building is not finished by November 1, 1897, it is agreed between the said parties that the sum of twenty-five dollars (\$25) per day is to be deducted from the final payment due under this contract as fixed and settled damages for each and every day thereafter on which the same remains uncompleted, provided that no undue delay has been caused by the introduction of plumbing, heating, electric lighting and elevators, and it is to be understood that the work under these contracts is to be done as fast as the progress of the general work will permit. 30
If undue delay is caused by said other contractors, the

parties of the second part shall notify the architects in writing of such delay, and if, in the opinion of the architects, such delay has been caused, as many days are to be allowed after November 1, 1897, for the completion of this contract, as the work has been delayed by other contractors.

10 In witness whereof, the said parties to these presents have hereunto set their hands and seals the day and year above written.

CATHARINE MEHEGAN, *President.* L. S.

CLARA JAMES, *Treasurer.* L. S.

SMITH BROS. L. S.

In presence of William Schickel.

BOND.

Know all men by these presents, That we, William J. Smith and Edward G. Smith, composing the firm of Smith Brothers, of Rutherford, New Jersey, as principal, and Frank A. Palen, of Kingston, New York, surety, are held, jointly and severally, and firmly bound unto the Sisters of Charity of Saint Elizabeth, a corporation existing under the laws of the state of New Jersey, in the sum of Thirty-nine Thousand Nine Hundred and Eighty-seven dollars (\$39,987.00) lawful money of the United States of America, to be paid to said corporation of Sisters of Charity of Saint Elizabeth, or its certain attorney, its successors and assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally, firmly by these presents. 10

Whereas, The said Smith Brothers have entered into a contract with the said Sisters of Charity of Saint Elizabeth, for the mason, carpenter and other works to be done for a new building to be erected for St. Mary's hospital, on Pennington avenue, near Ayerigg avenue, in the city of Passaic, New Jersey, bearing date the seventh day of March, in the year one thousand eight hundred and ninety-seven, 20

The condition of this obligation is such that if the above bounden Smith Brothers shall well and truly keep and perform all the conditions of the foregoing contract on their part to be kept and performed, and shall indemnify and save harmless the said Sisters of Charity of Saint Elizabeth as therein stipulated, then this obligation 30

shall be of no effect; otherwise it shall remain in full force and virtue.

In witness whereof, we hereto set our hands and seals on this 22nd day of March in the year eighteen hundred and ninety-seven.

WM. J. SMITH, L. S.

ED. G. SMITH, L. S.

F. A. PALEN, L. S.

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STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss.

On this 22nd day of March, 1897, personally appeared before me, William J. Smith, Edward G. Smith and Frank A. Palen, to me known, and known to me to be the persons described in, and who executed severally the foregoing bond, and acknowledge to me that they executed the same.

EDMUND W. WAKELEE,

Master in Chancery,

State of New Jersey.

20

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss.

Frank A. Palen being duly sworn, says that he is the bondsman named in the foregoing bond; that he is the owner of property at Kingston, New York, worth thirty-nine thousand nine hundred and eighty-seven dollars (\$39,987) over and above all his debts and liabilities exempt by law from sale and execution.

F. A. PALEN.

30 Sworn to before me this 22nd day of March, 1897.

EDMUND W. WAKELEE,

Master in Chancery,

State of New Jersey.

PASSAIC COUNTY CLERK'S OFFICE.

STATE OF NEW JERSEY, { ss.
 PASSAIC COUNTY.

I, Albert D. Winfield, Clerk of the said county and clerk of the county courts thereof, do hereby certify that the foregoing is a true copy of the building contract and bond between the Sisters of Charity of Saint Elizabeth and Smith Brothers, as the same is taken from and compared with the original contract and bond filed March 27, 1897, now remaining on file in my office.

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In testimony whereof, I have hereunto set my hand and affixed my official seal, at Paterson, this first day of May, A. D., 1900.

A. D. WINFIELD, *Clerk.*

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IN CHANCERY OF NEW JERSEY.

Between

THE SISTERS OF CHARITY OF
SAINT ELIZABETH,

Complainant,

and

WILLIAM J. SMITH *et als.*,

Defendants.

Bill of Interpleader.

To His Honor, Alexander T. McGill,

Chancellor of the State of New Jersey.

Humbly complaining shows unto your Honor,
your orator, the Sisters of Charity of Saint
Elizabeth, a corporation of the state of New Jer-
sey,

That on or about the seventeenth day of
March, in the year one thousand eight hundred
and ninety-seven, your orator made an agree-
ment in writing, dated on that day, with Wil-
liam J. Smith and Edward G. Smith, partners
trading under the firm name and style of Smith
Brothers, of Rutherford, in the state of New
Jersey, whereby the said Smith Brothers did
agree with your orator that they should and
would for the consideration in said agreement
mentioned, on or before the first day of Novem-
ber, eighteen hundred and ninety-seven, well
and sufficiently erect and finish the mason
work, carpenter work etc., required for the

erection and completion of a new building for St. Mary's hospital, Passaic, New Jersey, to be erected on Pennington avenue near Aycrigg avenue, for your orator, agreeably to the drawings and specifications made by Schickel and Ditmars, architects, and signed by the said parties, within the time aforesaid, in a good workmanlike and substantial manner, to the satisfaction and under the direction of said architects, to be testified by a writing or certificate under the hand of the said architects, and also should and would find and provide such goods, proper and sufficient materials of all kinds whatsoever as should be proper and sufficient for the completing and finishing all the mason work, carpenter work and other works of the said building mentioned in the general specifications for the sum of thirty-nine thousand nine hundred and eighty-seven dollars, to be paid in manner following:

1st payment.—When all walls and piers of cellar of basement are built, and the beams of first story floor laid throughout	\$4,500 00	10
2nd payment.—When all walls of first story are up and second floor beams laid	4,000 00	
3rd payment.—When all walls of second story are up and third floor beams laid	4,000 00	
4th payment.—When all walls of third story are up and fourth floor beams laid	4,000 00	30
5th payment.—When the roofs are set up and planked, all walls and		20

	chimneys topped out, and the structural iron work of piazza set	
		4,000 00
	6th payment.—When all roofing and metal work is completed, leaders run down and the inside all furred ready for plastering and deafening, and under floors laid.	3,500 00
10	7th payment.—When the brown coat of mortar is on throughout and the iron and wooden stairs are set, except slate steps.	3,000 00
	8th payment.—When the hard finish of plastering is done, except patching and standing and trim up, all sash hung and slate stairs set and the tiling done.	3,000 00
20	9th payment.—When the entire work under this contract is completed in accordance with the plans and specifications and to the satisfaction of the architects, the final balance of	9,987 00

And it was thereby among other things agreed between the said parties that said Smith Brothers, the contractors, at their own cost were to provide all manner of materials and labor, water, scaffolding, implements, moulds, models and cartages of every description, for the due performance of the work, and everything required for the proper execution and completion of any parts of the same, as directed by the architects, was to be furnished without extra charge. And should the said contractors, at any time during the progress of the said works, refuse or neglect to supply a sufficiency of material or workmen

your orator should have the power to provide materials and workmen, after three days' notice in writing being given, to finish the said works, and the expense thereof should be deducted from the amount of the contract.

