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NOTICE OF APPEAL.

Filed November 19, 1928.

In Chancery of New Jersey

59/202.

Between

RUDOLPH L. TANNER, *et ux.*,
Complainants,

and

BOYNTON LUMBER COMPANY,
Defendant.

On Bill, etc.

Notice of Appeal.

To Mr. Orlando H. Dey, Rahway, New Jersey, solicitor of the defendant:

The complainants, Rudolph L. Tanner and Clara H. Tanner, being aggrieved by an order made by the Chancellor on the advice of Vice-Chancellor Buchanan in the above-entitled cause on November 1, 1928, dismissing the bill of complaint, hereby appeal from the whole and every part of said order to the Court of Errors and Appeals in the last resort in all causes.

E. A. MERRILL,
Solicitor for and of Counsel
with the Complainants.

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

E. A. MERRILL,
Of Counsel with Appellants.

PETITION OF APPEAL.

Filed November 20, 1928.

New Jersey Court of Errors and Appeals

Between

RUDOLPH L. TANNER, *et ux.*,
Complainants,

and

BOYNTON LUMBER COMPANY,
Defendant.

On Appeal.

Petition of Appeal.

The petition of Rudolph L. Tanner and Clara H. Tanner, the appellants in the above stated cause, respectfully shows that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker bearing date the first day of November, 1928, wherein the said Rudolph L. Tanner and Clara H. Tanner were complainants and the said Boynton Lumber Company was defendant, in this respect, to wit;

(1) The decree does not adjudge that the material described in the item of March 8, 1924, of the bill of particulars filed in the mechanics' lien action of Boynton Lumber Company against Rudolph L. Tanner and Clara H. Tanner, his wife, the complainants herein, was not ordered for or used in the erection and construction of the dwelling house of complainants.

(2) The decree does not adjudge that the allegation in the affidavits of Catherine V. Nagle and John T. Evans that the material described in

said item of March 8, 1924, was used in the erection and construction of complainants' dwelling was false in fact; and that, being false, the affidavits were fraudulent as well upon being used for a fraudulent purpose.

(3) The decree does not adjudge that the defendant herein made a fraudulent use of the affidavits of said Catherine V. Nagle and John T. Evans.

(4) The decree does not adjudge that except for the said affidavits of said Catherine V. Nagle and John T. Evans, filed by and for the benefit of defendant, a summary judgment could not have been ordered against complainants.

(5) The Court dismissed the complainants' bill whereas it should have granted the relief prayed.

Your petitioners therefore pray that the said decree of the said Chancellor may be reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

E. A. MERRILL,
Solicitor for and of Counsel
with Appellant-Petitioners.

ANSWER TO PETITION OF APPEAL.

Filed December 30, 1928.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between	*On Appeal from Court of Chancery.*
RUDOLPH L. TANNER, *et als.*, *Complainants-Appellants,*	
and	*Answer to Petition of Appeal.*
BOYNTON LUMBER COMPANY, *Defendant-Respondent.*	

The answer of the above named respondent to the petition of appeal of the above named appellant.

This respondent not acknowledging the truth of all or any of the matters contained in the said petition of appeal for answer thereto, nevertheless says and admits that a decree was on November 1, 1928, made and entered in the Court of Chancery of New Jersey, as stated in said petition for the purpose therein mentioned; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced.

This respondent is advised and believes that the said decree is agreeable to equity, and it prays that the same may be affirmed with costs to be adjudged to this respondent.

ORLANDO H. DEY,
Solicitor for and of Counsel
with Respondent.

BILL OF COMPLAINT.

Filed October 6, 1925.

IN CHANCERY OF NEW JERSEY.

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

The complainants, Rudolph L. Tanner and Clara H. Tanner, residing in the Town of Westfield, Union County, New Jersey, respectfully show that:

1. On July 5, 1924, summons issued out of the Union County Circuit Court in the mechanics' lien action of Boynton Lumber Company, plaintiff, against John T. Evans, Rudolph L. Tanner and Clara H. Tanner, his wife, and the Westfield Trust Company, defendants.

2. The lands upon which the residence, the subject of the lien claim, was erected belonged to both these complainants as tenants by the entirety. But the contract for the residence was made with one Joseph E. Gallagher by complainant, Rudolph L. Tanner alone, and the contract given to said Joseph E. Gallagher was sub-let by him to said John T. Evans, one of the defendants in the lien action referred to in paragraph 1.

3. The full contract price was paid by said complainant Rudolph L. Tanner to said Joseph E. Gallagher, and an amount in excess of the contract price as between said Joseph E. Gallagher and said John T. Evans was paid to Evans by Gallagher, or to others on his behalf.

4. In the bill of particulars attached to the complaint the last date on which it is alleged material was delivered to the premises upon

which a lien was claimed was March 8, 1924; and the date of delivery next preceding the date of March 8, 1924, was February 12, 1924, which is nearly five months prior to the issuance of the summons in said lien action.

5. In paragraph 4 of the mechanics' lien complaint it is alleged that the materials described in said bill of particulars "were furnished to and used by said defendant, John T. Evans, in the erection and construction of said building," meaning the building erected on the premises liened.

6. In and by said bill of particulars it is alleged that on March 8, 1924, the following materials were "delivered to the Tanner job located on the Boulevard, Westfield, N. J.":

1 dr. 2-6 x 6-2-1¾ flush sanitary drs. birch
3 " 2-6 x 6-8-1¾ " " " "
2 " 2-2 x 6-8-1¾ " " " "
1 sash dr. 2-6 x 6-8-1¾ 1 panel and gla. 1 lt.

7. The defendants Tanner duly filed their answer denying that the alleged debt was a lien, following the suggestions as to form given by Luce in his 1923 Edition of the Mechanics' Lien Law.

8. The defendant Westfield Trust Co., also filed its answer.

9. The defendant Joseph E. Gallagher did not file an answer.

10. After answer filed by defendants Tanner said Boynton Lumber Co. gave notice of a motion to strike out said answer on the ground that it was frivolous and sham, and said motion was argued on September 6th and 15th, 1924.

11. To the notice of motion was attached the affidavit of John T. Evans, dated August 29, 1924, and in paragraph 3 of said affidavit said Evans deposed that the materials described in said bill of particulars were "used in the erection or construction of said building," referring to the residence of these complainants, at the times stated in said bill of particulars.

12. To the notice of motion was also attached the affidavit of one Catherine V. Nagle; in paragraph 1 of her affidavit said Catherine V. Nagle deposes that she is "the bookkeeper of Boynton Lumber Company"; and in paragraph 4 she deposes as of her own knowledge that "said materials," referring to the materials described in the bill of particulars, "were furnished to and used by said defendant, John T. Evans, in the erection and construction of said building," referring to the Tanner residence.

13. No other affidavits were filed by any representative of said Boynton Lumber Co., or by anyone having personal knowledge of the facts.

14. On September 15, 1924, the answer of the defendants Tanner was struck out on said motion and a summary, special, judgment entered against their lands in the sum of $2,700.81, and costs, which said judgment was thereafter affirmed.

15. Said John T. Evans prior to the commencement of the mechanics' lien action by Boynton Lumber Co., had given said Boynton Lumber Co. certain collateral security for an indebtedness which included the indebtedness for which the special judgment against the lands of the defendants Tanner was entered.

16. Subsequent to the affirmance of said mechanics' lien judgment said Rudolph L. Tanner and Clara H. Tanner instituted a proceeding in this court to ascertain their rights, status and legal relations with respect to the collateral security referred to in paragraph 15 herein, and said Boynton Lumber Co. and John T. Evans were made defendants therein.

17. In the course of the proceedings referred to above said bill was dismissed as to Boynton Lumber Co., and was thereafter proceeded in as to said Evans.

18. Said Evans failing to file an answer there was a decree *pro confesso* and order for proofs *ex parte,* and at hearings before Honorable Robert H. McAdams, sitting as Special Master, said Evans appeared under subpoena on behalf of complainants.

19. Upon his examination said Evans was unable to produce any order, or copy of any order, for the doors described in the bill of particulars as of March 8, 1924, or any bill for them.

20. Said Evans also testified that all the doors in the Tanner house were hung on or before March 1, 1924, and that the interior doors were one-panel doors, but the doors alleged to have been delivered on March 8, 1924, are described in the bill of particulars as "flush sanitary doors."

21. By the report of said Special Master, copy of which is attached hereto and made a part hereof, it appears, and complainants so charge, that the affidavit of John T. Evans, attached to the notice of motion for summary judgment in the mechanics' lien action of said Boynton Lumber Co. against complainants herein, was false

and fraudulent with respect to the item of March 8, 1924.

22. Complainants charge that paragraph 4 of the affidavit of Catherine V. Nagle, attached to said notice of motion, was false and fraudulent with reference to the item of March 8, 1924, and its implication that she had personal knowledge of the fact.

23. Complainants allege that except for the item of March 8, 1924, thus fraudulently added to said bill of particulars, said special judgment could not have been entered against these complainants, and charge that said judgment was thus fraudulently procured.

24. Through their solicitor complainants brought said fraudulent affidavits to the attention of the attorney of Boynton Lumber Co., but said attorney notified said solicitor that execution on said judgment will, nevertheless, be pressed.

25. Complainants have been informed by the Sheriff of Union County that levy has been made on their said lands for the enforcement of said judgment, thus fraudulently procured.

Complainants desire that defendant shall be perpetually enjoined from prosecuting its fraudulent judgment against their lands and therefore pray:

1. That the defendant Boynton Lumber Co. may answer this bill of complaint without oath, and each statement made therein.

2. That it be decreed that said Boynton Lumber Co. be perpetually enjoined from prosecuting its said special judgment against the lands of complainants.

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

E. A. MERRILL,
Solicitor for and of Counsel with Complainants.

VERIFICATION.

STATE OF NEW YORK,
COUNTY OF NEW YORK. } *ss.*

RUDOLPH L. TANNER, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am one of the complainants in the foregoing bill of complaint mentioned. I have read the same and am familiar with the contents thereof, and the matters and things therein set forth are true so far as relates to my acts and deeds, and so far as relates to the acts and deeds of others I believe them to be true.

2. I reside at No. 835 Boulevard, Westfield, New Jersey, being the lands and premises to which the lien of defendant's judgment attaches.

3. There are no flush sanitary doors, or one panel one glass light doors, in my said house, nor were such doors called for by the specifications or ordered by me or on my behalf.

4. The doors in my said house were hung on or before March 1, 1924, and were not changed subsequent to that date.

5. I have been advised by the Sheriff of Union County, by letter and through my solicitor,

that levy on my said lands has been made, and that he has received instructions from defendant's solicitor to proceed forthwith with the sale thereof.

RUDOLPH L. TANNER.

Subscribed and sworn to before me
this 6th day of October, 1925.

WM. B. COOLEY,
Notary Public.

ANSWER TO BILL.

Filed November 16, 1925.

IN CHANCERY OF NEW JERSEY.

59/202.

Between

RUDOLPH L. TANNER and CLARA H. TANNER, his wife,
Complainants,

and

BOYNTON LUMBER COMPANY, a corporation of New Jersey,
Defendant.

On Bill &c.
Answer.

Defendant, Boynton Lumber Company, a corporation of New Jersey, with its principal office at Sewaren, in the Township of Woodbridge, County of Middlesex, answering the bill of complaint filed in this cause, says that:

FIRST DEFENSE.

1. Paragraph 1 is admitted.

2. Defendant has no knowledge nor information sufficient to form a belief as to the allegations of paragraph 2.

3. Defendant has no knowledge nor information sufficient to form a belief as to the allegations of paragraph 3.

4. Paragraph 4 is admitted.

5. Paragraph 5 is admitted.

6. Paragraph 6 is admitted.

7. This defendant admits that the complainants filed an answer in the mechanics' lien action mentioned in the bill of complaint. Defendant has no knowledge nor information sufficient to form a belief as to that portion of said paragraph 7 which alleges that the said answer was filed "following the suggestions as to form given by Luce in his 1923 edition of the Mechanics' Lien Law."

8. Paragraph 8 is denied.

9. Defendant denies that Joseph E. Gallagher was defendant in said suit. Defendant admits that the said Joseph E. Gallagher did not file an answer.

10. Paragraph 10 is admitted.

11. Paragraph 11 is admitted.

12. Paragraph 12 is admitted.

13. Paragraph 13 is denied.

14. Paragraph 14 is admitted.

15. Paragraph 15 is admitted.

16. Paragraph 16 is admitted.

17. Defendant admits as alleged in paragraph 17 that "in the course of the proceedings referred to above, said bill was dismissed as to Boynton Lumber Company." Defendant has no knowledge nor information sufficient to form a belief as to the remainder of said paragraph 17.

18. Defendant has no knowledge nor information sufficient to form a belief as to the allegations of paragraph 18.

19. Defendant has no knowledge nor informations of paragraph 19.

20. Defendant has no knowledge nor information sufficient to form a belief as to the allegations of paragraph 20.

21. Paragraph 21 is denied.

22. Paragraph 22 is denied.

23. Paragraph 23 is denied.

24. Defendant admits that complainants, through their solicitor, brought to the attention of the solicitor for this defendant, the fact that he, the said solicitor for complainants, intended to claim that certain affidavits filed in said mechanics' lien action were fraudulent and that thereupon the solicitor for this defendant notified him that execution on the judgment of this defendant would, nevertheless, be pressed. These defendants deny that there were any fraudulent affidavits filed in said mechanics' lien action.

26. Defendant has no knowledge nor information sufficient to form a belief as to the allegations of paragraph 25.

SECOND DEFENSE.

1. In said mechanics' lien action in the Union County Circuit Court referred to in paragraph 1 of the bill of complaint, an order was made by the Honorable Samuel Kalisch, one of the Justices of the New Jersey Supreme Court holding the Union County Circuit on September 15, 1924, striking out the answer theretofore filed in said suit by the defendants Rudolph L. Tanner and Clara H. Tanner, his wife, who are the complainants in this present cause of action, be-

cause said answer was sham and frivolous and because said defendants had, after due notice, failed to show such facts as entitled them to defend.

2. Pursuant to the making of said order, a summary and final judgment was entered in said Union County Circuit Court on September 15, 1924, in favor of this defendant against said complainants specially for the sum of $2,619.19, together with lawful interest from March 8, 1924, and the plaintiff's cost of suit to be taxed, to be made of the building and lands described in the complainants' bill of complaint.

3. The complainants Rudolph L. Tanner and Clara H. Tanner, his wife, thereupon appealed from the judgment mentioned in paragraph 2 of this defense to the New Jersey Court of Errors and Appeals which last named court on March 25, 1925, rendered its judgment affirming said judgment by the Union County Circuit Court and ordering that the record be remitted to said Union County Circuit Court to be proceeded with in accordance with its judgment and the proceedings of said court.

4. The matters and things alleged in the complainants' bill of complaint are *res adjudicata* by the said respective judgments of the Union County Circuit Court and the N. J. Court of Errors and Appeals.

THIRD DEFENSE.

1. On October 2, 1925, a decree was entered in this court in favor of this defendant, denying an application then made by said complainants for the same relief as that which is prayed for in this suit.

2. The facts upon which said last mentioned application was made and denied were the same as those set out in the bill of complaint filed in this cause.

ORLANDO H. DEY,
Solicitor for Defendant.

REPLICATION.

Between RUDOLPH L. TANNER and CLARA H. TANNER, his wife, *Complainants,* *and* BOYNTON LUMBER COMPANY, a corporation, *Defendant.*	*On Bill, etc.* *Replication.*

Complainants, Rudolph L. Tanner and Clara H. Tanner, his wife, replying to the answer of the defendant filed in this cause say that:

FIRST DEFENSE.

The complainants join issue on the answer of the defendant under the first count.

SECOND DEFENSE.

1. Paragraphs 1, 2 and 3 are admitted. Paragraph 4 is denied.

THIRD DEFENSE.

1. Paragraphs 1 and 2 of the third defense are denied.

E. A. MERRILL,
Solicitor of Complainants.

TESTIMONY.

RUDOLPH L. TANNER, the above named complainant, being duly sworn in his own behalf, testifies as follows:

Direct examination by Mr. Merrill.

Q You are one of the complainants? A Yes, sir.

Q In this proceeding? A Yes, sir.

Q Is Clara H. Tanner, the other complainant, your wife, Mr. Tanner? A She is.

Q Do you and your wife own the property upon which was placed this mechanics' lien now in question? A We do.

Q Were you one of the defendants in that mechanics' lien suit? A Yes.

Q You made a contract with Mr. Joseph E. Gallagher, for the erection of this residence? A Yes, sir.

Q And sublet to John T. Evans? A Yes.

Q Were either of those contracts filed? A Not that I know of.

Q Were you one of the complainants in the proceedings for declaratory judgment, in the suit in which the Boynton Lumber Company and John T. Evans were defendants? A Yes.

Mr. Merrill: I offer in evidence so much of those proceedings as is included in the evidence of Catherine V. Nagle and John T. Evans.

The Court: You are offering only the two affidavits—

Mr. Merrill: No; the complaint, the answer, and the affidavits, and the bill of par-

ticulars. The purpose is merely to bring before the Court the statement of the Nagles and the affidavit of—

The Court: It has not been referred to. It may be admitted in the pleadings.

Mr. Merrill: It is.

Said document is marked Exhibit C. 1.

Q I show you a specification, which is marked Exhibit 12 on the part of the complainants, in the proceedings for a declaratory judgment. A Yes.

Q Were those the specifications for your house? A They are the ones.

Mr. Merrill: I offer them in evidence.

Mr. Dey: They are objected to. We are not bound by the specifications between the owner and Mr. Gallagher.

The Court: What is the purpose of the offer?

Mr. Merrill: The purpose of this is to show that there is no such door included in the specification for the Tanner house, as the doors specified in this item in the bill of particulars in question; no such doors were in contemplation of Tanner or Evans, and no such doors were furnished or put in the house in question.

The Court: The objection is overruled.

Said specifications are marked Exhibit C. 2.

Q Do you recognize that photograph, Mr. Tanner? A Yes, sir.

Q This is a photograph marked Exhibit 9 on the part of the complainants. Where was that

photograph taken? A It was taken from the inside of the rear left bedroom of the house.

Q Referring to the house on which the lien was placed? A Yes, sir.

Q How many, if you know, of the doors in your house, are of that description, not in number, but whether all of them or not are of that description—the interior doors I mean?

Mr. Dey: I object to testimony as to what kind of doors the gentlemen has in his house. That is entirely irrelevant and immaterial. I object to the entire line of testimony.

The Court: The objection is overruled.

A They are not all of that description.

Q How many are not of that description? A Two or three.

Mr. Merrill: I offer this photograph in evidence.

Said photograph is marked Exhibit C. 3.

Q The photograph Exhibit 10 on the part of the complainants in the proceedings for the declaratory judgment—I show you that exhibit and ask you if you recognize that photograph? A Yes, sir.

Q Where was that taken? A In the kitchen.

Q Do you know how many doors in your house are of that description? A Yes.

Q How many? A Two.

Mr. Merrill: I offer that in evidence.

Said photograph is marked Exhibit C. 4.

Q I show you a cut of a door marked Exhibit No. 19 in the proceedings for declaratory judg-

ment, and ask you if there are any doors in your house of that character? A No, sir.

Q There are not? A No, sir.

Q Do you know what kind of door that is? A Yes.

Q What kind of a door is it? A A hospital or sanitary door.

Q Is it called a flush sanitary door? A It is—

Mr. Merrill: I offer it in evidence.

Said cut is marked Exhibit C. 5.

Q Referring to complainants' Exhibit 5, did you ever order for your house any doors of that description; that character? A No, sir.

Q Were or were not all the doors in your house hung prior to March 1, 1924? A They were.

Q After March 1, 1924, were any doors in your house changed or exchanged? A No, sir.

Q Did you have a full complement of doors in the house on March 1, 1924? A Yes, sir.

Cross examination by Mr. Dey.

Q Are you sure, Mr. Tanner, that all the doors were hung by the 1st of March, 1924? A Yes, sir.

Q Positive of it? A Yes, sir.

Q And on what date did you know that? A Why, I knew it at or about that date.

Q About the 1st of March, 1924? A Yes, sir. It might have been a day or two earlier or a day later.

Q You watched the progress of the house as it was constructed? A As near as anyone would under the circumstances.

Rudolph L. Tanner, re-direct.

Q Give us an average of how frequently you attended the house during the week during the course of its construction? A If I was in the city at the time—I was doing some traveling—

Q Can't you approximate the number of times, whether you were traveling or not? A I should say I visited it five days a week, either before going to business or after coming home.

Q So that you knew on or about March 1st, what type of doors you had in your house? A Yes, sir.

Q When did you move in your house to live there? A I moved the great bulk of my furniture, that is, the bulky pieces, on the 19th of March.

Q You have lived there since the 19th of March, 1924? A Yes, sir.

Re-direct examination by Mr. Merrill.

Q Prior to March 19, 1924, had you moved any of your things into the house? A A great many of them.

Q For how long a period prior to March 19th were you gradually moving in? A For a period of three or four weeks.

Mr. Merrill: I want to offer in evidence the report made by Judge McAdams in the declaratory judgment proceedings. I offer that from the files.

Said Master's report is marked Exhibit C. 6.

COMPLAINANTS REST.

WILLIAM BIERLING, a witness produced on behalf of the defendant, being duly sworn, testifies as follows:

Direct examination by Mr. Dey.

Q You are employed by the Boynton Lumber Company, are you not? A Yes, sir.

Q And you were employed by it in December, 1923? A Yes, sir.

Q In what capacity are you employed? A Mill superintendent.

Q Do you know John T. Evans, whose name has been mentioned in this case? A Yes, sir.

Q And a man by the name of Ed. Feickessen? A I did.

Q Who was he? A As far as I knew he was a sort of right-hand man or possibly a foreman and all-around handy man. He did practically all of his detail work.

Q What negotiations or business did you transact with Feickessen, that had to do with John Evans, so far as the Tanner job was concerned? A He would come in and order the materials, and if there were no orders over at that time, he would place those orders.

Q Where did he order the materials? A At the Boynton Lumber office.

Q Did you personally see him there? A I did.

Q Did Evans ever come and order some materials himself? A He did sometimes, but not usually.

Q I show you this order dated December 27, 1923, John T. Evans, Tanner job, and ask you to what that refers? A That is an order accepted from Mr. Feickessen for the Tanner job, for these flush doors.

William Bierling, direct.

Q Are they the same doors described in these proceedings as having been delivered March 8, 1924? A They are.

Q Where were you and where was Feickessen when those doors were ordered? A In the office of the Boynton Lumber Company.

Q Did you have these doors in stock? A We did not.

Q What did you do? A We sent an order to Crooks manufacturing concern, and they supplied it.

Q Is this that order? A It is.

Q Did you afterwards receive the doors from the Crooks people, made up specially? A We did.

Q Then what happened? A They were delivered to the Tanner job.

Q You didn't personally deliver them to the Tanner job? A No.

Q Do you know who did make the deliveries at that time for the Boynton Lumber Company? A No, I don't know.

Q They were handed to somebody to deliver? A Yes, they were.

Q Are these in your handwriting? A They are.

Mr. Dey: I offer them in evidence.

By Mr. Merrill.

Q You have no writing here signed by either Feickessen or Evans? A No, sir; no written order.

Q Do you recall making an affidavit that these doors were ordered by Feickessen, a partner of Evans? A I don't recall it, as a partner of Evans.

William Bierling, direct.

Q You don't recall your affidavit? A Not as a partner of Evans, I don't.

Mr. Merrill: As to the alleged sales order Number 8409, I object to its introduction in evidence, on the ground that it does not carry the signature or either Evans or Feickessen. It is merely a memorandum which might be a self-serving declaration made by the defendant.

The Court: The objection is overruled.

By the Court.

Q I understand you to say this order was given to you personally verbally by Feickessen? A Yes, sir.

Q Is that what you mean to say? A Yes, sir.

Q And at that time you wrote out this order, which is a part of your business record? A Yes, sir.

The Court: I will admit it.

Said order No. 8409 is marked Exhibit D. 1.

By the Court.

Q Was a duplicate of it given to anybody else? A No, sir; that is not customary.

Mr. Merrill: I object to purchase order Number 5177, addressed to W. D. Crooks & Son, on the ground that it is immaterial and irrelevant. The question is as to the delivery of these doors for use in a particular house, and it is immaterial from what source they were ordered.

The Court: I will admit it.

Said purchase order is marked Exhibit D. 2.

Q I show you a slip dated March 8, 1924, sold to John T. Evans, Tanner job, order 8409. Is that the form of delivery slip which is used by the Boynton Lumber Company, Mr. Vierling? A Yes, sir.

Q Are the materials mentioned in that slip the same materials which you wrote out this sales order 8409 for? A Yes, sir.

Cross examination by Mr. Merrill.

Q Mr. Bierling, I show you a catalog of W. D. Crooks & Son, and I ask you if the illustrations from pages 47 to 51, inclusive, are or are not illustrations of flush sanitary doors? A They are.

By the Court.

Q Is there any other print of a flush sanitary door than that shown by those illustrations? A Not that I know of, sir.

Mr. Merrill: I offer those illustrations on pages 47 to 51, inclusive, in evidence.

Said illustrations are marked Exhibit C. 7.

MILLARD MUNN, a witness produced on behalf of the defendant, being duly sworn, testifies as follows:

Direct examination by Mr. Dey.

Q Mr. Munn, you drive truck for the Boynton Lumber Company, do you? A Yes, sir.

Q What is your position? A Well, I am in charge of the whole trucking end of it, and I run one truck myself also.

Q You deliver materials? A Yes, sir.

Q Were you employed by the Boynton Lumber Company in that capacity on March 8, 1924? A Yes, sir.

Q Do you know where the Tanner job was in Westfield? A Yes, sir.

Q Did you know John T. Evans? A Yes.

Q How long had you known him prior to March 8, 1924? A About a year before that.

Q Had you ever made any deliveries to this particular Tanner job to Mr. Evans prior to March 8, 1924? A A few.

Q Do you know whether Evans was engaged in other building operations in Westfield at about that time? A He was engaged in three or four different jobs.

Q Did you have occasion to deliver other materials to him from time to time on other jobs? A Yes, sir.

Q Did you make a delivery to the Tanner job March 8, 1924? A I did.

Q What did you deliver? A Some doors.

Q Where was Evans that day? A On the job with two other men.

Q Did you talk to him that day? A Passed the time of day with him, as I did on every job.

Q Who unloaded the doors? A I was on the truck myself, and I passed them to the two men who were working, I believe, for Mr. Evans.

Q Why do you say they were working for Evans? A Because they were on the job.

Q That was the Tanner house? A Yes, sir.

Q Was Evans working there that day? A Yes.

Millard Munn, direct.

Q Did he know you were delivering doors there? A Yes, sir.

Q How do you know? A He signed the ticket for me.

Q Acknowledging delivery of the doors? A Yes, sir.

Q Is this the ticket you refer to? (Showing witness a ticket.) A Yes, sir.

Q Is this Mr. Evans' signature? A That is his signature.

Q You know that? A Yes, sir.

Q How far along had the building progressed at the time? What was the exterior appearance of it? A Why, the sheathing, the outside, was on. I didn't go on the inside to see any further.

Q Was the roofing on? A The roof was on.

Q The lath and plaster in? A I couldn't say that.

By the Court.

Q You say Mr. Evans signed this? A I gave him the book.

Q Did you see him sign it? A He came back and handed it to me and I took the duplicate out.

Q Did you see him sign the slip? A I certainly saw him, but he opened the book and passed it out again to me, I didn't go in the house.

Q Where was he when you handed the book to him? A He was in the window inside.

Q What floor? A The first floor.

Q Of the residence? A Yes, sir.

Q Where were you? A I was outside in the front of the house.

Q You passed it in through the window? A Yes.

Millard Munn, cross.

Q How long did he keep it before he returned it to you, Mr. Munn? A About two or three minutes.

Q Did you say anything with reference to the slip? A No.

Q Did he to you? A No, he just handed it back.

Q Personally? A Yes.

Q Was this signature on when you handed it to him? A No.

Q Was it on after he returned it to you? A Yes, sir.

