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New York, 1841

SUBPOENA AD RESPONDENDUM.

(Filed June 29, 1925.)

NEW JERSEY, to wit, The State of New Jersey, to
N. Ross James, Michael Staub,
County of Gloucester,

(SEAL) GREETING: Whereas a bill of complaint
has lately been exhibited against you 10
in our Court of Chancery by F. Bedell
Wills, Paul Figel and William L.
Smith, to be relieved touching the mat-
ters therein contained.

Therefore, we command you, if you intend to make
a defense, that you file an answer to said bill in the
office of the clerk of our said court at Trenton, on or
before the expiration of twenty days from and after
the twenty-fifth day of June, 19 , and in default 20
thereof such order or decree will be made against
you as the Court shall think equitable and just.

Witness, his Honor, EDWIN ROBERT WALKER, Chan-
cellor of our said State, at Trenton, the 29th day of
May, in the year of our Lord one thousand nine
hundred and twenty-five.

THOMAS BARBER,
Clerk.

F. A. DEMARIS, JR.,
Solicitor.

Duly served June 18, 1925, on N. Ross James by
leaving copy of same at his dwelling house or usual 30
place of abode in the Township of West Deptford
with Minnie James, a member of his family, above
the age of fourteen years. Also duly served June
18, 1925, on Michael Staub, by leaving copy of same
at his dwelling house or usual place of abode in the

Subpoena Ad Respondendum

Borough of Pitman with Angelina Staub, a member
of his family, above the age of fourteen years.

Fee \$7.50.

W. HAROLD LEAP,
Sheriff,

By JACOB K. TRYON,
Under Sheriff.

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[ENDORSED]

Service acknowledged for County of
Gloucester.

June 15, 1925.

Oscar B. Redrow,
Sol'r. deft. County of Gloucester.

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BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY.

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

The complainants, F. Bedell Wills, of the Borough
of Haddonfield, County of Camden and State of New 10
Jersey, Paul Figel, of the City and County of Phila-
delphia and State of Pennsylvania, and William L.
Smith of the City and County of Philadelphia and
State of Pennsylvania respectfully show that:

1. Complainant, F. Bedell Wills, was employed
by one N. Ross James to do certain work on what
is known as Section 2 of the Woodbury-Blackwood
Road in the County of Gloucester, on or about the 20
ninth day of October, A. D. 1924. Complainant furn-
ished auto trucks with drivers which were used un-
der the direction of the said N. Ross James for haul-
ing the materials on the road aforesaid. The said
N. Ross James agreed to pay complainant at the
rate of three dollars per hour for truck and man and
the work done by complainant under the direction of
the said N. Ross James is as follows:

Labor performed with automobile truck as fol-
lows:

Oct. 9,	1924	16 hours	\$3.00 per hr.	\$48.00	30
Oct. 10	"	9 "	" " "	27.00	
Oct. 11	"	20 "	" " "	60.00	
Oct. 12	"	3 $\frac{1}{4}$ "	" " "	9.75	
Oct. 20	"	9 "	" " "	27.00	
Oct. 23	"	7 "	" " "	21.00	

TOTAL \$192.75

and the sum of One hundred ninety-two dollars and seventy-five cents, as above shown, is still due and payable, and no part thereof has been paid and the interest on the above sum, since October 23rd, 1924, is still due and owing to complainant, F. Bedell Wills and there is no set-off or counter claim against said sum or any part thereof.

2. Complainant, Paul Figel, was employed, by one
 10 N. Ross James to do certain work on what is known as Section #2 of the Woodbury-Blackwood Road in the County of Gloucester, on or about the ninth day of October, A. D. 1924. Complainant furnished auto trucks with drivers, which were used under the direction of the said N. Ross James for hauling the materials on the road aforesaid. The said N. Ross James agreed to pay complainant at the rate of three dollars per hour for truck and man and the work done by complainant under the direction of the said
 20 N. Ross James is as follows:

Labor performed with automobile truck as follows:

	Oct. 9,	1924	10 hours	@	\$3.00	per hr.	\$30.00
	Oct. 10	"	10 "	"	"	" "	30.00
	Oct. 11	"	10½ "	"	"	" "	30.00
	Oct. 12	"	3 "	"	"	" "	9.00
	Oct. 14	"	6 "	"	"	" "	18.00
	Oct. 15	"	10 "	"	"	" "	30.00
	Oct. 16	"	10 "	"	"	" "	30.00
30	Oct. 17	"	10 "	"	"	" "	30.00
	Oct. 18	"	10 "	"	"	" "	30.00

TOTAL\$237.00

and the sum of Two hundred and thirty-seven dollars, as above shown, is still due and payable, and no part thereof has been paid and interest on the above sum, since October 18th, 1924, is still due and

owing to complainant, Paul Figel, and there is no set-off or counter-claim against said sum or any part thereof.

3. Complainant, William L. Smith, was employed by one N. Ross James to do certain work on what is known as Section #2 of the Woodbury-Blackwood Road in the County of Gloucester, on or about the ninth day of October, A. D. 1924. Complainant furnished auto trucks with drivers, which were used under the direction of the said N. Ross James for hauling the materials on the road aforesaid. The said N. Ross James agreed to pay complainant at the rate of Three dollars per hour for truck and man and the work done by complainant under the direction of the said N. Ross James is as follows:

Labor performed with automobile truck as follows:

Oct. 9,	1924	10 hours	@ \$3.00	per hr.	\$30.00	
Oct. 10	"	10	"	"	30.00	20
Oct. 11	"	10	"	"	30.00	
Oct. 12	"	10	"	"	30.00	
Oct. 13	"	8 ³ / ₄	"	"	26.25	
Oct. 14	"	5 ¹ / ₂	"	"	16.50	
Oct. 15	"	10	"	"	30.00	
Oct. 16	"	8	"	"	24.00	
Oct. 17	"	9	"	"	27.00	
Oct. 18	"	10	"	"	30.00	
Oct. 20	"	10	"	"	30.00	
Oct. 21	"	10	"	"	30.00	30
Oct. 22	"	9	"	"	27.00	
Oct. 23	"	10	"	"	30.00	
Oct. 24	"	10	"	"	30.00	

TOTAL\$420.75

and the sum of Four hundred twenty dollars and seventy-five cents, as shown above, is still due and

payable, and no part thereof has been paid and interest on the above sum since October 24th, 1925, is still due and owing to complainant William L. Smith and there is no set-off or counter-claim against said sum or any part thereof.