That said contract in writing bears date the seventeenth day of March, in the year eighteen hundred and ninety-seven, the said contract, or a duplicate thereof, together with the specifications accompanying the same, or a copy thereof, was filed in the office of the clerk of Passaic county, on the twenty-seventh day of March, eighteen hundred and ninety-seven. 10

That shortly after the execution and filing of said contract, the said Smith Brothers commenced the erection of the said building, and proceeded therewith until they had received the first seven payments according to said contract, amounting in the aggregate to the sum of twenty-seven thousand dollars. 20

That on or about the thirty-first day of January, eighteen hundred and ninety-eight, said Smith Brothers, by William J. Smith, by a writing dated on that day and addressed to Rev. J. A. Shepperd, Passaic, N. J., authorized him to pay to Robert T. McMurray & Brothers the sum of two thousand three hundred and sixty dollars (eighty per cent. of their contract with him for iron work on St. Mary's hospital, at Passaic, N. J.) same to be deducted out of their eighth payment. That Robert T. McMurray and William H. McMurray compose the said firm of Robert T. McMurray & Brother. 30

That on or about the second day of February, eighteen hundred and ninety-eight, by a writing

dated on that day, and addressed to Rev. John Shepperd, St. Nicholas church, Passaic, N. J., Philip Schwickart gave notice that there was due to him for material furnished to St. Mary's Hospital, such as cast iron stairs, and elevator inclosures, delivered to Messrs. Robert T. McMurray & Bro., contractors for iron work on said building, and sub-contractors to Smith Brothers, the sum of one thousand and ninety-seven and 50-100 dollars, and requesting that he retain that amount due him from payments due, or becoming due to Smith Brothers, and their sub-contractor Robert T. McMurray & Bro., as an order of payment had been given him by the parties mentioned.

That on or about the fourth day of February, eighteen hundred and ninety-eight, by writing dated on that day, and addressed to the Sisters of Charity of Saint Elizabeth, the Ackerman Lumber and Wood Working company, by John A. Parker, treasurer, gave notice that there was due to them from Smith Brothers, contractors, the sum of fifteen hundred and ninety-five dollars and eleven cents, for materials by them furnished and by Smith Brothers used in the erection of your orator's hospital, known as Pennington avenue near Ayerigg avenue, in the city of Passaic; that they had demanded of them payment of the sum, and that they refused to pay them, and, therefore, they notified your orator to retain the amount so due out of the amount owing by it to said contractors and to pay the same to them. And on or about the eleventh day of February, of the same year, Smith Brothers by William J. Smith, by writing

of that date, addressed to your orator, requested it to pay to the order of the said company the sum of fifteen hundred dollars; charging the same to their account, for amount then due, or thereafter to grow due, for work done or materials furnished in the erection of your orator's building known as "St. Mary's hospital."

That on or about the tenth day of February, eighteen hundred and ninety-eight, by writing 10
of that date, addressed to your orator, owners of the new building known as St. Mary's hospital, H. W. Palen's Sons, by F. A. Palen gave notice that there was due to them from Smith Brothers, contractors, the sum of two thousand nine hundred and twenty-eight dollars and three cents, for material furnished by them, and by your orator used and employed in the erecting and constructing of your orator's said building; that they had demanded payment of the same 20
of said contractors, Smith Brothers; and they had refused to pay them and they therefore notified your orator to retain the amount so due out of the amount owing by your orator to said contractors, or that might thereafter become due from your orator to said contractors, for labor or materials used in the erection of said building and to pay the same to them; to which was annexed a bill of items of the said sum so due. That Frank A. Palen and Burton B. Palen compose the said firm of H. W. Palen's Sons.

That on or about the ninth day of February, 30
eighteen hundred and ninety-eight, by writing of that date, addressed to your orator, Wolfgang G. Triest by Cowles & Carey, attorneys, gave notice that there was then due to him from

Smith Brothers, contractors, the sum of four hundred and ninety-six dollars for work done and materials provided by him in erecting and constructing the building known as St. Mary's hospital; that he had demanded of said contractors payment of said sum, and that they had refused to pay him said sum, or any part thereof, and he therefore notified your orator to retain the amount so due to him out of the amount owing by it, or which might thereafter become due from it, to said contractors, and to pay the same to him.

That on about the fourteenth day of February, eighteen hundred and ninety-eight, by writing of that date, addressed to your orator, owners of the new building known as St. Mary's hospital, Edwin T. Galloway gave notice that there was due to him from Smith Brothers, contractors, the sum of eighty-five dollars and six cents for labor performed and materials furnished by him, and used in the erection of your orator's said building; that he had demanded of said contractors payment of the same, and that they had refused to pay him, and he therefore notified your orator to retain the amount so due out of the amount owing by it to said contractors, or that might thereafter become due from it to said contractors, and to pay the same to him.

That on or about the nineteenth day of February, eighteen hundred and ninety-eight, by writing of that date addressed to your orator, Albert B. Stewart gave notice that there was due to him from Smith Brothers, contractors, the sum of three hundred and thirty dollars and forty-eight cents for labor performed and materials furn-

ished by him, and used by your orator in the erection of its new building known as St. Mary's hospital; that he had demanded of said contractors payment of the same, and that they had refused to pay him, and he therefore notified your orator to retain the amount so due out of the amount owing by your orator to said contractors, or that might become due and owing from your orator to them, and to pay the same to him. 10

That on or about the fourteenth day of February, eighteen hundred and ninety-eight, by writing of that date, addressed to your orator, owners of the new building known as St. Mary's hospital, Henry A. Smith gave notice that there was due to him from Smith Brothers, contractors, the sum of one hundred and twenty-three dollars and fifty cents for labor performed in the erection of your orator's said building; that he had demanded of the said contractors payment of the same, and that they had refused to pay him, and he therefore notified your orator to retain the amount so due out of the money owing by your orator to said contractor, or that might thereafter become due from your orator to them, and to pay the same to him. 20

That on or about the fourteenth day of February, eighteen hundred and ninety-eight, by writing of that date, addressed to your orator, owners of the new building known as St. Mary's hospital, J. Asher Best gave notice that there was due to him from Smith Brothers, contractors, the sum of ninety dollars and forty-five cents for labor performed in the erection of your orator's said building; that he had demanded of the said contractors payment of the same, and 30

that they had refused to pay him, and he therefore notified your orator to retain the amount so due out of the money owing by your orator to said contractors, or that might thereafter become due from your orator to them, and to pay the same to him.