Mr. Dey: I offer it in evidence.

Mr. Merrill: I object to it; it wasn't signed in the presence of the witness, he says.

The Court: The objection is overruled.

Said paper is marked Exhibit D. 3.

Cross examination by Mr. Merrill.

Q You say that Evans had other jobs in the same vicinity, did you? A In the vicinity of Westfield.

Q He had seven or eight houses right around the Tanner house, didn't he? A I won't say whether it was seven or eight.

Q Quite a number? A I know there were some.

Q And you were delivering to other houses, too? A Yes, sir.

Q Are you quite sure that the house to which these doors were delivered had the sheathing on? A Yes, sir.

Q What, if you know, was to go over the sheathing? I mean, was it to be shingle? A I

don't know anything about the specifications of the house; I am just to see the goods get there.

Q According to your recollection the exterior of the house was in such condition that something further had to be done to the exterior? A I wouldn't say that just now. You mean the inside of the house?

Q The sheathing. A That is the outside.

Q Is there such a thing as a sheated house that is completed with the sheathing? A Sure, yes.

Q Was this a type of house that was completed when it was sheathed, so far as the exterior finish was concerned, Mr. Munn? A I couldn't say offhand.

Q Were the steps in? A The steps were in, one side, the side where I was on.

Q When you passed this book through the window, did you get a view of the interior of the room? A I did not.

Q How were those doors packed? A They were laid on a Ford truck?

Q Were they boxed? A Not when I took them out, no, sir.

Q Would you recognize a cut of the type of door that you delivered? A I wouldn't say for sure, at this time, but I made a remark when I delivered them that they were doors out of the ordinary, or which I delivered at different places —a different door from ordinary jobs.

Q Can you recollect whether they were what they call one-panel doors; did they have one long panel set into the jamb? A Yes, a one-piece door.

Q One piece? A Yes.

Q Referring to complainants' Exhibit No. 7, is that illustration shown on page 51, an illustra-

tion of that type of door? A It was a door similar to that.

Q Referring to complainants' Exhibit C. 3, might they have been doors of that description? A I couldn't say for sure.

Q You don't know? A Not for sure.

Q Referring to defendant's Exhibit D. 3, which is the alleged delivery receipt, might this be—and also referring to complainants' Exhibit 4—might that be an illustration of the last door? A No, sir; not the ones I delivered.

Q It isn't? A No.

Q What difference was there betwen this door and the door you delivered, referring to the last item of the delivery receipt? A The ones I had there was no glass; they were not a glass door.

Q No glass in it? A No, sir.

Q You didn't deliver any door at that place having any glass in it? A I don't remember.

Q You are not willing to say you did? A I won't say I did and I won't say I didn't.

Q You don't know? A I won't say.

Q Then as to that item, you are wholly at a loss to say whether this refers or represents what was delivered or not? A Not on that slip; no, sir.

Q When you delivered these doors, did Evans see the doors taken in? A Yes, sir.

Q Did you deliver any other materials for Evans at that same time? A Not at that special time; no, sir.

Q Did you have any other goods on the truck? A No, sir.

Mr. Dey: I offer in evidence these papers from the files in the Union County Circuit Court, in the mechanics' lien action, namely, the summons and complaint; the answer of

the defendants Tanner; the notice of motion of the complainant to strike out that answer, with affidavits attached; the additional affidavit of John T. Evans, used in support of that motion; the two affidavits filed by the defendants in support of their answer; the order for summary judgment, signed by Mr. Justice Kalisch; and the rule of the Court of Errors and Appeals affirming the judgment.

The Court: Does that constitute the entire record.

Mr. Dey: No; there are other papers which refer to the other defendants. I shall be glad to offer all of it if you desire it.

The Court: It makes no difference to me. It is for you.

Mr. Dey: I will offer the file.

Said file is marked Exhibit D. 4.

Mr. Merrill: I would like to enter an objection. It is reduced to a very narrow question, as to whether these goods were or were not delivered within time, and that there is enough admitted in the pleadings to cover all the requirements of the Court with respect to information as to the proceedings in question.

The Court: The objection is overruled.

Mr. Dey: I offer the entire file in the Chancery proceedings, Docket 57, page 686. The only part of these proceedings that we are particularly concerned with is the time of the decree dismissing the bill, but I am offering the entire file now.

Mr. Merrill: I object on the ground that they are immaterial and irrelevant on the issue before the Court.

The Court: The objection is overruled. Said files are designated as Exhibit D. 5.

DEFENDANT RESTS.

RUDOLPH L. TANNER, being recalled, testifies as follows:

Direct examination by Mr. Merrill.

Q Mr. Tanner? A Yes, sir.

Q Just a minute. What kind of a house is your house? A Brick; the ground floor is stucco.

Q Is it a sheathed house? A It is not.

Q Was the exterior of the house finished on March 1, 1924? A Yes, sir.

Q Referring to complainants' Exhibit C. 7, the catalog of W. D. Crooks & Son, will you look at the illustrations of the flush sanitary doors, pages 47 to 51, and state whether, if you know, there are any doors of that design and construction in your house? A There are none.

Mr. Dey: I have no questions.

By the Court.

Q And there never were any such doors? A Never were.

BOTH SIDES REST.

STIPULATION.

Filed January 14, 1929.

COURT OF ERRORS AND APPEALS OF NEW JERSEY.

Between

RUDOLPH L. TANNER and CLARA H. TANNER, his wife,
Complainants-Appellants,

and

BOYNTON LUMBER COMPANY, a corporation,
Defendant-Respondent.

On Bill, etc.

Stipulation.

For the purpose of avoiding the printing in the state of case of admittedly irrelevant portions of the specifications for the Tanner House, it is hereby stipulated and agreed as follows:

1. This stipulation may be printed in the state of case in lieu of the complete specifications.

2. The specifications for the Tanner House, marked Exhibit C. 2, are alleged to be those pursuant to which Gallagher or Evans constructed the Tanner House. Boynton Lumber Company was not a party to them; had no knowledge of their contents; and was not in anywise bound thereby.

3. Boynton Lumber Company does not hereby admit the relevancy of the portion of said specifications which is to be printed and which is stated in paragraph 4 infra, but reserves its rights under the objection heretofore made by it

Stipulation.

at the final hearing to the admission in evidence of any of said specifications.

4. The following is the portion of said specifications relating to doors:

"All doors to be first quality stock and free from imperfections; they are to be of sizes and thicknesses as marked."

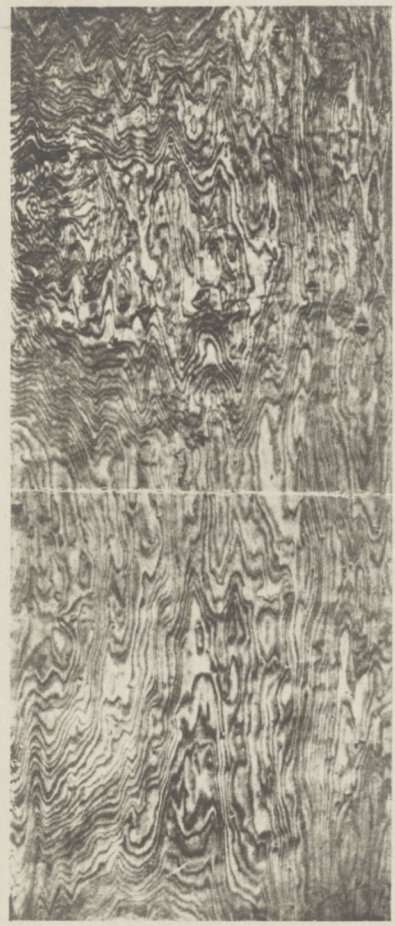
"Interior doors, except where otherwise noted, are to be Morgan or equal, 2 cross panel, birch veneer."

"All exterior doors are to be constructed of white pine in accordance with details."

"Doors are to be glazed where so shown. Muntins, wood 7/8" face."

E. A. MERRILL,
Solicitor for and of Counsel with
Complainants-Appellants.

ORLANDO H. DEY,
Solicitor for and of Counsel with
Defendant-Respondent.



M-115

EXHIBIT C. 5.

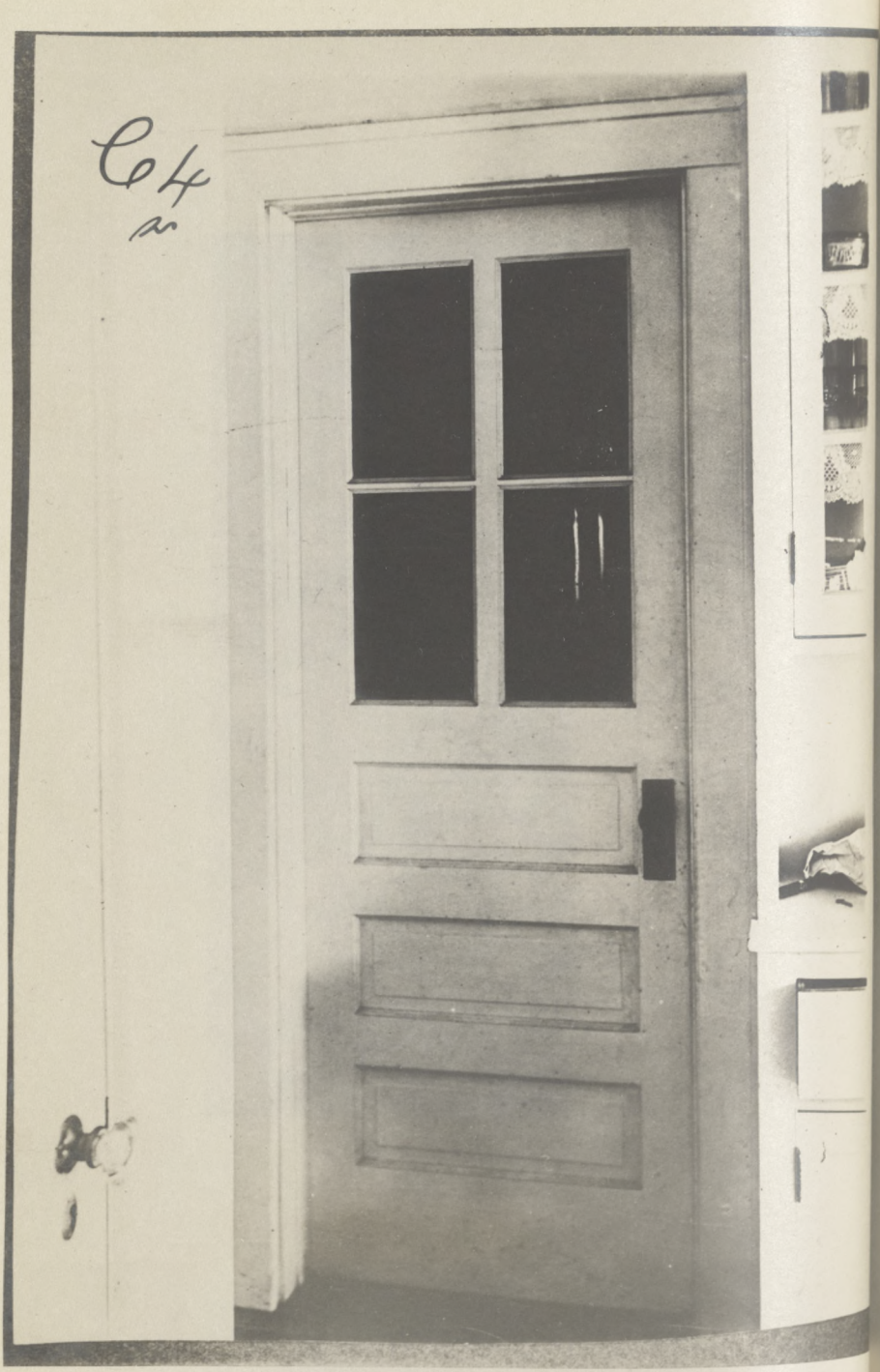


EXHIBIT C. 4.

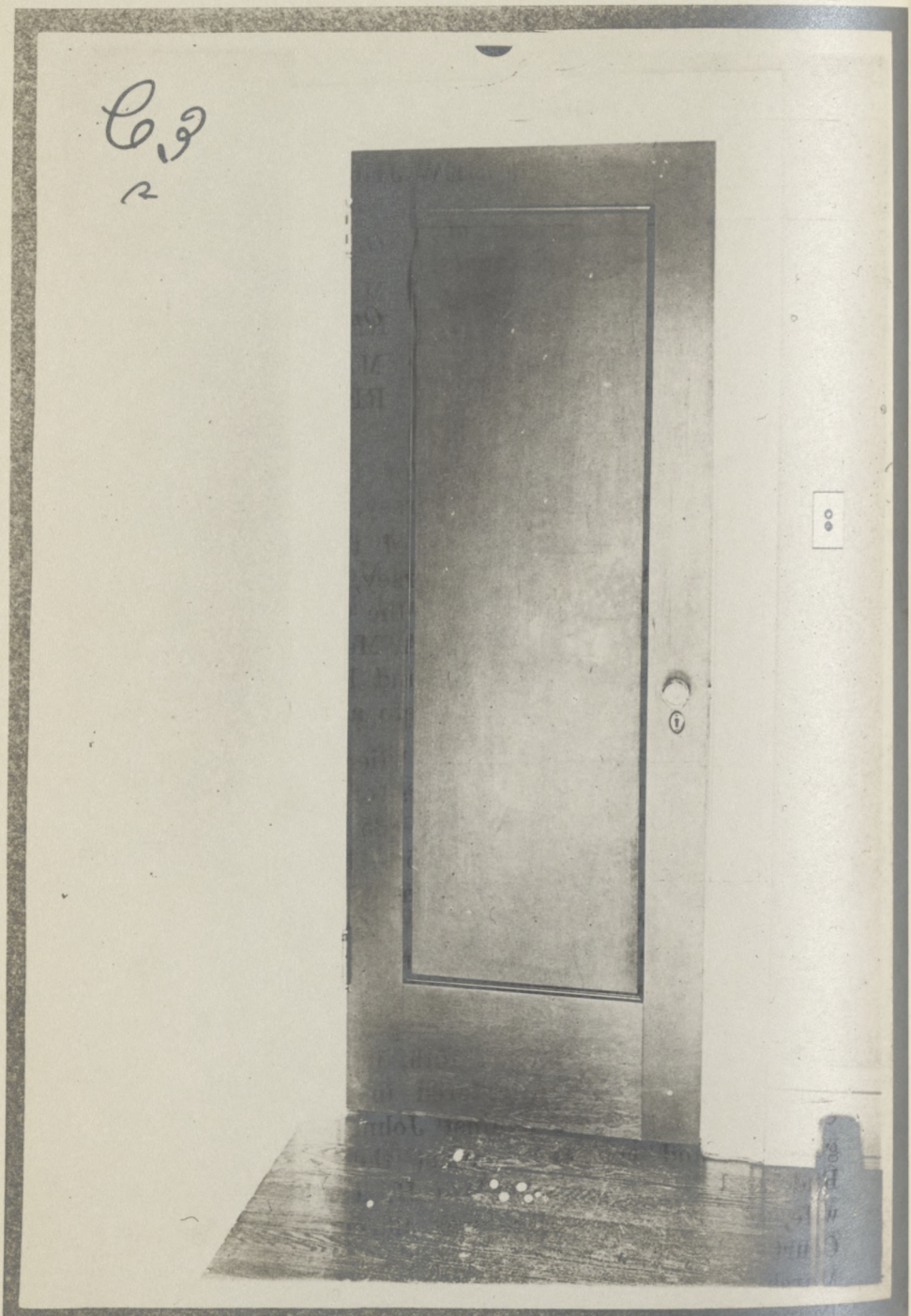


EXHIBIT C. 3.

Exhibit C. 6.—Master's Report.

EXHIBIT C. 6.

IN CHANCERY OF NEW JERSEY.

Between RUDOLPH L. TANNER, *et al.*, *Complainants,* *and* BOYNTON LUMBER CO., *et al.*, *Defendants.*	*On Bill, &c.* MASTER'S REPORT.

I, Robert H. McAdams, one of the Special Masters in Chancery of New Jersey, do hereby certify and report to his Honor, the Chancellor, that I have been attended by E. A. Merrill, Esq., solicitor for the complainants, and have taken the depositions of witnesses hereto annexed.

And I report that a mechanics' lien was filed against the lands and tenements of the complainants' property located at No. 835 Boulevard, Westfield, New Jersey, on July 5th, 1924, in an action begun by the Boynton Lumber Company, a corporation of New Jersey, in which John T. Evans as builder, Rudolph L. Tanner and Clara H. Tanner, his wife, owners, and Westfield Trust Company, a corporation, mortgagee, were defendants, and on September 15th, 1924, a judgment for $2,700.81 was entered in the Union County Circuit Court against John T. Evans generally and specially against the lands of Rudolph L. Tanner and Clara H. Tanner, his wife, which said judgment was affirmed by the Court of Errors and Appeals on the 17th day of March, 1925, against the lands of Rudolph L. Tanner and Clara H. Tanner.

Exhibit C. 6.—Master's Report.

And I further report that the summons on the said mechanics' lien suit was issued July 5th, 1924, based upon an indebtedness alleged to have been incurred upon various dates for materials furnished to the premises owned by Rudolph L. Tanner and Clara H. Tanner, his wife, up to and including March 8th, 1924; the last date prior to March 8th, 1924, being February 12th, 1924.

The evidence of one, John T. Evans, the builder in the mechanics' lien action, against whom a decree *pro confesso* has been taken in these proceedings, shows:

1. That on or before March 1st, 1924, all of the doors in the Tanner house aforesaid were hung;

2. That all of the interior doors, with two exceptions, were what is known in the trade as one panel doors were hung;

3. And the two exceptions were what is known in trade as sash doors four lights.

Upon request to produce all bills, the witness, Evans, produced bill dated October 20th, 1923; October 25th, 1923; November 13th, 1923; November 14th, 1923; December 8th, 1923; and February 14th, 1924. All of which bills were offered in evidence and marked respectively Exhibits 13, 14, 15, 16, 17 and 18 on the part of the complainants.

There are no bills offered in evidence by Evans, or testimony given to show that the six flush sanitary doors, and the one panel one glass light sash door, billed as of March 8th, 1924, as per bill of particulars attached to lien claim were ever ordered by Evans, or delivered or used in the Tanner house. To the contrary, however,

there is evidence on the part of the complainants, Tanner, that the interior doors, with the exception of two, are all one panel doors, as per Exhibit 9 on the part of the complainants, and testimony on the part of witness, Robert A. Hope, that the doors in the Tanner house are known in the trade as one panel doors, and that Exhibit 9 of a door in the Tanner house is a one panel door, and all doors, with the exception of the two sash doors referred to in the Tanner house are one panel doors.

The bill of particulars attached to the lien claim shows that thirty-three doors were delivered to the Tanner house between November 14th, 1923, and February 12th, 1924; a credit of four doors was given as of February 11th, 1924, leaving a total of twenty-nine doors supplied to the Tanner house by the Boynton Lumber Company. There are thirty one doors in the Tanner house, and all interior doors billed against the Tanner house were one panel birch veneer doors with the exception of the two sash doors, which are billed as four light doors. The evidence shows on the part of Tanner that no doors were hung, exchanged or replaced after March 1st, 1924.

And I further report that the testimony of Evans shows that he gave certain securities to the Boynton Lumber Company, consisting of a chattel mortgage in the sum of $7,877.13 dated the 20th day of March, 1924, and marked Exhibit 1 on the part of the complainant; the assignment of the Halligan contract dated March 20th, 1924, marked Exhibit 2 on the part of the complainants, and the transfer of the equity of said Evans in a lot of land in East Orange amount-

ing to $1000.00. All of which were given to secure an indebtedness of $7000.00 to the Boynton Lumber Company.

All of which is respectfully submitted as, in and by said order, this 5th day of August 1925.

Robert H. McAdams
SPECIAL MASTER.

IN CHANCERY OF NEW JERSEY.

57/686.

Between

RUDOLPH L. TANNER, *et als.*,
Complainants,

and

BOYNTON LUMBER COMPANY and JOHN T. EVANS,
Defendants.

On Bill, etc.

MASTER'S SUMMONS DUCES TECUM.

Sir:

You are hereby summoned to be and appear before me, as a witness called by the complainants, at my office at No. 120 Broad Street, Elizabeth, New Jersey, on Friday, July 10th, 1925, at 9:00 o'clock in the forenoon, when I shall proceed to hear and consider matters in reference before me in the said cause.

And you will bring with you the following papers and books:

Exhibit C. 6.—Summons Duces Tecum.

(1) A certain chattel mortgage dated March 20th, 1924, and given by you to the Boynton Lumber Company, if such chattel mortgage is now in your possession.

(2) Books of account showing the indebtedness to secure which said chattel mortgage was given.

(3) Original bills from the Boynton Lumber Company dated October 20 and 25; November 1, 6, 13, and 14, December 8 and 29, in 1923; and dated January 2, 8, 12, 21, 25, 28 and 29; February 7, 8, and 12; March 8; in 1924.

(4) Copies of your orders for the material covered by the bills referred to in paragraph 3.

(5) Original time book showing who worked on the Tanner house from March 1st to March 15th, 1924.

Given under my hand this 7th day of July, 1925.

Robert H. McAdams
Special Master.

To Mr. John T. Evans #853 Summit Avenue, Westfield, N. J.

Exhibit C. 6.—Testimony of John Thomas Evans.

TESTIMONY.

JOHN THOMAS EVANS, a witness produced on behalf of the complainants, being first duly sworn upon his oath according to law, deposes and says:

I am one of the defendants in this cause.

Mr. Merrill: I want to call the attention of the Special Master to the fact that Mr. Evans is the defendant in this proceeding; that he has not answered, and that this has made it necessary for me to call him as a witness for the complainants. He may, therefore, prove to be a hostile witness.

A No, sir.

Q Where do you reside? A 853 Summit avenue, Westfield, New Jersey.

Q Were you the contractor for the erection of a house on the Boulevard in Westfield, known as the Tanner house? A Yes, sir.

Q With whom did you contract? A With Mr. Joseph E. Gallagher.

Q Who was the owner of the house? A Mr. Rudolph L. Tanner.

Q Did you, yourself, have any contract relations with Mr. Tanner? A No, sir.

Q Did you order some of the materials used in the Tanner house from the Boynton Lumber Company? A Yes, sir.

Q Did you give the Boynton Lumber Company a chattel mortgage to secure those, and other indebtedness? A I don't know. You will have to ask Mr. Dey.

Q You gave the Boynton Lumber Company a chattel mortgage? A I don't remember; I

forget. I gave him some sort of a security, not to cover that job but various jobs.

Q You don't recall this chattel mortgage having been discussed in the mechanics lien suit brought by you just a few weeks ago? A With whom?

Q This chattel mortgage that I show you? A That had nothing to do with that.

Q You don't recall this chattel mortgage having been before the Referee just a few weeks ago? A I didn't see it there. I called up Mr. Dey and he said it was a chattel mortgage on no particular job, but for various jobs.

Q Will you please look that copy of the chattel mortgage over, and let me know if the personal property specified in this chattel mortgage was mortgaged to the Boynton Lumber Company to secure an indebtedness of $7,877.13? A It is too deep for me.

I desire to offer chattel mortgage in evidence.

Certified copy of Chattel mortgage John T. Evans to Boynton Lumber Company, a corp., dated the 20th., day of March 1924, is offered in evidence and marked Exhibit 1 on the part of the complainants.

Q You know you executed a chattel mortgage to the Boynton Lumber Company? A Yes, sir. If it states there is $7,877.13 the amount that I owe to them, it must be correct.

Q The amount specified in this chattel mortgage as of March 20, 1924, covered your entire indebtedness to the Boynton Lumber Company at that time? A Yes, sir.

Q Did you also assign to the Boynton Lumber Company your interest in the so-called Halligan contract? A Yes, sir.

Q Is that a copy of the assignment? A Yes, sir.

Copy of Assignment, John T. Evans to the Boynton Lumber Company dated March 20th, 1924, is offered in evidence and marked Exhibit 2 on the part of the complainants.

Q Was this assignment also made to protect your indebtedness to the Boynton Lumber Company as of its date March 20th, 1924? A Yes, sir.

Q To your knowledge has the chattel mortgage ever been cancelled? A I could not say.

Q To your knowledge has your interest in the Halligan contract been reassigned to you? A Not that I know of.

Q The subpoena required that you should bring in your bill from the Boynton Lumber Company dated October 25th, 1923. A Mr. Dey has it; he has all my papers.

Q Mr. Armstrong represented you; did he not? A Not in this case; he had nothing to do with this.

Q You do not know if Mr. Armstrong had been in communication with me in this particular action? A I do not know a thing about it. I never took up this question with Mr. Armstrong.

Q You gave Mr. Armstrong, did you not the copy of the complaint which was served upon you? A Sometime ago I showed him it, and asked him what to do, and he said to throw it in the waste basket.

Exhibit C. 6.—Testimony of John Thomas Evans.

Q You know that Mr. Dey appeared only for the Boynton Lumber Company in this proceeding? A I know that.

Q Did you bring your books of account? A Only an old time book.

Q Did you bring any book that would show the receipt of a bill dated October 25th, 1923 from the Boynton Lumber Company? A No, sir; we had no books then.

Q Did you make any effort to get any of the papers that were asked for in the subpoena that was served upon you? A Anything of any information. This is over two years ago.

Q You have then, in your possession no bill from the Boynton Lumber Company dated October 25th, 1923? A No; I gave it to Mr. Dey.

Q Are you sure you gave to Mr. Dey a bill of that date? A I don't know.

Q Have you a bill dated October 20th, 1923 from the Boynton Lumber Company? A For what amount?

Q Never mind the amount.

Q Have you any bill from the Boynton Lumber Company purporting to be a bill for material delivered to the Tanner job? A Not on my person.

Q Will you give the same answer with respect to bill dated November 6th, 1923? A I don't know anything about the bill. I will have to get a copy.

Q For November 13th, 1923? A The same thing.

Q November 14th, 1923? A Can't find it.

Q December 8th, 1923? A Can't find it.

Q Bill for December 29th, 1923? A Can't find it.

Q I will ask you to give me the Boynton bill for January 2nd, 1924? A I have it here.

Bill from Boynton Lumber Company dated January 2nd, 1924, to Mr. J. T. Evans is offered in evidence and marked Exhibit 3 on the part of the complainants.

Q I will ask you for the Boynton Lumber Co., bill of January 8th, 1924? A I produce it.

Bill of Boynton Lumber Company dated January 8th, 1924, to Mr. J. T. Evans is offered in evidence and marked Exhibit 4 on the part of complainants.

Q I ask you to produce the Boynton Lumber Co., bill for material furnished to the Tanner job and dated January 12th, 1924? A I produce it.

Bill of January 12th, 1924 to Mr. J. T. Evans from the Boynton Lumber Company is offered in evidence and marked Exhibit 5 on the part of the complainants.

By Mr. Merrill.

The bill of January 12th, 1925 covers more items than are included in the statement given in the bill of particulars.

Q I ask you to produce bill from Boynton Lumber Company for materials purporting to be delivered to the Tanner job dated January 21st, 1924? A That is lost.

Q I will ask you to produce the bill from the Boynton Lumber Company for materials dated January 25th, 1924? A I produce it.

Exhibit C. 6.—Testimony of John Thomas Evans.

Bill from Boynton Lumber Company to Mr. J. T. Evans, dated January 25th, 1924, is offered in evidence and marked Exhibit 6 on the part of the complainants.

Q I will also call your attention to the fact that the bill dated January 25th, calls for $103.65, which does not correspond with the items given in the bill of particulars which amount to $383.14.

Q I call for a bill dated February 7th, 1924, for materials purporting to be delivered to the Tanner job? A I produce it.

Bill dated January 28th, 1924 from the Boynton Lumber Company to Mr. J. T. Evans, is offered in evidence and marked Exhibit 7 on the part of the complainants.

Q I also ask for the original bill dated January 29th, 1924 for materials purporting to be delivered to the Tanner job? A I produce it.

Bill dated January 29th, 1924 to Mr. J. T. Evans from the Boynton Lumber Company is offered in evidence and marked Exhibit 8 on the part of the complainants.