4. The said N. Ross James was a sub-contractor under one Michael Staub. The said Michael Staub was the contractor with the County of Gloucester for
10 the work done on the said Section #2 of the Woodbury-Blackwood Road.

5. The work performed by complainants and auto trucks furnished by them were actually performed in the execution and completion of the said contract with the said County of Gloucester.

6. On March 30, A. D. 1925, complainants, F. Bedell Wills and Paul Figel, filed lien claims with the clerk
20 of the County of Gloucester in accordance with "An Act to secure the payment of laborers, mechanics, merchants, traders and persons employed upon or furnishing materials toward the performing of any work in cities, towns, townships and other municipalities in this State (Revision of 1918)" and on May 29th, A. D. 1925, the said William L. Smith filed a lien claim with the clerk of Gloucester County in accordance with the above Section of the above Act. The said claims were respectively for the
30 amounts above set forth.

7. By the filing of the said claims the defendants, the County of Gloucester and the said Michael Staub, become liable to complainants for the amounts of said claims in accordance with the Act above set forth.

8. The defendants have not nor have any of them paid to complainants or any of them the sums so claimed nor any part thereof, but have wholly neglected and refused so to do.

9. To the best of complainant's knowledge, information and belief no other persons have filed any lien claims on said contract or any part thereof.

Wherefore, complainants, being without adequate 10
remedy in the Courts of Law pray:

1. That N. Ross James, Michael Staub and County of Gloucester, who are the defendants in this suit, may answer this bill of complaint and each statement therein made.

2. That an account may be taken of the amounts due complainants.

3. That the defendants or one of them may be de- 20
creed to pay to complainants the amount so found due.

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

5. Complainants further pray for such relief as 30
may be equitable and just in addition of the relief above prayed for.

F. A. DEMARIS, JR.,
Solicitor for Complainants.
ROCCO PALESE,
Of Counsel with Complainants.

ANSWER OF THE COUNTY OF GLOUCESTER.
 IN CHANCERY OF NEW JERSEY.

Between, 10 F. BEDELL WILLS, <i>et al.</i> , <i>Complainant,</i> and N. ROSS JAMES, <i>et al.</i> , <i>Defendants.</i>	}	On Bill, etc. Answer of the County of Gloucester.
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The answer of the County of Gloucester, a municipal corporation of the State of New Jersey, says that:—

1. This defendant has no knowledge of the matters and things set forth in paragraphs 1, 2 and 3 of the bill of complaint, and leaves the respective complainants to prove the same.
2. In regard to paragraph 4 of the complaint this defendant admits that it entered into a contract with Michael Staub for the construction of the road known as Section 2 of the Woodbury and Blackwood Road. It has no knowledge as to whether or not N. Ross James was a sub-contractor under said Michael Staub, and leaves the complainant to prove the same.
3. The defendant has no knowledge as to the matters and things set forth in paragraph 5 of complaint and leaves the complainant to prove the same.

4. This defendant admits that the complainant filed lien claims as stated in paragraph 6 of the complaint, on or about the time stated therein.

5. This defendant denies that it is liable to the complainant for the amount stated in said lien claims or any other amount.

6. This defendant admits it has not paid any of said lien claimants.

7. No other person or persons have filed municipal lien claims in relation to the aforesaid contract for the construction of Section 2 of the Woodbury and Blackwood Road, excepting the complainants herein named.

8. This defendant further says that by reason of the aforesaid contract entered into between this defendant, the County of Gloucester, and Michael Staub, that the said County of Gloucester has paid to the said Michael Staub, in accordance with the terms of said contract, the sum of \$132,630.11. That there remains due to the said contractor a balance of \$14,736.68 for moneys due for extras and retained under said contract. This defendant the said County of Gloucester therefore prays that in the event that any order may be made by this Court, in the above entitled cause, concerning the distribution of any moneys remaining due on said contract, that if the amount found to be due to said claimants shall be in excess of the moneys in the hands of the said County of Gloucester, that no order be made for any greater sum but claimants distribute said fund *pro rata* in accordance with the statute in such case, made and provided.

OSCAR B. REDROW,
*Solicitor for and of Counsel
for the defendant, Board
of Chosen Freeholders.*

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ANSWER OF THE DEFENDANT,
MICHAEL STAUB.

IN CHANCERY OF NEW JERSEY.

10	Between, F. BEDELL WILLS, <i>et al.</i> , <i>Complainant</i> , and N. ROSS JAMES, <i>et al.</i> , <i>Defendants.</i>	}	On Bill, etc. Answer of the Defen- dant, Michael Staub.
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The defendant, Michael Staub, of the Borough of
20 Pitman, County of Gloucester and State of New Jer-
sey, answering the bill of complaint, says:—

1. The defendant Michael Staub neither admits
nor denies the matters and things set forth in para-
graphs 1, 2 and 3 of the complaint, but leaves the
complainant to prove the same.

2. This defendant admits that N. Ross James was
employed by him to do some hauling in the construc-
30 tion of Section 2 of the Woodbury and Blackwood
Road, and that the said N. Ross James was fully paid
for said work on October 25th, 1924, and released
this defendant and all claims arising under said con-
tract for hauling.

3. This defendant neither admits nor denies the
matters and things set forth in paragraphs 5 and 6

of the bill of complaint, but leaves the complainant to prove the same.

4. This defendant denies paragraph 7 of the complaint.

5. This defendant says that he has paid each and every person employed by him, for labor or materials, in the construction of the aforesaid road, prior to March 30th, 1925. 10

6. This defendant by way of further answer says that the said complainants are not entitled to file a municipal lien in connection with the contract for the construction of Section 2 of the Woodbury and Blackwood Road, made between this defendant and the said County of Gloucester, for the reason that no labor was performed or materials furnished in pursuance of or conformity with the terms of said contract. 20

7. This defendant, by way of further answer, says that at the time of the filing of the aforesaid lien claims as set forth in the bill of complaint, that there was no money due from this defendant, the contractor or from the County of Gloucester to N. Ross James the sub-contractor or to any other person by him employed.

