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TESTIMONY.

For Complainant.

EXHIBITS.

NOTICE OF APPEAL.

Filed January 27, 1930.

In Chancery of New Jersey

73/483

Between

AMERICAN HARDWARE CORPORATION OF NEW YORK,
Complainant,

and

A. C. GALM, INC., A. C. WINDSOR, INC., THE BOARD OF EDUCATION OF THE CITY OF NEWARK, HARRY G. HENDRICKS as receiver of A. C. Galm, Inc., and CATHERINE TRUBE,
Defendants.

On Bill, etc.

Notice of Appeal.

To complainant or Pitney, Hardin & Skinner, its solicitors:

Defendants Harry G. Hendricks as Receiver of A. C. Galm, Inc., and Catherine Trube, hereby appeal from the final decree made by the Chancellor on the advice of Vice-Chancellor Maja Leon Berry in the above-entitled cause on the twenty-first day of January, 1930, and from the whole and every part thereof, to the Court of

Notice of Appeal.

Errors and Appeals in the last resort in all causes.

Dated January 21, 1930.

CORN & SILVERMAN,
Solicitors for and of Counsel with Defendants Harry G. Hendricks as Receiver of A. C. Galm, Inc., and Catherine Trube.

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

JOSEPH J. CORN,
Of Counsel with Defendants Harry G. Hendricks as Receiver of A. C. Galm, Inc., and Catherine Trube.

PETITION OF APPEAL.

Filed February 14, 1930.

New Jersey Court of Errors and Appeals

Between AMERICAN HARDWARE CORPORATION OF NEW YORK, *Complainant-Respondent,* *and* A. C. GALM, INC., *et als.*, *Defendants-Appellants.*	*On Appeal from the Court of Chancery.* *Petition of Appeal.*

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

The petition of Harry G. Hendricks and Catherine Trube, the appellants in the above-entitled cause, respectfully shows that:

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, on the advice of Vice-Chancellor Maja Leon Berry, bearing date January 21, 1930, in a certain cause in said Court of Chancery wherein said American Hardware Corporation of New York was complainant and A. C. Galm, Inc., A. C. Windsor, Inc., The Board of Education of the City of Newark, Harry G. Hendricks as Receiver of A. C. Galm, Inc., and Catherine Trube were defendants, in this respect, to wit, that the said decree adjudges that complainant's lien is a valid lien against the funds in the hands of the Board of Education of the City of

Newark, and that said Board do pay to complainant the sum of twenty-four hundred sixty-three dollars and twenty cents ($2,463.20), and that defendant Catherine Trube do pay to complainant the costs of suit.

And petitioners appeal from the decree of the Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous in that:

(1) Complainant's lien claim was not filed with the proper officer as required by statute, and is therefore unenforceable.

(2) Complainant's lien claim was filed after a receiver was appointed by the Court of Chancery for defendant A. C. Galm, Inc., and is therefore ineffectual and invalid.

(3) Complainant's lien claim was not verified by oath or affirmation as required by statute, and is therefore unenforceable.

(4) Complainant's lien claim does not specify the fund on which it was intended to operate, and is therefore unenforceable.

(5) Complainant did not prove that it performed any labor or furnished any material toward the performance of any contract for public improvement made between A. C. Windsor (the contractor) and the municipality.

(6) Complainant did not prove that the materials sold by it to A. C. Galm, Inc., were actually used in the execution or completion of the contract between the contractor and the municipality.

(7) Complainant did not prove the contract, if any, between A. C. Windsor and the municipality.

(8) Complainant did not prove that A. C. Galm, Inc., was indebted to complainant.

(9) Complainant did not bring its action to enforce the lien claim within sixty days from the filing thereof.

(10) Complainant did not make parties to this suit all who have filed claims.

(11) The lien claims names the contractor as A. C. Windsor and the bill of complaint names the contractor as A. C. Windsor, Inc.

(12) Defendant Catherine Trube was charged with costs of suit.

Petitioners therefore pray that said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden, and that petitioners may have such other relief in the premises as to this Court shall seem proper.

CORN & SILVERMAN,
Solicitors and Counsel with Appellants.

ANSWER TO PETITION OF APPEAL.

Filed March 19, 1930.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between AMERICAN HARDWARE CORPORATION OF NEW YORK, *Complainant-Respondent,* *and* A. C. GALM, INC., and others, *Defendants-Appellants.*	*On Appeal from the Court of Chancery.* *Answer to Petition of Appeal.*

The respondent, American Hardware Corporation of New York, for answer to the petition of appeal of Harry G. Hendricks as Receiver of A. C. Galm, Inc., and Catherine Trube, appellants in the above-entitled cause, not acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, nevertheless, says and admits that a decree was made and entered in the Court of Chancery on the 21st day of January, 1930, in said cause for the purposes mentioned in the said petition, as is therein stated; but as to the substance and form thereof the respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said decree is agreeable to equity and prays that the same may be affirmed with costs to be adjudged to this respondent.

PITNEY, HARDIN & SKINNER,
Solicitors for and of Counsel
with Complainant-Respondent.

BILL OF COMPLAINT.

Filed June 19, 1929.

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

The complainant, American Hardware Corporation of New York, respectfully says that:

1. Between the 19th day of November, 1928, and the 25th day of February, 1929, complainant furnished certain materials of the agreed value of $2,463.20 to A. C. Galm, Inc., a corporation, which materials were furnished for and used in the erection of a certain public building in the City of Newark, New Jersey, commonly known as Bragaw Avenue School.

2. Said materials were used by A. C. Galm, Inc., in the erection of said building in performance of a certain contract between A. C. Galm, Inc., as sub-contractor, and A. C. Windsor, Inc., the contractor named in a certain contract with The Board of Education of the City of Newark, for the erection of said public building.

3. Complainant is informed and believes that on the 28th day of March, 1929, said The Board of Education of the City of Newark accepted and approved the work done in the erection of said public building under the last-mentioned contract, as complete and satisfactory and that said The Board of Education of the City of Newark and/or A. C. Windsor, Inc., still holds the sum of $1,621.15 due to A. C. Galm, Inc., as a sub-contractor as aforesaid.

4. Within sixty days of the date of acceptance of said public building, complainant filed with the Assistant-Secretary of The Board

of Education of the City of Newark, a notice of lien claim for the balance due on said materials furnished by complainant to A. C. Galm, Inc., verified by oath and in strict conformity and compliance with an act of the legislature of the State of New Jersey, entitled "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, Townships and other Municipalities in this State" (Revision of 1918).

5. Complainant is informed and believes that A. C. Galm, Inc., has been declared insolvent by a decree of this Court in a certain action between Ola E. Galm, complainant, and A. C. Galm, Inc., defendant, and that Harry G. Hendricks was appointed receiver of said corporation and of all its assets and property.

6. Complainant is informed and believes that on the 11th day of June, 1929, an order was made in the cause mentioned in the preceding paragraph authorizing and directing said receiver to sell the accounts receivable of said insolvent corporation, including the indebtedness of A. C. Windsor, Inc., and/or The Board of Education of the City of Newark for work performed and/or materials furnished to said public building by A. C. Galm, Inc., as a sub-contractor, to one Catherine Trube, and that said receiver did sell and assign said accounts receivable as therein directed.

7. Complainant alleges that under the provisions of the aforesaid municipal mechanics' lien act it has a lien to the extent of the balance due for materials furnished to A. C. Galm, Inc., and used in said public building, upon the moneys

under the control of A. C. Windsor, Inc., and/or The Board of Education of the City of Newark due or to become due to A. C. Galm, Inc., as a sub-contractor as aforesaid, to-wit: In the sum of $2,463.20, for materials furnished for said public improvement, together with lawful interest thereon from the 25th day of February, 1929.

8. Complainant files this Amended Bill of Complaint within sixty days of the filing of said notice of lien claim pursuant to the provisions of the aforesaid municipal mechanics' lien act, to enforce its claim against said funds in the hands of A. C. Windsor, Inc., and/or the said The Board of Education of the City of Newark.

Complainant is without adequate remedy in the courts of law, and therefore prays:

1. That A. C. Galm, Inc., A. C. Windsor, Inc.; The Board of Education of the City of Newark; Harry G. Hendricks, as receiver of A. C. Galm, Inc., and Catherine Trube, who are defendants to this suit, may answer this Amended Bill of Complaint and each statement therein made.

2. That the Court may determine the validity of the claim of complainant and of any and all other claimants who have filed claims within the time and in the manner prescribed by the aforesaid statute.

3. That the Court may determine the amount due from A. C. Windsor, Inc., and/or The Board of Education of the City of Newark, as aforesaid, to A. C. Galm, Inc., and also the amount due from A. C. Galm, Inc., and/or Harry G. Hendricks,

as receiver thereof to complainant, and to any other claimants who may file claims within the time and in the manner prescribed by the aforesaid statute.

4. That A. C. Windsor, Inc., and/or The Board of Education of the City of Newark be decreed out of the moneys due from it to A. C. Galm, Inc., and/or Harry G. Hendricks as receiver thereof, to pay over to complainant and to any other claimants whose claims have been determined to be valid claims on said funds, the sum or sums found due to them respectively, with interest and costs, or if such fund is insufficient to satisfy the valid claims of all such claimants, that distribution of said fund be made ratably to complainant and to the holders of other claims which have been determined to be valid liens thereon.