Q I call for a bill dated February 7th, 1924, from the Boynton Lumber Company. A I haven't it.

Q For bills dated February 8th from the Boynton Lumber Company. A I haven't it.

Q You have no bills for February 7th, 12th, or March 8th? A I will look up all the old papers; I have not them here.

Q Will you look them up and let me know by Monday morning if you can find them? A Yes, sir.

Q Did you give the Boynton Lumber Company written orders for materials on the Tanner job? A Yes, sir.

Q Did you keep copies of them? A No, sir.

Q Did you check the deliveries made by the Boynton Lumber Company against your orders? A Always.

Q What did you check against? A Against a bill that they sent; such as those bills.

Q Where is your check on the bill? A I marked it in my head.

Q Do you recall any credits for material returned on this job to the Boynton Lumber Company? A I don't remember.

Q Have you any record of any credit? A I don't know.

Q When you received these bills from the Boynton Lumber Company did you enter them in an account book? A No, sir.

Q You mean to say that you have no other record of your account with the Boynton Lumber Company? A Only the bills.

Q Have you paid the Boynton Lumber Company any part of the indebtedness for which they got a judgment against you? A They got no judgment against me; did I pay them any part? Yes, sir. I signed them over property in East Orange, New Jersey.

Q What was that property? A A lot.

Q When was that assignment made? A I don't know.

Q Do you recall whether it was made about the time you made this chattel mortgage? A Yes, sir; somewhere around that time.

Q Was that assignment made to protect your entire indebtedness as of that date? A Yes, sir.

Exhibit C. 6.—Testimony of John Thomas Evans.

Q In whose name was the East Orange property? A In my name.

Q What was the value of it? A I signed it over for $1000.00—the value of the land was about $3500.00; my equity was about $1000.00.

Q To whom was the mortgage made? A To my brother, David Evans.

Q When was the mortgage put on it? A I could not tell you.

Q Was that mortgage given as security for any indebtedness to Boynton Lumber Company? A Yes, sir; it was to cover that $7000.00.

Q Did you assign or transfer any other property to protect this indebtedness? A Nothing but the chattel mortgage; the persons from whom I purchased the land held a mortgage of $2500.00 on the property; I started to build a house and garage upon the land. I failed in this and turned the land over to the Boynton Lumber Company, they agreeing to give a credit of $1000.00.

Q In all of these transactions between yourself and the Boynton Lumber Company, Mr. Dey represented the Boynton Lumber Company? A Yes, sir.

Q Did you read the bill of complaint before you turned it over to Mr. Armstrong? A No. I had no interest in that Tanner job. It was up to Mr. Gallagher.

By Mr. Merrill.

Joseph E. Gallagher was the contractor on the Tanner job, and he sublet the entire job to Mr. Evans who failed to complete it.

Q You have your time book here? A Yes, sir.

Q Will that show who worked on the Tanner house March 1st, 1924? A No, sir; it will show names.

Q I understand then, that the only time book which you have, shows the time of all the men working for you, but without any such division as will enable you to pick out the particular men who worked on a particular job at a particular time? A Yes, sir; I can pick them out, but not here. The 15th., day of March 1924, was the last time work was performed on the Tanner job.

Q How do you fix that time? A It was on a Saturday noon time. I remember that—he refused to give me my payment.

Q Have you any record or any recollection which will fix the condition of the Tanner house as of March 1st, 1924? A We were trimming; the exterior was finished, and we were inside trimming.

Q Was the house substantially completed at that time? A Yes, sir.

Q On March 1st, was the plumbing practically done? A All the fixtures were there.

Q Electrical work was practically done? A Yes, sir.

Q Floors down? A Yes, sir.

Q Doors hung? A Yes, sir.

Q Can you give any particular circumstance which justifies you in stating positively that on March 1st, 1924, the work I have just outlined was actually completed. A Yes, sir they were completed; we were working on those various items just mentioned.

Q Were the floors all down? A Yes, sir.

Q Was the electrical work all done? A I don't know.

Exhibit C. 6.—Testimony of John Thomas Evans.

Q Were the doors all hung? A Yes, sir.

Q Although you have no book entry, are you sure that your recollection, as stated in the foregoing answers is correct? A On March 1st, we were working on the trim; the plumbers and the electricians were working on their respective jobs, and the work was about three quarters completed.

Q Do you recollect the style of the interior door that were furnished in the house? A Yes, sir.

Q Who was the manufacturer? A I don't know.

Q Do you know whether it was a Morgan door? A Yes, sir; It was a one panel door.

Q Don't you know the Morgan door is manufactured by the Morgan Door & Sash Company? A I don't know.

Q But you just said that it was a Morgan door? A I don't know.

Q Is that the kind of a door in it? A Yes, sir.

Photograph of one panel door is offered in evidence and marked Exhibit 9 on the part of the complainants,

Q Were all of the interior doors of this type? A Yes, sir; one panel door.

Q I show you another photograph—is that what is known as a sash door? A It is a four light door.

Q Do you recognize that of two doors that were furnished on the Tanner house? A He has some there like that photograph.

Photograph of door with four lights offered in evidence and marked Exhibit 10 on the part of the complainants.

Q Do you know what is known as a Flush Sanitary door? A Never heard of it by that name.

Q Are you familiar with the Morgan catalogue? A No, sir.

Q Do you recognize that as being the plan of the Tanner house? A Yes, sir.

Q How many doors were there in the cellar? A I don't know.

I desire to offer the plans and specifications in evidence.

Witness says that these specifications have alterations in them; the copy shown him was a carbon copy, and it has original typing on the first page and he says he is not sure it corresponds with his copy. He will produce the original.

Plans offered in evidence and marked Exhibit 11 on the part of the complainants.

Above hearing adjourned.

Hearing in the above cause resumed this 14th day of July 1925, at 9:30 A. M.

JOHN THOMAS EVANS, being recalled upon his oath, deposes and says:

Q Have you found the Tanner specifications? A Yes, sir.

Q Have you compared them with the specifications offered in evidence at the former hearing? A Yes, sir.

Q And did you find them to be the same, exactly the same? A Yes, sir.

Exhibit C. 6.—Testimony of John Thomas Evans.

I offer them in evidence.

Specifications offered in evidence and marked Exhibit 12 on the part of the complainants.

Q Have you found additional bills for materials charged by the Boynton Lumber Company against the Tanner job? A Yes, sir.

Q Will you please let me have them? A You have them in your possession.

I offer in evidence the following bills of Boynton Lumber Company against J. T. Evans and marked as delivered to the Tanner job:

October 20th, 1923;

October 25th, 1923;

November 13th, 1923

November 14th, 1923

December 8th, 1923

February 14th, 1924.

Above bills are offered in evidence and marked Exhibits 13, 14, 15, 16, 17 and 18 on the part of the complainants

Referring to the bill of February 14th, I call the attention of the Referee to the fact that while the bill is dated February 14th, it covers material which is listed in the bill of particulars as delivered on February 7, 8 and 12th.

Exhibit C. 6.—Testimony of Rudolph L. Tanner.

RUDOLPH L. TANNER, being first duly sworn upon his oath according to law, deposes and says:

Q You are the complainant in this proceeding? A I am.

Q With whom did you make your contract for the erection of your Boulevard residence? A With Mr. Gallagher.

Q Did you ever have any business relations in connection with this house, either with the Boynton Lumber Company or John T. Evans? A No, sir.

Q Were you indebted in connection with the erection of this house with the Boynton Lumber Company or John T. Evans? A No, sir.

Q Do you recall where you were in the early part of September 1924? A Yes, sir—Manchester, Vermont.

Q From what date to what date? A From the 10th., to the 17th.

Q Were you also away on the 1st., of September? A Yes, sir.

Q Out of town? A Yes, sir.

Q From what dates? A I was at my summer cottage until the 2nd., day after Labor Day; I reached home on the 3rd., day of September. I was home the balance of that week, and the week following I went to a business meeting at Manchester.

Q Have you counted the doors in your house? A Yes, sir.

Q How many? A Thirty-two.

Q Does that include a door to a broom closet? A Yes, sir.

Q About how wide is that broom closet door? A 15 or 18 inches wide.

Exhibit C. 6.—Testimony of Rudolph L. Tanner.

Q Referring to Exhibit 9 on the part of the complainant, which I hand you, do you recognize that photograph? A Yes, sir.

Q Where was it taken? A Taken in my house; the upstairs landing, first door to the left leading to a bed room.

Q Have you any interior doors in your house which differ in design from that door? A Only two, I think.

Q What are those two? A One leading from kitchen, to refrigerator room, and one from the refrigerator room to the laundry.

Q I show you complainants Exhibit 10, do you recognize that photograph? A Yes, sir. Taken in the kitchen; picture of door leading from kitchen to the refrigerator room.

Q Is that one of the two doors that differs from the panel door, just shown you? A Yes, sir.

Q I show you a cut of a door appearing on page 12 of the catalogue of Morgan Company, being a birch door M-115, are there any doors in your house of that type of construction? A No.

Page 12 of the Morgan catalogue, M-115 is offered in evidence and marked Exhibit 19 on the part of the complainants.

Q Were you in your house frequently during the latter part of February, and the early part of March 1924? A Yes, sir.

Q Can you recall whether or not the doors in your house had been hung prior to March 1st, 1924? A I can.

Q What is your recollection? A My recollection is that they were hung.

Q Had you begun to move into the house by March 1st? A Yes, sir.

Q Did you have any furniture in the house March 1st.,? A Yes, sir.

Q Were there any doors replaced or exchanged after March 1st, 1924? A No, sir.

ROBERT A. HOPE, a witness produced on behalf of the complainants, being first duly sworn upon his oath according to law, deposes and says:

Q What is your occupation? A Carpenter and builder.

Q How long? A Building about six years; twenty-six years in carpenter business.

Q I show you complainants Exhibit 9 and ask you what designation you would give a door of the type shown in that photograph? A One panel door.

Q I show you complainants Exhibit 10, and ask you to describe the door shown in that photograph? A Four light sash door.

Q I show you the catalogue of Morgan Company and refer you to the cut on page 12, and designated as a "Figured birch door M-115." What kind of a door would you call that? A Flush panel sanitary door.

Q Are these several doors known to the trade by the names you have given them? A Yes, sir.

Q What is the distinguishing difference between the Flush sanitary door shown in the Morgan catalogue, and the one panel door shown in complainants Exhibit 9? A One panel door

is one-half inch thick, with moulding on each side to hold in firm the panel.

Q And is the panel recessed into the door? A There is a groove around the door, and the panel sets in the grove.

Q What I am getting at is the panel in the same plane with the frame, or is it recessed A The door is 1¾ of an inch thick, and the panel ½ inch thick.

Q And in the flush sanitary door is there any recess? A No; it is 1¾ inch thick all the way through; double veneer covers the entire door with a flush surface.

C-680

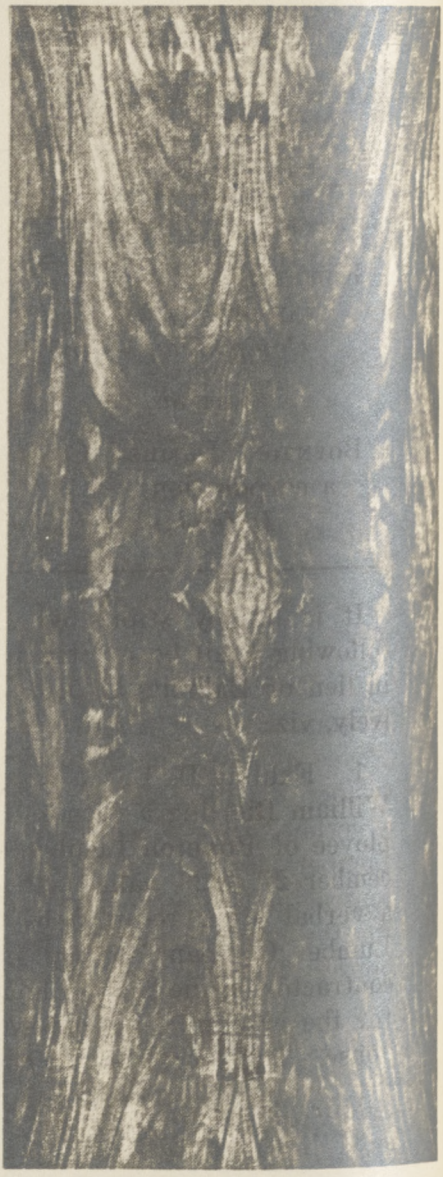


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EXHIBIT C. 7.

STIPULATION.

Filed January 14, 1929.

COURT OF ERRORS AND APPEALS OF NEW JERSEY.

Between	
RUDOLPH L. TANNER and CLARA H. TANNER, his wife, *Complainants-Appellants,*	*On Bill &c.*
and	*Stipulation.*
BOYNTON LUMBER COMPANY, a corporation, *Defendant-Respondent.*	

It is hereby stipulated and agreed that the following shall be printed into the state of case in lieu of Exhibits D. 1, D. 2 and D. 3 respectively, viz:

1. Exhibit D. 1 is a written record made by William Bierling a witness in this cause, an employee of Boynton Lumber Company, dated December 27, 1923, called sales order No. 8409, of a verbal order received by him at the Boynton Lumber Company's Yard from John T. Evans, contractor on the Tanner house for doors ordered for the erection and construction of the Tanner house. The doors are described as follows:

1 dr. 2/6 x 6/2, 1-3/4 flush sanitary, birch
3 " 2/6 x 6/8, 1-3/4 flush sanitary, birch
2 " 2/2 x 6/8, 1-3/4 flush sanitary, birch
1 sash dr. 2/6 x 6/8, 1-3/4, 1 panel and gla. 1 lt., birch

Stipulation in lieu of Exhibits D. 1, D. 2 and D. 3.

These doors are the same as are listed in the schedules attached to the Mechanics' lien claim and to the summons and complaint filed in the Union County Circuit Court under date of March 8, 1924, in the Mechanics' lien suit of the Boynton Lumber Company against Tanner, et als.

2. Exhibit D. 2 is the Boynton Lumber Company's purchase order No. 5177 on which it appears that the same doors were ordered by it to be specially made by the W. D. Crooks & Son Company at Williamsport, Pa. to be shipped to the Boynton Lumber Company at Sewaren, New Jersey.

3. Exhibit D. 3 is the delivery ticket signed by John T. Evans, the contractor on the Tanner house, showing delivery of the same doors to him, covered by order No. 8409 at the Tanner house by the Boynton Lumber Company's driver, Millard Munn, a witness in this cause on March 8, 1924, ticket being numbered 9475.

E. A. MERRILL,
Solicitor for and of Counsel with
Complainants-Appellants.

ORLANDO H. DEY,
Solicitor for and of Counsel with
Defendant-Respondent.

EXHIBIT D. 4.

Summons. . .

UNION COUNTY, *ss.*

The State of New Jersey to John T. Evans, Rudolph L. Tanner and (SEAL) Clara H. Tanner, his wife, and Westfield Trust Company, defendants.

You, John T. Evans, builder; Rudolph L. Tanner and Clara H. Tanner, owners, and Westfield Trust Company, a corporation, mortgagee, are summoned to answer the annexed complaint of the Boynton Lumber Company, a corporation of New Jersey in an action at law in the Circuit Court in and for the County of Union in which said Boynton Lumber Company, a corporation, claims a building lien on a certain building and lands of Rudolph L. Tanner and Clara H. Tanner, his wife, described in said complaint and upon which said Westfield Trust Company holds a mortgage of record, and take notice, that unless you file your answers to said complaint with the Clerk of said Court at Elizabeth within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, Samuel Kalisch, Esq., Judge of said Union County Circuit Court at Elizabeth this 5th day of July, 1924.

WM. B. MARTIN,
Clerk.

ORLANDO H. DEY,
Attorney for Plaintiff.

Exhibit D. 4.—Complaint.

Complaint.

UNION COUNTY CIRCUIT COURT.

BOYNTON LUMBER COMPANY, a corporation of New Jersey, *Plaintiff*, *vs.* JOHN T. EVANS, Builder; RUDOLPH L. TANNER and CLARA H. TANNER, his wife, Owners, and WESTFIELD TRUST COMPANY, a corporation, Mortgagee, *Defendants.*	*Action at Law on Mechanics' Lien.* *Complaint.*

Plaintiff, Boynton Lumber Company, a corporation of the State of New Jersey with its principal office in the Township of Woodbridge, County of Middlesex, says that:

1. Between October 25, 1923, and March 8, 1924, defendant John T. Evans, as contractor, was engaged in the erection and construction for one Joseph E. Gallagher, as owner of a certain one-family two and one-half story dwelling situated upon a certain lot of curtilage of land in the Town of Westfield, County of Union and State of New Jersey, more particularly described as follows:

> Known and designated as lots 117, 118, 119 and 120 on Map of a portion of Westfield Parkway, Westfield, New Jersey, owned by one Joseph E. Gallagher, October, 1919, filed in the Register's office of Union County, New Jersey, December 12, 1919, file No. 179-H.

Exhibit D. 4.—Complaint.

Said lots have a combined width of 100 feet front and a rear depth of 150 feet, and are located on the northeasterly side of the Boulevard 384.22 feet in a southeasterly direction from the intersection of the same with the southeasterly side of Grove street.

2. Between October 25, 1923, and March 8, 1924, plaintiff, at the request of said John T. Evans, sold and delivered to him, the materials stated in the schedule or bill of particulars hereto annexed and made a part hereof; and said defendant, John T. Evans, then in consideration thereof undertook to pay plaintiff what the same were reasonably worth.

3. The same were reasonably worth $2,655.19.

4. Said materials were furnished to and used by said defendant, John T. Evans, in the erection and construction of said building.

5. Said defendant, John T. Evans, is entitled to credit for materials returned as shown in said schedule, or bill of particulars in the sum of $46.00. The balance due for said materials amounting to $2,619.19 is still due and unpaid.

6. Said debt is a lien upon said building and land by virtue of the provisions of an act entitled, as amended, "An Act to secure to mechanics and others payment for their labor and materials in erecting any building and in making certain improvements to land (Revision of 1896)," and the amendments thereof and supplements thereto.

7. Defendants Rudolph L. Tanner and Clara H. Tanner, his wife, are the owners of said build-

ing and lands, having acquired title thereto by deed of the said Joseph E. Gallagher and Margaret Gallagher, his wife, dated September 17, 1923, recorded November 13, 1923, in the office of the Register of the County of Union in book 920 of deeds for said county, page 266, *et seq.*

8. Defendant Westfield Trust Company is made a party defendant because it holds a mortgage of record upon said land and building made by the said Rudolph L. Tanner and Clara H. Tanner, his wife, to the said Westfield Trust Company, dated January 14, 1924, recorded February 27, 1924, in said Union County Register's office in book 642 of mortgages for said county of page 120, *et seq.*, given to secure payment of the principal sum of $12,000 which said mortgage will be cut off by a sale under plaintiff's said claim.

Plaintiff demands as damages $2,619.19, together with lawful interest from March 8, 1924, and the costs of suit to be taxed.

ORLANDO H. DEY,
Attorney for Plaintiff.

Exhibit D. 4.—Answer of Defendant Tanner.

Answer of Defendants Rudolph L. Tanner and Clara H. Tanner.

Filed July 24, 1924.

UNION COUNTY CIRCUIT COURT.

BOYNTON LUMBER COMPANY, *Plaintiff*, *vs.* JOHN T. EVANS, Builder; RUDOLPH L. TANNER and CLARA H. TANNER, his wife, Owners, and WESTFIELD TRUST CO., Mortgagee, *Defendants.*	*Action at Law on Mechanics' Lien.* *Answer.*

The defendants, Rudolph L. Tanner and Clara H. Tanner, his wife, residing at Westfield, Union County, New Jersey, answering the plaintiff's complaint say that:

1. As to paragraphs 1, 2, 3, 4 and 5 the said defendants have not any knowledge and information thereof sufficient to form a belief, and leave the plaintiff to its proof.

2. Said defendants deny that said alleged debt is a lien as alleged in paragraph 6.

3. Said defendants admit that they are the owners of the lands described in the deed referred to in paragraph 7, but deny that they acquired title to the buildings thereon by the deed whereby the title to the lands was acquired.

Exhibit D. 4.—Answer of Defendant Tanner.

4. Defendants admit the allegation as to the mortgage held by the Westfield Trust Co. as set forth in paragraph 8, but deny that said mortgage will be cut off by a sale under plaintiff's said claim.

E. A. MERRILL,
Attorney of Defendants, Rudolph L. Tanner and Clara H. Tanner.

Exhibit D. 4.—Motion for Summary Judgment.

Notice of Motion for Summary Judgment.

Filed Sept. 15, 1924.

UNION COUNTY CIRCUIT COURT.

BOYNTON LUMBER COMPANY, a corporation of New Jersey, *Plaintiff*, *vs.* JOHN T. EVANS, Builder; RUDOLPH L. TANNER and CLARA H. TANNER, his wife, Owners, and WESTFIELD TRUST CO., Mortgagee, *Defendants.*	*Action at Law on Mechanics' Lien.* *Notice.*

To E. A. Merrill, Esq., attorney for defendant owners, Rudolph L. Tanner and Clara H. Tanner:

PLEASE TAKE NOTICE that on Saturday, September 6, 1924, at 9:30 A. M., at the Court House in Elizabeth, or as soon thereafter as the Court can attend to the same, I shall move before the Honorable Samuel Kalisch, a Justice of the New Jersey Supreme Court holding Union County Circuit, to strike out the answer filed in this case for the defendants, Rudolph L. Tanner and Clara H. Tanner, his wife, upon the ground that it is frivolous and sham. True copies of the affidivits, upon which said motion will be based, are attached hereto.

Dated, August 20, 1924.

ORLANDO H. DEY,
Attorney for Plaintiff.

Exhibit D. 4.—Affidavit of Catherine V. Nagel.

Affidavit of Catherine V. Nagel.

Filed Sept. 15, 1924.

UNION COUNTY CIRCUIT COURT.

BOYNTON LUMBER COMPANY, a a corporation of New Jersey, *Plaintiff*, *vs.* JOHN T. EVANS, Builder; RUDOLPH L. TANNER and CLARA H. TANNER, his wife, Owners, and WESTFIELD TRUST COMPANY, a corporation, Mortgagee, *Defendants.*	*Action at Law on Mechanics' Lien.* *On Motion to Strike Answer and Enter Summary Judgment.* *Affidavit.*

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

Catherine V. Nagle, of full age, being duly sworn on her oath according to law, deposes and says:

1. I am the bookkeeper of Boynton Lumber Company, a corporation of the State of New Jersey, plaintiff in the above-entitled cause, having its principal place of business in the Township of Woodbridge, County of Middlesex, and as such bookkeeper, am acquainted and well familiar with the books of account of said corporation, and especially with the records therein contained relating to its account of lumber and other building materials sold and delivered by it to John T. Evans, as contractor and used by him in the erection and construction of the one-

family two and one-half story dwelling for Joseph E. Gallagher situated upon a certain lot, or curtilage of land in the Town of Westfield, County of Union and State of New Jersey, more particularly described as follows:

Known and designated as lots 117, 118, 119, and 120 on Map of a portion of Westfield Parkway, Westfield, New Jersey, owned by Joseph E. Gallagher, October, 1919, filed in the Register's office of Union County, New Jersey, December 12, 1919, file No. 179-H.

Said lots have a combined width of 100 feet front and rear and a depth of 150 feet, and are located on the Northeasterly side of the Boulevard 384.42 feet in a Southeasterly direction from the intersection of the same with the Southeasterly side of Grove street.

2. Between October 25, 1923, and March 8, 1924, plaintiff at the request of the said John T. Evans sold and delivered to him the materials stated in the schedule, or bill of particulars annexed to the bill of complaint filed in this cause, a true copy of which is also annexed to the mechanics' lien claim filed by the plaintiff in this cause, and a true copy of which is also hereto annexed and made a part hereof; and said defendant, John T. Evans, then in consideration thereof undertook to pay plaintiff what the same were reasonably worth.

3. The same were reasonably worth $2,665.19.

4. Said materials were furnished to and used by said defendant, John T. Evans, in the erection and construction of said building.

Exhibit D. 4.—Affidavit of Catherine V. Nagel.

5. Said defendant, John T. Evans, is entitled to credit for materials returned as shown in said schedule, or bill of particulars in the sum of $46.00. The balance due for said materials amounting to $2,619.19 is still due and unpaid.

6. By deed dated September 17, 1923, and recorded November 13, 1923, in the office of the Register of the County of Union in book 920 of deeds for said county at page 266, *et seq.*, the said Joseph E. Gallagher conveyed said lands with the building thereon to the defendants Rudolph L. Tanner and Clara H. Tanner, his wife. The said Rudolph L. Tanner and Clara H. Tanner, his wife, are still the owners of said land and building and were such at the time the mechanics' lien claim was filed in this action, and also at the time this suit was started.

7. Defendant Rudolph L. Tanner and Clara H. Tanner, his wife, have filed an answer in this cause, but I believe and am advised by counsel that the same is sham and frivolous and does not state any defense to this action, and that there is no defense to this action.

CATHERINE V. NAGLE.

Sworn to and subscribed before
me this 21st day of August,
1924.

MARGUERITE T. MCGUIRE,
Notary Public for N. J.

Exhibit D. 4.—Affidavit of John T. Evans.

Affidavit of John T. Evans.

Filed Sept. 15, 1924.

UNION COUNTY CIRCUIT COURT.

BOYNTON LUMBER COMPANY, a corporation of New Jersey, *Plaintiff*, *vs.* JOHN T. EVANS, Builder; RUDOLPH L. TANNER and CLARA H. TANNER, his wife, Owners, and WESTFIELD TRUST COMPANY, a corporation, Mortgagee, *Defendants.*	*Action at Law on Mechanics' Lien.* *On Motion to Strike Answer and Enter Summary Judgment.* *Affidavit.*

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

John T. Evans, of full age, being duly sworn on his oath according to law deposes and says:

1. I am one of the defendants in the above-entitled cause and am a building contractor.

2. On or about October 15, 1923, I entered into a contract with one Joseph E. Gallagher who was then the owner of the lands described in the mechanics' lien claim and in the complaint filed in this cause, for the erection and construction for said Gallagher, upon said lands of a one-family two and one-half story dwelling. I completed the construction of said building on or about March 15, 1924.

3. Between October 25, 1923, and March 8, 1924, I purchased from the plaintiff Boynton

Exhibit D. 4.—Affidavit of John T. Evans.

Lumber Company, a corporation of New Jersey, and said plaintiff furnished and delivered to me, and I used in the erection and construction of said building lumber and other building materials at the times and for the prices stated in the bill of particulars attached to the mechanics' lien claim filed in this cause and also shown in the schedule annexed to the plaintiff's complaint filed in this cause.

4. The total reasonable value of said lumber and building materials so furnished to me and used by me in the erection and construction of said building as aforesaid was $2,665.19. As shown in plaintiff's complaint I am entitled to credit on account thereof for materials returned in the sum of $46. The balance $2,619.19 together with lawful interest from March 8, 1924, is still due and unpaid, and is justly due and owing from me to said Boynton Lumber Company.

JOHN T. EVANS.

Sworn to and subscribed before
me this 29th day of August,
1924.

JOHN J. COFFEY,
Notary Public of New Jersey.

Exhibit D. 4.—Order for Summary Judgment.

Order for Summary Judgment.

Filed Sept. 15, 1:58 P. M., 1924.

UNION COUNTY CIRCUIT COURT.

BOYNTON LUMBER COMPANY, a corporation, *Plaintiff*, *vs.* JOHN T. EVANS, Builder; RUDOLPH L. TANNER and CLARA H. TANNER, his wife, Owners, and WESTFIELD TRUST COMPANY, a corporation, Mortgagee, *Defendants.*	*Action at Law on Mechanics' Lien.* *Order for Summary Judgment.*

It appearing by affidavits filed in this cause that the defense made by the answer of the defendants Rudolph L. Tanner and Clara H. Tanner, his wife, is sham and frivolous, and the said defendants after due notice, having failed to show such facts as entitle them to defend:

It is on this 15th day of September, 1924, on motion of Orlando H. Dey, attorney for the plaintiff, ORDERED, that the answer filed by the said defendants Rudolph L. Tanner and Clara H. Tanner, his wife, be and the same is stricken out, and that final judgment be now entered in favor of the said Boynton Lumber Company, a corporation, against the said owners Rudolph L. Tanner and Clara H. Tanner, his wife, specially for the sum of $2,619.19 together with lawful interest from March 8, 1924, and the plaintiff's costs of this suit to be taxed, to be made of the

building and lands described in the plaintiff's complaint.