8. This defendant further says that no valid lien claim has been filed by the complainants, in accordance with the statute in such case made and provided. 30

JAMES T. DAWSON,
*Solicitor for and of Counsel
with the defendant
Michael Staub.*

REPLICATION.
IN CHANCERY OF NEW JERSEY.

F. BEDELL WILLS, *et als.*,
Complainants, }
v. } On Bill, etc.
10 N. ROSS JAMES, *et als.*, } Replication.
Defendants. }

Complainants join issue on the answers of the defendants, County of Gloucester and Michael Staub.

F. A. DEMARIS, JR.,
Solicitor for Complainants.

20 DECREE PRO CONFESSO.

(Filed Oct. 1, 1925.)

IN CHANCERY OF NEW JERSEY.

F. BEDELL WILLS, *et als.*,
Complainants, }
v. } On Bill, &c.
30 N. ROSS JAMES, *et als.*, } Decree Pro Confesso.
Defendants. }

This matter being opened to the Court by F. A. DeMaris, Jr., Solicitor for the Complainants and it appearing that the process of subpoena calling upon the defendants to answer the complainants' bill of complaint, has been duly issued and returned served

upon all the defendants and that the defendant N. Ross James has not filed any answer to the said bill of complaint, within the time required by law, but has wholly failed and neglected so to do.

It is therefore on this 1st day of October A. D. 1925, on motion of F. A. DeMaris, Jr., solicitor for the complainants, ordered that the said complainants' bill of complaint be and the same hereby taken as confessed against the said defendant N. Ross James to the end that such decree may be made against him as the Court may deem equitable and just.

E. R. WALKER,
C.

A True Copy.

THOMAS BARBER,
Clerk.

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STIPULATION.

IN CHANCERY OF NEW JERSEY.

Between
F. BEDELL WILLS, *et als.*,
Complainants,
and
N. ROSS JAMES, *et als.*,
Defendants.

On Bill, etc.
Stipulation.

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It is hereby stipulated by and between the complainants and the answering defendants, as follows:

1. That the County of Gloucester entered into a contract with Michael Staub for the construction of Section 2 of the Woodbury and Blackwood Road on April 17, 1924, for the sum of \$132,630.11.

2. That Michael Staub, contractor, entered into a contract with N. Ross James to do the grading on said road, and that the said Michael Staub, contractor, paid the said N. Ross James, sub-contractor, the sum of \$13,439.77, in full payment for said grading, on October 25, 1924.

3. That F. Bedell Wills did hauling for N. Ross James, sub-contractor, between October 9, 1924, and October 23, 1924, in the amount of \$192.75, and on March 30, 1925, filed a municipal lien with the Clerk of the County of Gloucester for said amount.

4. That Paul Figel did hauling for N. Ross James, sub-contractor, between October 9, 1924 and October 18, 1924, in the amount of \$237.00 and on March 30, 1925, filed a municipal lien with the Clerk of the County of Gloucester for said amount.

5. That William L. Smith, did hauling for N. Ross James, sub-contractor, between October 9, 1924, and October 18, 1924, in the amount of \$420.75 and on May 29, 1925, filed a municipal lien with the Clerk of the County of Gloucester for said amount.

6. That there was no moneys due from Michael Staub, contractor, to N. Ross James, sub-contractor, at the times the respective lien claims were filed, nor has any money since accrued.

7. That at the times the said lien claims of F. Bedell Wills, Paul Figel and William L. Smith, were

filed there was due from the County of Gloucester to Michael Staub, contractor, the sum of \$14,736.68.

.....
Solicitor of Complainants.

.....
Solicitor of Deft. Michael Staub.

..... 10
Solicitor of Deft. County of Gloucester.

CONCLUSIONS.

IN CHANCERY OF NEW JERSEY.

Between:
F. BEDELL WILLS, *et als.*,
 Complainants,
 and
N. ROSS JAMES, *et als.*,
 Defendants.

HEAD NOTES.

Under the provisions of the "Municipal Mechanics' Lien Law, Revision of 1918" (P. L. 1918, p. 1041; 1 Cum. Sup. to Compiled Statutes, p. 1859) a lien may be maintained against money in the possession of a municipality and due from the municipality to a contractor, by one who has supplied labor

or materials to a sub-contractor, even though it is made to appear that at the time the claim of lien was filed the contractor had paid the sub-contractor in full.

Final hearing on bill, answer, replication and proofs, in foreclosure of liens under the Municipal Mechanics' Lien Law, Revision of 1918.

FURMAN A. DEMARIS, JR., ESQ.,
For Complainant.

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OSCAR B. REDROW,
For Def't. County of Gloucester.

LEAMING, V. C.:

The single question for determination herein is whether under the provisions of our Municipal Mechanics' Lien Law (Revision of 1918) a lien may be maintained against money in the possession of a municipality and due from the municipality to a contractor by one who has supplied labor or materials to a sub-contractor, when it is made to appear that at the time the claim of lien was filed the contractor had paid the sub-contractor in full.

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Under the old act (P. L. 1892, p. 369) this inquiry was answered in the negative in *Garrison v. Borio*, 61 N. J. Eq. 236. It was there determined that while a lien on the fund in the possession of the municipality could be maintained for labor or materials supplied to a sub-contractor, the fifth section of the act limited such lien to the amount due from the contractor to the sub-contractor at the time the claim of lien should be filed, and thus spared the contractor the burden of twice paying for the same labor or materials. That section of the old act was as follows:

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“That the lien shall attach from the time of filing thereof to the extent of the liability of the contractor for the claim preferred upon any

funds which may be due or to grow due to said contractor from said city, town, township or other municipality under the contract against which the lien is filed.”

This apparent limitation of the lien “to the extent of the liability of the contractor” was deemed operative to exonerate the fund in the possession of the municipality from a claim of lien for labor or materials supplied to a sub-contractor in case the contractor had paid his sub-contractor in full, and to limit the amount of such lien to the amount due from the contractor to the sub-contractor. 10

Garrison v. Borio, was subsequently followed in the following cases under the old act: *Wilson v. Dietrich*, (N. J. Ch.) 59 at Rep. 251; *Herman & Grace v. Freeholders*, 71 N. J. Eq. 251; aff. 73 N. J. Eq. 415; *Meurer v. Kilgus*, 77 N. J. Eq. 175.