5. That a writ or writs of subpoena may issue commanding said defendants to answer this Amended Bill of Complaint and abide by such decree as this court may make in the premises.

PITNEY, HARDIN & SKINNER,
Solicitors for and of Counsel with
Complainant.

ORDER AMENDING BILL OF COMPLAINT.

Filed September 17, 1929.

IN CHANCERY OF NEW JERSEY.

Between	*On Bill, etc.*
AMERICAN HARDWARE CORPORATION OF NEW YORK, *Claimant,*	*Order Amending Amended Bill of Complaint.*
and	
A. C. GALM, INC., and others, *Defendants.*	

This matter being opened to the Court by Pitney, Hardin & Skinner, solicitors of complainant, and it appearing that the defendants, Harry G. Hendricks, as receiver of A. C. Galm, Inc., and Catherine Trube, have moved to strike out the Bill of Complaint and the Amended Bill of Complaint heretofore filed in this cause, and the Court having heard arguments of counsel and considered the matter and being of the opinion that the Bill of Complaint is defective in certain particulars unless cured by amendment, and that complainant should have leave to amend in such particulars, and being of the opinion that further consideration of the question as to the effect upon complainant's lien of the appointment of a receiver for the defendant, A. C. Galm, Inc., the sub-contractor, should be reserved to final hearing;

And it further appearing that the complainant now desires to make further amendments to the Bill of Complaint, partly to comply with the opinion of the Court as to the defective allega-

tions now contained in the Bill, and partly to clarify and change other allegations in the Bill not involved in the argument or decision of the motion to strike out;

And it further appearing that subpoenaes have been issued and served upon or service has been acknowledged by all of the defendants, but that they have not nor has any of them filed an answer in this cause;

It Is, on this 17th day of September, 1929, on motion of Pitney, Hardin & Skinner, solicitors for the complainant, Ordered that paragraphs 3, 4, 5, 6, and 7 of the Amended Bill of Complaint be amended to read as follows:

"3. On the 28th day of March, 1929, said Board of Education of the City of Newark, by resolution, accepted and approved of the whole work performed by the said contractor in the erection of said public building under the last-mentioned contract as complete and satisfactory. At the time of the filing of a notice of lien claim by complainant as hereinafter mentioned, said Board of Education held funds to the extent of $60,876.58 or some other sum due or to grow due to the said A. C. Windsor, Inc., as contractor, from the said Board of Education of the City of Newark, under said contract last mentioned. Complainant charges on information and belief that a part of said funds has been released and paid to the said contractor since said date upon the filing by said contractor of a bond in double the sum of all claims filed under the provisions of this act against the said contract or the funds due or to grow due thereunder, conditioned for the payment of such sums as may be decreed to be due under any such

claims, which bond was approved as to form by counsel for said Board of Education of the City of Newark and as to sufficiency by the financial officer with whom it was filed.

4. Within sixty days of the date of acceptance of said public building, to wit: on the 19th day of April, 1929, complainant served upon the Secretary of the Board of Education of the City of Newark, by leaving a copy with the Assistant Secretary acting for the Secretary and in charge of the Secretary's office in the absence of the Secretary, a notice of lien claim for the balance due for said materials furnished by complainant to A. C. Galm, Inc., and used in the erection of said public building as above stated, which notice was verified by oath and in strict conformity and compliance with an act of the Legislature of the State of New Jersey, entitled "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)."

5. Complainant charges on information and belief that on the 16th day of April, 1929, A. C. Galm, Inc., was declared insolvent by a decree of this court in a certain action between Ola E. Galm, complainant, and A. C. Galm, Inc., defendant, and that Harry G. Hendricks has been appointed receiver of said corporation and of all its assets and property.

6. Complainant charges on information and belief that on the 11th day of June, 1929, an order was made in the cause mentioned in the preceding paragraph authorizing and directing

said receiver to sell the accounts receivable of said insolvent corporation, including the claim against A. C. Windsor, Inc., and/or the Board of Education of the City of Newark for work performed and/or materials furnished to said public building by A. C. Galm, Inc., as sub-contractor, to one Catherine Trube, and that said receiver did sell and assign said accounts receivable as therein directed.

7. Under the provisions of the aforesaid municipal mechanics' lien act, the complainant has a lien to the extent of the balance due for materials furnished by complainant to A. C. Galm, Inc., and used in the erection of said public building, to wit: the sum of $2,463.20, together with lawful interest thereon from the 25th day of February, 1929, upon the monies in the hands of the Board of Education of the City of Newark, at the time of the filing of said notice of lien claim, due or to grow due to A. C. Windsor, Inc., under the aforesaid contract for the erection of said public building, whether said funds are now in whole or in part in the hands of the said Board of Education of the City of Newark or have been paid over to the said A. C. Windsor, Inc., or any other person or corporation.

And It Is Further Ordered that true copies of this order, which copies may be certified by the solicitor of complainant, be served upon the defendants to this cause or their solicitors within five days from the date hereof and that the time limited for the filing of answers by the defend-

ants herein be extended to the 8th day of October, 1929.

E. R. WALKER,
C.

Respectfully advised.

JOHN H. BACKES,
V.-C.

We consent to the entry and filing of the above order.

CORN & SILVERMAN,
Solicitors for Harry G. Hendricks as Receiver of A. C. Galm, Inc., and Catherine Trube, Defendants.

ANSWER.

Filed October 22, 1929.

IN CHANCERY OF NEW JERSEY.

Between AMERICAN HARDWARE CORPORATION OF NEW YORK, *Complainant,* *and* A. C. GALM, INC., and others, *Defendants.*	*On Bill, etc.* *Answer of Defendants, Harry G. Hendricks, Receiver of A. C. Galm, Inc., and Catherine Trube.*

Defendants Harry G. Hendricks, receiver of A. C. Galm, Inc., and Catherine Trube, answering the bill of complaint, as amended, filed herein, say that:

1. As to the allegations contained in paragraphs 1, 2, 3 and 4 these defendants have not sufficient knowledge or information whereof to form a belief.

2. They admit paragraphs 5 and 6.

3. They deny paragraph 7.

4. As to the allegations contained in paragraph 8, these defendants have not sufficient knowledge or information whereof to form a belief.

FIRST SEPARATE DEFENSE.

1. Complainant's lien claim was not filed with the proper officer as required by the statute in such case made and provided.

Answer.

SECOND SEPARATE DEFENSE.

1. Complainant's lien claim was filed after a receiver was appointed by this court for A. C. Galm, Inc., a New Jersey corporation.

2. By reason thereof, complainant's lien claim is ineffectual and invalid.

CORN & SILVERMAN,
Solicitors of Defendants, Harry G. Hendricks, Receiver of A. C. Galm, Inc., and Catherine Trube.

REPLICATION.

Filed October 24, 1929.

IN CHANCERY OF NEW JERSEY.

Between AMERICAN HARDWARE CORPORATION OF NEW YORK, *Complainant,* *and* A. C. GALM, INC., and others, *Defendants.*	*On Bill, etc.* *Replication.*

The complainant joins issue on the answer of the defendants, Harry G. Hendricks, receiver of A. C. Galm, Inc., and Catherine Trube.

PITNEY, HARDIN & SKINNER,
Solicitors of Complainant.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between

AMERICAN HARDWARE CORPORATION OF NEW YORK,
Complainant,

and

A. C. GALM, INC., *et als.*,
Defendants.

Transcript of testimony taken in the above-entitled cause before Hon. Maja Leon Berry, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, on January 8, 1930.

Appearances:

Messrs, Pitney, Hardin & Skinner, by William H. Osborne, Jr., Esq., for complainant.

Messrs. Corn & Silverman, by Joseph J. Corn, Esq., for Harry G. Hendricks, Receiver, and Catherine Trube, defendants.

HENRY HELMUS, sworn for complainant.

Direct examination by Mr. Osborne.

Q Mr. Helmus, what is your position? A Salesman.

Q For whom? A For P. & F. Corbin, Hardware Corporation.

Q In that capacity did you have a conference with the representative of A. C. Galm, Inc., concerning a contract which it had for the furnish-

ing of materials for the erection of Bragaw avenue school? A Yes.

Q With whom did you have that conference? A Mr. McNish.

Q Did you prepare any form of contract or itemized statement of the materials to be furnished by American Hardware Corporation of New York? A Yes.

Q Will you show us that statement? A (Paper produced.)

Q This statement is in your own handwriting? A Yes, sir.

Q What was the official status of Mr. McNish in A. C. Galm, Inc.? A I believe he was the secretary of the company.

Q Did he have anything to do with the work done by that company upon the Bragaw Avenue School? A Yes, he purchased the material.

Q Will you tell us how you came to arrive at the items set forth on these white sheets? A The quantities were taken from plans which I saw in A. C. Galm's office.

Q Those were plans for the erection of the building? A Plans of the building. We drew off all the items that required hardware which we furnished.

Q And you and he agreed at that time as to the materials to be furnished by your company? Is that right? A He agreed to this list, which was our interpretation of the specifications.

Mr. Osborne: I offer this list in evidence. (Marked Exhibit C. 1.)

Q Does that list set forth the value of these materials that was agreed upon between you and Mr. McNish? A Yes.

Q What is the amount? A $2,269.18.

Q And did that figure stand, or was there a further agreement? A There was a change, a small amount, about a little over three dollars.

Q Can you tell us from your records what the final figure on those items was, as agreed to between you and Mr. McNish? A Yes, it was $2,272.35.