That on or about the eleventh day of February, eighteen hundred and ninety-eight, by writing
 10 of that date, addressed to Rev. Jno. Shepard, attorney for your orator, Campbell, Morrell & company, incorporated, by James W. Clinton, treasurer, gave notice that there was due to them from Smith Brothers, contractors, the sum of seven hundred and fifty-nine dollars and eighty-six cents for materials by them furnished, and by said contractors used in the erection of your orator's hospital building; that they had demanded of said contractors payment of the same, and that said contractors had refused to
 20 pay them, and they therefore notified your orator to retain the amount so due out of the money due or to become due, by your orator to said contractors, and to pay the same to them, and attaching thereto a statement of the account.

That on or about the twenty-first day of February, eighteen hundred and ninety-eight, by writing of that date, addressed to your orator, Robert T. McMurray & Brother gave notice that there was due to them from Smith Brothers, contractors, six hundred and twenty-five dollars,
 30 over and above their order for twenty-three hundred and sixty dollars alleged to have been handed your orator on January 26, 1898, for work done and materials furnished by them, and used by your orator in the erection of its new build-

ing, known as St. Mary's hospital; that they had demanded from Smith Brothers payment of said sum, and that they refused to pay them, and they, therefore, notified your orator to retain the amount so due out of the money owing by your orator to said contractor, or to become due to said contractor, and to pay the same to them.

That on or about the twenty-eighth day of 10
February, eighteen hundred and ninety-eight,
by writing of that date, addressed to your ora-
tor, owners of the new building known as St.
Mary's hospital, Duffy & Watterston, by Thomas
Duffy, gave notice that there was due to them
from Smith Brothers, contractors, the sum of
one hundred and twenty-nine dollars, being bal-
ance of contract for cutting, setting and furnish-
ing exposed brown stone used in the erecting
and constructing of your orator's said building
according to contract made by them with said 20
Smith Brothers; that they had demanded pay-
ment of said contractors, Smith Brothers, and
they had refused to pay them; they therefore
notified your orator to retain the amount so due
out of the amount owing by your orator to said
Smith Brothers, or that might thereafter become
due from your orator to said contractors for labor
or material used in the erection of said building,
and to pay the same to them. That Thomas
Duffy and David Watterston compose the firm
of said Duffy & Watterston. 30

That on or about the third day of March, eigh-
teen hundred and ninety-eight, by writing bear-
ing date March 2, 1898, addressed by your ora-
tor, Wolfgang G. Triest, by Cowles & Carey, at-

torneys, gave notice that there was then due to him from Smith Brothers, contractors, the sum of two hundred and four dollars for work by him done, and for materials by him provided in the erecting and constructing the building known as St. Mary's hospital; that he had demanded of said contractors payment of the said sum, and that they had refused to pay him said sum, or
 10 any part thereof, and he therefore notified your orator to retain the amount so due to him out of the amount owing by your orator, or which might thereafter become due from your orator to said contractors, and to pay the same to him. And your orator was further notified that said sum of two hundred and four dollars is in addition to the sum of four hundred and ninety-six dollars, of which notice is alleged to have theretofore been given to your orator, and that the total sum due and owing to him from said Smith
 20 Brothers was seven hundred dollars.

That on or about the third day of March, eighteen hundred and ninety-eight, by writing dated February 28, 1898, addressed to your orator, Elmer D. Bennett gave notice that there was due to him from Smith Brothers, contractors, the sum of forty dollars for labor performed in the erection of your orator's new building, known as St. Mary's hospital; that he had demanded of said Smith Brothers, contractors, payment of the same, and that they had refused to
 30 pay him, and he therefore notified your orator to retain the amount so due of the amount due and owing from your orator to said Smith Brothers, contractors, or that might become due and

owing from your orator to them, and to pay the same to him.

That on or about the fifth day of March, eighteen hundred and ninety-eight, by writing of that date, addressed to your orator, the Falstrom and Tornqvist company, by George W. Falstrom, president, gave notice that there was due them from William J. Smith and Edward G. Smith, trading under the firm name of Smith Brothers, the sum of one thousand and twenty-five 61-100 dollars for work done and material furnished by them to said Smith Brothers, used in the erection of your orator's building, located on Pennington avenue, in the city of Passaic, county of Passic, and State of New Jersey; that they had demanded payment for the same, and that they refused to pay them, and they therefore notified your orator to retain the amount so due from said contractors, and to pay the same to them.

That on or about the seventh day of March, eighteen hundred and ninety-eight, by writing dated February 10, 1898, addressed to Rev. Father Shepard, St. Mary's hospital, Passaic, N. J., White, Van Glahn & Company gave notice that they had furnished the firm of Smith Brothers and W. J. Smith, of Rutherford, N. J., for the hospital, goods to the amount of one hundred and ninety-five dollars and ninety-five cents, and requesting that said amount be held from the amount due Smith Brothers or W. J. Smith. That Anna B. White, Anna B. Haulenbeck and Edward C. Van Glahn compose said firm of White, Van Glahn & Company.

That on or about the ninth day of March, eigh-

teen hundred and ninety-eight, by writing of that date, addressed to your orator, owners of the new building, known as St. Mary's hospital, J. A. Toscani & Company, by Joseph A. Toscani gave notice that there was due to them from William J. Smith and Edward G. Smith of Rutherford, New Jersey, trading under the firm name of Smith Brothers, contractors, the
 10 sum of twelve hundred and twenty-five dollars for tiles furnished and tile work then completed at their request, and by your orator, the said owner, used and employed in the erecting and constructing of its said building; that they had demanded payment of said contractors, and they refused to pay them, and they therefore notified your orator to retain the amount so due out of the amount owing by your orator to said contractors or that might thereafter become due from your orator to said contractors, for labor or materials used in the erection
 20 of said building, and to pay the same to them, a bill of items of which sum was so due and owing to them being thereto annexed. That Joseph A. Toscani and John L. Toscani compose said firm of J. A. Toscani and company.

That on or about the tenth day of March, eighteen hundred and ninety-eighth, by writing of that date addressed to Rev. John A. Shepard, Passaic, N. J., the Anderson Lumber company by S. T. Zabriskie, president, gave notice that
 30 Smith Brothers, the contractors for the building of St. Mary's Hospital, were justly indebted to them in the sum of nine hundred and ninety and 61-100 dollars for materials furnished by them at the request of said contractors, used by

them in the erection of said building; that they had demanded payment from the said Smith Brothers of the said sum of money so due and owing as aforesaid, and that the said Smith Brothers refused to pay the same, or any part thereof. He was therefore notified and required to retain the amount of money now due, or to become due by him to the said contractors, and upon being satisfied of the correctness of their demand to pay the said sum of money to them. 10

That on or about the twelfth day of March, eighteen hundred and ninety-eight, by writing of that date, addressed to your orator, Robert T. T. McMurray & Brother gave notice that there was due to them from Smith Brothers, contractors, the sum of twenty-three hundred and sixty dollars for work done and materials by them furnished, and by your orator used in the erection of its new building, known as St. Mary's hospital; that they had demanded of Smith Brothers payment of said sum, and that they refused to pay them, and they refused to pay them, and they therefore notified your orator to retain the amount so due out of the money owing by your orator to said contractors, or to become due to said contractors and pay the same to them. 20

That on or about the twenty-fourth day of March, eighteen hundred and ninety-eight, by writing dated March 22d, 1898, addressed to your orator, White, Van Glahn & Company gave notice that there was due to them one hundred and eighty-three dollars and fifty-eight cents from Smith Brothers, contractors, for materials furnished by them to said contractors, 30

and used in the erection and construction of the building, known as St. Mary's hospital; that they had demanded payment from the said Smith Brothers of the said sum of money so due, and owing to them, and that said contractors did on such demand refuse to pay the same, or any part thereof, and they therefore notified your orator to retain the amount of

10 money so claimed out of any amount then due, or which might thereafter become due from your orator to the said contractors, and to pay the same to them, to which was annexed a statement over the signature of Smith Brothers, by William J. Smith, stating that the amount of the above notice was correct and due to White, Van Glahn & Company.