SAMUEL KALISCH,
Justice of Supreme Court holding the Union County Circuit.

Endorsed: Filed Sept. 15, 1:58 P. M., 1924.

Judgment.

Filed Sept. 15, 1:58 P. M., 1924.

UNION COUNTY CIRCUIT COURT.

BOYNTON LUMBER COMPANY, a corporation, *Plaintiff*, *vs.* JOHN T. EVANS, Builder; RUDOLPH L. TANNER and CLARA H. TANNER, his wife, Owners, and WESTFIELD TRUST COMPANY, a corporation, Mortgagee, *Defendants.*	*Action at Law on Mechanics' Lien.* *Judgment.*

The summons and complaint in the above-entitled action having been duly served upon the defendants John T. Evans, on July 7, 1924, and Westfield Trust Company, a corporation, on July 8, 1924, and neither of the said defendants having filed any answer, or taken any other step in response to the complaint within the time limited by the rules of court, or at any other time:

Exhibit D. 4.—Judgment.

It is ORDERED that judgment interlocutory be entered in favor of the plaintiff and against the defendants John T. Evans and Westfield Trust Company, a corporation:

And the damages of the plaintiff having been assessed by the clerk of this court at the sum of $2,700.81.

It is thereupon ORDERED that judgment final be entered for the sum of $2,700.81 with costs to be taxed in favor of the plaintiff generally against the said John T. Evans, builder, and specially to be made of the land and building described in the complaint; and it is further ORDERED that judgment also be entered that the mortgage of the defendant, Westfield Trust Company, a corporation, in the complaint mentioned, is subject to the plaintiff's lien claim.

Costs taxed at $46.82. Rule actually entered this 15th day of September, 1924, on motion of Orlando H. Dey, attorney for plaintiff.

Endorsed: Filed Sept. 15, 1:58 P. M., 1924.

Exhibit D. 4.—Notice of Argument.

Notice of Argument.

Filed October 7, 1924.

COURT OF ERRORS AND APPEALS.

BOYNTON LUMBER COMPANY, a corporation,
Plaintiff-Respondent,

vs.

JOHN T. EVANS, RUDOLPH L. TANNER, CLARA H. TANNER and the WESTFIELD TRUST COMPANY, a corporation,
Defendants.

RUDOLPH L. TANNER and CLARA H. TANNER being the defendants-appellants.

Notice of Argument.

TAKE NOTICE, that I shall move the argument of the above-entitled cause before the Court of Errors and Appeals of New Jersey at the State House, Trenton, New Jersey, at 11 A. M., on Tuesday October 21, 1924, or as soon thereafter as counsel may be heard.

E. A. MERRILL,
Attorney of the Appellants,
Rudolph L. Tanner and
Clara H. Tanner.

To Mr. Orlando H. Dey, attorney for the plaintiff-respondent, Rahway, New Jersey.

CONCLUSIONS.

BUCHANAN, *V.-C.*

One Evans, a sub-contractor under the original contractor, undertook to build a dwelling house for complainants Tanner as owner. Defendant furnished Evans with the lumber and mill work for the house, and failing to receive due payment from Evans, filed a mechanics lien claim and brought suit thereon against Evans as contractor and the Tanners as owner, in the Union County Circuit Court. The complainant alleged the sale by the lumber company of the materials (itemized in a bill of particulars annexed) to Evans for use in the building and that they were so used by him.

The Tanners filed affidavit of merits and an answer which averred lack of knowledge or information sufficient to form a belief, as to the allegations of sale, furnishing and use. It denied that the alleged debt was a lien on their premises. Evans filed no answer.

The Lumber Company then filed affidavits in detail in support of its allegations and moved to strike out the answer as frivolous and sham. One of the affidavits was by Evans, the contractor. The Tanners filed counter affidavits, but none denying any of the allegations as to the supplying or use of the materials. On the argument the answer was stricken out by the Supreme Court Justice who heard the motion, and rule granted for judgment.

The judgment was appealed by the Tanners, and affirmed by the Court of Errors and Appeals.

Evans had given a chattel mortgage to the Lumber Company, as security, and the Tanners

filed bill in equity against Evans and the Lumber Company in an effort to obtain some interest in this security. The bill was dismissed as to the Lumber Company; but proceeded to the taking of proofs against Evans. In the course of these proofs Evans testified to certain facts which were contradictory to certain facts in his affidavit in the mechanics' lien suit, and which would tend to prove that the Lumber Company had furnished no materials for the Tanner house on the last date specified in its bill of particulars. If no materials had been so furnished on that date, the Lumber Company would have been out of time and could have had no lien.

The Tanners then filed the present bill, setting forth the foregoing facts, and charging that the affidavits of Evans, and also an affidavit of one Catherine Nagel in the mechanics' lien suit, were false and fraudulent, and that without them the judgment in the mechanics' lien suit could not have been validly entered; alleging also that the facts had been brought to the attention of the Lumber Company; that the Lumber Company had issued execution on the mechanics' lien judgment, and refused to refrain from enforcing it. Complainants charge that such enforcement would be unconscionable and fraudulent (at least constructively) and pray injunction against the prosecution of the execution and judgment.

The record in this suit shows that motion was made for injunction *pendente lite,* and a countermotion to strike out the bill—both of which were denied. Appeal was taken from the order denying the injunction *pendente lite,* and it was stated by counsel at the hearing in this case, that applica-

tion to stay the execution was made to and denied by the Court of Errors, and that at the suggestion of that Court the judgment was then paid under protest and this suit continued with as a suit to recover (because of the alleged fraud) the amount so paid. Of course, before any such decree could be made herein, supplement would have to be filed to the bill.

The answer denies that any of the affidavits in the mechanics' lien suit were fraudulent; and also sets up that the issue is *res adjudicata* by the judgment in the mechanics' lien suit.

The latest item in the mechanics' lien bill of particulars is March 8th, 1924, for seven "flush sanitary doors" and one glazed sash door.

The complaint alleged that these materials (with others on earlier dates) were "furnished to and used by (the contractor) Evans, in the erection and construction of the building." The answer denied knowledge or information on this point.

The affidavits of the Lumber Company on its motion for summary judgment were—as to this point—those of Catherine Nagel and of Evans. Miss Nagel swore that she was bookkeeper for the Lumber Company and familiar with its books; and that all the materials in the bill of particulars "were furnished to and used by Evans in the erection and construction of said (Tanners) building." Evans swore that the Lumber Company "furnished and delivered to me, and I used in the erection and construction of said (Tanner) building," all the materials at the times set forth in the bill of particulars. There were no other affidavits on this point—(except one by Mr. Dey as to what Evans had told him, which would seem hearsay

and incompetent as against the Tanners, and in any event rested solely upon Evans, and added nothing to Evans own affidavit).

The complainants' bill alleges that these affidavits were "false and fraudulent with respect to the item of March 8, 1924." (This item as has already been said, specified six "flush sanitary doors" and one glazed panel door; and the item is vital, because without it the Lumber Company would have been out of time with its lien claim and suit and could not have gotten any judgment against the Tanners). To prove this allegation the Tanners offered certain evidence in the present suit.

Tanner testified that all the doors in his house were hung and in place before March 1st, 1924; and that none of them were flush sanitary doors.

The report of the master, in the suit as to the chattel mortgage, with the deposition of Evans annexed, was offered in evidence. In this deposition Evans testified that the doors in the Tanner house were all hung by March 1st, 1924; and that all the interior doors were "one panel doors."

For the Lumber Company, Mr. Boynton produced the order from Evans to the Company for the flush doors, and the Lumber Company's order to the door-makers for those doors, and testified that these were the dors that were delivered on March 8th; and produced and offered the delivery receipt for them, signed by Evans. Millard Munn, driver for the Boynton Company testified that he delivered the doors at the Tanner house; that Evans signed the delivery slip; that the Tanner house was covered with sheathing; that Evans had several other

jobs in the same vicinity, which the Boynton Company delivered materials to; he could not identify the doors as to photographs of flush doors and one-panel doors which were shown him.

Tanner then testified that his house was a brick house, and was not sheathed. This was not contradicted.

Neither Evans nor Miss Nagel—or any other witnesses than those named—were called by either side.

In considering this evidence, it must be remembered that the Evans deposition in the chattel mortgage suit was *ex parte* as to the Boynton Lumber Company—taken after the bill in that suit had been dismissed as to the Lumber Company—and hence is incompetent in this suit on the issue as to whether or not the Evans affidavit in the mechanics' lien suit was false and fraudulent. (It is admissible in this suit as being part of the information which was brought to the attention of the Lumber Company in the Tanners endeavor to convince the Lumber Company that it could not equitably proceed to enforce the mechanics' lien judgment).

If the issue in the present suit were simply whether or not the doors in question had been actually used in the Tanner house, it would have to be conceded, I think, that on the weight of the evidence in this case, competent on that issue, the verdict would be that they were not so used. There is nothing in the evidence offered by the Lumber Company, which necessarily or even probably contradicts Tanner's testimony that they were not used in this house.

But that is not the issue in this suit. The issue in this suit is whether or not the affidavits of Evans and Miss Nagle in the mechanics' lien suit were false and fraudulent. That is complainants' allegation, and it is incumbent upon them to prove it. In order to prove it, they must prove that the affidavits were untrue in fact, and were known by the affiants to be untrue when made. To prove that the affidavits were untrue in fact there is the sworn statement of one witness, Tanner (whose credibility is not attacked, but who is a party having a vital interest in the suit), that the doors were not used in his house, as against the sworn statements of the two affiants (both of whom may be said to have had some interest to be served by their affidavits, but the credibility of neither being attacked by any competent evidence in this suit), that the doors were used in Tanner's house. The weight of the evidence on this issue is against Tanner; and (if we should assume that the statements in the affidavits were untrue) there is no evidence that the affiants intentionally made false affidavits as against their having been honestly (even though perhaps carelessly) mistaken.

Fraud must be proved: it is not to be inferred, except by *necessary* inference. The taking of a knowingly false affidavit is a criminal act; the presumption is against it, and that presumption must be overcome by convincing proof.

Complainants argue that Miss Nagle, being a bookkeeper, could not have had knowledge as to whether the doors were actually used in the house or not. It is true that ordinarily a bookkeeper would not have such knowledge; but it is perfectly possible that Miss Nagle might have

had such knowledge. It was for complainant to prove that she did not have such knowledge.

It is true that defendants did not offer Miss Nagle or Evans, or any one else to testify in this suit that the doors were in fact used in the Tanner house—and it might be thought that their failure so to do would warrant an inference unfavorable to defendants. Not so. Even if we assume that defendants' proofs were not as strong as they might well have been expected to be, defendants were not required to do more than meet the proofs made by complainant. And it was open to complainant to call Evans and Miss Nagle if he thought their testimony would prove his allegation.

Moreover, it appeared in the case that defendants believed it was not necessary for them to prove that the doors were actually used in the house; defendants believed it would be sufficient so long as it appeared that the doors were ordered and furnished for use in the house, even if they were not actually so used. This would also tend to negative any unfavorable inference from the failure to call Evans or Miss Nagle (if such inference could otherwise fairly be drawn against defendants).

The complainants' proofs being thus insufficient to establish that the affidavits of Evans and Miss Nagle were false and fraudulent, it need scarcely to be said that there is of course no proof whatever that the Lumber Company was guilty of fraud in filing its claim or prosecuting its suit and obtaining its judgment.

It is however further contended by complainant that even if the Lumber Company was guiltless of fraud in obtaining its judgment, it is unconscionable on its part to proceed with execu-

tion on that judgment after having had brought to its attention and knowledge that the affidavits of Evans and Miss Nagle were false and fraudulent.

It may be assumed that if it were duly proven in this suit that those affidavits were false and fraudulent, even though such falsity and fraud was not induced by, or participated in, or known by, the Lumber Company, that company would be enjoined from enforcing its judgment.

It may even be assumed for the sake of argument, that if it were proven in this suit—or if it appeared that it had elsewhere been proven —that the affidavits of Evans and Miss Nagle though not false and fraudulent were untrue in fact, the Lumber Company would likewise be enjoined.

The difficulty with complainants' contention is that it has not been proven in this suit that the affidavits were either false and fraudulent or untrue in fact; neither has it been established that this has been proven elsewhere. The depositions in the chattel mortgage suit did not establish even that the affidavits were untrue in fact. It may be added that a reading of the entire deposition of Evans in that suit leaves the mind in doubt as to whether the chances that his statements there made are mistaken are not just as great as that his statements in the mechanics' lien suit are mistaken. He did not specifically say that the latter were untrue or mistaken; his attention was not called to those statements; and the entire character of the deposition leaves much to be desired from the standpoint of assurance in its accuracy and certainty.

The result is that complainants' bill must be dismissed.

FINAL DECREE.

Filed November 2, 1928.

IN CHANCERY OF NEW JERSEY.

59/202

Between	
RUDOLPH L. TANNER, *et ux.*, *Complainants,*	*On Bill, &c.*
and	*Final Decree*
BOYNTON LUMBER COMPANY, *Defendant.*	

This cause having been heard on final hearing in the presence of Earle A. Merrill, Esq., of counsel with the complainants and Orlando H. Dey, Esq., of counsel with the defendant, and the pleadings and proofs having been read and the arguments and briefs of the respective counsel having been heard and considered, and the Court having duly considered the said pleadings, proofs and arguments, and having found as a matter of fact that the defendant is not guilty of the fraud alleged by the complainant and upon which the bill of complaint in this cause is rested, and it appearing to the Court that the complainants are not entitled to the relief sought and prayed for by them in their Bill of Complaint,

It is on this 1st day of November, 1928, by the Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED that the Complainants' Bill be and the same is hereby dismissed and that the said Complainants pay to the defendant

its costs of this suit to be taxed which shall include a counsel fee of $200 which is hereby allowed to counsel for the defendant, and that execution issue therefor, according to the practice of this court.

E. R. WALKER,
C.

Respectfully advised,

MALCOLM G. BUCHANAN,
Vice-Chancellor.

Exhibit D. 4—Affidavit of Orlando H. Dey.

NOTE.

The material hereinafter added is included at the request of counsel for the defendant-respondent. No reference is made to same in the brief of the complainant-appellant.

Affidavit of Orlando H. Dey.

Filed September 15, 1924.

UNION COUNTY CIRCUIT COURT.

BOYNTON LUMBER COMPANY, a corporation of New Jersey, *Plaintiff,* *vs.* JOHN T. EVANS, Builder; RUDOLPH L. TANNER and CLARA H. TANNER, his wife, Owners, and WESTFIELD TRUST COMPANY, a corporation, Mortgagee, *Defendants.*	*Action at Law on Mechanics' Lien.* *On Motion to Strike Answer and Enter Summary Judgment.* *Affidavit.*

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

Orlando H. Dey, of full age, being duly sworn on his oath according to law, deposes and says:

1. I am the attorney for the plaintiff in the above-entitled cause, and have discussed the details of this case with John T. Evans, one of

the defendants. The said John T. Evans informed me that he was the contractor who erected and constructed pursuant to a contract made with Joseph E. Gallagher, as owner, the building upon the lands described in the mechanics' lien claim and in the complaint filed in this cause.

2. That he, the said Evans, had purchased from the plaintiff, the materials set forth in the bill of particulars attached to said mechanics' lien claim, and also set forth in the schedule attached to said complaint, and had used the same in the erection and construction of said building.

3. That said materials were reasonably worth the sum of $2,619.19 and had been furnished to him on the dates specified in said bill of particulars attached to said lien claim, and in said schedule attached to said complaint, and that in said bill of particulars and in said schedule he had been given credit for all payments made upon said indebtedness and for all deductions that ought to be made therefrom, and that said balance of $2,619.19, together with lawful interest thereon was justly due and owing from him to said plaintiff.

4. I personally prepared and caused to be filed the mechanics' lien and summons and complaint in this cause.

5. Defendants Rudolph L. Tanner and Clara H. Tanner, his wife, have filed an answer to the plaintiff's complaint, but from my examination of said complaint and of said answer, it is my belief that there is no defense to this action; that said answer does not present any legal de-

fense; and that the allegations in said answer are sham and frivolous.

ORLANDO H. DEY.

Sworn to and subscribed before me
this 20th day of August, 1924.

MINNIE M. SORTER,
Notary Public of New Jersey.

Exhibit D. 4—Affidavit of Victor H. Eichhorn.

Affidavit of Victor H. Eichhorn.

Filed September 15, 1924.

UNION COUNTY CIRCUIT COURT.

BOYNTON LUMBER COMPANY, a corporation of New Jersey, *Plaintiff,* *vs.* JOHN T. EVANS, Builder; RUDOLPH L. TANNER and CLARA H. TANNER, his wife, Owners, and WESTFIELD TRUST COMPANY, a corporation, Mortgagee, *Defendants.*	*Action at Law on Mechanics' Lien.* *On Motion to Strike Answer and Enter Summary Judgment.* *Affidavit.*

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

Victor H. Eichhorn, of full age, being duly sworn on his oath according to law, deposes and says:

1. I am a clerk in the employ of Orlando H. Dey, an attorney-at-law of New Jersey, the attorney for the plaintiff in the above-entitled cause.

2. I am familiar with the system of recording and filing papers, especially mechanics' lien claims and building contracts in the Union County Clerk's office, and with the system of recording papers, especially deeds in the office of the Union County Register; and with the arrangements of the record themselves on file in said Clerk's and Register's offices respectively.

Exhibit D. 4—Affidavit of Victor H. Eichhorn.

3. I have examined the indices and records in said Union County Clerk's office to all building contracts filed during the period from January 1, 1923, to July 5, 1924. Such examination discloses no building contract on file between Joseph E. Gallagher, as owner and John T. Evans, as contractor affecting the lands and building described in the mechanics' lien claim and in the complaint filed in this cause.

4. I have also examined the indices and records in said Union County Clerk's office to mechanics' lien claims and find filed and recorded therein the mechanics' lien claim of the Boynton Lumber Company, plaintiff in the above-entitled cause, filed by it in this cause on July 5, 1924, affecting the lands and building hereinabove described. A true copy of said mechanics' lien claim and of the affidavit, or verification of Gorham L. Boynton thereto attached is hereto annexed and made a part hereof. To said original lien claim is also attached a bill of particulars exhibiting the amount, and kind of material furnished, and the prices at which, and the times when the same were furnished and giving credit for all payments made thereupon and deductions that ought to be made therefrom, and exhibiting a balance of $2,619.19 justly due to the said Boynton Lumber Company from the said John T. Evans. The schedule annexed to the affidavit of Catherine V. Nagle attached to this affidavit contains a true copy of all of the items, dates and prices as shown in said bill of particulars.

5. I have examined the indices and records to deeds in the said Union County Register's office made by the said Joseph E. Gallagher for

the period from January 1, 1923, to July 5, 1924, and find there recorded a deed from the said Joseph E. Gallagher and Margaret Gallagher, his wife, conveying the premises hereinabove described, together with all and singular the house, building, trees, ways, waters, profits, privileges and advantages with the appurtenances to the same belonging and in any wise appertaining to the said Rudolph L. Tanner and Clara H. Tanner, his wife, dated September 17, 1923, and recorded November 13, 1923, in book 920 of deeds for Union County, page 266, *et seq.*

VICTOR H. EICHHORN.

Sworn to and subscribed before me
this 20th day of August, 1924.

MINNIE M. SORTER,
Notary Public of New Jersey.

Exhibit D. 4—Affidavit of Joseph E. Gallagher.

Affidavit of Joseph E. Gallagher.

Filed September 6, 1924.

UNION COUNTY CIRCUIT COURT.

BOYNTON LUMBER COMPANY, a corporation of the State of New Jersey, *Plaintiff,* *vs.* JOHN T. EVANS, *et als.*, *Defendants.*	*Action at Law.* *Affidavit.*

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

Joseph E. Gallagher, being duly sworn, deposes and says:

1. Rudolph L. Tanner, one of the defendants in the above-entitled cause, contracted with me for the erection of his house on the Boulevard in Westfield, Union County, New Jersey, and I sub-let the contract to John T. Evans.

2. Said John T. Evans did not complete the contract but abandoned the work in an unfinished condition and the work was completed by me. The failure of said Evans to complete the contract is now a matter of litigation between us.

3. I have been paid in full the contract price as between Tanner and myself and I have paid said Evans an amount in excess of the value of

the work done and material furnished up to the time the contract was abandoned by him.

JOSEPH E. GALLAGHER.

Sworn and subscribed before me this 4th day of September, 1924.

JAMES E. WALSH,
Notary Public.

Affidavit of William M. Beard.

Filed September 6, 1924.

UNION COUNTY CIRCUIT COURT.

BOYNTON LUMBER CO., a corporation of the State of New Jersey, *Plaintiff,* *vs.* JOHN T. EVANS, *et als.*, *Defendants.*	*Action at Law.* *Affidavit.*

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

William M. Beard, being duly sworn, deposes and says:

1. I am an attorney and counsellor-at-law of the State of New Jersey.

2. At the request of E. A. Merrill I made an examination of certain records in the office of

the Clerk of Union County and the Register of Union County, and found the following:

On March 20, 1924, John T. Evans executed a chattel mortgage to the Boynton Lumber Company to secure the sum of $7,877.13, and any amounts thereafter due and owing, which said chattel mortgage is recorded in book 126 of chattel mortgages at page 100.

On July 14, 1924, there was served upon Rudolph L. Tanner the complaint in a mechanics' lien suit brought by John T. Evans against Rudolph L. Tanner and others. In said complaint the plaintiff, Evans, alleges that he has performed all the terms and conditions of a contract with one Joseph E. Gallagher for the erection of a house on lands of Rudolph L. Tanner.

3. In the above-entitled cause no answer has been filed on behalf of the defendant John T. Evans.

WILLIAM M. BEARD.

Subscribed and sworn to before me
this 3rd day of September, 1924.

DOROTHEA A. JENNY,
Notary Public for N. J.

Exhibit D. 4—Judgment.

Judgment.

Filed September 15, 1:58 P. M., 1924.

UNION COUNTY CIRCUIT COURT.

BOYNTON LUMBER COMPANY, a corporation, *Plaintiff,* *vs.* JOHN T. EVANS, Builder; RUDOLPH L. TANNER and CLARA H. TANNER, his wife, Owners, and WESTFIELD TRUST COMPANY, a corporation, Mortgagee, *Defendants.*	*Action at Law on Mechanics' Lien.* *Judgment.*

The summons and complaint in the above-entitled action having been duly served upon the defendants John T. Evans, on July 7, 1924, and Westfield Trust Company, a corporation, on July 8, 1924, and neither of the said defendants having filed any answer, or taken any other step in response to the complaint within the time limited by the rules of court, or at any other time:

It is ORDERED that judgment interlocutory be entered in favor of the plaintiff and against the defendants John T. Evans and Westfield Trust Company, a corporation:

And the damages of the plaintiff having been assessed by the clerk of this court at the sum of $2,700.81,

It is thereupon ORDERED that judgment final be entered for the sum of $2,700.81 with costs to be

taxed in favor of the plaintiff generally against the said John T. Evans, builder, and specially to be made of the land and building described in the complaint; and it is further ORDERED that judgment also be entered that the mortgage of the defendant, Westfield Trust Company, a corporation, in the complaint mentioned, is subject to the plaintiff's lien claim.

Costs taxed at $46.82. Rule actually entered this 15th day of September, 1924, on motion of Orlando H. Dey, attorney for plaintiff.

Endorsed: Filed Sept. 15, 1:58 P. M., 1924.

Exhibit D. 4—Opinion of Justice Minturn.

Opinion.

NEW JERSEY COURT OF ERRORS AND APPEALS.

BOYNTON LUMBER COMPANY,
Plaintiff-Respondent,

vs.

JOHN T. EVANS, Builder, RUDOLPH L. TANNER, *et al.*,
Defendants-Appellants.

APPEAL FROM UNION COUNTY CIRCUIT.

The opinion of the Court was delivered by MINTURN, *J.:*

Upon motion for that purpose, the answer filed was struck out as sham and frivolous; and summary judgment was entered for the plaintiff, and from that order this appeal was taken. The suit was upon a mechanics' lien filed by the plaintiff, as materialman, against the property of the defendant, Rudolph L. Tanner, situate at Westfield.

One Gallagher, contracted with Tanner, to erect a residence upon the latter's lot, and thereafter sublet the entire contract to the defendant Evans, who purchased some of the materials which entered the structure, from the Boynton Lumber Company, the plaintiff. Neither the contract with Gallagher, nor the contract of the latter with Evans was filed. Evans defaulted in his work, and Gallagher completed the contract. Tanner, knowing only Gallagher in the transaction, paid him the full contract price, while

Gallagher paid Evans more than the value of the material supplied by the plaintiff, at the time of Evans' default. Evans instituted a mechanics' lien suit for the balance claimed to be due to him from Gallagher, making Tanner as owner, and the Westfield Trust Company, as mortgagee, defendants, which suit is still pending. The present suit ignores Gallagher, but includes as will be observed, Tanner the owner, Evans as builder, and the mortgagee as defendants. The defendant Tanner only filed an answer.

The defense manifestly is constructed upon the legal theory that since Evans sustained no legal relation as builder, or otherwise, with the owner Tanner, and since the owner had performed his conventual obligations with his contractor, no right of action can arise by which the acts of Evans will impose an obligation upon Tanner, particularly in view of certain alleged dealings between the plaintiff, Gallagher and Tanner, which it is contended should be subjected to the discussion and scrutiny of a jury for determination.

Our examination of the facts, leads us to the conclusion, that there was no jury question involved, in the case, and that the answer was properly struck out at the circuit. Obviously the contractual relationship of the parties is not the matter in issue, since the right of the plaintiff to recover is based entirely upon the statutory remedy provided for the purpose by the mechanics' lien act.

Under the statutory liability created by the act, where the contract interpartes has not been filed, it becomes immaterial to inquire whether the owner paid the contractor, and whether the contractor paid his sub-contractors, the only in-

quiry being whether the materialman has been paid.

Gardner & Meeks Co. *v.* N. Y. Cen. R. R. Co., 72 N. J. L. 257.

An answer, therefore, which avers facts not legally responsive to this inquiry, is in contemplation of law either sham or frivolous, and upon motion may be struck out upon either ground.

Eisle & King *v.* Raphael, 90 N. J. L. 220; Fidelity etc. Co. *v.* Wilkes-Barre Co., 98 N. J. L. 507.

This view of the pleadings, and of the legal status of the parties, renders unnecessary, consideration of the other contentions presented by the briefs.

The judgment will be affirmed.

Exhibit D. 4—Rule Affirming Judgment.

Rule Affirming Judgment.

NEW JERSEY COURT OF ERRORS AND APPEALS.

BOYNTON LUMBER COMPANY, a corporation of New Jersey, *Plaintiff-Respondent,* *vs.* JOHN T. EVANS, Builder; RUDOLPH L. TANNER and CLARA H. TANNER, his wife, Owners, and WESTFIELD TRUST COMPANY, a corporation, Mortgagee, *Defendants,* RUDOLPH L. TANNER and CLARA H. TANNER, his wife, *Defendants-Appellants.*	*On Appeal from Union County Circuit Court.* *Rule Affirming Judgment.*

This cause having been duly argued at the October, 1924, term of this Court by Earl A. Merrill, Esq., of counsel for the defendants-appellants, Rudolph L. Tanner and Clara H. Tanner, his wife, and Orlando H. Dey of counsel for the plaintiff-respondent, and the Court having considered the same, and finding no error in the record or proceedings in the Union County Circuit Court;

It is thereupon ORDERED and ADJUDGED that the judgment of the Union County Circuit Court removed by the appeal in this cause, be affirmed, with costs of the plaintiff-respondent to be taxed against the defendants-appellants, Rudolph L. Tanner and Clara H. Tanner, his wife; and

that the record be remitted to the Union County Circuit Court to be proceeded with in accordance with its judgment, and the proceedings of said Court.