Q That figure was agreed to orally between you two? A Yes.

Q I show you two papers that purport to be orders from A. C. Galm, will you tell us what those are? A Those two orders represent material that we term "Extras," which were not included in this list, to fill the order.

Q Was the price of that extra material agreed upon between you and Mr. McNish? A Yes, sir.

Q What were the prices agreed upon for the extras? A There is an item here of $11.61; there is another item, of $179.24.

Mr. Osborne: I offer these in evidence for identification.

(Marked Exhibits C. 2 and C. 3 for identification.)

Q Were all of the materials called for by that contract and by these orders for extras, furnished by your company to A. C. Galm, Inc.?

Mr. Corn: I object, unless it is shown whether it is upon his own knowledge.

Q Do you know whether, of your own knowledge, they were all furnished? A Yes.

Q Have you receipts? A I have receipts here of the shipments that we made to A. C. Galm.

Henry Helmus, cross.

Q And those receipts are signed by whom? A They are sigend by R. Struck.

Q Do you know who R. Struck was? A He was an employee of A. C. Galm.

Mr. Osborne: I offer them in one batch for identification.

(Marked Exhibit C. 4 for identification.)

Q Have there been any payments by A. C. Galm on account of this Bragaw Avenue School contract for the extras furnished on that contract? A No, sir.

Cross examination by Mr. Corn.

Q This contract was made with P. & F. Corbin, was it not? A Yes, P. & F. Corbin, which is, we call it, P. & F. Corbin Division of the American Hardware Corporation. We are known as P. & F. Corbin.

Q This order marked Exhibit C. 2, that is addressed to P. & F. Corbin Manufacturing Company, is it not? A Yes, sir.

Q The order marked Exhibit C. 3 is addressed to P. & F. Corbin Manufacturing Company? A Yes.

Q And marked "Received P. & F. Corbin"? A Yes.

Q American Hardware Corporation does not appear on this, does it? A No, it does not appear on there.

Q It does not appear on the original contract which you have here? A There is no name on here at all, except "A. C. Galm."

Q Except it is marked "P. & F. Corbin"? A Yes, on that.

Q Did you attend to the delivery of these materials from your company? A No, sir.

Q Do you know where the materials were delivered to? A They were delivered to the expressman from our warehouse.

Q And that is as much as you know about the delivery? A Yes.

Q You don't, from your own knowledge, know where they finally landed? A No.

Re-direct examination by Mr. Osborne.

Q These materials were actually furnished by American Hardware Corporation of New York? A Yes, that is the name of our corporation.

Q Will you explain to us what you mean by "P. & F. Corbin"?

The Court: He has already explained that; it is a division of the organization.

A The corporation consists of four different factors, and we are one division.

Q When you say that the goods were delivered to an expressman, how do you reconcile that with these receipts signed by Mr. Struck? A There are some receipts there that are signed by an expressman; the top is probably signed by Struck —he is an employee of A. C. Galm. Others were delivered by us to an express company.

Re-cross examination by Mr. Corn.

Q By the way, these bills are marked "P. & F. Corbin American Hardware Company of New York Successor"—

The Court: Do you seriously claim that the Americna Hardware Corporation is not the real creditor?

Mr. Corn: Not the one with whom the contract was made.

The Court: This man here says there are four divisions of this company; one of them is P. & F. Corbin Division. Have you any evidence that that is not so?

Mr. Corn: No, sir.

The Court: Why waste time over it, then?

Mr. Corn: I want to know these facts.

The Court: He has testified that it is so. I don't suppose he is going on the stand here and testify to a bald lie on a matter of that kind.

Mr. Corn: I didn't have the slightest idea that he was. I wanted to bring out the facts. It says "American Hardware Corporation Successor of P. & F. Corbin."

The Court: He has explained it to my satisfaction, whether he has explained it to yours or not.

ALFRED H. KRICK, sworn for complainant.

Direct examination by Mr. Osborne.

Q What is your business? A Assistant secretary of the Board of Education of Newark.

Q Did you, acting for the secretary, receive a notice of mechanics lien claim from the American Hardware Corporation? A I did.

Q Will you give us the date on which it was filed? A April 19, 1929.

Alfred H. Krick, cross.

Q Can you tell us the date on which the Bragaw Avenue School was accepted by the Board? A At a meeting of the Board of Education held March 28, 1929.

Q Are you authorized to act for the secretary in the receiving of such notices? A In accordance with the rules of the Board, I am.

Q I show you a manual of the Board of Education, and ask you whether that is the manual adopted by the Board? A That is, yes.

Q Will you read us the powers and duties of the assistant secretary? A "An assistant secretary shall have the duty to assist the secretary in the discharge of his duties. In the absence of the secretary, he shall perform the duties of that office and render such other services as the Board may prescribe."

Q At the time this notice of lien claim was filed how much money did the Board have on hand to pay for this building? A It was a matter of $60,876.58.

Q So that there is sufficient money to cover the full amount claimed in the municipal mechanics lien claim filed by the complainant? A There is.

Cross examination by Mr. Corn.

Q Have you the lien claim? A Yes.

The Court: Mark it in evidence.
(Lien claim marked Exhibit D. 1.)

Q Will you tell me what balance is still remaining on this contract and unpaid by the City of Newark? A In the hands of the Board at the present time we have $3,152.36.

The Court: Were there any other liens filed?

The Witness: There were, Chancellor; in addition to this one, we have four others.

The Court: They are not parties to this suit. Have those all been paid?

The Witness: Three of them have been paid; there is still one in dispute, that of Buhl & Caffrey, for $689.

Mr. Osborne: The mechanics lien suit was commenced prior to this suit by another municipal mechanics lien claimant, that did not name us as parties. All of the other defendants have been paid, with the exception of one complainant, who has been invited to join in this suit. He has expressed no willingness to take any part in the suit, or to continue in the suit that he is named as defendant in.

The Court: Is there enough money to cover both claims?

The Witness: There is.

NORRIS McNISH, sworn for complainant.

Direct examination by Mr. Osborne.

Q Mr. McNish, you have heard Mr. Helmus' testimony, that there was an oral contract between Galm and the complainant; what was your position in A. C. Galm, Inc., at the time that contract was entered into? A I was secretary of the corporation.

Q Did you have anything to do with the materials furnished for the erection of the Bragaw Avenue School? A Yes.

Q What did you have to do with it? A I had charge of the handling of the job, and I saw that the materials were furnished on the building, and also saw that they were applied, though I had nothing to do with the applying of them.

Q Was Galm the main contractor, or a sub-contractor? A For the hardware.

Q Was Galm the main contractor for the erection of the building? A No, sub-contractor.

Q I show you a statement marked Exhibit C. 1, and ask you whether that is a statement prepared in your presence by Mr. Helmus at the time the contract was entered into? A Is this whole thing Exhibit C. 1?

Q Yes. A Yes.

Q Will you with reference to that tell us the amount that was then agreed upon as the contract price to be paid to American Hardware Corporation of New York? A I believe it was $2,269.18.

Q Was there later a change in that? A Yes, there was a change made in that, amounting to a few dollars.

Q And you agreed to that? A Yes.

Q I show you Exhibit C. 2 and C. 3 and ask you whether those were sent by you or under your instruction? A Yes.

Q What are those? A These are orders for extras applying on the contract for material that we didn't know about at the time.

Q Was the price agreed upon as to those extras, as you recollect? A The price of these extras was agreed upon in this way, that we had a catalogue and price list shown to us, giving us the definite prices as to the value of these materials.

Norris McNish, cross.

Q And when they were billed to you, they were billed according to the prices in the catalogue; therefore the prices charged were correct, and the prices that were billed to you were prices which you understood would be charged? A Yes.

Mr. Osborne: I offer in evidence papers heretofore marked Exhibits C. 1, C. 2 and C. 3 for identification.

(Marked Exhibits C. 1, C. 2 and C. 3.)

Q Do you know of your own knowledge whether all of the materials called for under the main contract and the order for extras were furnished by the American Hardware Corporation to Galm? A Yes, they were.

Q Do you know whether they were all used in the erection of the school ? A They were.

Cross examination by Mr. Corn.

Q How do you know that they were used in the erection of the school? A In the matter of hardware of this type, it is manufactured especially to fit that building. All of the locks are master keys, according to the Board of Education, for that particular building, and in this way it would be necessary to furnish all that list in order for A. C. Galm, Inc., to complete their contract with the general contractor; therefore, the hardware was received.

Q Do you know that of your own knowledge? A I know it of my own knowledge.

Q Have you the books of A. C. Galm here? A No, I have no books here.

Q There were payments made to the American Hardware Corporation, were there not, during this period? A Yes.

Q Were those payments segregated as to each contract or general account? A No, when a check was mailed to this corporation, it was not mentioned as to what it was in payment of, because the company was always more or less behind in their payments to P. & F. Corbin, and therefore, as I understood it, they applied them to the best advantage of the books.

Q Did they tell your company how they applied it? A They used to write and tell us how the check was applied, in order to keep our books in order with their own.

Q Were any of those payments applied to this contract on the Bragaw Avenue School? A I don't believe so, though I am not certain. I don't recall definitely.

Q Did A. C. Galm receive anything from Windsor on his contract in payment of this job?

Mr. Osborne: I object. I don't see that that is important. Windsor is the contractor.

The Court: I don't see that that is material, but you may pursue the question.