That on about the thirtieth day of March, eighteen hundred and ninety-eight, John Foster presented to your orator a writing of that date as

20 follows: "To John Foster, plasterer, for day work done on St. Mary's Hospital, Passaic, N. J., for Smith Brothers, contractors, 62 hours' work at 40 cents per hour, twenty-four eighty \$24.80."

That one Henry Dabinett alleges that about the middle of the month of May, eighteen hundred and ninety-eight, he served a notice upon your orator, claiming the sum of twenty-six dollars to be due him from Smith Brothers, the contractors, for your orator's aforesaid building,

30 being for one hundred and four hours' labor at twenty-five cents per hour. But your orator, as at present advised, is unable to say whether such notice was delivered to it, and if so, when it was delivered, and what its terms were, but leaves

said Henry Dabinett to make such proof as he may be able.

That on or about the third day of September, eight hundred and ninety-eight, by writing dated September 1, 1898, addressed to St. Mary's hospital association, Joseph Partusch gave notice that there was due to him from Smith Brothers, contractors, the sum of thirty dollars for labor by him performed and by them used in the erection and construction of its new building then being erected by them on the southeasterly corner of Pennington avenue and Aycrigg avenue, in the city of Passaic, county of Passaic, and state of New Jersey; that he had demanded of the said Smith Brothers payment of the said amount, and that they had refused to pay him, and he therefore notified the said association to retain the amount so due out of the amount owing by it to the said contractors, and to pay the same to him, to which was annexed an itemized bill of said account. 10 20

That the several parties who have served notices, orders or other writings as aforesaid claim that under and by virtue of the mechanics' lien law of this state they are severally entitled to be paid the amounts alleged to be due to them respectively from said William J. Smith and Edward G. Smith, partners, trading under the firm name and style of Smith Brothers, and several of them have threatened to commence suits at law against your orator for the recovery of the said several amounts alleged to be due to them, as aforesaid. 30

That during the month of March, eighteen hundred and ninety-eight, the said Smith Broth-

ers served notices in writing upon your orator that they disputed the claims, hereinabove set forth, of Philip Schwickart for the sum of one thousand and ninety-seven dollars and fifty cents, of Wolfgang G. Triest for the sum of four hundred and ninety-six dollars, of Campbell, Morrell & Company for the sum of seven hundred and fifty-nine dollars and eighty-six cents, of Duffy & Watterston for the sum of one hundred and twenty-nine dollars; of Wolfgang G. Triest for the sum of two hundred and four dollars, and of J. A. Toscani & Company for the sum of twelve hundred and twenty-five dollars, and stating that they had given said respective claimants notices in writing that they disputed the same, and requesting said respective claimants to establish the same by judgment, as required by the mechanics' lien law and warning your orator not to pay said respective claims unless and until they were so established.

That on or about the first day of March, eighteen hundred and ninety-eight, the said Smith Brothers, for a long time prior thereto having neglected to provide a sufficiency of materials, labor and other essentials for the due performance of the work in the erection and completion of said building; your orator served a notice in writing on said Smith Brothers, contractors, requiring them at once to supply a sufficiency of materials and workmen to finish and complete the works required of them by the agreement in writing entered into between them and your orator, hereinabove more particularly set forth, and if they failed after three days from the date of service of said notice to supply such suffi-

ciency of materials or workmen to finish said works, your orator would at once provide materials and workmen and finish the said works, and the expense thereof would be deducted from the amount of the contract money still unpaid; which notice was stated to be given under and in pursuance of the terms of said agreement, as hereinabove set forth.

That thereafter, to wit, after the expiration of three days' notice in writing having been given to finish the said works as aforesaid, your orator proceeded to finish the said works by obtaining bids therefor and after due competition, awarding the contract therefor to Frank A. Palen, of Kingston, New York, for the contract price of eight thousand four hundred and twenty-eight dollars, leaving a balance on said original contract with Smith Brothers in the hands of your orator of four thousand five hundred and forty-nine dollars owing to said Smith Brothers, or to their creditors as aforesaid, for work done and materials furnished on said work before said Smith Brothers abandoned their said contract. 10 20

That your orator cannot safely pay the said sum of money owing by it under said contract to any of said claimants without a discovery as to what, if anything, is due to said respective claimants, when the same, if anything, became due and payable to them respectively from said Smith Brothers, whether the same was for work done or materials furnished and used in the erection of your orator's said building, and whether they respectively, or which of them, if any, demanded payment of their respective claims from said Smith Brothers prior to serving 30

their respective notices upon your orator, as above stated.

That your orator hereby offers to state an account under the direction of this honorable court with said Smith Brothers and said claimant of the cost and expense incurred by your orator in completing said building, and your orator further offers to pay into this honorable court the said
10 sum of four thousand five hundred and forty-nine dollars, or any other sum which, upon taking said account may be found owing by your orator on said contract, or otherwise, to said Smith Brothers, or others; to the end that the same may be paid or distributed to such person or persons as may be legally and equitably entitled to receive the same.

And your orator further shows that it does not in any respect collude with any of the said defendants touching the matters in this cause;
20 and that it has not been indemnified by such defendants or any of them, but brings this suit of its own free will and to avoid being molested or injured touching the matters contained in this bill.