Rule actually entered

Endorsed:

"Filed March 25, 1925.

THOMAS F. MARTIN,
Clerk."

On motion of

ORLANDO H. DEY,
Attorney for Plaintiff-Respondent.

Exhibit D. 5—Bill of Complaint.

Bill of Complaint.

Filed March 25, 1925.

IN CHANCERY OF NEW JERSEY.

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

The complainants, Rudolph L. Tanner and Clara H. Tanner, residing in the Town of Westfield, Union County, New Jersey, respectfully show that:

(1) On September 15, 1924, judgment for $2,700.81 was entered in the Union County Circuit Court against John T. Evans generally, and specially against the lands of Rudolph L. Tanner and Clara H. Tanner, his wife, in the mechanics' lien suit of Boynton Lumber Company *v.* John T. Evans, builder, and Rudolph L. Tanner and Clara H. Tanner, his wife, owners, and the Westfield Trust Company, mortgagee.

(2) On March 17, 1925, the opinion of the Court of Errors and Appeals was filed, affirming said judgment in the sum of $2,700.81 made specially against the lands of Rudolph L. Tanner and Clara H. Tanner.

3) The summons in said mechanics' lien suit was issued July 5, 1924, and the suit was based upon an indebtedness alleged to have been incurred upon various dates, the latest alleged date being March 8, 1924, upon which date said John T. Evans was billed the following materials by said Boynton Lumber Company:

March 8—
1 dr. 2-6 x 6-2—1¾ flush sanitary drs. birch
3 " 2-6 x 6-8—1¾ " " " "
2 " 2-2 x 6-8—1¾ " " " "
1 sash dr. 2-6 x 6-8—1¾ 1 panel and gla. 1 lt.
$169.00

(4) On March 20, 1924, said John T. Evans executed and delivered to said Boynton Lumber Company a chattel mortgage to secure an indebtedness of $7,877.13, and amounts thereafter due and owing, which said indebtedness included the indebtedness reduced to judgment as set forth in paragraph 1. Said mortgage was recorded in Book 126 of Chattel Mortgages in Union County at page 100, and has not been canceled of record. A copy of said mortgage is attached hereto and made a part hereof.

(5) On a date not known to this complainant, but subsequent to March 8, 1924, said John T. Evans sold and assigned to said Boynton Lumber Co., a claim of said Evans against one Joseph E. Gallagher, in the sum of $500, which said claim has not been paid.

(6) Said Boynton Lumber Company has not collected any part of said general judgment of $2,700.81 from said John T. Evans; nor has it made any attempt to collect said judgment, or any part thereof; nor has it applied against said judgment any part of the collateral assigned to it by Evans as a security for his indebtedness to said Company, or the proceeds thereof.

(7) Complainants were never indebted to said company, or to said John T. Evans, but contracted with one Joseph E. Gallagher for the erection of the building liened, and have paid

said Joseph E. Gallahger the entire contract price.

These complainants assert that some part, or all, of any security given to said Boynton Lumber Company, by said John T. Evans should be applied or apportioned in reduction or extinguishment of said judgment of $2,700.81 entered by said company against the lands of these complainants, but said company has failed and refused to make such application, or apportionment.

Complainants are uncertain as to their rights and status in the premises, and pray the declaration of this court as follows:

(1) May the Boynton Lumber Company be required, by complainants, to apply the securities, or the proceeds thereof, received from said John T. Evans for securing said sum of $7,877.13, or so much thereof as may be necessary for that purpose, to the payment of said judgment of $2,700.81?

(2) May the Boynton Lumber Company be required, by complainants, to apportion such securities, or the proceeds thereof, in the same ratio as the said judgment shall bear to the entire indebtedness of said John T. Evans to said Company so secured, or upon any other ratio?

(3) May the Boynton Lumber Company be required, by complainants, to apply to the reduction of said judgment the claim, or the proceeds thereof, of said John T. Evans against said Joseph E. Gallagher, which was sold and assigned by John T. Evans to said Company, as set forth in paragraph 5?

Exhibit D. 5—Bill of Complaint.

(4) May complainants be subrogated to the rights of said Boynton Lumber Company in any security given it by said John T. Evans subsequent to the incurring of the indebtedness for which judgment was given?

The complainants further pray:

(1) That said Boynton Lumber Company and John T. Evans, may answer this bill of complaint, and each statement therein made.

(2) For such other or further relief as shall seem equitable and just.

(3) That writs of subpoena may issue commanding said defendants to answer this bill of complaint, and abide by such decree as the Court may make in the premises.

E. A. MERRILL,
Solicitor of and of Counsel with
the Complainants.

Exhibit D. 5—Notice of Motion.

Notice of Motion.

Filed April 28, 1925.

IN CHANCERY OF NEW JERSEY.

Between	
RUDOLPH L. TANNER and CLARA H. TANNER, his wife, *Complainants,*	*On Bill &c.*
and	*Notice.*
BOYNTON LUMBER COMPANY, a corporation, and JOHN T. EVANS, *Defendants.*	

To the complainants Rudolph L. Tanner and Clara H. Tanner, his wife:

Take notice that on Tuesday, April 21, 1925, at the hour of 10:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard at the Chancery Chambers in the City of Newark, I shall apply to the Chancellor for an order striking out the bill of complaint filed by you in the above entitled cause for the following reasons:

1. The said bill of complaint discloses no cause of action in that:

a. It does not set forth any facts or circumstances which would entitle the said complainants to have the securities, or the proceeds thereof received from John T. Evans to secure the sum of $7,877.13 applied or apportioned to the payment or reduction of the said judgment of $2,-

Exhibit D. 5—Notice of Motion.

700.81 mentioned in paragraph 1 of said bill of complaint.

b. It does not set forth any facts or circumstances which would entitle the complainants to have the claim mentioned in paragraph 5 of said bill of complaint, applied to the reduction of the above mentioned judgment of $2,700.81.

c. It does not set forth any facts or circumstances which would entitle the said complainants to be subrogated to the rights of the Boynton Lumber Company in any security given it by the said John T. Evans.

2. The said bill of complaint on its face shows that the matters involved are *res adjudicata* having been decided in the law court action mentioned in paragraph 1 of the said bill of complaint and affirmed by the Court of Errors and Appeals as set forth in paragraph 2 of the complaint.

3. The said bill of complaint prays for no specific equitable relief.

ORLANDO H. DEY,
Solicitor for Defendant, Boynton Lumber Company.

Exhibit D. 5—Opinion of Vice-Chancellor Fielder.

Opinion of Vice-Chancellor Fielder.

Filed June 18, 1925.

June 17, 1925.

IN CHANCERY OF NEW JERSEY.

Between	
RUDOLPH L. TANNER, *et al.*, *Complainants,*	*On Bill, etc.*
and	*On Motion to Strike Out Bill.*
BOYNTON LUMBER COMPANY, *et al.*, *Defendants.*	*Memorandum.*

Mr. Orlando H. Dey for the motion.

Mr. E. A. Merrill, contra.

FIELDER, *V.-C.*

The bill of complaint alleges that on September 15, 1924, a mechanics' lien judgment was entered in the Union Circuit Court in favor of Boynton Lumber Company generally against John T. Evans, builder, and against the complainants, as owners, specially to be made of their building and lands, which judgment was affirmed by the Court of Errors and Appeals (128 Atl. 180); that after the last material was furnished for which the lien was claimed and before the mechanics' lien suit was commenced, Evans, the builder, executed and delivered to the Boynton Lumber Company a chattel mortgage to secure the indebtedness upon which the lien claim was founded and that about the same time

Evans also assigned a chose in action to the Boynton Lumber Company. It is not alleged that the chose in action was assigned to secure said indebtedness or in part payment thereof. The bill further alleges that Boynton Lumber Company has not attempted to collect its general judgment against Evans and that it has not applied any part of the collateral given it by Evans, on account of said judgment. Complainants claim that Boynton Lumber Company should apply the security given it by Evans, in payment or reduction of said special judgment against complainants but that the company refuses to make such application. The bill further alleges that complainants are uncertain as to their rights and status and prays a declaration by this court as to whether Boynton Lumber Company should not be required to apply the securities received by it from Evans, in payment or reduction of the judgment and whether complainants may be subrogated to the rights of the Boynton Lumber Company in any security given it by Evans. The bill makes Evans and Boynton Lumber Company defendants and prays subpoena *ad respondendum* against and answer by them and for such other relief as shall be equitable and just.

The defendant Boynton Lumber Company now moves to strike out the bill on the ground that it discloses no cause of action in that it sets forth no facts which would entitle complainants to have the securities received by it from Evans applied to the payment or reduction of its judgment against complainants, or which would entitle complainants to be subrogated to the rights of said defendant in any securities given it by Evans and on the further ground that the mat-

ters involved in the bill are *res adjudicata* under the decision of the Court of Errors and Appeals and that the bill prays for no specific relief against said defendant.

The bill is filed under P. L. 1924, Chap. 140, known as the Uniform Declaratory Judgments Act, which empowers courts of record "within their respective jurisdictions * * * to declare rights, status and other legal relations, whether or not further relief is or could be claimed." To entitled complainants to have this court consider the situation set out in their bill and to render a declaratory judgment thereon, it should appear from the facts alleged, that they have present rights against the persons whom they make parties to the proceedings, with respect to which they may be entitled to some relief. If it appears from the bill that the complainants can have no relief as against any party they have named as a defendant, such party should not be forced into a litigation which can have no final result in favor of complainants, especially if such litigation will delay the party defendant in enforcing rights which have already been established in his favor as against complainants.

The bill shows that in a mechanics' lien suit Boyton Lumber Company recovered a general judgment against the builder and a special judgment against complainants, to be made specially of complainants' building and lands, which judgment has been affirmed by the Court of Errors and Appeals. This judgment fixes definitely the rights and liabilities of the parties and it is not within the jurisdiction of this court to interfere with such rights and liabilities by determining them to be otherwise than the Court of Errors and Appeals said they were.

Under the Mechanics' Lien Act (Comp. Stat. 3291) Boynton Lumber Company is not required to first attempt to collect its general judgment by issuing execution against the builder, but (Section 27) it may issue a separate execution on its special judgment, by virtue of which (Section 28) the sheriff shall advertise, sell and convey complainants' building and lands in the same manner as directed by law in case of lands levied on for debt. This is a statutory right given to this defendant and this court cannot, by a declaratory decree, determine, as complainants suggest, that the company shall proceed in the first instance, on its general judgment against the builder before proceeding to sell complainants' building and lands.

The further claim which complainants make to equitable consideration is that Boynton Lumber Company holds other security for the debt on which the judgment is founded, which complainants suggest should be first applied to the payment or reduction of the judgment before recourse is had to complainants' building and lands. The Mechanics' Lien law was, in effect, written into and became part of the contract under which complainants' building was erected, with the same effect as if actually incorporated therein in express terms. By failing to file their contract in the County Clerk's office, as provided by the law, complainants impliedly agreed that their building and land should be liable for the material furnished by Boynton Lumber Company to the builder. Under the law the builder's debt became a lien upon complainants' building and lands from the time such material was furnished and the proceedings in the Circuit Court, so far as complainants were concerned, was an

action *quasi in rem* to establish and foreclose the lien which complainants had, by virtue of the law, given the Boynton Lumber Company. The lien having been established by judgment, complainants cannot now say that Boynton Lumber Company must look to some other fund or security for the satisfaction or reduction of the judgment, before proceeding to collect thereon.

Complainants seem to invoke the doctrine of marshalling of assets or securities. This doctrine is that if a creditor has a lien on or interest in two funds for a debt and another creditor of the same debtor has a lien on or interest in but one of the funds, the later has a right in equity to compel the former to resort to the other fund in the first instance for satisfaction, if that course is necessary for the satisfaction of the claims of both creditors. But that is not the situation here. There are not two funds in question belonging to the builder, nor are complainants' creditors of the builder until they pay the judgment. They seek to escape payment of their debt to Boynton Lumber Company by compelling that company to look to another fund in which complainants have no interest. Moreover, the doctrine of marshalling of assets or securities does not apply when it will trench upon the rights or operate to the prejudice of the party entitled to the double fund. Boynton Lumber Company has the right to resort to the most speedy and efficacious mode of obtaining satisfaction of its debt and it should not be put to any loss, delay or additional expense in collecting. Foreclosure of its chattel mortgage security may demonstrate that it is adequate security for its debt, but on the other hand, how far the mortgagor's title to the chattels is good, or en-

cumbered, or whether the chattels will be available to answer the debt, are all matters of uncertainty and their determination will mean delay, risk and expense, for the benefit of complainants.

Complainants cannot ask to be subrogated to the rights of Boynton Lumber Company in its general judgment against the builder, or in its chattel mortgage and assigned chose in action security, until they first satisfy the Boynton Lumber Company judgment. If complainants pay the judgment, it is possible that Boynton Lumber Company will, on demand, assign such security to complainants. Until the judgment is satisfied and demand for the collateral is refused, there is no dispute between complainants and Boynton Lumber Company and this court should not determine an hypothetical question, namely, whether if complainants pay the judgment, Boynton Lumber Company should assign the collateral in question to them. This court, even under the provisions of the Uniform Declaratory Judgments Act, should not undertake to decide or declare the rights or status of parties upon a state of facts which is future, contingent and uncertain.

The bill of complaint will be dismissed as to Boynton Lumber Company, with costs.

Exhibit D. 5—Decree as to Boynton Lumber Co.

Decree as to Boynton Lumber Company.

Filed June 24, 1925.

IN CHANCERY OF NEW JERSEY.

Between RUDOLPH L. TANNER and CLARA H. TANNER, his wife, *Complainants,* *and* BOYNTON LUMBER COMPANY, a corporation, and JOHN T. EVANS, *Defendants.*	*On Bill, &c.* *Decree.*

This matter coming on to be heard on the motion of the defendant Boynton Lumber Company to strike out the complainants' bill of complaint, and the Court having heard the argument of Earl A. Merrill, Esq., solicitor for and of counsel with complainants, and of Orlando H. Dey, solicitor for and of counsel with said defendant, the Boynton Lumber Company, and having duly considered the arguments of counsel, the briefs filed by them respectively, and the pleadings filed in this cause; and

It appearing by the allegations in the complainants' said bill of complaint that complainants have no present rights, status or legal relations against said defendant Boynton Lumber Company entitling them to the relief prayed for, or to any other relief in this court;

It is thereupon on this 24 day of June, 1925, declared and determined that the complainants

have no rights, status or legal relations against the said defendant Boynton Lumber Company entitling them to the relief prayed for in said bill of complaint or to any other relief in this court; and

It is thereupon ORDERED, ADJUDGED and DECREED that the said motion of the defendant Boynton Lumber Company prevail, and the complainants' bill of complaint be and the same is hereby stricken out as to said defendant Boynton Lumber Company, and that complaints pay to said defendant its costs of this suit to be taxed, together with a counsel fee of $100 which is hereby allowed to the solicitor for said defendant Boynton Lumber Company and which shall be included in said defendant's bill of taxed costs and collected with the other items of said bill.

E. R. WALKER,
C.

Respectfully advised,

JAMES F. FIELDER,
V.-C.

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

E. A. MERRILL,
Solicitor for Complainants.

Exhibit D. 5—Decree Pro Confesso as to Evans.

Decree Pro Confesso as to Evans,

Filed July 2, 1925.

IN CHANCERY OF NEW JERSEY.

57/686.

Between	
RUDOLPH L. TANNER, *et al.*, *Complainants,*	*On Bill, etc.*
and	*Decree Pro Confesso and Order for Proofs Ex Parte.*
BOYNTON LUMBER COMPANY and JOHN T. EVANS, *Defendants.*	

This matter being opened to the Court by E. A. Merrill of counsel with the complainants, and it appearing to the Chancellor that the bill has been dismissed as the defendant Boynton Lumber Company, but that the defendant John T. Evans has not appeared and pleaded, answered or demurred; and it further appearing that the time within which said defendant John T. Evans should appear and plead, answer or demur has expired:

It is, on this 2nd day of July, 1925, ORDERED, that the bill of complaint be taken as confessed against the said defendant John T. Evans; and it is further ORDERED that the complainant proceed to take depositions and other evidence to substantiate and prove the allegations in his

said bill and to bring on the hearing of the cause *ex parte.*

E. R. WALKER,
C.

Respectfully advised,

BAYARD STOCKTON,
A. M.

Exhibit D. 5—Notice of Motion.

Notice of Motion for Restraining Order.

IN CHANCERY OF NEW JERSEY.

Between RUDOLPH L. TANNER, *et al.*, *Complainants,* *and* BOYNTON LUMBER CO., *et al.*, *Defendants.*	*On Bill, etc.* *Notice of Motion.*

TAKE NOTICE, that on Thursday, October 1st, 1925, at two o'clock in the afternoon, or as soon thereafter as counsel may be heard, I shall apply to the Chancellor before Vice-Chancellor Church, at Chancery Chambers, Prudential Building, Newark, New Jersey, for an order restraining the Boynton Lumber Company from issuing execution, or from proceeding with execution, against the lands of the complainants herein, pending the filing of a decree in the above-entitled cause and the further order of the Court.

E. A. MERRILL,
Solicitor of the Complainants.

To Mr. Orlando H. Dey, Rahway, New Jersey, solicitor of Boynton Lumber Company.

Exhibit D. 5—Order Denying Motion.

Order Denying Motion.

Filed October 2, 1925.

IN CHANCERY OF NEW JERSEY.

57/686

Between

RUDOLPH L. TANNER, *et al.*,
Complainants,

and

BOYNTON LUMBER COMPANY, *et al.*,
Defendants.

On Bill, &c.

Order.

This matter coming on to be heard on October 1, 1925, on the motion of the complainants for an order restraining the defendant Boynton Lumber Company from issuing execution or from proceeding with execution against the lands of the complainants, and the Court having heard and considered the argument of Earl A. Merrill, Esq., solicitor for complainants, and of Orlando H. Dey, solicitor for said defendant Boynton Lumber Company, and having duly considered the written notice of said motion and the affidavit filed in support thereof; and being of the opinion that the motion of the said complainants is not well founded;

It is thereupon on this 2nd day of October, 1925, ORDERED that the aforesaid motion be and the same is hereby denied; and that the said complainants pay to the defendant Boynton Lumber Company its costs of this motion to be taxed, together with a counsel fee of $50, which is

hereby allowed to the solicitor for said defendant Boynton Lumber Company and which shall be included in said defendant's bill of taxed costs and collected with the other items of said bill; and that said defendant Boynton Lumber Company may issue execution against said complainants to recover said costs.

E. R. WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

Rule to Show Cause with Ad Auterim Restraint.

Rule to Show Cause.

IN CHANCERY OF NEW JERSEY.

Between	
RUDOLPH L. TANNER and CLARA H. TANNER, his wife, *Complainants,*	*On Bill, etc.*
and	*Rule to Show Cause and ad Interim Restraint.*
BOYNTON LUMBER COMPANY, a corporation, *Defendant.*	

This matter being opened to the Court by E. A. Merrill, solicitor of complainants, and the Court having read the bill of complaint in the above-entitled cause and the affidavit thereunto annexed;

It is, on this 6th day of October, 1925, ORDERED that the defendant Boynton Lumber Company show cause before the Chancellor at the Chancery Chambers in the City of Newark on the 13th day of October, 1925, why an interlocutory injunction should not be allowed, to restrain said defendant from proceeding with execution to enforce against the lands of complainants the summary special judgment, entered in its favor in the Union County Circuit Court September 15, 1924, against the lands of complainants, in the mechanic's lien action of said defendant against complainant and others, until final decree made in this cause.

And it is further ORDERED that said defendant Boynton Lumber Company, and its agents and

servants, and the Sheriff of the County of Union, in the meantime, and until the further order of this court in the premises, desist and refrain from selling the lands of the complainant under the execution issued to the Sheriff of Union County on said judgment.

It is further ORDERED that copies of said bill of complaint and the affidavit thereunto annexed, and of this order, which may be certified to be true by complainants' solicitor, be served on said defendant within two days from the date hereof.

It is further ordered that a copy of this order certified as aforesaid be served on the Sheriff of the County of Union within two days from the date hereof.

Leave is given the complainant to take further affidavits to be read upon the return of this order, provided that copies thereof be served upon the defendant or its solicitor at least two days before the return day of this order.

Respectfully advised,

JAMES F. FIELDER,
V.-C.

Notice of Motion to Strike Out Complaint.

Filed November 4, 1925.

IN CHANCERY OF NEW JERSEY.

59/202

Between	
RUDOLPH L. TANNER and CLARA H. TANNER, his wife, *Complainants,*	*On Bill, etc.*
and	*Notice of Motion to Strike Complaint.*
BOYNTON LUMBER COMPANY, a corporation, *Defendant.*	

To Earl A. Merrill, Esq., solicitor for complainants.

TAKE NOTICE that on Wednesday, November 4, 1925 at 10:00A. M. or as soon thereafter as counsel may be heard I shall apply to the Chancellor at the Chancery Chambers in the City of Newark for an order striking out the Bill of Complaint filed in this cause and dissolving the restraint contained in the Rule to Show Cause dated October 6, 1925 for the following reasons:

1. Because said bill of complaint fails to disclose any cause of action in that it does not state any facts or set up any equities entitling complainants to the relief prayed for or to any other relief in this court.

2. Because the matters and things alleged in said complaint are *res adjudicata,* having been

decided adversely to complainants by the judgment of the Union County Circuit Court entered on September 15, 1924 in favor of defendant, as alleged in said complaint, which judgment was afterwards affirmed by the Court of Errors and Appeals.

3. Because by this proceeding the complainants are attempting to nullify the effect of said Union County Circuit Court judgment and to deprive defendant of the benefit thereof by relying upon facts which, if properly pleadable at all, should have been, but were not, interposed as a legal defense in the action at law resulting in said judgment.

4. Because the matters and things alleged in said complaint are *res adjudicata,* having been decided adversely to complainants by the decree of the Chancellor entered in this court on June 24, 1925, in favor of defendant.

5. Because the matters and things alleged in said complaint are *res adjudicata,* having been decided adversely to complainants by a further decree of the Chancellor entered in this court on October 2, 1925, in favor of defendant.

6. Because this proceeding is vexatious and brought by complainants to hinder, delay and embarrass defendant in the enforcement and collection of its said judgment recovered in said law court.

Dated, October 23, 1925.

ORLANDO H. DEY,
Solicitor for Defendant.

Order Discharging Rule to Show Cause.

Filed November 4, 1925.

IN CHANCERY OF NEW JERSEY.

59/202.

Between RUDOLPH L. TANNER and CLARA H. TANNER, his wife, *Complainants,* *and* BOYNTON LUMBER COMPANY, a corporation, *Defendant.*	*On Bill, etc.* *Order.*

This matter coming on to be heard on the motion of the defendant, Boynton Lumber Company to strike out the complainants' bill of complaint and to dissolve the restraint contained in the rule to show cause made on October 6, 1925, and the Court having heard and considered the argument of E. A. Merrill, Esq., solicitor for and of counsel with the said complainants and Orlando H. Dey, solicitor for and of counsel with said defendant, and having duly considered the pleadings and affidavits filed in this cause;

It is thereupon on this 4th day of November, 1925, on motion of Orlando H. Dey, solicitor for said defendant, ORDERED, ADJUDGED and DECREED that the rule to show cause made on October 6, 1925, be and the same is hereby discharged, and that the restraint therein contained

Order Discharging Rule to Show Cause.

be and the same is hereby dissolved, and that the complainants' application for an interlocutory injunction be and the same is hereby denied; and

That the motion of said Defendant to strike the Bill of complaint filed in this cause be and the same is hereby denied with leave to said defendant to plead to said bill of complaint within ten days from the date hereof.

E. R. WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

Notice of Appeal from Order.

Filed November 27, 1925.

IN CHANCERY OF NEW JERSEY.

59/202.

Between RUDOLPH L. TANNER and CLARA H. TANNER, his wife, *Complainants,* *and* BOYNTON LUMBER COMPANY, a corporation, *Defendant.*	*On Bill, etc.* *Notice.*

The complainants hereby appeal to the Court of Errors and Appeals in the last resort in all causes from so much of the order made in this court on November 4, 1925, in the above-entitled cause, as denies complainants' application for an interlocutory injunction and dissolves the restraint imposed by a certain order dated October 6, 1925, and filed in this cause.

E. A. MERRILL,
Solicitor of Complainants.

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

E. A. MERRILL,
Solicitor for Complainants.

Petition of Appeal.

COURT OF ERRORS AND APPEALS OF NEW JERSEY.

Between	
RUDOLPH L. TANNER and CLARA H. TANNER, his wife, *Complainants-Appellants,*	*On Bill, etc.*
and	*Petition of Appeal.*
BOYNTON LUMBER COMPANY, a corporation, *Defendant-Respondent.*	

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

The petition of Rudolph L. Tanner and Clara H. Tanner, his wife, the appellants in the above-entitled cause, respectfully shows that your petitioners find themselves aggrieved by the order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the 4th day of November, 1925, wherein the said Rudolph L. Tanner and Clara H. Tanner, his wife, were complainants, and Boynton Lumber Company, a corporation, was defendant, in this respect, to wit:

That it is thereby ordered "that the rule to show cause made on October 6, 1925, be and the same is hereby discharged, and that the restraint therein contained be and the same is hereby dissolved, and that the complainants' application for an interlocutory injunction be and the same is hereby denied;"

And your petitioners have appealed and do hereby appeal to this Honorable Court from so much of said order dated November 4, 1925, as is hereinabove recited, upon the following grounds:

1. The order contained in the rule to show cause dated October 6, 1925, requiring the Boynton Lumber Co., and its agents and servants, and the Sheriff of Union County, to desist and refrain from selling the lands of the complainants under the execution issued to the Sheriff of Union County on said judgment until the further order of this court in the premises should not have been discharged and dissolved.

2. The application by the complainants for an interlocutory injunction to restrain said Boynton Lumber Co. from proceeding with execution to enforce against the lands of complainants the summary special judgment entered in favor of the Boynton Lumber Company in the Union County Circuit Court on September 15, 1924, should have been granted.

Your petitioners therefore pray that the said order dated November 4, 1925, may be reversed, set aside and for nothing holden as to those parts thereof to which objection is made, and that your petitioners may have such relief in the premises as to this Honorable Court may seem just.

E. A. MERRILL,
Solicitor of and of Counsel
with the Petitioners.

Notice of Motion for Further Stay of Execution.

COURT OF ERRORS AND APPEALS OF NEW JERSEY.

Between	
RUDOLPH L. TANNER and CLARA H. TANNER, his wife, *Complainants-Appellants,*	*On Appeal.*
and	*Notice of Motion.*
BOYNTON LUMBER COMPANY, a corporation, *Defendant-Respondent.*	

To Mr. Orlando H. Dey, Rahway, New Jersey, solicitor of defendant-respondent.

TAKE NOTICE, that on Friday, December 4, 1925, at ten o'clock in the morning, or as soon thereafter as counsel may be heard, I shall move before the Court of Errors and Appeals for a stay pending the decision of the court in this appeal, and a further stay until final hearing in the Chancery Court against proceeding with execution upon the judgment entered September 15, 1924, in the Mechanics' Lien action of Boynton Lumber Company *v.* Rudolph L. Tanner, and others.

E. A. MERRILL,
Solicitor of Complainants-Appellants.

Order of Court of Errors Denying Motion.