In the revised act of 1918 (1 Cumulative Supplement to Compiled Statutes, p. 1859) the provisions of the first and second sections of the act remove any doubt that theretofore may have existed as to whether a sub-contractor could maintain a lien and also as to whether a lien could be maintained by laborers and material men under a sub-contractor; and the fifth section of the act, which took the place of the section of the same number of the old act, was made to read as follows: 20

“The lien shall attach from the time of the filing thereof to the extent of the liability of the contractor or sub-contractor, as the case may be, for the claim preferred upon any funds which may be due or to grow due to the said contractor from the municipality under the contract against which the lien is filed...” 30

Accordingly it seems clear that insofar as the fifth section of the old act may have been thought to limit the lien for labor or material supplied to a sub-contractor on the funds in the possession of the municipality to the amount due from the contractor to his sub-contractor, that limitation now is removed by the corresponding section of the later act. Indeed, the specific legislative declaration of the new section is that the lien (which clearly includes a lien
10 under a sub-contractor) shall attach from the time of the filing thereof to the extent of the liability of the sub-contractor. Language can scarcely be plainer; and in view of the terms of the fifth section of the old act and the force subsequently attributed to it by judicial construction and the terms adopted for the corresponding section of the new act, it seems impossible to escape the conclusion that the new act was intended to subject the funds in the possession of a municipality to a lien for labor and
20 materials supplied to a sub-contractor, irrespective of the amount due from the contractor to such sub-contractor, unless some other provision of the act should be found to disclose a contrary intent.

The only provision of the act which might be thought to have that effect is a proviso contained in the tenth section of the revised act.

By the tenth section of the revised act the Court is specifically directed to ascertain the amount due from the municipality to the contractor and from the
30 contractor or sub-contractor (the corresponding section of the old act did not include the words "or sub-contractor") to the respective claimants, with no suggestion that the amount due from the contractor to his sub-contractor be ascertained, except the appropriate provision that the claim of a sub-contractor shall be chargeable with the amount paid to claimants under him. The Court is then directed

to make a decree directing the municipality "out of the moneys due from it to the contractor, to pay over to the several claimants the sums found due to them respectively," and if the amount in the possession of the municipality be found insufficient then distribution shall be ordered made ratably, without regard to priority in filing claims. Then follows a provision relating to claims of laborers which includes the proviso already referred to as a possible indication of legislative intent that claims under a sub-contractor can only be enforced to the extent of the amount due from the contractor to such sub-contractor. 10

That provision is as follows:

"Provided, however, that laborers shall have a lien [prior?] to others upon filing notices under this act at any time before payments are due and made, and the lien of any laborer filed under this act shall have priority over any assignment by a contractor or sub-contractor to any third person of any money due to such contractor or sub-contractor for any labor or materials furnished for any public improvements referred to in this act, notwithstanding the assignment may have been made prior to the filing of the notice by the laborer; provided, such moneys shall not have been paid to the assignee prior to the time of the filing of the notice." 20

Touching the force of that part of the tenth section above quoted, it will be observed that as to assignments made by a contractor to a third person such assignments, if paid, necessarily would be paid by the municipality, and the proviso would have no persuasive force of the nature hereinafter suggested. But assignments made to a third person by a sub-contractor of money due to him from his contractor 30

might be paid either by the contractor or by the municipality with the contractor's sanction. If the former is to be deemed contemplated then support appears to be given to the notion that a legislative intent is disclosed to the effect that a lien under a sub-contractor can only attach in any event for the amount due from a contractor to his sub-contractor, since it does not seem that a payment made by a contractor to an assignee of his sub-contractor should
10 be given a greater force than a payment directly made by a contractor to his sub-contractor.

I am impressed that the legislative intent above suggested cannot be said to be adequately disclosed. To give that force to this proviso not only is to wholly nullify the specific provisions of the act already referred to which provide to the contrary, but is to attribute to the proviso by indirection a force beyond its terms and beyond any inference necessarily flowing from its provisions. It will be re-
20 called that under the old act assignments by a contractor were held to have priority over liens filed subsequent to the dates of such assignments. *Cape v. Walton Co.*, 77 N. J. Eq. 512; *U. S. Fidelity & Guaranty Co. v. Newark*, 76 N. J. Eq. 230. The proviso protects labor claims against such outstanding assignments, and to attribute that general intent of the proviso is to harmonize it with the entire act.

The sixth section of the revised act contains a similar provision, as to claims of laborers and ma-
30 terial men, but that section relates only to liens filed under the old act.

A decree will be advised in accordance with the views herein expressed.

Submitted: January 13th, 1926.

Determined: January 23rd, 1926.

FINAL DECREE:

IN CHANCERY OF NEW JERSEY.

F. BEDELL WILLS, <i>et als.</i> , <i>Complainants,</i> v. N. ROSS JAMES, <i>et als.</i> , <i>Defendants.</i>	}	On Bill, &c. Final Decree.	10
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This matter coming on to be heard on motion of F. A. DeMaris, Jr., Esq., solicitor for the complainants, in the presence of Oscar B. Redrow, Esq., solicitor for the defendant, County of Gloucester, and James T. Dawson, Esq., solicitor for the defendant, Michael Staub. 20

And it further appearing by the proofs that the complainant, F. Bedell Wills, performed labor on what is known as Section No. 2 of the Woodbury-Blackwood Road in the County of Gloucester between the dates of October 9th, 1924, and October 23rd, 1924, inclusive, in the sum of One hundred ninety-two dollars and seventy-five cents.

And that the complainant, Paul Figel, likewise performed labor on the same road between the dates of October 9th, 1924, and October 18th, 1924, inclusive, in the sum of Two hundred and thirty dollars. 30

And that the complainant, William L. Smith, likewise performed labor on the same road between the dates of October 9th, 1924, and October 24, 1924, in

the sum of Four hundred twenty dollars and seventy-five cents,

And it further appearing that all the complainants were employed by the defendant, N. Ross James, who was the sub-contractor under the defendant Michael Staub, who was the main contractor with the defendant, County of Gloucester, for the work done on the said road,

10 And it further appearing that on March 30, 1924, the complainants, F. Bedell Wills and Paul Figel, filed lien claims with the clerk of the County of Gloucester, and that on May 29th, 1924, the complainant, William L. Smith, likewise filed lien claim for the amounts above set forth, said lien claims being filed in accordance with the provisions of the "Municipal Mechanic's Lien Law, revision of 1918," and one Cum. Sup. to compiled statutes, 1859.