Wherefore, and as your orator can only have adequate relief in this court, in consideration of the premises and to the end that the said William J. Smith and Edward G. Smith, partners trading under the firm name and style of Smith Brothers, may be decreed to account with your
30 orator of, and concerning, the costs and expenses incurred by your orator in completing said building; that the amount justly owing on said contract for the construction of said building by your orator may be ascertained; that your orator

may be at liberty to pay the same into this court;
 and that the said defendants may interplead and
 settle their rights to said moneys; and that the
 said William J. Smith and Edward G. Smith,
 partners under the firm name and style of Smith
 Brothers, Robert T. McMurray and William H.
 McMurray, partners trading under the firm name
 and style of Robert T. McMurray & Brothers,
 Philip Schwickart, the Ackerman Lumber and 10
 Wood Working company, Frank A. Palen and
 Burton B. Palen, partners etc., as H. W. Palen's
 Sons, Wolfgang G. Triest, Edwin T. Galloway,
 Albert B. Stewart, Henry A. Smith, J. Asher
 Best, Campbell, Morrell & Company, a corpora-
 tion, Thomas Duffy and David Watterston, part-
 ners etc., as Duffy & Watterston, Elmer D. Ben-
 nett, the Falstrom & Tornqvist company, Anna
 B. White, Anna B. Hallenbeck and Edward G.
 Van Glahn, partners etc., as White, Van Glahn
 & Company, Joseph A. Toscani and John L. Tos- 20
 cani, partners etc., as J. A. Toscani & Company,
 the Anderson Lumber Company, John Foster,
 Henry Dabinett and Joseph Partusch, may be
 enjoined and restrained from proceeding in any
 suit at law against your orator touching or con-
 cerning any claim they, or either of them, may
 have or claim to have against it on account of
 the contract, hereinbefore mentioned, between
 your orators and Smith Brothers, or touching or
 concerning any claim they, or either of them,
 may have, or claim to have, against your orator, 30
 founded on any notice served, or claimed to
 have been served, upon your orator under or pur-
 suant to the Mechanic's Lien Law of this state
 or otherwise.

And your orator, upon paying into this court the amount found to be owing by it on said contract, and procuring said defendants to interplead according to the course of this court may be discharged from all liability to such defendants in the premises and may have its costs therein.

And your orator may have such further and other relief as the nature of its case requires and
 10 as may be agreeable to equity.

May it please your Honor to grant unto your orator not only the State's writ of injunction issuing out of and under the seal of this Honorable Court to restrain the said William J. Smith and Edward G. Smith, partners trading under the firm name and style of Smith Brothers, Robert T. McMurray and William H. McMurray, partners trading under the firm name and style of Robert T. McMurray & Brother, Philip Schwickart, the Ackerman Lumber and Wood
 20 Working company, Frank A. Palen and Burton B. Palen, partners etc., as H. W. Palen's Sons, Wolfgang G. Triest, Edwin T. Galloway, Albert B. Stewart, Henry A. Smith, J. Asher Best, Campbell, Morrell & Company, a corporation, Thomas Duffy and David Watterston, partners etc., as Duffy & Watterson, Elmer D. Bennett, Falstrom and Tornqvist company, Anna B. White, Anna B. Haulenbeck and Edward C. Van Glahn, partners, etc., as White, Van Glahn & Company, Joseph A. Toscani and John I.
 30 Toscani, partners, etc., as J. A. Toscani & Company, Anderson Lumber company, John Foster, Henry Dabinett and John Partusch and each of them from proceeding at law against your orator touching the matters aforesaid, but also a

writ or writs of supboena, also issuing out of and under the seal of this Court, to be directed to the said William J. Smith and Edward G. Smith, partners trading under the firm name and style of Smith Brothers, Robert T. McMurray and William H. McMurray, partners trading under the firm name and style of Robert T. McMurray & Brother, Philip Schwickart, Ackerman Lumber and Wood Working company, Frank A. Palen and Burton B. Palen, partners, etc., as H. W. Palen's Sons, Wolfgang G. Triest, Edwin T. Galloway, Albert B. Stewart, Henry A. Smith, J. Asher Best, Campbell, Morrell & Company, a corporation, Thomas Duffy and David Watterston, partners etc., as Duffy & Watterston, Elmer D. Bennett, Falstrom & Tornqvist company, Anna B. White, Anna B. Haulenbeck and Edward C. Van Glahn, partners, etc., as White, Van Glahn & Company, Joseph A. Toscani and John L. Toscani, partners, etc., as J. A. Toscani & Company, Anderson Lumber company, John Foster, Henry Dabinnett and Joseph Partusch, there in hand thereby commanding them and each of them on a certain day and under a certain penalty, therein to be inserted, to be and appear before your Honor in this honorable court, and then and there to answer all and singular the premises aforesaid, and to stand to, perform and abide such order, directions and decree therein as to your Honor shall seem meet.

And your orator will ever pray.

JOHN W. HECK,
Sol'r for Compl't.
 EDWIN KELLER,
Of Counsel.

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

John A. Sheppard of full age being duly sworn according to law upon his oath says that he was the agent and representative of the complainant during the period of the erection of the building known as St. Mary's hospital, Passaic, New Jersey, in the foregoing bill mentioned, that he has read the said bill of complaint and knows
10 the contents thereof, and that the same is true of his own knowledge except as to matters that are therein stated to be on information and belief, and to those matters he believes it to be true; that some of the defendants in said bill mentioned have threatened to bring suits at law against the complainant concerning the matters in said bill stated; that complainant is advised that it cannot safely pay any of said claimants without the discovery prayed for in said bill of complain; that deponent believes that complainant has rendered a just and true
20 statement of the amount owing by it on its said contract with Smith Brothers as stated in said bill of complaint; that complainant has exhibited its bill of interpleader against the said defendants without any fraud or collusion between it and the said defendants; and that said bill is not exhibited at the request of the said defendants, or of any, or of either of them; and that the complainant is not indemnified by the said defendants or by any or either of them; and that complainant has exhibited said bill for no other intent, but to avoid being sued or molested by the said defendants touching the matters contained in said bill.

30

JOHN A. SHEPARD.

Sworn to and subscribed before me this 30th day of January, A. D. 189 .

CHARLES H. HARTSHORNE,
Master in Chancery of New Jersey.

IN CHANCERY OF NEW JERSEY.

Between

THE SISTERS OF CHARITY OF
SAINT ELIZABETH,*Complainant,* } *On Bill.**and*WILLIAM J. SMITH *et als.*,*Defendants.*

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Answer.

The answer of Robert T. McMurray and William H. McMurray partners trading under the firm name of Robert T. McMurray and Brother, defendants in this cause, to the bill of complaint of the Sisters of Charity of Saint Elizabeth.

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These defendants answering, admit the averments in said bill in reference to the contract made between the complainant, the Sisters of Charity of Saint Elizabeth, and William J. Smith and Edward G. Smith, partners trading under the firm name of Smith Brothers, for the construction of a building for the said Sisters of Charity of Saint Elizabeth to be known as "St. Mary's Hospital," and that the said contract with specifications accompanying the same was filed in the office of the clerk of the county of Passaic at Paterson, New Jersey; and that it is true that after the making and filing of said contract, said Smith Brothers did commence work on the building and did proceed therewith until seven pay-

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ments had been paid to them by the said complainant according to said contract.

And these defendants further answering say, that they are manufacturers of and dealers in iron and iron products and that their office and principal place of business is in the city of New York, and state of New York.

10 And these defendants further answering say, that on the eighteenth day of October, eighteen hundred and ninety-seven, they did enter into a contract with the said Smith Brothers, contractors, to furnish the materials for and sufficiently construct the elevator channels, beams, stairs and whatever other iron work there might be necessary in and about the elevator shaft of the said building, and that these defendants were to receive for the same the sum of two thousand nine hundred and fifty dollars (\$2,950.)