Filed December 14, 1925.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between	*On Appeal.*
RUDOLPH L. TANNER and CLARA H. TANNER, his wife, *Complainants-Appellants,*	*Order Denying Motion for Temporary Restraint.*
and	
BOYNTON LUMBER COMPANY, a corporation, *Defendant-Respondent.*	

This matter being opened to the Court by Earle A. Merrill, Esq., as counsel for the complainants-appellants in the presence of Orlando H. Dey, of counsel for the defendant-respondent and it appearing that an order was made by the Chancellor in the Court of Chancery on November 4, 1925 in a certain cause wherein the said appellants were the complainants, and the said respondent was the defendant, by which order a certain rule to show cause made in said proceedings in the Court of Chancery on October 6, 1925 was discharged, and the restraint contained therein was dissolved, and the application of the said complainants for an interlocutory injunction to restrain the defendant from proceeding with an execution upon the judgment recovered by it on September 15, 1924 against the said complainants in the Union County Cir-

cuit Court, until after final hearing of said cause in said Court of Chancery, was denied; and

That the said appellants have appealed from said order made by the Chancellor in the Court of Chancery on November 4, 1925 to this court; and

Application now being made to this court for a stay pending the decision of this court in this appeal, and a further stay until final hearing in said Court of Chancery to restrain the said defendant-respondent from proceeding with said execution issued upon said Union County Circuit Court judgment; and

The matter having been duly argued by said counsel for said respective parties, and the Court having duly considered the same;

It is thereupon on this 4th day of December, 1925 on motion of Orlando H. Dey of counsel for the defendant-respondent, ORDERED and ADJUDGED that the motion of the said complainants-appellants before this court for a stay pending the decision of this court in this appeal and a further stay until final hearing in said Court of Chancery to restrain defendant-respondent from proceeding with an execution upon the judgment recovered by it on September 15, 1924 against the said complainants-appellants in the Union County Circuit Court, be and the same is hereby denied; and that the said defendant-respondent do recover of the said complainants-appellants its costs of this motion to be taxed.

By the Court,

E. R. WALKER,
C. & P. J.

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

New Jersey Court of Errors and Appeals

Between RUDOLPH L. TANNER, *et al.*, *Complainants-Appellants,* *and* BOYNTON LUMBER COMPANY, *Defendant-Respondent.*	*On Bill, &c.* *On Appeal.*

BRIEF OF THE COMPLAINANTS-APPELLANTS.

Statement.

This is an appeal from a decree of the Court of Chancery dismissing a bill for an injunction restraining a material man from making, out of the lands of the owners, the amount of a judgment entered by default, in favor of the material man against the builder, in a mechanics' lien suit.

For convenience the several parties will be hereinafter referred to as follows:

The owners—the complainants herein—as "Tanner";

The material man—the defendant herein—as the "Lumber Company";

The builder as "Evans."

The bill charges fraud.

The Court below held that fraud was not proved.

The Lumber Company brought a mechanics' lien action against Evans as builder and Tanner as owner. Evans filed no answer and the Lumber Company subsequently entered a default judg-

ment against him (Case, p. 74). Tanner answered and set up the statutory plea denying "that said alleged debt is a lien" (Case, p. 65, l. 30), thereby putting the Lumber Company to its proof, under the statute.

The Lumber Company then moved to strike out Tanner's answer as being "frivolous and sham" (Case, p. 67, l. 34), and for the entry of a summary judgment. The motion was granted and judgment "special" was summarily ordered to be entered that the debt of Evans to the Lumber Company, as evidenced by the default judgment entered against Evans, "be made of the land and building described in the plaintiff's complaint" (Case, p. 75, l. 16).

The Lumber Company's motion for summary judgment rested upon the affidavits of Evans and of one Catherine V. Nagle, a bookkeeper of the Lumber Company. These affidavits averred that the material listed in the bill of particulars was "used in the erection and construction" of Tanner's house. The statutory plea denying that the alleged debt of Evans to the Lumber Company was a lien upon the lands of Tanner put the Lumber Company to its proof of *all* the items in the bill of particulars, but as the lien was invalid if the last item be excluded the argument here will be confined to that particular item. That item (Case, p. 59, l. 34) is as follows:

March 8:

1 dr. 2-6x6-2-1¾ flush sanitary birch.
3 dr. 2-6x6-8-1¾ flush sanitary birch
2 dr. 2-2x6-8-1¾ flush sanitary birch.
1 sash dr. 2-6x6-8-1¾.
1 panel and gla. 1 lt., birch.

Not only were these doors not used in Tanner's house *on March 8, 1924,* but they were

never used *at any time* in Tanner's house. Doors of that type were never *intended* to be used in Tanner's house, or ordered by Tanner, or called for in the specification for his house. There is not even legal proof that these doors were *ordered* by *Evans,* or ordered by anyone for Tanner's house, or delivered there.

If the item dated March 8, 1924, be excluded the claim fails, as the balance of the material was admittedly delivered more than four months before the claim was filed. It is Tanner's contention that Evans "willfully" made a false representation when he made his affidavit that these doors were delivered on March 8, 1924, and were "used in the erection and construction" of the Tanner house, and that the use of such affidavit to the injury of Tanner made of it a false and fraudulent affidavit which voids the claim; he further contends that the continued reliance of the Lumber Company upon that affidavit after its fraudulent character had been pointed out was fraudulent on the part of the Lumber Company.

The fraud was discovered and established after the summary judgment had been entered and affirmed, but before execution, and in this wise.

Subsequent to the entry of the summary judgment that the alleged debt of Evans be made out of his lands, Tanner brought a chancery action, against the Lumber Company and Evans, to have his rights determined with respect to certain securities which Evans had previously given the Lumber Company for a general indebtedness of which the amount involved in the mechanics' lien suit was a part, but the bill was dismissed. It was in the course of that action that it was established that, as affecting Tanner, the affi-

davits upon which the lien suit and the resulting judgment were based were false in fact.

Upon the discovery that these affidavits were false that fact was immediately brought to the attention of the Lumber Company, but it refused to discontinue its lien action, and insisted upon the payment, by Tanner, of its default judgment against Evans as an alternative to a sale of Tanner's property under execution.

Thereupon Tanner filed the present bill to restrain the collection out of his lands of the judgment against Evans. Application for preliminary restraint being denied the judgment against Evans was paid by Tanner under protest, but with the suggestion from the Court that should the prayer of the bill be granted a writ of restitution would probably lie. The bill recites the facts, and alleges that the affidavits referred to were "false and fraudulent with respect to the item of March 8, 1924" (Case, p. 8, l. 40 and p. 9, l. 8) and that the judgment was "fraudulently procured" through the use of said affidavits (Case, p. 9, l. 18).

The issue was not, as stated by the Court, "whether or not the affidavits of Evans and Miss Nagle in the mechanics' lien suit were false and fraudulent" (Case, p. 82, l. 5). *The issue was whether an innocent owner can be compelled to pay the alleged debt of a contractor to a material man without a scintilla of proof that the debt was a lienable debt as against the owner, where the proof is conclusive that a part of the material charged for was not included in the building contract and never was used, or intended to be used, in the owner's building, where the material man's judgment rested upon false affidavits procured for and by the material man himself, and where*

the material man, prior to execution, was apprised of the fraudulent character of the judgment.

The petition of appeal sets forth that appellants are aggrieved for that:

(1) The decree does not adjudge that the material described in the item of March 8, 1924, of the bill of particulars filed in the mechanics' lien action of Boynton Lumber Company against Rudolph L. Tanner and Clara H. Tanner, his wife, the complainants herein, was not ordered for or used in the erection and construction of the dwelling house of complainants.

(2) The decree does not adjudge that the allegation in the affidavits of Catherine V. Nagle and John T. Evans that the material described in said item of March 8, 1924, was used in the erection and construction of complainants' dwelling was false in fact; and that, being false, the affidavits were fraudulent as well upon being used for a fraudulent purpose.

(3) The decree does not adjudge that the defendant herein made a fraudulent use of the affidavits of said Catherine V. Nagle and John T. Evans.

(4) The decree does not adjudge that except for the said affidavits of said Catherine V. Nagle and John T. Evans, filed by and for the benefit of the defendant, a summary judgment could not have been ordered against complainants.

(5) The Court dismissed the complainants' bill whereas it should have granted the relief prayed.

The attention of the Court will also be called to the further insistment of appellants that the justice who ordered the summary "special" judgment that the debt of Evans be made out of the lands of Tanner was without jurisdiction to make such order for that:

1. The defendants in the lien action (complainants here) set up a *statutory defense,* and a statutory defense can be neither "sham" nor "frivolous."

2. The justice was without jurisdiction to order a summary *"special"* judgment that the debt of Evans be made of the lands of Tanner, as the general judgment supporting the *"special"* judgment was a judgment by default, and such *"special"* judgment, over the objection of the owner, cannot be rested upon a default judgment against a builder.

POINT I.

The doors in question were never used in Tanner's house.

There was neither proof nor offer of proof that these doors were actually *used* in Tanner's house. There was no proof even that the doors were *delivered* at Tanner's house. To be sure, Munn, the truckman, *said* that he delivered the doors to Evans at the "Tanner house" (Case, p. 27, l. 38), but it does not appear that his statement that the place of delivery was the "Tanner house" was based on other than hearsay, and his statement is further weakened by his admission that he could not tell if the interior was lathed and plastered (Case, p. 28, l. 21), and his assertion that it was a "sheathed" house (Case, p. 28, l. 18), although, as a matter of fact,

the house was then so near completion that at the examination before Judge McAdams, Mr. Evans testified that the house was then "substantially completed" (Case, p. 50, l. 25), Tanner had begun to move in (Case, p. 56, l. 5), and the house is brick and stucco (Case, p. 33, l. 16).

As to the erection of these doors in the house on or subsequent to March 8, 1924, Tanner testified:

> Q Were or were not all the doors in your house hung prior to March 1, 1924? A They were.
>
> Q After March 1, 1924, were any doors in your house changed or exchanged? A No, sir.
>
> Q Did you have a full complement of doors in the house on March 1, 1924? A Yes, sir.
>
> Q Are you sure, Mr. Tanner, that all the doors were hung by the first of March, 1924? A Yes, sir (Case, p. 21, l. 20).

At the examination before Judge McAdams, Mr. Evans himself testified, referring to March 1, 1924:

> Q Were the doors all hung? A Yes, sir (Case, p. 51, l. 4).

Judge McAdams reported, as of March 1, 1924:

> "The evidence of one, John T. Evans, the builder * * * shows:
>
> 1. That all the interior doors, with two exceptions were what is known in the trade as one panel doors (and) were hung.
>
> 2. And the two exceptions were what is known in the trade as sash door four lights" (Case, p. 38, l. 12).

And further:

> "The evidence shows on the part of Tanner that no doors were hung, exchanged or replaced after March 1, 1924" (Case, p. 39, l. 27).

And the Vice-Chancellor remarks, in his conclusions that:

> "If the issue in the present suit were simply whether or not the doors in question had been actually used in the Tanner house, it would have to be conceded, I think, that on the weight of the evidence in this case, competent on that issue, the verdict would be that they were not so used" (Case, p, 81, l. 30).

It must, therefore, be accepted as conclusively determined that the doors in question were never used in the "erection and construction" of the Tanner house.

POINT II.

These doors were never ordered by Tanner, or on his behalf, for his house.

According to the testimony of one William Bierling, an employee of the Lumber Company (Case, p. 23, l. 10), who claims to have taken the order (Case, p. 23, l. 36), the order for these doors was not given by Evans, but by "a man by the name of Ed. Feickessen" (Case, p. 23, l. 17), who, so far as Bierling knew "was a sort of right-hand man or possibly a foreman and all-around handy man" for Evans (Case, p. 23, l. 19). It does not appear that Feickessen had any authority from Evans to order material for the Tanner house; the alleged order was an oral order; the alleged order was never confirmed in writing either by the Lumber Company to Evans, or by Evans to the Lumber Company; Evans nowhere claims that he ever received an order from, or on behalf of, Tanner for these doors; Tanner testified that he never ordered "any doors of that description" (Case, p. 21, l. 17); and it is admitted that no such doors are called for in the

specifications for the Tanner house (Case, p. 34, l. 7).

The failure of the Lumber Company to produce order, confirmation, bill, or ledger account supporting Bierling's testimony is significant, not only because it runs counter to the ordinary and usual business practice, but because of Evans' testimony and *his* failure to produce any bill for this particular item:

> Q Did you give to Boynton Lumber Company written orders for materials on the Tanner job? A Yes, sir.
>
> Q Did you keep copies of them? A No, sir.
>
> Q Did you check the deliveries made by the Boynton Lumber Company against your orders? A Always.
>
> Q What did you check against? A Against a bill that they sent; such as those bills (Case, p. 48, l. 4).

The Special Master reported:

> "There are no bills offered in evidence by Evans, or testimony given to show that the six flush sanitary doors, and the one panel one glass light sash door, billed as of March 8th, 1924, as per bill of particulars attached to lien claim were ever ordered by Evans, or delivered or used in the Tanner house" (Case, p. 38, l. 33).

In his conclusions the Vice-Chancellor says that "Mr. Boynton produced the order from Evans to the company for the flush doors" (Case, p. 80, l. 29); the Court is in error; Mr. Boynton did not testify, and doubtless what the Court had reference to was the testimony of Bierling, who produced merely *his own memorandum* of a *verbal* order alleged to have been received by him from Feickessen for the account of Evans (Case, p. 24, l. 34). Feickessen was not produced. Neither was Evans. The claim of the

Lumber Company that Evans ordered the doors is hearsay three times removed.

There was a memorandum which Bierling produced, and which he testified was made in the Lumber Company's office (Case, p. 24, l. 7), at the time the order was alleged to have been personally placed by Feickessen (Case, p. 25, l. 17), but it was neither signed nor initialed by Feickessen or by Evans (Case, p. 25, l. 6).

Over four months elapsed between the date of the alleged order and the issuing of the summons in the lien action, but neither Evans nor the Lumber Company produced any bill rendered for the doors, or produced any account book showing a charge for the doors.

It must, therefore, be accepted as conclusively determined that the doors in question were never ordered by Evans for, or intended for use in the Tanner house.

POINT III.

The affidavits of Catherine V. Nagle and John T. Evans are false as to the item of March 8, 1924, in the Bill of Particulars.

Catherine V. Nagle was a bookkeeper in the employ of the defendant Lumber Company. In her affidavit (Case, p. 68), she swears that the *entire list* of items in the bill of particulars was "furnished to and used by said defendant, John T. Evans, in the *erection and construction* of said building," meaning the residence of the complainants, Tanner.

The list itemizes some 113 separate charges for material alleged to have been delivered over a period of four and one-half months while the

building was under construction, and includes windows, frames, mullions, doors of various kinds, sash, shutters, jambs, trim, molding, mirror and several thousand feet of flooring.

That Miss Nagle, a woman bookkeeper, who claims only, "*as such bookkeeper,*" to be "familiar with the *books of account* of said corporation, and especially with the *records* therein contained relating to its account of lumber and other building materials sold and delivered by it to John T. Evans" etc., was competent to depose that all this material actually went into the Tanner house is more than improbable—it is incredible and, because incredible, entitled to no weight. Further, without showing or alleging any qualifications upon the subject, she also swears to the *reasonable value* of the material listed.

It probably will not be denied that the affidavit was prepared by counsel for the defendant, and was subscribed and sworn to by the deponent without any comprehension of its contents, or its purpose. No further attention will be paid to this affidavit.

The affidavit of Evans is to the same effect (Case, p. 71). Evans was a vitally interested party. He would benefit to the extent he could shift to Tanner the burden of paying any indebtedness of his to the Lumber Company. To that extent the security he had given the Lumber Company would be applicable to any other indebtedness of his to the Lumber Company. His affidavit is flatly contradicted by the testimony he later gave before the Master in the proceedings for a declaratory judgment.

That the Court did not credit these affidavits is manifest from the conclusion of the Court that

"it would have to be conceded, I think, that on the weight of the evidence in this case, competent on that issue, the verdict would be that they (the doors in question) were not so used" (Case, p. 81, l. 32) in the Tanner building.

It must, therefore, be accepted as conclusively determined that the affidavits of Miss Nagle and Evans were false as to the item in question. Evans must have known his affidavit was false at the time he made it.

POINT IV.

Upon being apprised that the Evans affidavit was false the retention of the item of March 8, 1924, in the Bill of Particulars made that item such "wilfull or fraudulent misstatement" by the Lumber Company as voided the lien claim under the Statute, and the execution of the judgment obtained through such misstatement should be restrained.

The statute provides that

> "if the bill of particulars shall contain any willful *or* fradulent misstatement of the matters above directed to be inserted therein, the building or lands shall be free from all lien for the matters in such claim." (3 C. S. 3304; Sec. 16; par. IV.)

Whatever may have been the situation when the item of March 8, 1924, was first incorporated in the lien claim, after its falsity was discovered its continued retention in the bill of particulars by the Lumber Company made that item a "willful misstatement." Such willful misstatement was fradulent even if a corporation defendant cannot be charged with moral delinquency. Without moral delinquency a false representation resulting in injury to another may be fradulent

in equity. *Com. Casualty Ins. Co.* v. *South Surety Co.,* 100 N. J. E. 92.

That the false representation was made by Evans, and not by an official of the Lumber Company, cannot help the Lumber Company. Evans' affidavit was made for the benefit of and used by the Lumber Company, and in making it Evans was acting for the Lumber Company. In *Kavky* v. *Harris,* 102 N. J. L. 371, this court said:

> "Where a person acts for another who accepts the fruits of his efforts, the latter must be deemed to have adopted the methods employed, as he cannot, even though innocent, receive the benefits and at the same time disclaim the responsibility for the means by which they were acquired."

That where one takes advantage of an agent's fraud it becomes his fraud was also held in *Tuttle* v. *Harris,* 83 N. J. E. 666-672.

Again, in *Crosby* v. *Wells,* 73 N. J. L. 790-801, this court said:

> "It is to be remembered that fraud in misrepresentations of fact may be either in the knowledge of their falsity, or, without knowledge of their truth or falsity, in coupling the representations with an express or implied affirmation of personal knowledge of their truth."

The securing of the "special" judgment here questioned gave the Lumber Company a legal advantage which it had no right to enforce; and where the nature of the transaction is such that one party secures an advantage over the other, and uses such advantage in an inequitable, or unconscionable, manner to the injury of the other, equity will infer fraud.

The "special" judgment having been obtained through the fraud of the agent of the Lumber

Company, and that fraud having been adopted and acted upon by the Lumber Company, the right of execution thus acquired may be restrained. As said by this court in *Freeman* v. *Conover,* 95 N. J. L. 89, there exists in the court of chancery

> "an inherent power to prevent one from exercising even his rights when, by his fraudulent conduct, he has made it inquitable that he should be permitted to exercise those rights."

If one, because of his fraudulent conduct, may be restrained from exercising his *rights,* by so much the more may be he restrained from exercising, to the injury of another, what is merely a fraudulent *claim* of rights.

That the Chancery Court may protect one against the collection of a judgment fraudulently obtained is abundantly established. In *First Baptist Church* v. *Syms,* 51 N. J. Eq. 363-368, Chancellor McGill said that the power of the Chancery Court

> "to give relief against a judgment which has been procured by fraud or imposition upon another court is beyond all question. It deals with the consciences of the parties to the judgment, and will inquire whether those parties to the judgment, or either of them, have intentionally withheld or concealed from the court in which the judgment was rendered, any fact which, if disclosed, would have shown that there was either no cause of action or no warrant for the amount of the recovery."

See also, to the same effect, *Turner* v. *Kuehnle,* 70 N. J. Eq. 61; *Savage* v. *Edgar,* 85 N. J. Eq. 420; *Sands* v. *Ruddick,* 87 N. J. Eq. 620; *Povey* v. *Ready,* 88 N. J. Eq. 342.

POINT V.

Bell v. Mecum does not support respondent's assertion that its right to its judgment is not affected by the false and fraudulent character of Evans' affidavit.

In his brief filed in the court below counsel for the respondent made this surprising assertion:

> "It is entirely immaterial whether or not the Evans affidavit was actually false and fraudulent in the respect in which it is now claimed that it was, for if it was false in that respect (in regard to the actual use of the doors in the building in question) this does not affect the plaintiff's right to its judgment."

And quoting further from that brief:

> "The Lumber Company's right to a judgment in the Circuit Court was not dependent on Evans' affidavit to the effect that these doors were actually used in the construction of the Tanner dwelling. All that is necessary to support the Lumber Company's lien judgment is that the materials were
>
> 'delivered in good faith for use in the erection of the building, and when that is established it is no defense that, in the absence of fraud on the part of the creditor, there may have been a failure to use materials thus furnished, or a diversion of the same from the purpose for which they were intended.'
>
> *Bell* v. *Mechum*, 75 N. J. L. 547 at page 549."

There is a passage in the Conclusions of the Court below which seems to look in the same direction:

> "It appeared in the case that defendants (referring to the Lumber Company) believed it was not necessary for them to prove that the doors were actually used in the house;

> defendants believed it would be sufficient so long as it appeared that the doors were ordered and furnished for use in the house, even if they were not actually used." (Case p. 83, l. 19.)

If what is said and implied in these quotations be sound law then it is possible for a dishonest builder to order delivered at one house material sufficient for, and intended by him to be used in, two or more houses, and if the order is accepted and delivery made in good faith by the material man, the value of all that material can be made out of the lands upon which such material was delivered, notwithstanding the owner never ordered it, and never knew either of its delivery upon or removal from his premises. That such is the law, or that such conclusion is supported by the opinion of this court in *Bell* v. *Mecum,* or by any other case, is denied.

To protect the creditor where material "for use in the erection of the building" has been delivered to the building, but thereafter diverted from its original purpose, there must be, in the words of this court, "*absence of fraud on the part of the creditor.*" That case, therefore, is inapplicable here, as the creditor—the Lumber Company—*was* guilty of fraud. The use of the fraudulent affidavit made by Evans, to the damage of Tanner, was a fraud upon Tanner by the Lumber Company.

But the cited case is inapplicable here, even if it be admitted that the misrepresentation by Evans was merely a mistake and made without fraudulent intent, or if the use of the affidavit by the Lumber Company, although after the misrepresentation was pointed out, was also without fraudulent intent, if that be possible.

As pointed out by this court in *Coddington* v. *Drydock Co.*, 31 N. J. L. 477-482, and cited by this court in *Gardner & Meeks Co.* v. *C. R. Co.*, 72 N. J. L. 257, the fundamental purpose of the mechanics' lien act is

> "to hold a lien on the estate of the owner of the building in the land, *on account of the increased value given by the building to the land,* and the natural injustice there is in the owner of the land *apropriating to his use, without compensation the toil and capital of others.*"

But here these doors never gave value, and never were intended to give value, to Tanner's building or land; they never were ordered or specified by Tanner for his building, never were used in its erection and construction, and he paid, in full for everything that *was* used in his building. In no sense, therefore, can it be said that he appropriated to his own use without compensation, the toil and capital of others.

As said by this court in *Kavky* v. *Harris,* 102 N. J. L. 371:

> "The statute, in substance declares that every building to be erected shall be liable for the payment of any debt owing to any person for labor performed or *materials furnished in the erection and construction thereof* * * *."

The theory which supports the opinion of the Court in *Bell* v. *Mecum, supra,* assumes that the owner contracted with the builder for the material in question, that the material was delivered for the owner's benefit, and that the material was *in fact,* required in the erection and construction of the building. In such case the material man will not lose his lien merely because, after delivery, this particular material was diverted by the builder to some other purpose, and replaced from another source.

The mechanics' lien act neither says nor implies, and if it did it would be unconstitutional as depriving one of his property without due process of law, nor has any court held or intimated, that a material man may shift to the lands of an owner the burden of the indebtedness of a builder for material neither included nor contemplated within the terms of the owner's contract with the builder, merely by accepting an order from the builder stipulating that delivery of such material be made upon such owner's premises.

The delivery of material upon lands of a stranger, through the fraud of a builder, cannot establish liability as between the owner of the lands and the material man, where there was no liability for such material as between such owner and the builder.

The act requires that the builder and owner be made co-defendants, and no "special" judgment that the debt of the contractor be made out of the lands of the owner can be made without the support of a general judgment by the material man against the builder. In other words, the lien is a security for the builder's debt to the material man. But the builder's debt to the material man for which the lands are liable can only be a debt for which the builder can hold the owner personally liable because the material in question is within the terms of his contract. But if it appears that the debt asserted by the material man against the builder is not for material required by the term of the *owner's* contract with such builder the lands of the owner, of course, cannot be made liable.

This court certainly never intended to lay down a rule permitting a material man to make

out of the lands of an innocent and unsuspecting owner the value of material the owner never included in his building specification, never included in his contract with the builder, never ordered, never used, and never even knew had been delivered on his lands, merely because the builder (whether by fraud or mistake is immaterial) directed the material man to deliver such material on the lands of such owner. And yet that is the construction which the respondent would now have this court place upon Bell v. *Mecum, and apply as against these appellants, as that is precisely their situation.*

It appearing that the doors described in the item of March 8, 1924, in the bill of particulars were never *ordered* by or on behalf of Tanner or called for by the specifications, and there being no evidence that they were even *ordered by Evans* for use in Tanner's house; and it further appearing that such doors were never "*used* in the erection and construction" of Tanner's house, and that no doors of any description were *hung, changed,* or *exchanged* after March 1, 1924; and it further appearing that these facts were brought to the attention of the Lumber Company *prior* to execution issuing upon its judgment, and have never been refuted, or attempted to be refuted, by the production of any written order, confirmation, bill, letters, or books of account on the part of either the Lumber Company or Evans, it must be accepted as conclusively determined that the Lumber Company never had a legal lien upon the lands and building of Tanner, that such lien as it claimed was defeated, that its judgment that the debt of Evans be made out of the lands of Tanner was either void or voidable, and that its continued reliance upon the false affidavits of its agents

after having knowledge of such falsity was fraudulent as against the complainants-appellants. In that situation the complainants are entitled to the aid and protection of this court against execution on the judgment.

So much as to the right of appellants to a perpetual injunction restraining the respondent from using the process of execution in fraud of appellants' rights, based upon the issue of *fraud.*

But there is another aspect of the case to which the attention of this court will now be directed. *The issue of jurisdiction.* The Justice before whom the motion for a summary judgment was made was without jurisdiction to entertain the motion for a summary "special" judgment, or to order the entry of a summary "special" judgment that the alleged debt of Evans be made out of the lands of Tanner, or to order the entry of *any* judgment affecting Tanner.

This question of jurisdiction is not raised for the purpose of opening or vacating the judgment, but as a further reason, and in itself a sufficient reason, for granting to the complainants the injunctive relief prayed.

POINT VI.

A statutory defense cannot be sham or frivolous.

The complaint in the lien action alleged that the materials in question "were reasonably worth $2,655.19," and "were furnished to and used by said defendant, John T. Evans, in the erection and construction of said building" (Case, p. 63, l. 20).

The answer set up a statutory defense. In Section 24 of the Lien Act, 3 C. S. 3309, it is provided that, in addition to other defenses,

> "the owner or mortgagee may plead that said building or land are not liable to said debt, and in such case it shall be necessary for the plaintiff, to entitle him to judgment against the building and lands, to prove that the provisions of this act, requisite to constitute such lien, have been complied with."

This statutory defense was pleaded (Case, p. 65, l. 30) and it is a good plea. Obviously a statutory plea cannot, on its face, be declared insufficient as a matter of law. The effect of pleading this statutory defense relieved the defendants of the necessity of pleading *any other defense* and shifted to the plaintiff the burden of going forward with "proof" of its right of lien.

The statute requires that if the defendant owner, as was here done, pleads in his answer that the debt is not a lien, the plaintiff must "*prove*" that the provisions of the act "requisite to constitute such lien have been complied with."

In *Cornell* v. *Matthews,* 27 N. J. L. 522, the defendant having pleaded the statutory plea that the land was not subject to the lien, the Court remarked that:

> "It was not the design of that plea to put the plaintiff upon proof that the person sued as owner is owner, but that his estate in the land, whatever it is, is chargeable with the lien; that the lien was properly filed; that the lumber was furnished for and went into the house—in short, everything necessary to show that the land is chargeable with the debt, on the supposition that the owner is a party to the action."

The statute clearly and obviously contemplates that, where the owner whose property is to be charged with the debt of another pleads that his land is not subject to lien, the laborer or material man *must proceed to trial and prove his claim,* to the end that such owner shall then have an opportunity to cross examine the lienor and his witnesses under oath, to compel the production of papers, and to have the benefit of witnesses in his own behalf. It surely was never in the contemplation of the Legislature that the additional protection accorded the owner by this plea might be immediately destroyed by the substitution of hearsay affidavits, in a summary proceeding, in the place of the "proof" required upon a trial of the merits.