Q Were any payments made by Windsor to A. C. Galm on account of the Bragaw Avenue School? A Yes, there were.

Q Were those payments forwarded on to American Hardware Corporation?

Mr. Osborne: I object; I don't see that it is relevant, unless Mr. Corn asks whether they were forwarded and applied to this particular account.

The Court: That has to follow; he has to prove that also. They may have been forwarded to apply as the Corbins or American Hardware saw fit.

A Yes.

Q Did you inform American Hardware Corporation of these payments that you received from any source on this Bragaw Avenue School? A I just stated that the company was always behind in their payments to P. & F. Corbin, and for that reason, when checks were sent in, we also had what we called a miscellaneous account, where we purchased materials for shelf purposes, and on that account we just simply sent a check in for whatever payment we were able to get, and P. & F. Corbin would apply that payment to the best advantage of their books, to make the company appear paid as well as possible.

Q They had the authority to apply it as they saw fit? A Yes.

Mr. Corn: I move to dismiss this bill on the ground that other claimants have not been made parties.

The Court: Motion is denied.

Mr. Corn: I think the lien claim is vitally defective, and therefore move for a dismissal on that ground.

The lien claim offered in evidence is addressed to the Board of Education of the City of Newark. There is nothing to show on what the lien is to attach or on what it is claimed. It simply says "We claim a lien"; it does not say on what.

The Court: It is a fact that moneys to cover this lien claim have been set aside by the Board of Education?

Mr. Corn: Yes.

The Court: How do you suppose they knew out of what fund that was to come, if the fund isn't designated in this notice?

Mr. Corn: This is a statutory proceeding.

The Court: In my judgment the lien claim sufficiently designated the fund out of which the moneys are claimed and upon which the lien is claimed. It might have been made more specific, but it is sufficient, so long as there can be no question under the notice as to what fund is intended, and I can see no room for argument as to what fund the claim was made against.

Your motion on that ground is denied.

Mr. Corn: The third motion is addressed to the lien claim, and is that it is signed on the affidavit as taken by an assistant secretary.

The Court: Does it make any difference who files notice of lien claim, just so long as it is authorized by the corporation?

Mr. Corn: It is a stautory proceeding, and ordinarily, of course, it wouldn't make any difference; any party authorized could act for the corporation. We haven't any notice here that he is or is not authorized. There is no proof here as to by whom it is signed.

The Court: That argument does not appeal to me at all. There may be something in it; I don't know whether there is or not, but it does not appeal to my conscience as

an equity judge, that is sure; and if this objection is stressed, I will suspend this matter right now and reopen the hearing and permit the complainant to bring in testimony to show the authority of the man who signed this paper. I haven't the slightest doubt in the world, but what he had sufficient authority to do what he did.

Mr. Corn: I will admit for the purpose of the record, that he had. I have no notice that he is not. What I say is, that where statutory notice is required to be sworn to, it must appear from the papers, either that the officer is in legal contemplation the corporation or is authorized.

The Court: You are willing to admit the authority?

Mr. Corn: Yes.

The Court: You are willing to admit on the record that the man who filed this lien claim and swore to it had the authority of the corporation to act for it in that capacity and knew what he did?

Mr. Corn: Yes, I am willing to admit it.

The Court: Then your motion on that ground is also denied.

Mr. Corn: The matter came up before, before Vice-Chancellor Backes, on the real question of law, which is involved in this case, and we both submitted a memorandum, and the Vice-Chancellor decided that the matter should be held until final hearing; and the point involved is this: the mechanics' lien act provides that the lien shall attach from the time of the filing thereof, and the cases hold that the claimant has no

inchoate lien until he has filed his notice. At the time of the filing of this lien A. C. Galm, Inc., had been adjudged insolvent, and receivers had been appointed. There is a line of cases which the solicitor for complainant knows, decided by this court and affirmed by the Court of Errors, which hold that where a contractor becomes insolvent or bankrupt before the lien is filed, then the claimant has no lien, because his lien attaches as of the date when he files it, and if at that time the contractor should be insolvent, there can be no lien, and that claimant comes in as a general creditor. I don't think it has been definitely decided in this State as to whether that same rule would or would not apply where the sub-contractor is insolvent or bankrupt. And whether a receiver of an insolvent corporation should have this money or the claimant should have it, must depend, therefore, on the interpretation of the act and the decided cases.

In my opinion there is no difference between a contractor and sub-contractor—that is, as to the bankruptcy—whether the actual party who is supposed to pay to the claimant is a contractor or a sub-contractor, because the act makes no distinction between a contractor and sub-contractor.

The Court: Is that the only point now that remains to be disposed of?

Mr. Corn: That and the other point, which is, that the act provides that the notice of lien shall be filed with the chairman or other officer, and secretary or clerk in the County.

In this case, it was filed with the assistant secretary.

The Court: So far as that is concerned, your motion to dismiss is denied, but your other proposition is a much more serious one, and inasmuch as this has already been before Vice-Chancellor Backes on memoranda from both parties, I think I would be presuming, to settle it off-hand, without at least looking at the authorities which you submitted to him. If you will submit to me a memorandum on that one point, then I will dispose of it.

Mr. Corn: I would like to make one more objection, as to the proof. The notice of the lien claim states what the act provides, which is that the materials were actually used in the execution or completion of said contract with the municipality, but there has been no proof of that, as we haven't even the contract between the municipality and Windsor. We have no proof that that contract provided for these materials, and that these materials were delivered in execution of that contract.

The Court: I think it is fairly inferable from the testimony which is already in, that there is no basis for that objection.

If you will submit to me your memoranda on that one question, I will dispose of the matter.

EXHIBIT D. 1.

NOTICE OF MECHANICS LIEN

To the BOARD OF EDUCATION OF THE CITY OF NEWARK, COUNTY OF ESSEX and STATE OF NEW JERSEY, and to all others whom it may concern:

PLEASE TAKE NOTICE that American Hardware Corporation of New York, a corporation of the State of New York, having its principal office at #101 Park Avenue, New York City, has and claims a lien for the principal and interest of the value and agreed price of materials furnished in the erection of a certain school building in the City of Newark, commonly known as Bragaw Avenue School.

The amount claimed is $2,463,20, which amount is now due and owing and is the total value of materials furnished as hereinafter set forth, and is the contract price of finished hardware so furnished by claimant, against which there are no credits or off-sets.

The party to whom the materials were furnished and from whom said amount is due is A. C. Galm, Inc., a corporation of the State of New Jersey, which is a sub-contractor under A. C. Windsor, the contractor engaged in the erection of said Bragaw Avenue School under a contract with the Board of Education of the City of Newark. Said materials were furnished to said sub-contractor and were actually used

Exhibit D. 1.

in the execution of said contract with said Board of Education.

AMERICAN HARDWARE CORPORATION
OF NEW YORK

By WALTER S. JOHNSON,
Assistant Secretary

Dated—April 15th, 1929.

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

WALTER S. JOHNSON, being duly sworn according to law deposes and says: That he is Assistant Secretary of American Hardware Corporation of New York, the lien claimant named in the foregoing notice of lien; that he has read the said notice and knows the contents thereof and that the statements therein contained are true.

WALTER S. JOHNSON,
Asst. Secretary.

Subscribed and sworn to before me,
a Notary Public of the State of
New York, this 18th day of April,
1929.

FLORA M. FOX,
Notary Public New York County,
State of New York.

CONCLUSIONS.

Filed January 13, 1930.

IN CHANCERY OF NEW JERSEY.

Between	
AMERICAN HARDWARE CORPORATION OF NEW YORK, a corporation, *Complainant,*	*On Bill, etc.*
and	*On Final Hearing.*
BOARD OF EDUCATION OF THE CITY OF NEWARK, *et als., Defendants.*	*Conclusions.*
	Docket 73, page 483.

Pitney, Hardin & Skinner, for the complainant.
Corn & Silverman, for the defendant.

SYLLABUS.

1. The right of one who furnishes labor or material to a sub-contractor under a municipal contract for the erection of a public school, to a lien against the fund in the hands of the municipality due or to grow due to the general contractor, is not affected by the insolvency of the sub-contractor and the appointment of a receiver prior to the filing of notice of such lien.

2. *Ocumpaugh* v. *Linde & Griffith Co.,* 95 N. J. Eq. 228, followed.

BERRY, *V.-C.:*

This is a suit to enforce a municipal mechanics' lien claim. The complainant furnished materials to A. C. Galm, Inc., a sub-contractor

Conclusions.

which was declared insolvent by this court and for which a receiver was appointed on April 16, 1929. The notice of lien was filed three days later. The receiver of the sub-contractor is a party defendant to this proceeding and invokes the familiar rule of *Mack Manufacturing Company* v. *Citizens' Construction Company,* 85 N. J. Eq. 331 (affirmed 86 N. J. Eq. 254), to the effect that no lien attaches to the funds in the custody of the municipality if the notice of lien is filed after the contractor is declared insolvent and a receiver appointed, and the question as to the application of that rule to the present controversy was the only point reserved at the final hearing. This question is disposed of adversely to the claim of the defendant receiver by the decision of the Court of Errors and Appeals in *Ocumpaugh* v. *Linde & Griffith Company,* 95 N. J. Eq. 228, where this exact point was involved. The reasoning of Justice Kalisch who wrote the opinion for the Court of Errors and Appeals in that case indicates that the lien is given to claimants who furnish labor or material under a municipal contract pursuant to "a well-defined state policy one of the principal objects of which is to secure" to the materialman payment for materials furnished, and that the lien is against the funds in the hands of the municipality due or to grow due to the general contractor without regard to any claims which a sub-contractor might have against the general contractor; in other words, the lien runs to the materialman through and by virtue of the contract between the municipality and the general contractor, and this is not interrupted by the insolvency of a sub-contractor to whom the municipality owes no duty under its contract.