20 And these defendants further answering say, that as sub-contractors in accordance with the terms of the contract aforesaid they did commence and proceed with the construction of said elevator enclosure and shaft until it was nearly completed and there remained less than fifty dollars (\$50) worth of work left unfinished; that the architect examined the said work; that he found it executed satisfactorily and in accordance with the specifications of the contract between these defendants and Smith Brothers; and that he certified the same unto the said Smith
30 Brothers; and that two thousand three hundred and sixty dollars (\$2,360), eighty per cent. of the contract was due to these defendants; and that although these defendants had received promises of payment from time to time as pay-

ments became due from Smith Brothers, nothing whatever was paid them up to the time the architect passed upon the work.

And these defendants further answering say, that on or about the last day of January, eighteen hundred and ninety-eight, they demanded payment of the eighty per cent. of the contract price due and owing to them in accordance with the terms of the contract between Smith Brothers and these defendants as aforementioned; and that the said Smith Brothers gave to this defendant an order upon Father John Shepard of Passaic, New Jersey, the agent, attorney and executive representative of the Sisters of Charity of Saint Elizabeth, in favor of these defendants, for two thousand three hundred and sixty dollars (\$2.360) being eighty per cent. of their contract with the said Smith Brothers, as is stated in the bill of complaint, and that this amount was due and owing for iron work on and furnished for St. Mary's Hospital, Passaic, N. J., by these defendants, and that the moneys upon which this order was drawn were to be deducted out of the eighth payment then due from the complainant to the said Smith Brothers, contractors. 10 20

And these defendants further answering say, that at the time this order was given and served upon the complainant, there had been no claims filed under the Mechanics' Lien Law and these defendants charge that this order aforesaid from Smith Brothers upon the complainant in favor of these defendants, worked an assignment of all moneys then due or to become due from the said complainant to Smith Brothers to the extent of the amount of the said order. 30

And these defendants further answering say, that on or about the twenty-first day of February, eighteen hundred and ninety-eight, they gave notice to the complainant that there was due them from Smith Brothers, contractors, the sum of six hundred and twenty-five dollars over and above the order of Smith Brothers in their favor for two thousand three hundred and sixty
 10 dollars, for work done and materials furnished in the erecting of said building as aforesaid; that they had demanded payment thereof of the said Smith Brothers, contractors; that said Smith Brothers refused to pay them and that these defendants notified the complainant to retain the amount so due out of the moneys due or to become due to said contractors and to pay the same to these defendants.

And these defendants further answering say, that on or about the twelfth day of March, eighteen hundred and ninety-eight, they served a
 20 written notice on the complainant, stating that there was due to them from the said Smith Brothers, contractors, the sum of two thousand three hundred and sixty dollars for work done and material furnished by these defendants to said Smith Brothers for the use of the complainant, in the erection of said St. Mary's Hospital; that these defendants had demanded payment of the said Smith Brothers, payment had been refused and the complainant was notified to retain the
 30 amount aforesaid out of moneys due or to become due to the said Smith Brothers and to pay the same to the defendants.

And these defendants further answering say, that they neither admit or deny the validity of

the other claims under which lien is claimed upon the said St. Mary's hospital, as set forth in the bill of complaint, but leave such claimants to prove their liens according to law.

And these defendants further answering say, that on or about the thirty-first day of January, eighteen hundred and ninety-eight, and at the time that the defendants served upon Father John Shepard the order upon the complainant made by Smith Brothers in favor of these defendants, as aforesaid, the said Father John Shepard upon the presentation of the aforesaid order, told these defendants to go ahead and complete the work; that there were ample funds then due Smith Brothers to complete the building and pay all contractors and that these defendants would surely be paid. 10

And these defendants further answering say, that acting upon this promise they did go ahead and complete their contract, as sub-contractors, with Smith Brothers, contractors, but that they have never received any payment of any amount whatsoever, as sub-contractors, with Smith Brothers, contractors, but that they have never received any payment of any amount whatsoever from either the owner, the complainant or from the said Smith Brothers, although they have often demanded payment of the same. 20

The defendants say that they have heard that the said firm of Smith Brothers forfeited the contract as set forth in pages fifteen and sixteen of the bill of complaint and that the building was completed by other contractors, but, whether this is true or not, or what part was left uncompleted and what amounts were paid the contractors who 30

finished the building, these defendants know not, and they leave the complainant to make proof thereof.

These defendants further answering say, that after the completion of their work upon the said Saint Mary's hospital, and on the twenty-first day of January, eighteen hundred and ninety-nine, these defendants commenced suit
 10 against the Sisters of Saint Elizabeth, complainant in this cause, by issuing summons and declaration against the said complainant, returnable on the fourth day of February, eighteen hundred and ninety-nine, in the New Jersey Supreme Court and these defendants verily believe that they have good cause of action at common law against said Sisters of Charity of Saint Elizabeth upon the premises and assurances of the agent, attorney and executive manager of the said corporation, the complainant in this
 20 cause, made to these defendants, as aforesaid.

These defendants further answering say, that said action at law was enjoined by this honorable court, to the great injury and detriment of your orators, and while they submit to the jurisdiction of their court, they pray the court that they may have reserved unto them all rights of action against the Sisters of Charity of Saint Elizabeth, aside from any liens or claims which they may have under the Mechanics' Lien Law unless this court shall determine that the claim
 30 of your orators shall be paid in full by its decree in this suit.

These defendants further answering charge, that the order made by Smith Brothers upon the complainant in favor of these defendants is

an equitable assignment by the contractor of that amount of his interest in the moneys arising out of said contract; that it was given for work and materials furnished in the construction of the said building for which payment was due and owing these defendants; that it was an assignment of money then due and owing from the owners, the complainants, to Smith Brothers, the contractors; and that it could not be construed an advance payment; that it is a claim for which a stop notice might have been served under the mechanics lien law. 10

These defendants further claim that they should be paid in full for the reasons aforementioned and because the order in their favor from the contractors worked an immediate assignment of the funds in hand of said complainant due said Smith Brothers, as aforesaid, and your orator should have received immediate payment since there was enough money due at the date thereof from the complainants to said Smith Brothers, to pay all material men and workmen who had claims against said Smith Brothers; and further because your orator is a sub-contractor and therefore has a peculiar lien upon the building and the funds due thereon. 20

These defendants further show that they have served stop-notices, as hereinbefore set out, and as mentioned in the bill of complaint, and if pro rata distribution of the moneys due from the complainant to Smith Brothers, the contractors, among those who have served stop-notices in accordance with the mechanics' lien law be declared, these defendants charge that they should receive their pro rata, but pray the Honorable 30

court that by taking such share they shall not be deprived of any right or ground which they now have for suit at law against the Sisters of Charity of St. Elizabeth, aforesaid, but may reserve the same and sue for the balance remaining of the amount now due these defendants, after the payment of their share as decreed by the court.

- 10 And these defendants, reserving this right to sue on the aforesaid promise or assurance of the complainant, the Sisters of Charity of Saint Elizabeth, tender themselves willing to comply with whatever decree this honorable court may make in their behalf.