The provisions of the act of which the statute requires *"proof,"* and applicable in this case, will be found in Sections 1 and 18 of the act, and are to this effect:

1. That the material the subject of the lien is material for which the owner was liable under his contract with the builder.

2. That the material furnished was, in fact, "for the erection and construction" of the building liened.

3. That the date when the last material was furnished was within the four months immediately preceding the date of filing the lien claim.

4. That the sum liened for was the sum the builder owed the material man for material used or intended to be used in the building liened.

What, then, is *"proof"* within the statutory meaning of the term "proof"?

In *Inglis* v. *Schriener,* 58 N. J. L. 120, the Court said, after citing numerous cases,

> "these and many other cases hold, with respect to divers statutes, that the word 'proof,'

> when used in a legislative enactment, means 'competent and legal evidence,' or, in other words, testimony that conforms to the fundamental rules of proof."

In *Githens* v. *Mount,* 64 N. J. L. 166, the Court said that:

> " 'proof,' when used in a legislative enactment, means legal evidence, upon which judicial action may be rested."

In *Davis* v. *Alvord,* 94 U. S. 545—24 L. Ed. 283 —the Court holds that persons having an interest in the

> "property against which such a lien is sought to be enforced have a right to call for strict proof of all that is essential to the creation of the lien. * * * This proof must be furnished by the party who asserts the existence of the lien."

In *Jaudel* v. *Schoelzke,* 95 N. J. L. 171-177, this court said that

> "It is too well settled in this state so as to warrant any debate on the subject that when a legislative act requires proof to be made of the existence of certain facts, for example as the statute does in the present instance (attachment), it means competent evidence—such testimony as would be admissible in the trial of a case in a court of justice."

The defendants in the lien action, in pleading the statutory defense, did all that the statute requires shaall be done to maintain their constitutional right to a trial by jury. This provision of the act gives the Court no power to pass upon the validity or sufficiency of affidavits as proof, or to order the entry of a summary "special" judgment depriving the defendants of their rights to submit the case to a jury.

In *Fidelity, etc., Co.* v. *Wilkes-Barre, etc., Co.*, 98 N. J. L. 507-510 this court remarked that:

> "At common law a plea was considered sham when it was palpably or inherently false, and from the plain or conceded facts in the case must have been known to the party interposing it to be false."
>
> "A frivolous plea need not be false, but is palpably insufficient as a legal defense to the action; and hence legally insubstantial or frivolous, and therefore presumably interposed for the purpose of delay."

A statutory plea, deemed sufficient by the Legislature, cannot be "palpably or inherently false"; and there were no "plain or conceded facts" known to the defendants which stamped the plea as false in fact. Nor can a statutory plea be "palpably insufficient as a legal defense." Nor has the Legislature vested the Court with discretion to set aside this statutory enactment.

The plea not being sham or frivolous the Justice was without jurisdiction to order the entry of a summary "special" judgment, or to dispense with legal proof of the validity of the alleged lien, or to deprive the defendants of their constitutionl right to a jury trial.

> "In this state the procedure (motion to strike answer as sham or frivolous) is regarded as merely an inquiry whether there is an issue of fact to be tried, a distinction being recognized between the determination whether there is a real issue to be tried and the trial of an issue upon a motion; whether what is in form an issue is a real issue." *South Camden Tr. Co.* v. *Stiefel,* 137 Atl. 91 (Not officially reported).

The Legislature having determined what shall be considered to be an issue of fact it does not lie with the Court to set aside such statutory determination, and to substitute its own deter-

mination therefor. The very pleading of the statutory defense raises issues of fact, and deprives the Court of jurisdiction to say that such issues are not real issues. Issues of fact being raised by pleading the statutory defense there cannot be an "inquiry whether there is an issue of fact to be tried," and the statute itself imposes upon the plaintiff the burden of meeting such issues with a preponderance of "proof."

The statutory answer denying that the Lumber Company had a lien was a statutory reservation of the right of Tanner to go to the jury upon the issues raised by that answer, of which right he was wrongfully deprived.

The facts required by the statute to be proved could not be proved without testimony, and

> "When, to decide the question, it becomes necessary to take testimony to enable the court to determine the relative merits of the controversy, or the justice or injustice of the defense, the defendant's constitutional right to a jury trial requires that the motion to deprive him of his defense be denied." Muhlenbeck *v.* Hoboken, 2 Miscl. 7.

That is to say—the statutory plea that the building and lands of the owner are not liable for the builder's debt to the material man definitely and positively removes the answer of a defendant owner from attack by motion to strike. Whatever the merits or weaknesses of other defenses the statutory plea so far protects the owner as to compel the plaintiff to prove his case before a jury, subject only to motions for nonsuit or directed verdict. A defendant owner's answer is sufficient if it contains no other defense than this statutory plea.

Rule 58 of the 1912 Practice Act, being Rule 81 of the Supreme Court, requires that a motion for summary judgment "shall be made upon affidavit of the plaintiff * * * stating the amount claimed and his *belief* that there is *no* defense to the action." One cannot, as a matter of law, *believe* that a *statutory defense* is *"no defense."* The Court cannot, therefore, accept or consider an affidavit of plaintiff's *"belief* that there is *no* defense to the action" where the statutory defense is pleaded. The plaintiff is estopped *by the statute* from making such affidavit and without the affidavit he cannot be heard on a motion to strike. The requirement is statutory, it is for the protection of the defendant, and it may neither be disregarded nor relaxed by the Court over the objection of the defendant.

If, notwithstanding the clear terms of the statutory requirement as to the contents of plaintiff's affidavit and notwithstanding the statutory requirement of proof, the defendant owner can be deprived of his statutory rights by a motion to strike the answer because the statutory plea is sham or frivolous, it will, in those numerous instances where the proof is in the sole possession of the builder and material man, put the owner absolutely at the mercy of an unscrupulous builder, and destroy the very defense the statute was intended to give.

The Court having no jurisdiction to entertain the motion to strike, or to declare either sham or frivolous the statutory defense pleaded by Tanner, the "special" judgment against his lands was improvidently entered, and execution upon such judgment should now be restrained.

POINT VII.

A summary "special" judgment that a debt owing a material man by a builder be made out of the lands of an owner not personally liable cannot be entered by the material man where the judgment of the material man against the builder is a default judgment.

There was no judgment against Tanner personally. Notwithstanding an owner is made a party defendant in a material man's lien action the judgment is merely that the debt and costs be made "specially" of the land and building of the owner, and before such judgment can be entered the debt must not only be established by the material man as against the builder, but *it must be established as a lienable debt.*

The debt must be fixed as a debt for which the land and building may be liened under the statute.

Before such "special" judgment affecting lands can be entered there must be a concurrence of three factors, and the absence of any one of the three will bar the entry of such judgment.

First: There must be a prior general judgment of the material man against the builder for an amount which is the same amount as, or includes the amount of, the material man's lien claim against the lands of the owner.

Second: The material liened for must, in fact, be material for which the owner was, at some time during the progress of the work, liable to the builder.

Third: The sum liened for must be the reasonable value of the material furnished.

In other words, it must be established by a judgment conclusive against the owner, as well

as against the builder, that the builder owes the material man for the reasonable value of the very material for which the owner contracted with the builder.

In *Crane* v. *Brighton Mills,* 98 N. J. L. 308, in speaking of the purpose of the Mechanics' Lien Act, the Court observed that:

> "for the protection of the owner against false claims, the statute requires the material man, or laborer, when seeking to enforce by suit his claim against the building, to join the owner and contractor as co-defendants; and, for the purpose of demonstrating his right to a lien and its amount, to prove not only that the labor was done upon or the material furnished to the building which was being erected by the owner, but that the amount of the lien was the sum which the principal contractor owed for such material and labor; and to prove these facts conclusively by the recovery of a judgment against the contractor."

And, of course, such "judgment against the *contractor*" must be a judgment which is *res judicata* as against the *owner* as to the matters settled by such judgment; and to be *res judicata* as against the owner such owner must have been a party to the action in which the judgment is entered.

But where a *default* judgment is entered against a *builder* the *owner* is not a party to such judgment. The owner cannot contest such judgment. It may be entered without his knowledge. All that such default judgment establishes is the fact that the amount of the judgment is owed by the builder to the material man. It does not determine the validity of the lien claim, and it neither proves that the builder's debt was for material that went into the building, nor that the amount of the judgment is the

reasonable value of such material as may, in fact, have gone into the building.

A default judgment in favor of a material man and against a contractor is, as affecting an owner, no more than the mere production of a bill by the material man containing an account stated with the contractor, and comes within the rule laid down in *Ferraro* v. *Public Service Ry. Co.,* 141 A. 590 (not officially reported), that:

> "The mere production of a bill without proof that the charges therein contained were proper, necessary, and reasonable, is within the hearsay and self-serving rule, and not permissible."

In *Shoemaker* v. *Maloney,* 132 Atl. 606 (not officially reported), Shoemaker, a material man, first brought his action against one Gough, the builder, and recovered a judgment. Subsequently he brought his mechanics' lien action against Martin Maloney, 2d, owner, and Martin Maloney mortgagee. This court, upon appeal in the lien action, held that the judgment against Gough, the builder,

> "was without force as against Maloney, 2nd, as owner, and Maloney, as mortgagee. It was open to the latter to contest the correctness and cost of the items of materials supplied to Gough for the construction of the building."

In the instant case the default judgment against Evans was, in effect, a judgment in a personal action to which Tanner was not a party; it was, therefore, in the language of this court in the Shoemaker case, *supra,* "without force as against Tanner, as owner, and it was open to Tanner to contest the correctness and cost of the materials supplied (or alleged to have been supplied) to Evans for the construction of Tanner's

dwelling," and this he did by denying that the debt was a lienable debt.

It may here be observed that while the argument centers upon the item of March 8, 1924, it was Tanner's right to put the Lumber Company to its proof of *all* the items in the bill of particulars, and "to contest the correctness and cost" of *all* such items. Evans' failure to produce bills for items other than that of March 8th, creates a suspicion, at least, that there may have been other materials never "used in the erection and construction" of Tanner's house, and never intended for or delivered to his house.

The act itself, in section 13, provides that:

> "Nothing in this act contained shall be so construed as to make the lands of any person liable for any building or repairs *not authorized by the owner, or built or done without the knowledge of the owner,*"

and a default judgment against the builder is without effect to bar the owner from proving that material *was* furnished or work done *without his authority or knowledge.*

As the default judgment entered against Evans, the builder, was not evidential against Tanner, the owner, either that the material was material for which Tanner was, or had been, liable to Evans, or that the value alleged was the reasonable value of said material, and as there was no legal proof upon either of these issues of fact, there were lacking two of the three elements indispensable to the exercise of jurisdiction by the Court.

The statutory plea that "said defendants deny that said alleged debt is a lien" directly raises, as issuable facts, all the matters to be proved under Point VI. That plea denies that the ma-

terial the subject of the lien was material for which the owner was liable under his contract with the builder, and that the owner was not so liable is admitted as to the doors in question (Case, p. 34). It denies that the material was used for the erection and construction of the Tanner house, and the Vice-Chancellor concluded that there was not only *no* proof that these doors *were* used in the building, but that the proof was to the contrary (Case, p. 81, l. 30).

If the owner was not liable to the builder for the material in question, and it was not used in the building, that is an end of the matter.

Even if it appeared that the owner *was* liable to the builder for *material* that still leaves upon the material man, under the statute, the burden of proving the reasonableness of the charges in the bill of particulars.

That burden cannot be met by affidavit.

> "What is reasonable in any given circumstances is a question of fact; and as such is peculiarly a question for the jury, and not for the court to determine." *Stern* v. *Garber,* 143 Atl. 432 (not officially reported).

The statutory plea directly raised this issue; it, in effect, and with other denials, denied the reasonableness of the charges in the bill of particulars. Upon this issue of fact alone Tanner was entitled to a jury trial.

The Court, in the absence of a judgment against Evans *res adjudicata* as to Tanner, being without jurisdiction to enter *any* "special" judgment that the debt of Evans to the Lumber Company be made out of the lands of Tanner, the "special" judgment against his lands was improvidently entered, and execution upon such judgment should now be restrained.

This is an appeal to the original equity judisdiction of the Court of Chancery for the protection of complainants-appellants against the consequences of the fraud of the defendant-respondent. For each of the reasons urged, and for all of them, the decree of the Court of Chancery should be reversed and the prayer of the appellants granted.

Respectfully submitted,

E. A. MERRILL,
Solicitor for and of Counsel
with Complainants-Appellants.

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

New Jersey Court of Errors and Appeals

Between RUDOLPH L. TANNER, *et al.*, *Complainants-Appellants,* *and* BOYNTON LUMBER COMPANY, *Defendant-Respondent.*	*On Bill, Etc.* *On Appeal from Chancery.*

BRIEF FOR DEFENDANT-RESPONDENT.

Statement.

The following summarizes the history of this litigation:

The complainants Tanner contracted with Gallagher for the erection of a dwelling on their land in Westfield, Union County. Gallagher subcontracted the entire work to John T. Evans. Evans purchased lumber and building material which he used in the construction of the building from Boynton Lumber Company, but failed to pay for it. Tanner did not file his building contract with Gallagher, nor did Gallagher file his building contract with Evans. Boynton Lumber Company filed a mechanics' lien claim and instituted suit thereon in the Union County Circuit Court on July 5, 1924, naming as defendants, Evans, the builder; the Tanners, as owners, and the Westfield Trust Company, as mortgagee. Complaint—Case, page 62.

Neither Evans nor the Westfield Trust Company filed answers and a general judgment by default was entered against Evans, and a default judgment, adjudicating the priority of the lien claim over the mortgage was entered as

against the Westfield Trust Company. Case, page 74.

The Tanners filed an answer (Case, p. 65) portions of which appeared sham, and other portions frivolous, and thereupon plaintiff, after due notice, moved for an order striking the answer and entering summary judgment.

Under Supreme Court rules 80 and 81, and Section 15 of the Practice Act (1912), pursuant to which this motion was made, it became incumbent upon the defendants to file affidavits showing such facts as might be deemed by the Judge hearing the motion, sufficient to entitle them to defend.

Two affidavits were filed to support the answers: viz., by Gallagher (Case, p. 93), and by Beard (Case, p. 94). No affidavit was filed by Tanner.

The motion was argued before Mr. Justice Kalisch on September 6, 1924, and in his opinion, the answer and its supporting affidavits disclosed no facts which, though true, would constitute any defense and he, therefore, granted the motion.

Before the Order could be reduced to writing and signed, Tanners applied for leave to argue the matter further. Such application was granted and the matter re-argued on September 15, 1924, when the same conclusion was reached and the Order striking the Answer and entering Summary Judgment, specially to be made of the Tanner land, was signed and filed. Case, page 73.

This judgment was final and conclusive and the matter thus became *res adjudicata,* not only as to every matter which was offered and received

to sustain or defeat the claim or demand, but as to every other admissible matter which might have been offered for that purpose.

An appeal was taken from the Circuit Court Judgment, to the Court of Errors and Appeals, which, on an opinion written by Mr. Justice Minturn, (Case, p. 98) affirmed the judgment of the lower court on March 25, 1925. *Boynton* v. *Tanner,* 101 N. J. L. 120.

Thereupon, and on the same day, viz. March 25, 1925, Tanner filed a bill in Chancery *v.* Boynton Lumber Company and Evans (Case, p. 103) reciting the judgment against them; alleging that the Lumber Company held a chattel mortgage from Evans; stating that they were "uncertain as to their rights and status in the premises"; and praying for a declaratory decree. There were no allegations of fraud.

Boynton Lumber Company moved to dismiss the bill because it stated no facts entitling Tanner to equitable relief and because it showed on its face that the matter was *res adjudicata.* Following an opinion by Vice-Chancellor Fielder (Case, p. 109) a decree was entered on June 14, 1925 (Case, p. 115), striking out the complainants' bill as to Boynton Lumber Company and declaring that Tanners

> "have no rights, status, or legal relations, against the said defendant Boynton Lumber Company, entitling them to the relief prayed for in said Bill of Complaint, or to any other relief in this Court."

In the course of his opinion, referring to the Circuit Court judgment, and to the affirmance thereof by the Court of Errors, the Vice-Chancellor says:

> "This judgment fixes definitely the rights and liabilities of the parties and it is not

within the jurisdiction of this court to interfere with such rights and liabilities by determining them to be otherwise than the Court of Errors and Appeals said they were.'' Case, page 111, lines 30-40.

Thereafter execution was issued on the Lumber Company's Circuit Court judgment directing the Union County Sheriff to sell the Tanner lands to raise the amount due.

Thereupon, and on October 1, 1925 Tanner applied to Vice-Chancellor Church, in the same proceeding which had already been dismissed as to Boynton Lumber Company by the decree of June 14, 1925, for an order restraining the Lumber Company from proceeding to collect on its execution. Notice of Motion. Case, page 119.

On October 2, 1925 Vice-Chancellor Church advised an order denying that motion. Case, page 120.

Thereupon and on October 6, 1925, the bill of complaint was filed *v.* Boynton Lumber Company in the suit resulting in the decree from which the present appeal is taken. Bill, Case, page 5.

Upon filing the bill, and on October 6, 1925 Vice-Chancellor Fielder allowed a rule to show cause returnable before Vice-Chancellor Church, why an interlocutory injunction should not issue restraining the Lumber Company from enforcing its execution, with an ad interim restraint. Case, page 122.

The Lumber Company immediately gave notice of a motion to be made on the return of the rule to dismiss the bill and dissolve the restraint. Case, page 124.

On November 4, 1925, on the return of the rule before Vice-Chancellor Church, the restraint was dissolved; the motion for an interlocutory injunction denied; but the bill of complaint was retained. Case, page 126.

Thereupon, Tanner appealed to the Court of Errors from the order denying the interlocutory injunction, and applied for a stay of execution until final hearing and decree thereon in the Chancery suit. The application was denied by order made December 4, 1925. Case, page 132.

Thereafter Tanner paid the amount due on the execution but insisted upon proceeding with the suit (although no supplemental pleadings showing the changed status of the matter have been filed).

The case came on for final hearing before Vice-Chancellor Buchanan, testimony was taken —briefs submitted—conclusions filed (Case, p. 77) and decree entered dismissing complainant's bill (Case, p. 85) from which the present appeal is now taken.

That is a resume of what has proven to be rather vexatious, protracted, and costly, litigation.

* * * * * * *

And now an analysis of the bill of complaint will be attempted to point out the precise issues.

The bill recites (Case, p. 5):

The institution of the Mechanics' Lien suit; the striking out of the Tanner answer; and the entry of the Summary Judgment against their lands; and

That the last item in the bill of particulars in the Lien Claim was dated March 8, 1924 and

comprised six flush sanitary doors and one 1-panel glazed sash door;

That though the Lien Claim was filed within four months from March 8, 1924, it was filed more than four months after the dates of all previous items in said bill of particulars; and

That among the affidavits submitted by the Lumber Company in support of its motion to strike the Tanner answer, were those of Nagle and Evans which alleged that all of the materials stated in the bill of particulars were used in the erection and construction of the building; and

That Tanners now claim that all the doors in their house were hung on or before March 1, 1924; and that all interior doors are one-panel doors and not flush sanitary doors; and that Evans himself (though in another proceeding which had previously been dismissed as to the Lumber Company and by which it was obviously not bound), has since testified to substantially the same effect and thus tended to contradict the statement in his earlier affidavit; and

That Tanner has called this new statement of Evans to the attorney for the Lumber Company who nevertheless insists on enforcing payment of the judgment.

On the basis of such allegations (I think I have not unfairly deleted the matter in the complaint) the bill charges that the Nagle and Evans affidavits were fraudulent and that the judgment was fraudulently obtained.

The prayer is for a perpetual injunction against enforcement of the judgment.

It may be noted that the bill contains no allegations whatever that Boynton Lumber Company

knew the affidavits were false or untrue in fact —much less that it was guilty of any fraud or fraudulent conduct in the recovery of its judgment; nor does it contain any allegation to show that Boynton Lumber Company did not deliver the doors in good faith for use in the construction of the building, which, after all, is the test in determining whether it is entitled to its lien claim and judgment.

It merely alleges Tanner's present contention, made for the first time in the bill filed October 6, 1925, viz., that the doors were not used in the construction of his house, and on the basis of that contention, and because it conflicts with the Nagle and Evans affidavits, which state that the materials were so used, and which affidavits were made in August, 1924, it charges that the latter were fraudulently made and the Boynton judgment fraudulently recovered. Facts pleaded in the bill do not justify any such conclusion.

* * * * * * *

The following is a summary of the evidence produced at the final hearing:

Tanner testified on direct examination:

That there were no flush sanitary doors in his house; and

That all doors in his house were hung prior to March 1, 1924.

Case, page 20, line 39, to page 21, line 28.

And on cross examination:

That he visited the house approximately five days per week during its construction; and

Knew, on or about March 1, 1924, that all doors had been previously hung, and what type of doors they were; and

That on or before March 19, 1924, he had moved most of his furniture into the house and had resided there ever since that date.

Case, page 21, line 29, to page 22, line 30.

For the Boynton Lumber Company, the following testimony was given:

By Bierling:

That he was Boynton's mill superintendent.

That Feickessen, who was Evans' foreman, came to the Boynton Lumber Company's yard at Sewaren from time to time and ordered material for the Tanner house; and

That, following this custom, and on December 27, 1923, he came to the yard and placed an order with Bierling for the purchase of the doors in question, for the Tanner house; and

That Bierling then wrote out the written order for the doors, which order is a part of the Lumber Company's business record, and which was produced in evidence and shows that the doors were ordered for the Tanner house; and

That the Lumber Company did not carry such doors in stock and ordered them specially made up by the Crooks Company of Pennsylvania and afterwards received them from Crooks.

Case, pages 23-25.

The written record of the order from Feickessen, and the requisition to the Crooks Company were produced and offered in evidence. Case, pages 59-60.

By Millard Munn:

That he was a driver for Boynton Lumber Company; and

That he knew Evans, the contractor, and knew the Tanner house to which he had previously made deliveries of material; and

That on March 8, 1924 he delivered to Evans personally at the Tanner house, where Evans was then personally working, the doors in question and had Evans sign the delivery ticket for them which ticket was produced and offered in evidence.

See testimony, page 26, line 38, to page 28, line 20.

See stipulation re delivery ticket, Case, page 60.

The foregoing is the entire testimony in the case. Tanner is the only witness for the complainant and Bierling and Munn were the only witnesses for the defendant.

Tanner's testimony then is the only testimony which may be properly considered in determining what the complainant has actually proven in support of his allegations of fraudulent conduct on the part of the Boynton Lumber Company in the recovery of its mechanics' lien judgment.

The most that can be said for his testimony is that all doors were hung in his house prior to March 1, 1924 and that this tends to contradict the statement in the Evans' affidavit in the mechanics' lien suit, that the doors delivered on March 8, 1924 were used in the construction of his house. But it does not necessarily follow that Tanner is right and that Evans is wrong. But even if Tanner was right, his proof is utterly insufficient to establish that the Evans affidavit

was fraudulently made; or that the Boynton Lumber Company made fraudulent use of it; or that the Boynton Lumber Company did not deliver the doors in question in good faith for the construction of the dwelling.

Before leaving this discussion of the evidence, I wish to point out that complainants' brief frequently refers to "Evans' testimony" and to "Tanner's testimony" and to the report of Robert H. McAdams, Special Master, for the apparent purpose of showing that Evans himself testified that the doors were hung on or before March 1, 1924, and thus tended to contradict his previous statement in the mechanics' lien affidavit to the effect that the doors in question were used in the construction of the Tanner house.

But Evans did not testify in this case nor was any testimony in this case ever taken before Mr. McAdams, as Special Master. References, therefore, to such testimony and report are improper and misleading.

The Evans testimony and the McAdams report were made in the declaratory decree proceeding hereinabove mentioned after June 24, 1925, when the decree was made striking the bill as to the defendant, Boynton Lumber Company. From that date on, viz., June 24, 1925, the Lumber Company was not a party to, nor bound by any further proceedings which Tanner thereafter pursued against the remaining defendant, Evans.

It is not at all clear what purpose Tanner had in mind in pursuing that suit against Evans, but he did. On July 2, 1925, he took a decree *pro con* against Evans and apparently afterwards obtained an order of reference for some purpose to Judge McAdams, who issued a subpoena to

Evans to testify and thereafter Evans did testify before the Master.

That testimony and the proceedings in that case became a part of the record in this case, the entire file having been offered in support of the Lumber Company's contention before Vice-Chancellor Buchanan, that the matters raised in this case were *res adjudicata* not only by the Circuit Court judgment in the mechanics' lien suit afterwards affirmed by the Court of Errors, but also by the judgment in the Court of Chancery in the declaratory decree proceedings.

But, as mentioned above, reference to that testimony in support of the allegations in the present bill seems to me to be improper.

Such references appear in the complainant's brief as follows:

On page 7:

Evans' testimony, case page 50, line 25; and

Tanner's testimony, case page 56, line 5; and

Evans' testimony, case page 51, line 4; and

McAdams' report, case page 38, line 12; and

McAdams' report, case page 39, line 27.

On page 9 of complainant's brief:

Evans' testimony, case page 48, line 4;

McAdams' report, case page 38, line 33.

The papers printed in the state of case in the various proceedings are not in order. For the convenience of the Court in considering the point just made, the following tabulation is given of the papers filed in the declaratory judgment proceeding, viz:

Bill of complaint, case page 103;

Boynton's motion to strike the bill, case page 107;

Opinion of Vice-Chancellor Fielder, case page 109;

Decree striking bill as to Boynton Lumber Co., made June 24, 1925, case page 115;

Decree *pro con* against Evans made July 2, 1925, case page 117;

Master's subpoena to Evans to testify issued July 2, 1925, case pages 40-41;

Evans' testimony, case pages 42-53;

Tanner's testimony, case pages 54-56;

Hope's testimony, case pages 56-57;

Master's report, case page 37.

POINT I.

The decree should be affirmed because it rests upon a conclusion of fact.

The right to equitable relief was based on an allegation that the judgment was recovered on fraudulent affidavits.

The issue raised by the bill, as Vice-Chancellor Buchanan points out in his conclusions, was an issue of fact, viz:

> "whether or not the affidavits of Evans and Miss Nagle in the Mechanics' Lien suit were false and fraudulent. That is complainants' allegation, and it is incumbent upon them to prove it. In order to prove it, they must prove that the affidavits were untrue in fact, and were known by the affiants to be untrue when made." Case page 82, lines 1-12.

This issue of fact the Vice-Chancellor resolved against the complainants. He says in part, in his conclusions:

> "The complainants' proofs being thus insufficient to establish that the affidavits of Evans and Miss Nagle were false and fraud-

> ulent, it need scarcely be said that there is of course no proof whatever that the Lumber Company was guilty of fraud in filing its claim or prosecuting its suit and obtaining its judgment." Case page 83, lines 30-36.

And so the final decree dismissing complainants' bill, is based on the adjudication that the Court,

> "found *as a matter of fact* that the defendant is not guilty of the fraud alleged by the complainant and upon which the bill of complaint in this cause is rested, etc." Case page 85, lines 28-32.

Of course, in appeals from Chancery, the Appellate tribunal will consider the evidence and reach different conclusions of fact from those reached in the Court below where it appears proper to do so. *Carton* v. *Phelps*, 91 Eq. 312 and 314.

However, unless there are cogent reasons for reaching a different result, great weight should, for well-known reasons, be accorded the Vice-Chancellor's findings of fact, and the decree based thereon should be affirmed. *Idem.*

In this case there was a noticeable absence of evidence to prove any fraud on the part of the Lumber Company; the Vice-Chancellor's findings of fact are well justified and should not be disturbed; and the decree should be affirmed.

* * * * * * * *

POINT II.

The questions involved in this suit are res adjudicata by the judgment of the Union County Circuit Court afterwards affirmed by the Court of Errors and also by the declaratory decree in the previous proceeding in the Court of Chancery.