Conclusions.

Funds in the hands of the municipality against which the insolvent sub-contractor might have a right of lien are not assets of the insolvent estate for the very good reason that until such right of lien is perfected the sub-contractor has no claim or right of action against the municipality. Until the lien is perfected by the statutory proceeding the sub-contractor's claim is against the general contractor only; consequently it cannot be said that any portion of the fund in the hands of the municipality is in *custodie legis* upon the appointment of a receiver for the sub-contractor. That fund is not affected by such appointment, but remains subject to statutory liens if and when asserted in conformity with statutory requirements. In the *Ocumpaugh* case Justice Kalisch said at page 232 of the report of the case:

> "It is clear that the funds in the hands of the municipalities could not in any aspect have become a part of the assets of the bankrupt company until it or its trustees had impressed upon such fund a statutory lien in the bankrupt's favor, and even then such statutory lien would be subservient to the statutory liens, upon the fund, of the party who furnished the materials and did the work for the bankrupt sub-contracting company."

This language is very forceful and peculiarly applicable to the case at bar.

I will advise a decree for the complainant.

Decided January 10, 1930.

FINAL DECREE.

Filed January 21, 1930.

IN CHANCERY OF NEW JERSEY.

Between

AMERICAN HARDWARE CORPORATION OF NEW YORK,
Complainant,

and

A. C. GALM, INC., and others,
Defendants.

On Bill, etc.

Final Decree.

This cause coming on to be heard in the presence of Pitney, Hardin & Skinner, solicitors of complainant, and Corn & Silverman, solicitors of the defendants, Harry G. Hendricks, as receiver of A. C. Galm, Inc., and Catherine Trube, and it appearing that the Bill of Complaint filed herein has been taken as confessed against the defendants, A. C. Windsor, Inc., The Board of Education of the City of Newark and A. C. Galm, Inc.; and it further appearing that the defendants, Harry G. Hendricks, as receiver aforesaid, and Catherine Trube, have filed an answer herein;

And it further appearing that the defendant, The Board of Education of the City of Newark, has funds in its hands under a certain contract with A. C. Windsor, Inc., as contractor for the erection of a certain school in the City of Newark known as Bragaw Avenue School, which funds are sufficient to cover the amount of all municipal mechanics' lien claims filed against said funds and still unpaid; and it further ap-

pearing that complainant filed a notice of municipal mechanics' lien claim against said fund for materials furnished and used in the erection of said school in the sum of $2,463.20; and the Court having heard and considered the evidence and the argument of counsel;

It is thereupon on the twenty-first day of January, 1930, Ordered, Adjudged and Decreed that the lien of complainant is a valid lien against said fund in the hands of The Board of Education of the City of Newark, and that the defendant, The Board of Education of the City of Newark, do pay to complainant the sum of $2,463.20 out of the money due from it to said contractor under the contract for the erection of the said Bragaw Avenue School.

It is further Ordered, Adjudged and Decreed that the answering defendant, Catherine Trube, do pay to complainant costs of this suit to be taxed.

Respectfully advised.

MAJA LEON BERRY,
V.-C.

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

New Jersey Court of Errors and Appeals

AMERICAN HARDWARE CORPORATION, *Complainant-Respondent,* *vs.* A. C. GALM, INC., *et als.,* *Defendants-Appellants.*	*On Appeal from Court of Chancery.*

APPELLANTS' BRIEF.

Facts.

This action is brought under the "Municipal Mechanics' Lien Laws."

The bill of complaint, filed June 19, 1929, alleges that between November 19, 1928 and February 25, 1929, complainant furnished materials amounting to $2,463.20 to defendant A. C. Galm, Inc., a corporation, which were used in the erection of a public school, known as Bragaw Avenue School, in Newark, New Jersey. That the materials were used by A. C. Galm, Inc., as subcontractor of defendant A. C. Windsor, Inc., the contractor named in a contract with defendant Newark Board of Education. That on March 28, 1929 the Board accepted the work. That on April 19, 1929 complainant served its notice of lien claim by leaving a copy with the Assistant Secretary of the School Board. That on April 16, 1929 A. C. Galm, Inc. was declared insolvent by the Court of Chancery of New Jersey and defendant Harry G. Hendricks was appointed receiver of all its assets and property. That said receiver, under direction of the Court, assigned the claim against A. C.

Windsor, Inc., and the Board to defendant Catherine Trube. It concludes with a claim of lien.

The answer admits the appointment of a receiver for A. C. Galm, Inc., and the assignment to Catherine Trube, denies complainant's right to lien, and leaves complainant to proof of its other allegations.

At final hearing it appeared the contract for the sale of the goods to A. C. Galm, Inc., was made with P. & F. Corbin, the order for the goods was addressed to "P. & F. Corbin Manufacturing Company" and marked "Received P. &. F. Corbin," and that "P. & F. Corbin" was a division of complainant corporation. It further appeared that a lien claim of Buhl & Caffrey (who are not party to this suit) for $689 on the Bragaw Avenue School job was still in dispute. The contract between the Board and the contractor was not offered nor testified to. There was no proof that the goods delivered by complainant were used pursuant to any contract between the contractor and the school board .

Final decree was entered awarding the lien and taxing costs against defendant Catherine Trube.

The grounds of appeal are that (1) the lien claim was not filed with the proper officer, (2) it was filed after appointment of a receiver for A. C. Galm, Inc., (3) it was not properly verified, (4)it does not specify the fund on which it is to attach, (5) there was no proof that the materials were furnished pursuant to contract made between the contractor and the Board, (6) there was no proof that the materials were used in the completion of such contract, (7) there was no proof of the contract between the contractor and the Board, (8) there was no proof of a debt

due to complainant, (9) suit was not brought within time, (10) Buhl & Caffrey were not made parties hereto, (11) the contractor is named differently in the lien and in the bill of complaint, and (12) costs were taxed against Catherine Trube.

POINT 1.

Complainant's lien claim was not filed with the proper officer.

Section 2 of the Municipal Mechanics' Lien Law (P. L. 1918, p. 1041) provides that the notice of lien be filed "with the chairman or other head officer, or with the secretary or clerk of the county, city, town, township, public board or commission, or other municipality, with which the contract for said work was made." The filing here was made with the Assistant-Secretary of the Board of Education.

The Legislature, by expressly naming the officers with whom the notice is to be filed, evidently intended that it should not be filed with any one else. Had our law-making body contemplated filing with an assistant, there would have been added appropriate language. It is apparent that the design was for the notice to be given to one of the responsible officers named, for by the next (the third) section of the Act the duty is placed on "the officer upon whom notice of lien is served to give notice of the filing thereof to the financial officer of the municipality." By extending the class of persons with whom the notice may be filed, the probability of failure to notify the financial officer of the municipality is increased. If filing with an Assistant Secretary be proper, then why may not the notice of lien be filed with an acting secre-

tary or the secretary's stenographer or his office boy? Where is the line to be drawn? The law permits filing with the chairman or other head officer or the secretary or clerk, one of whom surely is always to be found. Complainant did not allege or show that it was unable to find any of these officials with whom to file the notice.

POINT 2.

Complainant's lien claim was filed after a receiver was appointed for A. C. Galm, Inc.

Section 5 of the Municipal Mechanics' Lien Law provides that "The lien shall attach from the time of the filing thereof, to the extent the liability of the contractor or subcontractor, as the case may be, for the claim preferred."

A claimant has no inchoate lien. His lien does not come into existence or effect until he files his lien claim.

> "The lien attaches at the moment of the filing of the notice, and does not relate to the time when the labor or materials were furnished."
>
> *Garretson* v. *Clark* (Ch. Ct. 1904) 57 Atl. 414 (not officially reported).

> "In the act of 1892, now under consideration, there is * * * no inchoate lien on the fund." *Somers Brick Co.* v. *Souder* (Ch. Ct. 1905) 70 N. J. Eq. 388; modified (E. & A. Ct. 1908) 71 N. J. Eq. 158, but affirmed as to this point, this Court holding:
>
> "The notice of claims of the materialmen became liens from the time of the notice, as was correctly held by the Vice Chancellor."
>
> "The statute under which complainant claims a lien expressly provides that the lien shall attach from the time it is filed, and our courts have repeatedly held that this provision, unlike the provisions of the Mechanics' Lien Act, which relates the lien to a

prior date, is destructive of the idea of an inchoate lien prior to that date."

Mack Mfg. Co. v. *Citizens Trust Co.* (Ch. Ct. 1915) 85 N. J. Eq. 331; affirmed (E. & A. Ct. 1916) 86 N. J. Eq. 254.

"The lien is created only by the filing of the notices, and takes effect from the completion of such filing."

Agnew v. *Board of Education* (Ch. Ct. 1914) 83 N. J. Eq. 49; affirmed (E. & A. Ct. 1914) 83 N. J. Eq. 336.

To the same effect are also:

Cope v. *Walton Co.* (Ch. Ct. 1910) 77 N. J. Eq. 512.