And these defendants humbly pray they be hence dismissed with their reasonable costs and charges in their behalf most wrongfully sustained.

- 20 STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss.

Robert T. McMurray and William H. McMurray, being duly sworn on their respective oaths say, that the matters and things set forth in the above answer, so far as relates to their own acts are true, and so far as relates to the acts of others they believe them to be true.

Sworn and subscribed to before me this 16th day of March, 1899.

- 30 ROBERT T. McMURRAY,
W. H. McMURRAY.

J. BAYARD KIRKPATRICK,
Master in Chancery of New Jersey.

IN CHANCERY OF NEW JERSEY.

Between

THE SISTERS OF CHARITY OF ST.

ELIZABETH,

Complainant, *On Bill, &c.*

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and

WILLIAM J. SMITH, *et als.*,*Defendants.***Verree.**

This cause coming on to be heard by the Court of Chancery, at the Chancellor's chambers, in the city of Jersey City, in the presence of John W. Heck, solicitor for, and John L. Keller, of counsel with complainant, Edmund W. Wakelee, of counsel for defendants, William J. Smith, Edward G. Smith, Ackerman Lumber and Wood Working Company, Frank A. Palen, individually and as executor of Burton B. Palen, Albert B. Stewart, Henry A. Smith, J. Asher Best and Elmer D. Bennett, Thomas M. Moore, of counsel for defendants, Campbell, Morrell & Company, and Anderson Lumber Company, Joseph Coult, of counsel for defendant, Robert T. McMurray and William H. McMurray, Addison Ely, of counsel for defendants. Anna B. White, Anna B. Haulenbeck and Edward C. Van Glahn, and Luther Shafer, of counsel for defendant, Edwin T. Galloway, and the plead-

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ings and proofs having been read, and the arguments of the respective counsel having been heard and considered, and it appearing to the court upon consideration thereof that the complainant held the funds in its bill mentioned, to wit, the sum of four thousand five hundred and forty-nine dollars (\$4,549.00), for the true owners, without having or claiming any right or interest therein, and that the said funds have been deposited in this court, to be delivered to whomsoever may have right thereto, and the defendants having asserted that the said fund (which represents the amount due from the complainant the firm of Smith Brothers mentioned in the bill) should be and is greater than the said sum of four thousand five hundred and forty-nine dollars, and the court having heard evidence produced thereon, and being satisfied that the amount just mentioned is the true amount so due from complainant to said Smith Brothers,

It is thereupon on this twenty-first day of November eighteen hundred and ninety-nine, by His Honor, Alexander T. McGill, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor does, by virtue of the power and authority of this court, hereby order, adjudge and decree that the said bill of interpleader is properly brought by the complainant in this cause, and that it is entitled to relief in this court;

And it is further ordered, adjudged and decreed that said complainant be dismissed from the further prosecution of this suit, with its costs to be taxed, including a counsel fee of seventy-

five dollars, to be paid by the clerk of this court out of the funds so paid into court, and that it be released, acquitted and discharged from all claims or liability to either of the defendants in this suit, for, upon or by reason of said fund;

And it is further ordered, adjudged and decreed that the said defendants do interplead, settle and adjust their several claims, demands and matters in controversy in this suit as between themselves. 10

And it is further ordered, adjudged and decreed that William J. Smith and Edward G. Smith, partners trading under the firm name and style of Smith Brothers, Robert T. McMurray and William H. McMurray, partners trading under the firm name and style of Robert T. McMurray & Brother, Philip Schwickart, the Ackerman Lumber and Wood Working company, Frank A. Palen, individually and as executor of Burton B. Palen, late partners trading under the firm name of H. W. Palen's Sons, Wolfgang G. Triest, 20
Edwin T. Galloway, Albert B. Stewart, Henry A. Smith, J. Asher Best, Campbell, Morrell & Company, a corporation, Thomas Duffy and David Watterston, partners, &c., as Duffy & Watterston, Elmer D. Bennett, Falstrom and Tornqvist company, Anna B. White, Anna B. Haulenbeck and Edward C. Van Glahn, partners, &c., as White, Van Glahn & Company, Joseph A. Toscani and John L. Toscani, partners, &c., 30
as J. A. Toscani & Company, Anderson Lumber Company, John Foster, Henry Dabinett and Joseph Partusch, all of the defendants to this suit, and each of them, their counsellors, attorneys, solicitors and agents, be, and they are

hereby enjoined and restrained from further or other proceedings in any suit at law or in equity against the said complainants for the recovery of any moneys touching the matters set forth in said bill of complaint. But nothing herein shall be taken or held as in anywise affecting the right of the defendants, Robert T. McMurray and William H. McMurray, trading as Robert T. McMurray & Bro., from prosecuting their suit at law against the complainant, so far as the same is based upon the acceptance by complainant of an order served by Smith Bros., upon complainant in their favor.

Respectfully advised.

H. C. PITNEY,

Vice Chancellor.

ALEX. T. MCGILL,

Chancellor.

A true copy.

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L. A. THOMPSON,

Clerk.

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IN CHANCERY OF NEW JERSEY.

 THE SISTERS OF CHARITY OF ST.

ELIZABETH,

Complainants,

and

WILLIAM J. SMITH AND OTHERS,

Defendants.

On Bill, &c.

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Decree of Distribution.

This cause coming on to be heard in presence of John W. Heck, counsel of the complainants; Edmund W. Wakelee, counsel of the defendants, H. W. Palen's Sons, William J. Smith & Edward G. Smith, partners as Smith Brothers, Ackerman Lumber and Wood Working company, Henry A. Smith, J. Asher Best and Elmer D. Bennett; Luther Shafer, counsel of the defendants, Edwin T. Galloway and Henry Dabinett; Addison Ely, counsel of White, Van Glahn & Company; Coult & Howell, counsel of Robert T. McMurray & Brother; Thomas M. Moore, counsel of Campbell, Morrell & Co., The Anderson Lumber company and Joseph Partusch, and the several answers of the defendants being read, depositions of witnesses taken and the arguments of the respective counsel heard; and it appearing that the said complainants on the seventeenth day of March, eighteen

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hundred and ninety-seven (1897) entered into a contract with the defendants William J. Smith and Edward G. Smith, partners for the erection by them of a building known as St. Mary's hospital in the city of Passaic and that the said contract was in part performed by said builders, and the work then abandoned by them whereupon the complainant completed said building in accordance with said contract, and that after paying the expense of so completing the building, there remained in the hands of the complainants owing to said builders the sum of four thousand five hundred and forty-nine dollars which sum by the order of this court has been paid into this court, and that the same, less the costs and a counsel fee of fifty dollars of the complainants, still remains deposited subject to the order of this court, and the court having duly considered the claims made against said money by the several defendants,

It is on this fourth day of January nineteen hundred ordered, adjudged and decreed by the court that the defendants hereinafter named are entitled to the balance of said sum of four thousand five hundred and forty-nine dollars, and interest accumulated thereon remaining after deducting therefrom the complainant's costs and counsel fee, in the order and for the amounts hereinafter specified namely:

(1) Henry A. Smith one hundred and twenty-three dollars and fifty cents (for labor) with his costs.