The question involved in the mechanics' lien suit in the Circuit Court was whether the Lumber Company was entitled to a lien claim against the Tanner property for the materials which it had furnished to Evans for use in the construction of the building. After proper consideration of the matters alleged by the defendant in defense of such claim, the judgment of the Court was in favor of the Lumber Company. This judgment, therefore, adjudicated the Lumber Company's right to such lien claim and to enforce payment thereof against the Tanner property. By that judgment and its affirmance by the Court of Errors and Appeals, the right of the Lumber Company to such lien claim and to enforce payment thereof became a thing decided; *res adjudicata.*

That judgment concluded the parties to it

> "*Not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.* Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed of which no proof was offered, such as forgery, want of consideration, or payment." *Paterson* v. *Baker,* 51 N. J. Eq. 49 at 53.

The question now sought to be raised by the complainant in the Chancery suit is the same

question viz., the right of the Lumber Company to a lien claim and to enforce payment thereof, against the Tanner lands. To be sure, the Tanners assail that right in the present Chancery action upon different facts from those which they set forth as their defense in the Circuit Court action. They now say that the doors delivered on March 8, 1924 were not actually used in the construction of their building. But such matter was admissible in the Circuit Court proceeding. It might have been set up therein. Since the Circuit Court judgment is *res adjudicata* not only as to matters which were offered to defeat the complainants' claim, but also as to any other admissible matter which might have been offered for that purpose, it precludes the Tanners from now contesting the validity of the lien claim and the right to enforce payment thereof in the Chancery suit.

And the question raised in the present Chancery suit is also *res adjudicata* by the decree in the first Chancery suit, which has been referred to as the declaratory proceeding decree. The bill of complaint in that cause was filed March 25, 1925 (Case p. 103). It says among other things:

> "Complainants are uncertain as to their rights and status in the premises, and pray the declaration of this court as follows:" Case page 105, lines 17-19.

This bill sought to require some action on the part of the Boynton Lumber Company which would be favorable to the Tanners and contained a prayer for a decree declaring what rights Tanners might have against the Lumber Company, and also for further relief. Its object was to obtain some relief against the enforcement of the Lumber Company's lien claim and the judgment which it had recovered thereon, and the

question was whether Tanner was entitled to any such relief. To be sure, Tanner did not in that case allege that the doors delivered March 8, 1924 were not actually used in the construction of his house, though he might have alleged it as well then as in the present proceeding.

This question as to whether Tanner was entitled to any relief against the Lumber Company from the enforcement of its lien claim against the Tanner property was decided adversely to Tanner and thus became *res adjudicata* not only as to every matter which was offered to defeat the Lumber Company's claim, but as to any other admissible matter which might have been offered for that purpose. Vice-Chancellor Fielder pointed out in his opinion in the first Chancery suit that the judgment of the Circuit Court afterwards affirmed by the Court of Errors:

> "Fixes definitely the rights and liabilities of the parties and it is not within the jurisdiction of this Court to interfere with such rights and liabilities by determining them to be otherwise than the Court of Errors and Appeals said they were." Case page 111, lines 35-40.

The complainants' bill prayed for a decree declaring what their rights might be. The decree entered pursuant thereto provides among other things as follows:

> "It is thereupon on this 24th day of June, 1925 declared and determined that the complainants have no rights, status or legal relations against the said defendant, Boynton Lumber Company entitling them to the relief prayed for in said bill of complaint, or to any other relief in this Court." Case page 115, line 39 to page 116, line 10.

This decree is also *res adjudicata* of the question now presented.

> "The doctrine under consideration (*res adjudicata*) is not a mere rule of procedure limited in its operation and only to be enforced in cases where a defeated suitor attempts to litigate anew a question once heard and decided against him; but a rule of justice unlimited in its operation, which must be enforced whenever its enforcement is necessary for the protection and security of rights and for the preservation of the repose of society." *Paterson* v. *Baker, supra,* at page 59.

In re Walsh's Estate, 80 N. J. Eq. 565, where the Court of Errors and Appeals applies the same doctrine, the language above quoted from *Paterson* v. *Baker* was approved and used, and the following quotation from page 570 also appears, viz.:

> "It (doctrine of *res adjudicata*) is a rule of law based upon two grounds: the first that there should be an end to litigation, and the second that a person should not be twice vexed for the same cause."

These reasons for the rule seem to apply with special force to the present case. There should be an end to this litigation somewhere; and the Lumber Company should not again be vexed with the same cause. Reference to the history of the litigation which is set forth above shows that the Lumber Company has not been twice vexed, but many times that. Every time an application for a restraint was made, the same subject was litigated. The right to enforce the mechanics' lien claim has actually been presented and argued and decided *nine* times: twice before Mr. Justice Kalisch; once before Vice-Chancellor Fielder; twice before Vice-Chancellor Church; once before Vice-Chancellor Buchanan;

and three times (including the present appeal) before the Court of Errors and Appeals.

After having passed through this mill, the Lumber Company is in hearty accord with the rule that says that a person should not be twice vexed for the same cause and that there should be an end to litigation.

So the second point is made that the matter is *res adjudicata.*

POINT III.

The bill is, in effect, an application for a new trial of the law court action over which equity has no jurisdiction, there being an adequate remedy at law.

The new matter upon which the bill is based is that the Tanners have recently discovered (the bill was filed October 6, 1925) something which presumably they did not know before, viz. that the doors delivered on March 8, 1924 were not used in the construction of their house. Because of this they ask that the Lumber Company be restrained from enforcing collection of its judgment. In short, they want this new statement of fact considered by a Court for the purpose of defeating the Lumber Company's right to collection of its judgment. This, in effect, is a request for a new trial on the ground of newly discovered evidence.

Years ago when the law courts did not grant new trials for newly discovered evidence, and later when they did do so but only within a very limited time after judgment had been entered, courts of equity granted new trials to prevent substantial injustice where the complainant had discovered new evidence which constituted an

absolute defense to the law court action, after the time when his application to the law court might have been made and where it clearly appeared that the discovery of such evidence could not have been made with the exercise of due diligence in time to present it as a defense in the law court. This practice was justified on the ground that there was not an adequate remedy at law. *Hannon* v. *Maxwell,* 31 N. J. Eq. 318; *Hayes* v. *Phonograph Co.*, 65 N. J. Eq. 5; *Stein* v. *Cuff,* 76 N. J. Eq. 277.

But today, the situation is different. Chief Justice Gummere writing the opinion in *Stein* v. *Cuff* says at page 279:

> "Since courts of law have assumed jurisdiction over applications for new trials in causes instituted before them, equity has gradually withdrawn from that field of jurisprudence so that in the present day it may be said, as a general rule, that it will only interfere in that direction, when adequate relief cannot be afforded by the court in which the judgment has been obtained; or to state it differently, when the grounds upon which the new trial is sought are not cognizable by the legal tribunal."

In the present case, the allegation that the doors of March 8, 1924 were not used in the construction of the house discloses no defense peculiar to a court of equity which could not have been set up in the Circuit Court action.

The right to set aside verdicts for fraud, surprise or newly discovered evidence is today constantly and liberally exercised by the common law tribunals and there must be something of an exceptional character to the case to take it out of the rule that equity will not interfere. *Hannon* v. *Maxwell, supra.*

The Tanners might have applied to the Circuit Court for a new trial on the ground that they had discovered this new evidence and since such Circuit Court would have had jurisdiction over such an application, there was adequate remedy at law and therefore, no equitable right to maintain the bill in the present case.

> "As courts of law have extended their jurisdiction over this subject, courts of equity have in this instance, withdrawn theirs, in accordance with the principle that where a court of law can furnish an adequate remedy, equity will not interfere." *Hannon* v. *Maxwell, supra* at 329.

The bill should, therefore, be dismissed because it in effect, seeks a new trial for newly discovered evidence, over which the Circuit Court has jurisdiction and can afford proper relief. There is, therefore, an adequate remedy at law and the bill in chancery should be dismissed.

POINT IV.

Even though the Chancery Court be willing to assume jurisdiction of the complainants' application for a new trial, nevertheless the bill should be dismissed because it does not contain allegations necessary to entitle complainants to such relief.

In the *Hannon* v. *Maxwell* and *Hayes* v. *Phonograph Co.* cases it was held that the bill must show on its face that the complainant used due diligence in the preparation of his defense in the law court action in endeavoring to discover all pertinent facts and that notwithstanding the exercise of such diligence, he could not have discovered the new evidence upon which he bases his right to relief in the Chancery Court.

The bill in this case is utterly devoid of any such allegations. Nowhere is it alleged that the Tanners did not know or by the exercise of due diligence could not have learned, that the doors in question had not actually been used in the construction of their dwelling.

Nor was any attempt made to prove such diligence at the final hearing. On the contrary, Tanner's testimony proves a failure to exercise due diligence in the preparation of his defense to the law court action. He testified that he had attended the house on an average of five days a week during its construction and knew on or about March 1, 1924, that all doors were hung by that date and what type of doors they were, and that he gradually moved his furniture into the house until March 19, 1924, when he went there to reside and that he has lived there ever since. Case page 21, line 30 to page 22, line 30.

The summons and complaint in the mechanics' lien suit was issued July 5, 1924. It was served on Tanner personally. To it was attached a bill of particulars, the last item of which was the item of March 8, 1924, stating the number and type of doors delivered on that date. The Tanner answer was filed July 24, 1924.

The Tanner testimony shows that Tanner knew on March 1, 1924, what type of doors were in his house. He, therefore, knew it at the time he was served with the complaint and at the time his answer was filed. Knowing it, it was incumbent upon him to set forth by his answer or by the affidavits filed in support thereof, that the doors in question were not used in his house if he wished to rely upon that as a defense. Having failed to make such allegation, his own testimony

proves that he is clearly guilty of negligence in the preparation of his defense and necessarily that he did not use due diligence in its preparation.

Therefore, the bill should be dismissed because it fails to allege the exercise of due diligence and the inability to discover the new evidence notwithstanding the exercise of such diligence; and because Tanner's own testimony conclusively proves that such diligence was not exercised.

POINT V.

The bill should be dismissed because the alleged newly discovered evidence does not constitute a defense.

Assuming that Chancery will entertain jurisdiction of this bill for a new trial, on the ground of newly discovered evidence; and assuming that the allegations in the bill are sufficient to show the exercise of necessary diligence in the preparation of the defense, nevertheless the newly discovered evidence, even though true, does not constitute a defense and would not change the result even though it were interposed.

We may assume that the doors in question were never actually used in the construction of the Tanner dwelling. But that does not deprive the Lumber Company of its right to a lien claim. All that is necessary to support the lien claim is that the materials were:

> "Delivered in good faith for use in the erection of the building and when that is established, it is no defense that, in the absence of fraud on the part of the creditor, there may have been a failure to use materials thus furnished or a diversion of the same from the purpose for which they were

intended." *Bell* v. *Mecum*, 78 N. J. L. 547 at 549.

In *Crane* v. *Brighton Mills*, 98 N. J. L. 308, a mechanics' lien claimant, in order to prove delivery of material, offered in evidence certain slips known as delivery tickets signed by one of the contractors, admitting the receipt of the material therein specified. These deliveries were made at the plant of the claimant. (In the Boynton case, they were actually made at and in the very building for the construction of which they were ordered.) It was objected to the admission of the slips, that standing alone they were not evidential on the question whether the material had been actually used in the construction of the building, and that no attempt was made to prove such actual user. The Court approved the reception of these slips in evidence and said:

> "They showed on their face not only the amount and character of the materials delivered, but that the delivery was for use in the buildings of the Brighton Mills on the Allwood Tract, and the signature of the Berridge concern (contractors) to these slips was evidence that the materials were received for that use." "In the case of Bell *v.* Mecum, 78 N. J. L. 547 at page 549, it was held that evidence tending to support the plaintiff's claim for materials delivered in good faith for use in the erection of the building was sufficient to support his claim, and that in the absence of fraud on his part even though there had been a diversion of the same by the principal contractor to a purpose other than that for which they were supplied, the owner could not take advantage of this breach of good faith of the contractor."

It follows that if Evans, the contractor, did in fact divert the March 8, 1924 delivery of doors to a purpose other than that for which they

were supplied, still Tanner could not take advantage of Evans' breach of good faith and preclude the Lumber Company from its lien claim rights.

As has been pointed out, the testimony before Vice-Chancellor Buchanan demonstrated beyond any question, the good faith of the Lumber Company. It received the order for the doors at its plant where a written order of the same was made, which was offered in evidence. This showed that the doors were ordered for the Tanner house.

Not having the doors in stock, it ordered them specially made for this particular job from the Crooks Company in Pennsylvania. Written evidence of this was offered.

Upon receipt of the doors from the Crooks Company, it delivered these very doors to Evans, the contractor personally at the Tanner house, which was the very house for which they were ordered and Evans then signed a delivery slip or ticket acknowledging receipt of these doors, which ticket showed that they were delivered for the Tanner house and which was offered in evidence.

Therefore, conceding the truth of the newly discovered evidence, that the doors in question were never used in the construction of the house, nevertheless such evidence does not constitute a defense and would not change the result in the law court action.

POINT VI.

Neither the allegations of the bill of complaint nor the evidence adduced at the final hearing showed any facts or grounds entitling the complainant to any equitable relief.

This point will not be argued to any further extent than to invite the Court's attention to the bill itself on page 5 of the case, and to the testimony which has already been discussed in this brief.

POINT VII.

Points VI and VII in appellant's brief are improperly raised and require no consideration.

POINT VI in appellant's brief is that:

> "**A statutory defense cannot be sham or frivolous**" (Brief, p. 20).

POINT VII is that:

> "**A summary special judgment that a debt owing a materialman by a builder be made out of the lands of an owner not personally liable cannot be entered by the materialman where the judgment of the materialman against the builder is a default judgment**" (Brief, p. 27).

These points are raised for the first time in appellant's brief. They were not issues in the Court of Chancery; they were not argued before the Vice-Chancellor; there has never been any adjudication by the Court of Chancery upon them; they are not stated in the petition of appeal to this court; and are, therefore, improperly raised for the first time in the brief. *Penn Ins. Co.* v. *Semple*, 38 N. J. Eq. 575 at 585.

While it is unnecessary and perhaps improper to argue these two points, it may do no harm to point out that since they challenge the right of the Supreme Court Justice to strike the answer and enter summary judgment in the mechanics' lien case, they are obviously questions which could and should have been raised before the Justice when that motion was made; and before the Court of Errors and Appeals on the appeal from the summary judgment thus granted.

These points are thus *res adjudicata* by the judgment of the Circuit Court afterwards affirmed by the Court of Errors and Appeals. *Paterson* v. *Baker,* 51 N. J. Eq., page 49; *in re Walsh's Estate,* 80 N. J. Eq. 565.

Furthermore, consideration of these points in the Chancery proceeding involves the necessity of the Court of Chancery reviewing the judgment and decision of the Circuit Court and of the Court of Errors and Appeals affirming the same. It requires no argument to prove that the Court of Chancery has no such power or jurisdiction.

The defendant-respondent, Boynton Lumber Company, summarizes its contentions for affirmance of the Chancery decree, as follows:

1—Because it rests upon a conclusion of fact which there was ample evidence to justify;

2—Because the questions involved in this suit are *res adjudicata;*

3—Because the bill is in effect an application for a new trial of the law court action over which equity has no jurisdiction, there being an adequate remedy at law;

4—Because though equity be willing to assume jurisdiction of such application, nevertheless the bill does not contain the necessary allega-

tions to entitle complainants to such relief, to wit: evidence of the exercise of proper diligence in the preparation of the defense in the law court; and the evidence shows affirmatively, a failure to exercise such diligence;

5—Because the matter or evidence alleged to have been newly discovered does not, though true, constitute a good defense which would change the result of the Circuit Court action; and

6—Because neither the bill nor the evidence at the final hearing shows any grounds for equitable relief.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

Between RUDOLPH L. TANNER and CLARA H. TANNER, his wife, *Complainants-Appellants,* *and* BOYNTON LUMBER COMPANY, *Defendant-Respondent.*	*On Bill, etc.* *On Appeal.*

REPLY BRIEF OF COMPLAINANTS-APPELLANTS.

The defendant-respondent continues to ignore the true basis of appellants' objections, and its brief is in no respect responsive to the appellants' brief.

From the beginning of the litigation the defendant-respondent has argued as if the burden of proof rested upon the appellants, and as if no question of jurisdiction were involved.

The insistment of the defendant-respondent that the issue turned upon the failure of the appellants to show such facts as entitled them to defend was confusing upon the argument on the motion for a summary judgment in the lien action, and seems to have been the basis of the statement in the opinion of this court, in affirming that judgment, that "an answer which avers facts not legally responsive to this inquiry (whether or not the material man has been paid) is, in contemplation of law, either sham or frivolous" (Case, p. 100, l. 8).

Counsel submits that an inquiry as to whether a material man has been paid by the builder is not "the only inquiry," and is not the issuable inquiry so far as the owner is concerned, but is merely a preliminary inquiry. It is only when it appears that the material man has not been paid that the meritorious issue arises, and that issue is *whether the alleged debt is, or is not, a lienable debt* as against the owner.

An answer, therefore, need not, and usually will not, aver facts responsive to an inquiry as to any indebtedness of the builder to the material man; nor need the answer aver *facts* responsive to, or in denial of, the allegation that the alleged indebtedness is a lien, for the sufficient reason that the statute permits the owner to plead merely that said alleged debt is *not* a lien, whereupon it shall be *necessary, not optional,* for the plaintiff, *to entitle him to judgment,* to first *prove* the alleged debt to be a lienable debt as against the lands of the owner.

The affidavits submitted on behalf of Tanner at the hearing of the motion for summary judgment were not claimed to be affidavits responsive to any inquiry as to whether the Lumber Company had been paid by Evans, but were simply explanatory of a situation which made it all the more incumbent upon the court to follow the clear mandate of the statute, and to require the Lumber Company to "prove that the provisions of this act, requisite to constitute such lien, have been complied with."

The statutory requirement that the *plaintiff* must prove his case *before* he is entitled to judgment brings this aspect of the situation directly within the judgment of this court in the recent case of *Collins Realty Co.* v. *Sale,* VII Adv. Rep.

173 (not officially reported. Issue of February 9, 1929), where it was held that:

> "Whenever the existence of any fact is necessary in order that a party may make out his case or establish a defense the burden is on such party to show the existence of such fact, and if he desires any court to give judgment as to any legal right or liability, dependent on the existence or non-existence of facts, which he asserts or denies to exist, he must prove that those facts do or do not exist in order to be entitled to relief."

In other words, that case lays down the rule, applicable here, that the statute made it incumbent *upon the Lumber Company,* in order that it might "make out its case," and move the "court to give judgment" in the lien action, as to its "legal right or liability," to *first* "prove that those facts do * * * exist in order to be entitled to relief," "those facts" being the facts necessary to be proved to make the alleged debt a lienable debt. The Circuit Court had no right to waive the production of *legal proof* by the Lumber Company, and had no right to bar Tanner from his statutory, and equitable as well, right to demand that the Lumber Company first prove *its* case.

This vital question as to the jurisdiction of the court to *hear* the motion for summary judgment was not considered, and seems to have been lost sight of, in the dust raised by counsel for the Lumber Company in arguing that the burden of proof rested upon Tanner, notwithstanding the statutory direction to the contrary, and which now seems conclusively settled against the Lumber Company by the judgment of this court in *Collins Realty Co.* v. *Sale, supra.*

Upon appeal the question of jurisdiction was again lost sight of, and evidently did not enter into the consideration given the matter by this court. On no other supposition can the comment of the court be explained, that "this view of the pleadings, and of the legal status of the parties, renders unnecessary consideration of the other contentions presented by the briefs" (Case, p. 100, l. 17), the "other contentions" urged by Tanner being the contentions going to the effect of the several statutory provisions, and the issue of jurisdiction.

Respondent insists, in its brief, that issues are raised here which were not raised below. The only issue here raised and not raised below is the issue of jurisdiction, and, of course, the issue of jurisdiction may be raised anywhere, any time, and collaterally as well as directly. It was not raised below because the equitable issue was one of fraud, and it seemed altogether unlikely that the court of chancery would pass upon a question of jurisdiction already argued in this court, notwithstanding this court had expressed no opinion thereon.

Respondent also insists, at length, in its brief, that issues of fact cannot be here raised, and that the judgment having been affirmed cannot now be attacked.

Respondent asserts that the matters here raised are *res adjudicata*, and cites *Paterson* v. *Baker*, 51 N. J. E. 49, that the rule of *res adjudicata* is "a rule of justice unlimited in its operation, which must be enforced *whenever its enforcement is necessary for the protection and security of rights.*" But this court has repeatedly held that a rule intended to *protect* rights, and to *prevent* fraud, shall never be so construed and

enforced as to *deny* protection and security to rights, or to lend its aid to the perpetration and consummation of a fraud.

Appellants are not asking this court to reverse, vacate or re-open that judgment. The court is asked to prevent the consummation of a fraud and the denial of appellants' statutory rights by now interposing its arm to stay execution on the judgment, on the ground that the court inadvertently entered a judgment void because of lack of jurisdiction, and on the further ground that the judgment was procured through a legal fraud.

An affirmation cannot give life to a void judgment, and, notwithstanding arguments upon the issue of *res adjudicata,* an affirmation can give no right of execution upon a void judgment.

The judgment was void:

Because the statute provides that when the bill of particulars contains a wilful misstatement no lien will lie (3 C. S. 3304; Sec. 16, p. 4).

Because the statute provides that where the statutory plea of no lien is interposed the plaintiff is not entitled to judgment until he, the *plaintiff,* has *proved* the alleged debt to be a lien (3 C. S. 3309; Sec. 24).

Because a lien cannot be fastened upon lands for materials furnished without the knowledge or authorization of the owner (3 C. S, page 3302; Sec. 13—last three lines).

Because no judgment against lands can be entered without first entering a judgment against the builder which is binding upon, and *res adjudicata* as to, the owners.

There can be no doubt but that a grievous wrong has unwittingly and inadvertently been done these appellants, and it is within the power of this court, in this action, to redress that wrong. The equities fully justify counsel for appellants in pressing for such remedial action, and in a repetition of the arguments sustaining their cause.

The court will please bear in mind that:

Tanner contracted for a complete house, to be built according to written specifications.

The house was built according to the specifications and contract.

Tanner paid his contractor in full in accordance with the contract.

Tanner's contractor paid the sub-contractor in full.

Evans, the sub-contractor, was building some six or eight houses in the immediate vicinity of Tanner's house.

True it is that Evans, apparently, as evidenced by the fact that he had given the Lumber Company collateral security for an indebtedness to the Lumber Company far in excess of the alleged lien claim, bought building material from the Lumber Company.

BUT—There is not a scintilla of proof offered by the Lumber Company that one single item of the *entire* bill of particulars:

Was included in the Tanner specification or contract.

Was ordered by Evans for the Tanner house.

Was delivered at the Tanner house or was used in the erection and construction of the Tanner house.

It is further to be noted that the Lumber Company failed:

To produce a written order from Evans for a single item in the bill of particulars.

To produce a bill or statement rendered Evans.

To produce a confirmation to Evans of any order received from him.

To produce any book or ledger containing the Evans account.

To produce Evans.

To produce Feickessen, the alleged agent of Evans.

To produce any officer or employee who had dealt directly with Evans.

As to the particular item of March 8, 1924, it is conclusively established that the special doors there listed:

Were not called for by Tanner's specification or contract.

Were not ordered by Tanner, or on his behalf.

Were never intended for Tanner's house.

Were never used in the erection and construction of Tanner's house.

The affidavit made by Evans:

Was false.

Was procured by and for the benefit of the Lumber Company.

Was relied upon after its falsity had been pointed out.

Made of the item of March 8th a "wilful misstatement."

Was fraudulent because used for a fraudulent purpose.

The whole case rests upon the Evans affidavit, and the theory that if, in fact, material was merely *delivered* at the Tanner house Tanner can be held liable. The difficulty is that the affidavit was false, the theory is unsound, there is a total absence of proof, and the statutory limitations and directions cannot be ignored.

The effort of respondent to divert the attention of this court from the issues of fraud and lack of jurisdiction, and to raise a fictitious issue, is evident throughout its brief.

Point I asserts that "The Decree Should Be Affirmed Because It Rests Upon A Conclusion Of Fact." That is not a valid reason for affirmation.

Point II asserts that "The Questions Involved In This Suit Are Res Adjudicata By The Judgment Of The Union County Circuit Court Afterwards Affirmed By The Court of Errors." There has been no adjudication of the issue of jurisdiction.

Point III asserts that "The Bill Is, In Effect, An Application For A New Trial Of The Law Court Action." Not so. This court is not asked to set aside or re-open the judgment in the lien action, but to stay execution, and there is no doubt of its power so to do on equitable and jurisdictional grounds.

Point IV asserts that the bill asks the court of chancery "to assume jurisdiction of the *complainants' application for a new trial.*" A most misleading and unfounded assertion.

In Point V it is again attempted to class the bill as an application for a new trial because of "alleged newly discovered evidence," and the assertion is made that "we may assume that the

doors in question were never actually used in the construction of the Tanner dwelling. But that does not deprive the Lumber Company of its right to a lien claim''—wholly ignoring the further facts that the doors were never *ordered* by or for Tanner, were not included in his *contract* with the builder, or *intended* for use in his house.

And this is followed by the equally surprising statement—taking all the facts into consideration—that ''it follows that if Evans, the contractor, did in fact divert the March 8, 1924, delivery of doors to a purpose other than that for which they were supplied, still Tanner could not take advantage of Evans' breach of good faith and preclude the Lumber Company from its lien claim rights. Thus calmly assuming that the Lumber Company had already established lien claim rights—the very point at issue—and that while *Tanner* could not set up Evans' breach of good faith for his protection against a fraud, the *Lumber Company could* ''take advantage of Evans' breach of good faith'' to the injury of Tanner.

Appellants do not agree with respondent's conclusion that, ''conceding the truth of the newly discovered evidence, that the doors in question were never used in the construction of the house, nevertheless such evidence does not constitute a defense and *would not change the result in the law court action.*'' (Italics mine.)

Point VII of respondent's brief argues that Points VI and VII of appellants brief cannot be considered because ''these points are raised for the first time in appellants' brief.'' These *Points* go to the question of jurisdiction and are, of course, properly raised here. They were also raised, but not passed upon, upon the motion for

summary judgment and upon the appeal from that judgment. From the very first counsel for appellants has urged the jurisdictional issues, and is entitled to press them to a decision. It does not make the slihgtest difference that these issues have been previously raised; so long as they remain undecided counsel not only has a *right* to raise them, but is under a *duty* to his clients so to do to the end that wrong may be redressed.

This is an important case not only as affecting the appellants, but also as a precedent. Discussions with attorneys has revealed a surprising misunderstanding (as it seems to counsel) of the holding of this court in *Bell* v. *Mecum,* 75 N. J. L. 547, as argued in Point V of appellants' brief.

Neither *Bell* v. *Mecum, supra,* nor any other case, holds, or intimates, that a material man can mulct an owner for material alleged, but not proved, to have been delivered on such owner's lands upon the verbal order of an alleged employee of a dishonest builder, without the knowledge or consent of the owner, as required by the statute, without proof that the alleged debt of the builder to the material man is a lienable debt, as required by the statute, and where it further appears that the owner was never liable to the builder for such material.

Furthermore, no other case can be cited where this statutory right given the owner in a lien action, to plead as a defense that the alleged debt is not a lien, is held to be either sham or frivolous, and such holding appears to be clearly erroneous.

It appearing that neither *Bell* v. *Mecum, supra,* nor any other case, can be construed to support the contentions of respondent, that the statute

definitely removes the plea of "not lienable" from attack by a motion to strike on the ground that such plea is sham or frivolous, that the equities are with appellants, and that the court was without jurisdiction to enter a summary "special" judgment against appellants' lands, these appellants respectfully urge that the prayer of the bill be granted, and that execution by the respondent be permanently restrained.

Respectfully submitted,

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Solicitor of and of Counsel
with Complainants-Appellants.