Board of Education v. *Tait* (Ch. Ct. 1912) 80 N. J. Eq. 94.

It therefore follows that the bankruptcy or insolvency of the contractor or subcontractor, and the appointment of a trustee or receiver for him or it, puts to an end lienability of all claims of every creditor of such bankrupt person or insolvent corporation.

"If therefore, no bankruptcy receivership had intervened, these liens for wages would have been created, and would have been entitled to the priority which the statute gives them. I think, however, that no liens were affected by the filing of these notices by the laborers, who are the claimants, because the subject-matter of the liens (the fund) was in *custodia legis* and under the control of the Bankrupt Court, and therefore the filing of the notices was entirely inoperative."

Agnew v. *Board of Education, supra.*

"Complainant has acquired no lien under the act, and its bill must be accordingly dismissed. The insolvency provision of our corporation act renders it clear that upon the appointment of a receiver in insolvency, the title of the insolvent corporation to its

assets are divested and forthwith vested in the receiver, subject only to the liens then existing, to the end that an equal distribution of the net assets may be made among general creditors. The assets are thus placed in *custodia legis* for the purpost stated. * * * The creation of any liens against the assets after the appointment and qualification of a receiver are utterly destructive of the obvious purposes of the act, unless, perchance, such liens may be properly based upon rights antecedent the receivership."

Mack Mfg. Co. v. *Citizens Trust Co., supra.*

"The claims filed after the receiver (of an insolvent corporation) was appointed are, in my opinion, void."

Hoffman Builders' Supply v. *Stein* (Ch. Ct. 1924) 96 N. J. Eq. 241.

"The lien claims filed after the appointment of the receiver do not attach to the fund."

Board of Education v. *Zink* (Ch. Ct. 1927) 101 N. J. Eq. 78

We submit that the case cited by the trial court (State of Case, pp. 37-39): *Ocumpaugh* v. *Linde & Griffith Co.* (Ch. Ct. 1923) 94 N. J. Eq. 602; reversed (E. & A. Ct. 1923) 95 N. J. Eq. 228, is not in point. The facts, as brought out by the Vice-Chancellor, are that on December 6, 1921 Ajax Electric Co., the subcontractor, was adjudged a bankrupt; on December 17, 1921 complainant filed his lien, and on December 22, 1921 a trustee was appointed in the bankruptcy proceedings. Thus, it is clear, the lien was filed before the appointment of a trustee. In the instant case the lien was filed three days after the appointment of a statutory receiver. It is significant that Vice Chancellor Lewis, in the Ocumpaugh case, held: "I do not see, however,

how any distinction can be drawn between the effect of the bankruptcy of the main contractor, as decided in the Agnew case, and the bankruptcy of a subcontractor, as in this case;" this Court did not overrule that holding, but reversed the decree because the Vice-Chancellor adopted the view "that the adjudication in bankruptcy, having taken place on December 6, 1921, invalidated the filing of the complainant's lien on December 17, 1921." It is not the date of adjudication in bankruptcy or insolvency, but the date of appointment of trustee or receiver, that controls.

Respondent may cite the case of *Atlantic City Lumber Co.* v. *Atlantic City* (E. & A. Ct. 1929) 7 A. R. 820, 146 Atl. 307 (not yet officially reported) but this is not authority for or against respondent's or appellants' contention. All that there appears is that the subcontractor was insolvent, but whether and when it was so declared by a court of competent jurisdiction, and if so whether and when a receiver was appointed, does not appear, nor was the point now under discussion there involved. The only issues raised on the appeal were whether a general verification to the claim was sufficient, whether the materials furnished were used in the building and whether the failure of the subcontractor to complete the work was fatal to the claim.

The Act (Section 5) makes no distinction between a contractor and a subcontractor, for it provides for the lien to attach from the time of its filing to the extent of the liability of the *contractor or subcontractor as the case may be.* Surely this cannot be interpreted one way as affecting the contractor and another as affecting the subcontractor.

The distinction as to the rights of creditors is not as to whether the insolvent or bankrupt

debtor was a contractor or a subcontractor, but whether the lien was filed before or after a receiver was appointed for the debtor.

> "My conclusion is that an order of the bankrupt court appointing a general receiver of the entire bankrupt estate, directing the delivery of such estate to him as far as possible from the bankrupt, and enjoining all other persons from transferring or otherwise interfering with a property, assets, and effects of the bankrupt, etc., effects a sequestration of the bankrupt's estate to such extent as to prevent the acquisition of any new lien. The creation of such a receivership in bankruptcy may be a very serious affair, and bankrupt courts wisely exercise caution in regard to the matter. There is a wide difference between the status of the alleged bankrupt's estate in its relation to himself and third parties, when merely a petition has been filed against him, and the status of that estate when the bankrupt court has appointed a receiver in order to strip the alleged bankrupt of all his assets and put them into the possession of such receiver. I think, therefore, that the proposition, advanced by counsel for the trustee in bankruptcy, that this receivership order prevented the creation of all liens by notice under our statute after December 12, 1910, at 4 P. M. is sound law, so that, if either by the decree of this court or by the decree of the Court of Errors and Appeals the lien of the John Agnew Company and the assignment to the First National Bank of Town of Union should be declared void, a substantial sum would pass to the trustee in bankruptcy, to the exclusion of the long list of lienors whose notices were filed after the order appointing the receiver was entered."
>
> *Agnew* v. *Board of Education, supra.*

Although, technically, the title of a receiver or trustee relates back to the date of the filing

of the insolvency bill (P. L. 1919, p. 456, sec. 4) or of the adjudication in bankruptcy (Federal Bank. Act, Sec. 70a), the assets and property of the insolvent corporation or bankrupt are not actually in *custodia legis* until a receiver or trustee is appointed.

> "*Custodia legis* is that custody only which an officer has the right to assume over property by virtue of legal process. The term involves the actual domination over some objective thing by the court."
> 31 C. J. 357.

> "The order appointing the bankruptcy receiver placed the whole fund in *custodia legis.*"
> *Agnew* v. *Board of Education, supra.*

> "Receivers are arms of the Court of Chancery and the appointment of receivers * * * put the property of defendant corporation in *custodia legis.*"
> *Scranton Button Co.* v. *Neonlite Corp.* (Ch. Ct. 1930) 105 N. J. Eq. 708.

Thus, in *Moore* v. *Mercer Wire Co.* (Ch. Ct. 1888) 15 Atl. 737 (not officially reported) Vice Chancellor Bird held that one who takes property from a receiver of an insolvent corporation is guilty of a contempt for "the possession of the receiver in this as in every other case was the possession of the court, or of the law."

The same principle applied as between a judgment creditor and a claimant, in *Kienzlan* v. *Board of Education* (Ch. Ct. 1927) 100 N. J. Eq. 511; affirmed (E. & A. Ct. 1928) 6 A. R. 488, where it was held "the levy under the execution here places the fund in *custodia legis,* and the subsequent filing of a lien claim gives the lien claimants no priority as to the fund seized."

Section 5 of the Municipal Mechanics' Lien Law designates the claim as a preferred one.

The Mack case held the creation of liens after appointment of receivership to be contrary to the Corporation Act. Since then the Corporation Act was supplemented (P. L. 1919, p. 456, sec. 3) making null and void all liens and priorities after the filing of a bill whereby a receiver in insolvency is appointed. The provisions of this supplement are broad enough to render complainant's lien null and void.

POINT 3.

Complainant's lien claim was not properly verified.

The notice of lien (State of Case, pp. 35-36) is signed and sworn by Walter S. Johnson, Assistant Secretary of complainant. Is this a compliance with section 2 of the Act which permits "any claimant" to file a notice which shall be "verified by oath or affirmation"?

A secretary (and more so, an assistant secretary) of a corporation has not the apparent power to act for the corporation in making an affidavit.

> "The authority of the secretary of a corporation, as defined in our act concerning corporations (P. L. 1896, p. 277, sec. 13) is 'to record all the votes of the corporation and directors * * * and perform such other duties as shall be assigned to him.' Plainly in the absence of a special assignment, the authority thus defined does not extend to the making of an affidavit upon which litigation is to be instituted."
>
> *Iron Co.* v. *Boyce* (*Sup Ct.* 1904) 71 N. J. Law 434.

> "Acts of a president or vice president of a mortgagee corporation are in legal contemplation the acts of the corporation. Those

of a secretary or agent may or may not be. This affidavit is therefore defective."

Pincus v. *U. S. Dyeing & Cleaning Works* (Ch. Ct. 1926) 99 N. J. Eq. 160.

Neither the notice of lien nor the affidavit annexed thereto recite that Mr. Johnson had any special assignment to execute the same, or that he had appropriate authority so to do. On the face of the notice it does not appear that, in legal contemplation, the complainant made the notice or verified it. Even though Mr. Johnson may have actually had authority to bind complainant by the notice and verification, this does not cure the fatal defect apparent on the instrument. The instant proceedings are statutory and must be strictly complied with by the claimant before he can recover.

POINT 4.

Complainant's lien claim does not specify the fund on which it was intended to operate.

The notice of lien (State of Case, pp. 35-36) merely says that complainant "has and claims a lien" but does not show on what fund the lien is alleged to attach.