20 And it further appearing that at the time of the filing of the three liens aforesaid the said County of Gloucester had funds remaining due to the said contractor, Michael Staub, in the amount of fourteen thousand seven hundred thirty-six dollars and sixty-eight cents, and it further appearing that no other liens were filed, and it further appearing by the proofs that the said defendant, Michael Staub, had paid the said N. Ross James, sub-contractor, in full

30 It is, on this 11th day of March, A. D. 1926, ordered, adjudged and decreed that the said County of Gloucester pay unto the said F. Bedell Wills the sum of one hundred ninety-two dollars and seventy-five cents, with interest thereon from the thirtieth day of March, A. D. 1925, and that the said County of Gloucester do pay unto the said Paul Figel the sum of two hundred and thirty dollars from the thirtieth day of March, A. D. 1925, and that the said County of Gloucester do pay unto the said William

L. Smith the sum of four hundred twenty dollars and seventy-five cents, with interest thereon from the twenty-ninth day of May, A. D. 1925. The said sums are to be deducted from the amount due Michael Staub, the contractor, from the said County of Gloucester.

And it is further ordered that the said County of Gloucester out of such funds due from it to Michael Staub, the complainants, or their solicitor, the costs of this suit to be taxed.

10

E. R. WALKER,
Chancellor.

Respectfully advised,

E. B. LEAMING,
V. C.

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

20

Between

F. BEDELL WILLS, *et als.*,
Complainants,

and

N. ROSS JAMES, *et als.*,
Defendants.

} Notice of Appeal.

30

To Furman A. DeMaris, Jr., Solicitor of Complainants:

The defendants, County of Gloucester and Michael Staub, hereby appeal from the whole and every part

of the final decree made in this Court in the above stated cause on the 11th day of March, nineteen hundred and twenty-six, to the Court of Errors and Appeals in the last resort in all causes.

Dated April 10, 1926.

OSCAR B. REDROW,
JAMES T. DAWSON,
Solicitors for Defendants.

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

OSCAR B. REDROW,
*Solicitor for and of Counsel
with Defendant, County of
Gloucester.*

[ENDORSED]

Due and legal service of within notice is hereby acknowledged.

Furman A. DeMaris, Jr.,
Sol'r for Compls.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
F. BEDELL WILLS, *et als.*,
Complainants-
Respondents,
and
N. ROSS JAMES, *et als.*,
Defendants-Appellants.)

On Appeal from
Chancery.
Petition of Appeal.

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To the Honorable, the Court of Errors and Appeals 20
in the last resort in all causes:

The petition of County of Gloucester and Michael Staub, 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, Chancellor of the State of New Jersey, bearing date the 11th day of March, 1926, wherein F. Bedell Wills, Paul Figel and William L. Smith were complainants, and N. Ross James, Michael Staub and County of Gloucester, were defendants, and from the whole and every part thereof, to wit: That said decree grants to complainants the relief prayed for in the bill when it should have denied such relief. And your petitioners humbly appeal from every part of said

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decree of the said Chancellor upon the ground that the same is erroneous.

Your petitioners, therefore, pray that the said decree of the said Chancellor may be, in the particulars aforesaid, 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.

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OSCAR B. REDROW,
*Solicitor for and of Counsel
with Defendant, County of
Gloucester.*

JAMES T. DAWSON,
*Solicitor for and of Counsel
with Defendant, Michael
Staub.*

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[ENDORSED]

Due and legal service of within petition is hereby acknowledged.

Furman A. DeMaris, Jr.,
Sol'r of Complts.

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NEW JERSEY COURT OF ERRORS
AND APPEALS.

Between
F. BEDELL WILLS, *et als.*,
Complainants-Respondents,
and
N. ROSS JAMES, *et als.*,
Defendants-Appellants.

ON APPEAL FROM CHANCERY.

BRIEF FOR RESPONDENTS.

STATE OF FACTS.

Respondents did hauling with their automobile trucks on Section 2 of the Woodbury-Blackwood Road being constructed by the appellant, County of Gloucester. Respondents were employed by the defendant, N. Ross James, who was a sub-contractor under the appellant, Staab, the main contractor.

On March 30, 1925, the respondents, Wills and Figel, filed lien claims with the clerk of Gloucester County for the amounts due them respectively from James. On May 29, 1925, respondent Smith filed a like notice, and on that same day the three claimants filed a bill in the Court of Chancery in accord-

ance with the Municipal Mechanics' Lien Act (Revision of 1918). Subpoena was issued on that day and was subsequently served on Staab and James, service on the County of Gloucester being acknowledged by Mr. Redrow, its solicitor. Notices as required by the act were served with the subpoena. After answers had been filed by both appellants, and a decree *pro confesso* taken against the defendant, James, the matter was heard on stipulated facts. After the filing of the conclusions the final decree in favor of respondents was made, the form thereof being settled by the learned Vice-Chancellor below in the presence of complainants' solicitor and Mr. Redrow who was acting for both appellants.

ARGUMENT.

Appellants' points will be taken up in the order in which they appear in the brief for the appellant.

Appellants first contend that the respondents, Wills and Figel, did not bring an action to enforce the lien claim within sixty days from the date of filing the lien.

The answer to this is three-fold:

POINT I.

The question of whether the suit was brought in time is not open to argument in this Court, as it was not pleaded below.

A defendant must in his answer state to the Court all of the circumstances of which he intends to avail himself by way of defence.

New Jersey Co. v. Lord, 66 N. J. Eq. 344
(Err. and App.).

No special defences are made by the county (Case, pp. 6 and 7).

In his answer (Case, page 9, pars. 5 to 8) Michael Staab sets up several defenses but nowhere does he raise the point now under discussion.

The limitation of the time within which the action must be brought is analogous to the general statute of limitations and must be affirmatively pleaded by defendants.

Martin v. Lehigh Valley R. Co., 90 N. J. L. 258 (Err. and App.);

W. Hoboken v. Syms, 49 N. J. L. 546 (Sup. Ct.);

Cox v. Brown, 87 N. J. Eq. 462 (Chan.);

French v. Armstrong, 79 N. J. Eq. 283 (Chan.).