(2) J. Asher Best ninety dollars and forty-five cents (for labor) with his costs.

(3) Elmer D. Bennett forty dollars (for labor) with his costs.

(4) John Foster twenty-four dollars and eighty cents (for labor) with his costs.

(5) Joseph Partusch thirty dollars (for labor) with his costs.

(6) The Ackerman Lumber Company one thousand and ninety-five dollars and eleven cents with its costs.

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(7) H. W. Palen's Sons, two thousand nine hundred and twenty-eight dollars and three cents with their costs.

(8) Edwin T. Galloway eighty-five dollars and six cents with his costs.

(9) Campbell, Morrell & Company seven hundred and fifty-nine dollars and eighty-six cents with its costs.

(10) The Anderson Lumber Company nine hundred and ninety dollars and sixty-one cents with its costs.

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(11) White, Van Glahn & Company one hundred and eighty-three dollars and fifty-eight cents with its costs.

(12) Henry Dabinett twenty-six dollars and his costs.

And it is further ordered, adjudged and decreed that the said fund and the interest accumulated thereon be forthwith distributed and paid by the clerk of this court to the parties entitled thereto as above set forth, or their solicitors, and that there be added to the amount above stated to be due each defendant the

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amount of interest which has accrued thereon in
this cause to be computed by the clerk.
Respectfully advised.

H. C. PITNEY,
Vice Chancellor.

ALEX T. MCGILL,
Chancellor.

A true copy.

L. A. THOMPSON,
Clerk.

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N. J. COURT OF ERRORS AND APPEALS.

ROBERT T. McMURRAY AND WILLIAM H. McMURRAY, Partners, Etc., <i>Defendants in Error,</i>	} <i>In Error to Su- preme Court.</i>	10
<i>vs.</i>		
THE SISTERS OF CHARITY OF ST. ELIZABETH, <i>Plaintiff in Error.</i>		

Assignment of Error.

Afterwards, to wit : on the twelfth day of December, nineteen hundred and one, before the Judges of the said Court of Errors and Appeals, in the last resort in all causes at Trenton, comes the said the Sisters of Charity of St. Elizabeth, the plaintiff in error, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit :

(1) Because the said justice before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, admitted as evidence against the defendant, the Sisters of Charity of St. Elizabeth, testimony on the part of Benjamin Benas, a witness sworn on behalf of the plaintiff, to the effect that Father Shepard, after the alleged acceptance of the order referred to in said evidence, had admitted the acceptance, on his part, of said order.

(2) Because the said justice at the said trial

admitted in evidence a copy of a contract that was made for plumbing work in the building, with John Collins, signed by Father Shepard, as tending to prove the agency of Father Shepard to accept orders.

10 (3) Because the said court at the close of the plaintiff's testimony, refused to order a judgment of nonsuit to be given in favor of the defendant and against the plaintiff.

(4) Because the said court at the said trial refused to charge the jury that they should find a verdict for the defendant.

(5) Because the said court at the said trial left to the jury the sole question whether the order which was the subject matter of said suit, was accepted or not.

20 (6) Because the said court at the said trial charged the jury that if the said order was accepted, then their verdict must be for the plaintiffs.

(7) Because the said court at the said trial charged the jury as follows: "The form which this case has taken leaves for the jury to determine but one question, and that is whether the order which has been offered in evidence, made by Smith Brothers, was accepted by the defendant. If it was, then the plaintiffs are entitled to recover the amount of it with interest for the time which I will indicate."

30 (8) Because the said court at the said trial, charged the jury as follows: "The plaintiff Robert T. McMurray, took the order, which he had received from Smith Brothers, to Father Shepard, who was acting for the Sisters of Charity to have it accepted, and right here arises the

question for your determination—did he accept it? If he did, then the defendant is bound to pay, and your verdict should be for the plaintiffs.”

(9) Because the said court at the said trial charged the jury as follows: “It will be for you to determine under all the evidence in the case whether Father Shepard, acting for the defendant, accepted this order or not. If he did, the verdict should be for the plaintiffs.” 10

(10) Because the said court at the said trial refused to charge the jury that there was no evidence in the case that Father Shepard had authority from the Sisters of Charity of St. Elizabeth to verbally accept said order.

(11) Because the said court at the said trial refused to charge the jury as follows; “The defendant, or its agent, Father Shepard, could not by voluntarily paying these moneys to Smith Brothers, or their assignees, defeat the effect of the acceptance. But if, under the effect of the Mechanics’ Lien Act, the servers of stop notices were entitled to this fund by operation of law, as seems to have been the case, in preference to McMurray Brothers, the acceptance being conditional on a fund being available for the payment of the order, failed of any legal effect.” 20

(12) Because the said court at the said trial, following up its refusal to charge as requested, as set forth in the next preceding assignment, charged the jury as follows: “So that the question left for you to determine is still whether this order was accepted or not. If it was not, your verdict should be for the defendant; if it was accepted, then your verdict should be for 30

twenty-three hundred and sixty dollars, etc., if there is any sum found for the plaintiff."

10 (13) Because the said Court at the said trial refused to charge the jury that if they believed Father Shepard accepted said order, the effect of such acceptance was an agreement to pay the amount of such order out of any funds which if no stop notices had been served would have
 20 been due to Smith Brothers under the contract, such refusal to charge as requested, being expressed in the following language: "I have no objection to charging that. That will not affect your action at all. I think that is a question of law and is covered already by the ruling of the court as well as the second request to charge."

(14) Because there was no evidence in the case of any acceptance of said order on the part of the Sisters of Charity of St. Elizabeth.

20 Therefore the said The Sisters of Charity of St. Elizabeth prays that the judgment aforesaid, by reason of the aforesaid error, and of other errors appearing in the record and proceedings aforesaid, be reversed, annulled and held for nothing, and that the said plaintiff in error may be restored to all things it has lost on account of the said judgment.

JOHN B. HUMPHREYS,

Attorney for and of counsel with the Plaintiff in Error.

N. J. COURT OF ERRORS AND APPEALS.

ROBERT T. McMURRAY and
WILLIAM H. McMURRAY,
PARTNERS, ETC.,

Defendants in Error,

vs.

THE SISTERS OF CHARITY OF
SAINT ELIZABETH,

Plaintiff in Error.

*In Error to Su-
preme Court.*

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Joinder in Error.

And hereupon, afterwards, to wit, on the twelfth day of December, nineteen hundred and one, before the Judges of the said Court of Errors and Appeals, in the last resort in all causes, at Trenton, comes the said Robert T. McMurray and William H. McMurray, partners in trade as Robert T. McMurray & Brother, by Coult & Howell, their attorneys, and say that there is no error either in the record and proceedings aforesaid or in giving the judgment aforesaid, and they pray here that the court may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid assigned for error, and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed.

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COULT & HOWELL,

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Attorneys for and of Counsel with Defendants.