Section 1 of the Act provides for a lien "upon the moneys in control of said municipality due or to grow due under said contract" (with the contractor.) Section 2 provides that the notice of lien shall state "the amount claimed" and "the amount of the demand." Section 3 requires the lien book to contain "a brief designation of the municipal contract upon which the claim is made." Section 4 provides "no lien provided for in this act shall be binding, on the funds of the municipality therein referred to" unless action be brought. Section 5 attaches the lien "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." Section 7 provides for service "upon any person who by the records of the municipality may appear to have any interest in the fund in the possession of the municipality against which such labor claim or claim for material furnished is filed." Section 8 provides that "any claimant who has filed the notice mentioned in the second section of this act may enforce his claim against the fund therein designated" by suit.

There can be no lien without a fund.

> "It is quite plain that unless there is some fund to which the lien can attach, there necessarily can be no lien."
>
> *Meurer* v. *Kilgus* (Ch. Ct. 1910) 77 N. J. Eq. 175.

As the lien attaches on money due to the contractor from the municipality under the contract (section 1) the notice should specify that a lien is claimed on a definite sum due to a definite contractor under a definite contract, so that the municipality can ascertain the moneys and the contract involved.

The notice here involved contains but one sum, $2,463.20 stated as the amount claimed. But section 2 requires two amounts to be stated "the amount claimed" and "the amount of the demand;" it could hardly be said that both amounts are identical, and refer to the balance due the claimant. We submit that "the amount claimed" has reference to the fund on which the lien is claimed, for, by section one, the lien binds the amount "due or to grow due under said contract." Following "the amount claimed," in section 2, is "from whom due, and if not due, when it will be due;" this requires disclosure

of the name of the municipality making the contract, and the time of future payments according to the contract. One can hardly believe that the Legislature intended this to apply to claimant's claim, for how can one file a lien for moneys which are not yet due to him? A statement of "the amount of the demand" and "the name of the person by whom employed, or to whom the materials were furnished" sets out the amount due the claimant and from whom due. Did the Legislature mean that the amount of the claim and the name of the debtor be given twice in the same notice? We think not. The amounts are those due from the municipality and from the debtor, and the names to be inserted are those of the municipality and of the debtor.

How can the lien book contain a "designation of the municipal contract upon which the claim is made" (per section 3), unless the notice expressly sets out a claim of lien upon such contract?

Under section 4 there can be no question that the notice of lien must refer to the funds of the municipality on which it is to take effect. The lien binds only the fund therein specified.

The lien attaches to the funds due or to grow due under the contract against which it is filed (section 5). If the claimant does not state a claim of lien against definite funds under a definite contract, there can be no lien.

Notices cannot be given, under section 7, unless the filed claim of lien specifies the fund of the municipality applicable thereto, for otherwise record cannot be made of such claim.

By section 8, suit for enforcement of the lien is against "the fund therein designated," so

that, if no fund is therein designated, there is nothing to enforce.

Complainant's lien claim, by way of description of A. C. Galm, Inc., makes mention of a contract between the contractor and the municipality but fails to state that the lien is claimed upon such contract or the moneys due or to grow due thereunder. Neither the date of said contract, nor any other means of identification, nor the amount thereof, nor the amount of the fund held by the Board appears in the notice of lien. That there may have been a misunderstanding as to what fund the lien was intended to attach is evident from paragraph 3 of the bill of complaint (State of Case, p. 7, l. 36) where the balance held by the Board is stated as $1,621.15, whereas the testimony (same, p. 25, l. 40) shows this balance to be $3,152.36.

POINT 5.

Complainant did not prove that it performed any labor or furnished any material toward the performance of any contract for public improvement made between A. C. Windsor and the Municipality.

The notice of lien (State of Case, p. 35, l. 33) alleged that the materials were so used in execution of the contract with the Board, and such statement is required by section 2 of the Act. The answer denied complainant's right of lien, which made it complainant's duty to prove that allegation. Section one of the Act gives a lien for materials furnished toward the performance or completion of any such contract; thus it is not sufficient to show that the materials went into the public building but it must be proved that the materials were furnished pursuant to

the contract with the municipality. Thus one who installed electrical fixtures in a public building would have no lien if the contract with the municipality did not provide for such fixtures or provided for fixtures other than as supplied by the claimant.

There was no proof of any kind as to the contents of the contract between A. C. Windsr, Inc., and the Board of Education. There was no proof that such contract called for hardware or that the hardware supplied by cmplainant was that provided for in such contrct.

POINT 6.

Complainant did not prove that the materials sold by it to A. C. Galm, Inc., were actually used in the erection or completion of the contract between the Contractor and the Municipality.

The Windsor contract not having been offered, nor any testimony introduced linking the use of the materials with the contract, there was nothing before the court to show that complainant's materials were actually used in the completion of such contract. The Act (section 2) requires the notice to state that the materials "were actually performed or used in the execution or completion of the said contract with the municipality" and of course the claimant must prove this to obtain a lien.

POINT 7.

Complainant did not prove the contract, if any, between A. C. Windsor and the Municipality.

The assistant-secretary of the Board of Education testified (State of Case, pp. 24-26) but did

not mention or refer to the Windsor contract. For all that appears in the proofs the Board had made no contract with Windsor. The lien attaches only by virtue of a contract made with the municipality.

POINT 8.

Complainant did not prove that A. C. Galm, Inc., was indebted to complainant.

The proofs indicate that the creditor is "P. & F. Corbin" and not the complainant.

The contract with A. C. Galm, Inc., was made with P. & F. Corbin (State of Case, p. 22, l. 20). The orders were addressed to P. & F. Corbin Manufacturing Co. (same, ll. 25-30). Acknowledgment of the orders was made by P. & F. Corbin (same, l. 32). Complainant's name does not appear on the contract or orders (same, l. 35). The Secretary of A. C. Galm, Inc., speaks of dealings with P. & F. Corbin (same, p. 30, ll. 13-23).

POINT 9.

Complainant did not bring the action to enforce the lien claim within sixty days from the filing thereof.

Section 4 of the Act provides that no lien shall be binding unless an action to enforce the lien claim be brought within sixty days from the filing thereof.

On April 19, 1929, the lien was filed. The bill of complaint was filed June 19, 1929. The interval is 61 days: 11 days in April, 31 in May and 19 in June.

POINT 10.

Complainant did not make parties to the suit all who have filed claims.

The testimony disclosed (State of Case, p. 26, l. 13) that Buhl & Caffrey had filed a lien for $689 against the fund, which was still in dispute.

Section 9 of the Act provides "the claimant first bringing an action for the enforcement of his claim in the Court of Chancery must make parties to the suit all who have filed claims." Must is most mandatory. The failure to bring in Buhl & Caffrey is fatal, especially since complainant knew of this before institution of this suit (State of Case, p. 26, ll. 13 to 23). Complainant could have brought those claimants in as defendants, under section 9 of the Act, or have moved to consolidate the actions, or have asked for a continuance to bring them in.

Such a positive requirement of the statute, making it obligatory on the complainant to make parties all who have filed claims, cannot be avoided no matter for what reason. And complainant has not offered any excuse whereby one may sympathize with its failure to obey the mandate.

The usual practice of the Court of Chancery cannot prevail where the statute directs otherwise.

> "It must be remembered that the proceeding is wholly statutory (under the Municipal Mechanics' Lien Law), and can be in touch with the ordinary systematic methods of the Court of Chancery only at the point of procedure. Beyond mere procedure, the

rights, duties and liabilities of the parties are regulated by statute."

U. S. Fidelity & G. Co. v. *Newark* (Ch. Ct. 1907) 72 N. J. Eq. 841.

POINT 11.

The lien claim names the contractor as A. C. Windsor and the bill of complaint names the contractor as A. C. Windsor, Inc.

The notice (State of Case, p. 35, l. 30) names the contractor as "A. C. Windsor." The bill of complaint (same, p. 7, l. 23) names the contractor as "A. C. Windsor, Inc." It is to be noticed that one is an individual and the other a corporation. The contractor named in the notice was not made party to the suit, and the contractor named in the suit was not mentioned in the notice. The variance is fatal.

> "As the rights of the claimants is wholly dependent upon the force of that statute (Municipal Mechanics' Lien Law), the omission of any claimant to comply with its requirements must operate to defeat his claim."
>
> *Somers Brick Co.* v. *Souder* (Ch. Ct. 1905) 70 N. J. Eq. 388.

POINT 12.

Defendant Catherine Trube was charged with costs of suit.

In actions under the Municipal Mechanics' Lien Law the costs of a successful complainant comes out of the fund.

Agnew Co. v. *Board,* 83 N. J. Eq. 49, affirmed 83 N. J. Eq. 336.

In *Hall* v. *Jersey City,* 64 N. J. Eq. 766, the Court of Chancery (62 N. J. Eq. 489) was re-

versed in allowing costs against a defeated defendant, this Court declaring that the award of costs was unwarranted and that costs should be paid out of the fund.

We respectfully submit that the decree of the Court of Chancery should be reversed.

CORN & SILVERMAN,
Counsel for Appellants.

New Jersey Court of Errors and Appeals

BETWEEN AMERICAN HARDWARE CORPORATION OF NEW YORK, *Complainant-Respondent,* *and* A. C. GALM, INC., and others, *Defendants-Appellants.*	On Appeal from the Court of Chancery. BRIEF OF COMPLAINANT-RESPONDENT.