The learned Vice-Chancellor who sat below begins his conclusions (Case, p. 14) by referring to "the single question for determination herein" a statement which is most significant as showing this Court the nature and extent of the argument below.

For this reason then, the question is no longer an open one, but must be disregarded in the Appellate Court.

POINT II.

The respondents, Wills and Figel, are protected by being made parties to the action of the respondent Smith.

The Municipal Mechanics Lien Act (Revision of 1918), P. L. 1918, p. 1041, hereafter referred to as

“the Act” provides in Section 9 that “The claimant first bringing an action * * * must make parties to the suit all who have filed liens * * *.” And in Section 4, “But if any action be brought by any claimant the lien of any other claimant may be preserved and enforced by filing an answer * * * within the time provided for in the practice of the Court.”

The respondent, Smith, who filed his lien on May 29 and began his action the same day by filing the bill in Trenton and issuing subpoena thereon was unquestionably in time as far as his claim was concerned.

The complainant, Smith, joined the other respondents with him as complainants. They were therefore parties to his action, and their claims were joined with his own and pleaded in the bill. Their notices were combined with his and served on the defendants with the subpoena. Under this procedure, the respondents, Wills and Figel, stand in no worse position than if Smith had filed the bill making them defendants instead of complainants in which case their claims would have been protected by the simple expedient of filing an answer to his bill. They were therefore entitled to their claims as parties to Smith’s suit.

POINT III.

With respect to the claims of Figel and Wills, this action was brought within the time limited by the statute.

Section 4 of the Act reads:

“No lien provided for in this Act shall be binding on the funds of the municipality therein referred to, unless an action to enforce the lien

claim be brought within sixty days from the filing thereof * * * .”

These two claims were filed on March 30, 1925, not on the 3rd as stated in the brief for appellant. The sixty days expired on May' 29th, and not on the 28th as stated in the brief of appellant.

The rule is, that in the computation of time from a date or the day of a date, or from an event happening, the day of the date or of the event is to be excluded.

Thorne v. Mosher, 20 N. J. Eq. 257 (N. J. Chan.).

The elements necessary for the bringing of an action are two. First, the bill must be filed, and second, the subpoena must issue.

Herman v. Mexican Petroleum Corp., 85 N. J. Eq. 367 (N. J. Chan.);

Haupt v. Bd. of Education, 87 N. J. Eq. 362 (Err. & App.);

Del. R. Q. & C. Co. v. Freeholders, 88 N. J. Eq. 506 (N. J. Chan.);

Blackwood Imp. Co. v. Public Service, 91 N. J. Eq. 220 (”).

The only limitation on the above rule is that the subpoena must directly or indirectly be the means of bringing the defendant into court.

A situation analogous to this exists in the operation of the private Mechanics Lien Act. In *Wharton v. Ward*, 91 N. J. L. 45, it was held that the suit in the Circuit Court is begun to enforce a mechanic's lien when the summons is issued and sealed by the clerk of the Circuit Court, and that the summons may then be delivered to the sheriff at a considerably later date.

The other acts limiting the time within which various forms of action shall be brought *e. g.*, the Death Act, have received consideration from the Courts and the cases below hold that the issuance of process together with the intention of having it promptly served although actual service is not made until after the time has expired, is sufficient.

Updyke v. Ten Broeck, 32 N. J. L. 105;

McCracken v. Richardson, 46 N. J. L. 50;

Lynch v. R. R. Co., 57 N. J. L. 4;

County v. Pac. & Co., 67 N. J. L. 48.

The question of what was a reasonable time for delivery of the papers to the sheriff must be determined from the particular facts of the case, and as the matter was not pleaded or argued below, those facts are not available in this Court, as they form no part of the record, whereby respondents find themselves prejudiced by the failure of appellants to plead this point in season.

Appellants' argument that the suit is not commenced until the subpoena has been served would lead to many hardships and would in some cases make it almost impossible for a claimant to protect his lien. Under the holding in *Lehigh Valley R. R. Co. v. Andrus*, 91 N. J. Eq. 224, action is not begun against a non-resident by the mere filing of a bill and the issuance of subpoena without more. However, it is held that where the issuing of subpoena results in the bringing into Court of the defendant, then the suit is commenced as of the issuing of that subpoena, and if the subpoena cannot be served and the defendant is brought in on an order of publication issued after the return of the subpoena, then the suit will have been begun as of the date of the issue of the subpoena, as the subpoena has, through

the order of publication, indirectly been the means of bringing the defendant into court.

Section 9 of the Act provides:

“Subpoena may be issued against all parties and served either actually or by publication according to the practice of the Court of Chancery.”

Since the complainant must make all claimants parties to his action, and since one or more of the claimants, or the general contractor may be non-residents, appellants' contention that the action is not brought until subpoena served, together with the holding in *Lehigh Valley R. R. Co. v. Andrus, supra*, would mean that in the case of a non-resident defendant it would be practically impossible to commence the suit, in the sense contended for by appellant within the statutory time. The only practical conclusion to be drawn from the act and the cases is that the service of the subpoena within a reasonable time after its issue will make the date of the bringing of the action coincide with the date of filing of the bill and issuing of the subpoena.

POINT IV.

The decree below is not now subject to attack on the ground that the proofs were insufficient.

A decree *pro confesso* was taken against James, who was the sub-contractor, who employed respondents, case p. 10.

Section 23 of “An Act Respecting the Court of Chancery (Revision of 1902)” found in 1 Comp. Stat. p. 418, provides that upon the entry of a decree *pro confesso* the Court may enter such decree as

shall be deemed equitable and just; or the Chancellor may at his discretion order complainant to produce witnesses and documents to substantiate his claim, or may examine the complainant under oath.

Appellants did not deny that respondents had wages due and unpaid from James, and upon the entry of the decree *pro confesso* the Court below could either make a decree against James or require complainants to prove their case. The only other question, viz: Whether the sum decreed to be due from James was a lien, was settled by the conclusions below, hence, a decree was proper.

POINT V.

The lien of one who has performed labor or furnished material to a sub-contractor will attach to funds in the possession of the municipality and due the main contractor, notwithstanding the fact that the sub-contractor may have been paid in full.

Appellants, in their attack upon the construction of the act given by the learned Vice-Chancellor below, rely chiefly on the fact that the act as thus construed becomes a piece of unwise legislation. This Court has repeatedly held that it is the duty of the Legislature to determine the wisdom of a certain law, but the duty of the Court to determine the meaning of the law. The wisdom of a law, cannot influence a Court in its determination of the meaning of the language used by the legislature.

Respondents do not agree with appellants contention that the construction of the act below makes it dangerous legislation. The object of the statute is to protect those who actually perform labor or furnish materials for the work. The policy of the law has been to constantly afford more protection to

these people, particularly to the men who perform labor, that they might not be as formerly subject to assignments made by a contractor nor to the wrongful payment of money to an irresponsible sub-contractor. The municipality is at all events protected as it can retain sufficient funds to complete the work, regardless of liens which only attach to the balance due the contractor and the contractor can easily protect himself by taking proper indemnity bonds from his sub-contractors.

The conclusions of the learned Vice-Chancellor in the Court below give such a well-considered and illuminating discussion of the act that respondents submit them herewith as a final answer to the arguments raised by appellants and as completely and accurately expressing respondents' view of the statute and its proper construction.

Respectfully submitted,
FURMAN A. DE MARIS, JR.,
Solicitor for Respondents.
ROCCO PALESE,
Of Counsel with Respondents.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between
F. BEDELL WILLS, *et als.*,
Complainants-Respondents,
and
N. ROSS JAMES, *et als.*,
Defendants-Appellants.

ON APPEAL FROM CHANCERY.

BRIEF OF APPELLANTS.

STATE OF FACTS.

The County of Gloucester, a municipal corporation, on April 17, 1924, entered into a contract with Michael Staub for the construction of a concrete road known as Section 2, of the Woodbury and Blackwood Road for the sum of \$132,630.11. The said Staub contractor, employed N. Ross James, sub-contractor, to grade the road, and the said James, sub-contractor, employed in doing this grading, the respondents, who did some work of hauling with trucks.

The respondents claim this work was done between October 9th, and October 23, 1924. On October 25, 1924, the contractor, Staub, paid the sub-contractor,

James, the full amount of money due to him, which included any work done by respondents.

On March 3, 1925, the respondents, Wills and Figel, filed notices of lien with the County of Gloucester. On May 29, 1925, the respondent, Smith, filed notice of lien with the County of Gloucester. On the same day, May 29, 1925, all the respondents joined in a bill filed in the Chancery Court, a subpoena was issued in this suit which was dated May 29, 1925, and which was served on the sub-contractor, James, on June 18, 1925, and on the contractor, Staub, on June 18, 1925, and on the County of Gloucester on June 15, 1925. The sub-contractor, James, did not file any answer and the other parties filed a statement of facts as above set forth, but no proof was made by respondents of the amount due to them or whether they had been paid at any time the amounts due to them. There was due by the County of Gloucester to the contractor Staub when the liens were filed, \$14,736.68.

On March 11, 1926, the Chancery Court entered a decree directing the County of Gloucester to pay to the respondents, the moneys claimed by them, said sums to be deducted from the amount due to Staub, contractor. From this decree an appeal is taken.

ARGUMENT.

POINT 1.

The respondents, Wills and Figel, did not bring an action to enforce the lien claim within sixty days from the date of filing the lien.

The sixty days expired on May 28, 1925. Section 4 (1918, page 1043) "No lien provided for in this act shall be binding, on the funds of the municipality therein referred to, unless an action be brought within sixty days from the filing thereof." Sec. 15 (1918, page 1048) "The lien may be discharged as follows: Second, by lapse of time, when sixty days have elapsed since filing of the claim and no action shall have been commenced in the Court of Chancery to enforce any lien claim under the contract with the municipality."

In a Chancery suit when a lien is claimed, the suit is not begun until the subpoena is served.

The necessary elements are the filing of the bill, and the issuing and serving of subpoena.

Haughwont v. Murphy, 22 N. J. Eq. 531;

Hazard v. Phoenix Co., 78 N. J. Eq. 568;

Hermann v. Mexican Petroleum Corp., 85 N. J. Eq. 367;

Haupt v. Edgewater, 100 Atl. Rep. 337;

Roselle Park v. Montgomery, 60 Atl. Rep. 954;

White v. White, 61 N. J. Eq. 630.

The subpoena in the present case was not served until more than twenty days after the expiration of the sixty days prescribed by Sections 4 and 15, Act, 1918.

1 *Cum. Sup. to Compiled Statutes*, 1860-1864.

The Act of 1918, reduces the time for commencing suit from 90 days to 60 days.

POINT II.

The Court of Chancery did not determine the validity of the respondents' claims as provided by Section 10 of the Act of 1918, and had no power to make a decree directing that the lien claims be paid by the appellants.

1 *Cum. Sup. Compiled Statutes*, 1863.

The case was presented on stipulation (Case, page 11) there were no proofs taken other than the stipulation. The appellants could not stipulate as to the validity of the liens as the fact as to whether they had been paid was not within their knowledge.

The sub-contractor, James, for whom the respondents did hauling, filed no answer.

There was no proof that the several amounts due to the respondents was still due and unpaid.

POINT III.

If at the time of the filing of a lien for labor or material furnished to a sub-contractor, nothing remains owing to the sub-contractor, the lien attaches to no part of the contract price.

The Court below held that under Sec. 5 of the Municipal Mechanics' Lien Act of 1918, that even though a sub-contractor had been paid in full that a person who had furnished labor or material to the sub-contractor could maintain a lien for the amount due to him.

This construction of the act establishes a dangerous precedent and is one in which a fraud may easily be perpetrated on the municipality or general

contractor, and it does not seem possible that the Legislature intended such a construction of the act.

Under the previous Acts there were several cases which held that "If at the time when such lien is filed nothing remains owing to the sub-contractor, the lien attaches to no part of the contract price."

Garrison v. Borio, 61 Eq. 236;

Meuer v. Kilgus, 77 Eq. 175;

Wilson v. Dietrich, 59 Atl. 251.

The Act of 1892 did not give to sub-contractors a right to file a lien for moneys which may be due to them, whether that right might be inferred was previously a mooted question.

The only real change in Section 1 of the 1918 Act was to insert the words "or sub-contractor" after the word "trader" on the first line.

Under the Act of 1892, section one gave to the person who may have furnished material or labor to a sub-contractor, a right of a lien, and the first section of the 1918 Act does not change this right.

The right of any person to file a lien is, of necessity, confined to section one of the Acts of 1892 and 1918. The change made by the Legislature in 1918, does not change, in any way, the rights of the respondents, and they stand in the same position under Section 1 of the 1918 Act as they did under Section 1 of the 1892 Act. That is, they furnished either labor or materials to a sub-contractor and under either section could file a lien.

A construction, therefore, of section one of the Act of 1892 by this Court must, of necessity be a construction of section one of the Act of 1918.

The Courts have construed this section one that "If at the time when such a lien (material furnished to a sub-contractor), nothing remains owing to the sub-contractor, the lien attaches upon no part of the contract price."

See Comp. Statutes, 1910, pages 3315-3316.

Sections 2, 3 and 4 of both the Act of 1892 and 1918, relate to procedure of filing claims.

Section 5 of both Acts fixes the time when the lien arises, that is, from the time of the filing thereof. That is, no matter when the labor was performed or materials furnished the lien becomes effective only when filed as provided by the Act.

Agnew v. Patterson, 83 Eq. 49, aff. 83 Eq. 336;

Garretson v. Clark, 57 Atl. 414.

The learned Vice-Chancellor has misunderstood the meaning of the extent of this lien under Section 5 of the 1918 Act, "To the extent of the liability of the contractor or sub-contractor" we feel is intended and does limit the lien to the amount of moneys which may be due to the contractor from the municipality or to grow due, and to limit the lien to the amount which may be due from the contractor to the sub-contractor or to grow due. Under the terms of a contract between a municipality and a general contractor, the contractor agrees to do certain work and upon the doing the work the municipality agrees to pay the contractor a certain specified price. There can be no moneys due from the municipality to any one except the contractor.

The first two words of this section five "The Lien" refers to the claim or demand of a certain laborer for instance of \$100, for work done on a school house. The word "lien" as used in Section 5 means more than a claim, it means more than the person, it includes both and includes the amount due. As applied to the present case, the word "lien" means "the claim of, say, William L. Smith, one of the respondents, for \$420.75, for hauling."

By including this language in Section 5 we have "The claim of William L. Smith, for \$420.75, for

hauling—to the extent of the liability of the contractor or sub-contractor, as the case may be, upon any funds which may be due or to grow due to the said contractor from the municipality under the contract against which the lien (claim of William L. Smith for \$420.75, for hauling) is filed.

That is to say, that if there is enough money due to the sub-contractor, the claim will be paid.

Section 6 of the 1918 Act provides for priority of payment as follows:

“Section 6. The lien of any laborer, or of any person, persons or corporation furnishing any material hereafter filed under the Act to which this is a supplement, shall have priority over any assignment by a contractor or sub-contractor to any third person or persons of any money due or to grow due to such contractor or sub-contractor for any labor or material furnished for any public improvement referred to in said Act, notwithstanding such assignment may have been made prior to the filing of notice by any such laborer, or any such person, persons or corporation furnishing any material, provided such money shall not have been paid to such assignee at the time of the filing of such notice.”

Under this section, if a sub-contractor should assign his claim to a third party, and either the municipality or contractor pay such assignee prior to the filing of notice of a lien, then such payment would bar the claim of any laborer or material man from any lien.

Therefore, the Legislature intended that payment of the sub-contractor would bar the persons working for him from making any claim under this Act.

Sections 7, 8 and 9 define procedure.

Section 10, particularly provides that the Court of

Chancery shall determine the amount due from the municipality to the contractor and from the contractor or sub-contractor to the respective claimants, and particularly provides that the claims of sub-contractors shall be chargeable with the amounts paid to claimants under them for work done or materials furnished in the execution of the sub-contract. This provision contemplates the filing of a lien by a sub-contractor as provided by section one of this Act.

Section ten further provides, in identical language as used in Section 6, that the claim for laborers shall have priority over assignments by contractors or sub-contractors, *providing* such assignee shall not have been paid prior to the filing of the claim.

It seems perfectly clear that the Legislature intended and did provide that where the sub-contractor or his assignee had been paid, no lien would lie under this Act.

The principle established in the case of *Garrison v. Borio*, 61 N. J. Eq. 236, *Ibid*, was not changed by the Act of 1918, and this court has not since 1918 even had to consider the matter, so generally has the principle been accepted by the bar.

The only opinion by this Court that approaches the subject is the opinion of Justice Kalisch in *Ocumbaugh v. Linde*, and *Griffith Co.*, 122 Atl. Rep. 817, which holds that a municipal lien of a second sub-contractor is a prior lien to the claim of the trustee in bankruptcy of the sub-contractor. That such a creditor might proceed to enforce a municipal lien.

This case is not a parallel to the one at issue, for, in that case, there was money due the sub-contractor, from the contractor and what this Court did was to say to the second sub-contractor that he had a right to file a lien.

If the lower Court is sustained in this case it will

place great obligations on the municipalities and the general contractor, and will permit the door to be opened to fraud in filing such claims. For example, a municipality may enter into a contract with a general contractor for the construction of a public building costing \$100,000 and the general contractor may sub-contract the heating and plumbing, for instance, to a sub-contractor for \$25,000, and the sub-contractor might, if he choose, make another contract or contracts with several material men for the installation of the heating and plumbing, to the extent of, say, \$50,000, and these persons who furnish or contract to furnish labor and materials for such work to the sub-contractor, would be entitled to be paid the sum of \$50,000 out of the contract price without the municipality or the general contractor having knowledge of such claims perhaps until such building was completed. The same thing might apply to a road where the sub-contractor was employed to do certain grading in the construction of the road under contract at a certain specified price. This sub-contractor could easily incur bills and obligations, far exceeding the amount of his contract, all of which would be entitled to be paid by the municipality. The sub-contractor could even go so far as to submit a ridiculously low bid for doing the work of grading on such a road, knowing full well that no matter what his bid was, the man whom he employed to do the work would be entitled to recover the full amount due him.

We cannot feel that the Legislature intended the construction placed upon this Act by the Chancery Court, and submit that the decree of the Chancery Court should be reversed for the reason herein stated.

Respectfully submitted,
OSCAR B. REDROW,
JAMES T. DAWSON,
*Solicitors and of Counsel
with Appellant.*

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