The Bill of Complaint in this cause was filed June 14, 1929, (not June 19, 1929 as stated in appellants' brief) to enforce a municipal mechanics' lien claim for materials furnished by complainant to A. C. Galm, Inc. and used in the erection of a school known as Bragaw Avenue School in the City of Newark, under a contract between A. C. Windsor, Inc. and The Board of Education of the City of Newark. A. C. Galm, Inc., (hereinafter called "Galm"), held a sub-contract for the furnishing and installation of the hardware used in the erection of said building.

On April 19, 1929 a notice of lien claim was filed by the complainant-respondent with the Secretary of the Board of Education through the Assistant Secretary. Prior to the filing of such notice the sub-contractor, Galm, was declared insolvent and Harry G. Hendricks was appointed receiver thereof by the Court of Chancery. The receiver is one of the appellants. The other appellant is the pur-

chaser of the accounts receivable of Galm on receiver's sale. Neither of the appellants filed a notice of lien claim with the municipal body or has an interest in the fund held by such body. The municipal body holds sufficient funds to cover all municipal mechanic's lien claims remaining unpaid. No answer was filed in this cause by either the municipal board or the main contractor.

At the hearing before the learned Vice Chancellor respondent submitted uncontradicted proof that the materials furnished by respondent under its agreement with Galm were all used in the erection of the building in pursuance of the terms of the main contract. The appellants introduced no evidence at the hearing.

POINT I.

Respondent's lien was filed with the proper officer.

The bill of complaint as amended, in Paragraph 4, (Record page 13), states that "Complainant served upon the Secretary of the Board of Education of the City of Newark, by leaving a copy with the Assistant Secretary acting for the Secretary and in charge of the Secretary's office in the absence of the Secretary, a notice of lien claim." The Assistant Secretary testified (Record pages 24 and 25) that he, acting for the Secretary, received a notice of mechanic's lien claim from the American Hardware Corporation, (the respondent), and that he was authorized to act for the Secretary in receiving such notices, and that the manual adopted by the Board of Education fixes as the powers and duties of the Assistant Secre-

tary "the duty to assist the Secretary in the discharge of his duties. In the absence of the Secretary he shall perform the duties of that office".

The Municipal Mechanic's Lien Act (Revision of 1918) 1 Supp. 1924 page 1859, provides, in Section 2, for filing of the notice of lien claim upon the persons generally in charge of the affairs and records of a public body, to wit, the chairman or other head officer or the secretary or clerk. The purpose of the filing is to give notice to the municipality. The sufficiency of the notice is mainly to be determined by a consideration of the objects of the notice. *Agnew Co.* vs. *Paterson Board of Education,* 83 N. J. E. 49, 60.

It is generally recognized that the chief officers of large municipal bodies have such multifarious duties that routine matters must be delegated by them to assistants, to perform in their name, in order that they may give the time and attention to the more important matters connected with their office.

It is respectfully submitted that respondent's lien claim was filed with the Secretary in compliance with the provisions of the act above set forth.

POINT II.

The insolvency of the sub-contractor had no effect upon the respondent's lien claim.

It is admitted that a receiver for the sub-contractor, Galm, was appointed by the Court of Chancery on April 16, 1929, and that the notice of lien claim was filed by the respondent on April 19, 1929. The main contractor is perfectly solvent. Section 1 of the act gives to a claimant who, "in pursuance

of or conformity with the terms of any contract for any public improvement made between any person or corporation and any . . . public board", complies with the provisions of the act "a lien for the value of such labor or materials or both upon the moneys in the control of said municipality due or to grow due under said contract". This section clearly provides for the creation of a lien upon the funds in the hands of the municipality due or to grow due to the main contractor. Of course, if a receiver were appointed for the main contractor the funds would be due from the municipality to such receiver, not to the main contractor. *But the insolvency of a sub-contractor in no way affects the indebtedness running from the municipality to the main contractor. Ocumpaugh* v. *Linde & Griffith Company,* 95 N. J. E. 228 (reversing 94 N. J. E. 602); *Atlantic City Lumber Company* vs. *Atlantic City,* 7 A. R. 820.

With the exception of the cases just cited, none of the cases referred to by the appellants under Point 2 of their brief involves the bankruptcy or insolvency of a sub-contractor as distinguished from a main contractor, and they are for this reason not in point.

In *Ocumpaugh* v. *Linde & Griffith Company,* supra, the late Justice Kalisch, on the appeal to this Court, stated:

> "The Linde & Griffith Company subcontracted the electrical work and equipment required for the operation of the gates to the Ajax Electric Company. The latter, in turn, subcontracted the same work to the complainant, which work he completed, as required, by October 10, 1921. The entire contract was completed at that time, and was accepted by the municipalities on or about October 27, 1921. The Ajax Electrical Company failed to pay to complainant what was due to him for

the materials furnished and the work done by him. On December 6, 1921, the company was adjudicated a bankrupt. There was a certain amount of the contract price withheld by the counties from the Linde & Griffith Company, in accordance with the terms of their contract. On December 17, 1921, complainant gave notice of his lien claim, within the time prescribed by the statute, to the municipalities and general contractor, and filed such notice of lien claim in accordance with the requirements of the Municipal Lien Act of 1918, supra.

"On behalf of the trustee in bankruptcy a motion was made to dismiss the bill of complaint on the ground that the adjudication in bankruptcy, having taken place on December 6, 1921, invalidated the filing of the complainant's lien on December 17, 1921, and that the funds due from Linde & Griffith Company, the main contractor, to the Ajax Electric Company, the first subcontractor, the bankrupt, are assets of the bankrupt estate, and that the complainant must come in under the bankruptcy proceedings and share with the general creditors of the bankrupt. The learned Vice Chancellor, practically adopted that view, and dismissed complainant's bill. We think the complainant was entitled to the relief sought, and that the bill was therefore erroneously dismissed.

"In the present case the complainant filed his bill of complaint to enforce his lien claim on the funds of the municipality within 60 days from the filing thereof, and by virtue of section 4 of the statute under which the proceedings were had the complainant's claim became a binding and subsisting lien upon such funds.

"The Municipal Mechanics' Lien Law of 1918 is the outgrowth of a settled and well-defined state policy, one of the principal objects of which is to secure to the merchant or trader who furnishes materials and to the mechanic

or workman who performs labor, under contracts let out to contractors by municipalities for any public improvement, payment for the materials furnished and for the work performed. The obligation resting upon the municipality is to pay the principal contractor, unless lien notices of subcontractors and materialmen or workmen are served upon the municipality, and when such notices are served the municipality may pay to the principal contractor all sums in excess of what is required to meet the claims of lienors.

"It is quite obvious that the counties of Essex and Hudson were not indebted in any sum to the Ajax Electric Company, and that the latter had not the slightest claim upon the funds of these municipalities which by their contract were payable to the Linde & Griffith Company, the principal contractor. The only manner in which the Ajax Company could have a legal interest in and a lien upon the funds in question would have been by taking proceedings under the statute. This the company did not see fit to do, and therefore its only enforceable claim was against Linde & Griffith Company, with obligation to pay out of its funds to the Ajax Company, with whom it had a subcontract, and upon whom was cast the legal debt owing to the latter, but not out of any particular fund remaining in the hands of the municipalities." . . .

"It is clear that the funds in the hands of the municipalities could not in any aspect have become a part of the assets of the bankrupt company until it or its trustee had impressed upon such fund a statutory lien in the bankrupt's favor, and even then such statutory lien would be subservient to the statutory liens upon the fund of the parties who furnished the materials and did the work for the bankrupt subcontracting company.

"The complainant is clearly entitled to be paid out of the fund withheld by the municipalities his claim, if valid, for the materials

which he furnished to and for the work done by him for the Ajax Company.

"The decree below is reversed, with the direction that the municipalities be decreed to pay to the complainant out of the fund in their possession arising out of their contract with the Linde & Griffith Company such sum as shall be found due him from the Ajax Company on his statutory lien."

It is respectfully submitted that the law on this point, which appellants' solicitors admitted was "the real question of law which is involved in this case" (Record, page 32) has been definitely settled in favor of the respondent.

POINT III.

Respondent's lien claim was properly verified.

The appellants imply that as the lien claim was verified by the Assistant Secretary of the respondent corporation, it is possible that such verification was without authority. Counsel apparently overlooked the fact that at the hearing counsel admitted, for the purpose of the record, that Walter S. Johnson, the Assistant Secretary, had sufficient authority to verify the claim (Record, page 32).

POINT IV.

The notice of lien claim sets forth all the information required by the statute.

A comparison of the lien claim with the provisions of Paragraph 2 of the Act will show that the notice sets forth, in order, the facts as therein specified, including the amount claimed by the

claimant and due, from whom due, the name of the person to whom as a sub-contractor the materials were furnished, the nature of the public work, the name of the contractor with the municipality, the name of the municipality and the fact that the materials were actually used in the execution of said contract with the municipality. Such facts identified the contract and the fund to the satisfaction of the municipal body, (Record, page 25), and were sufficient to enable counsel for the appellants to cross-examine the Assistant Secretary of the Board of Education as to the balance "still remaining on this contract and unpaid by the City of Newark". (Record, page 25).

Paragraph 2 of the Act provides that the notice shall state "the amount claimed, from whom due, and if not due, when it will be due, and shall state as nearly as may be the amount of the demand after deducting all just credits and off-sets". The appellants purport to read into these words a requirement that the amount due from the municipality and from the debtor must be inserted in the notice. Such construction not only strains the ordinary meaning of the words of the statute but ignores the legislative intent as more clearly illustrated in Paragraph 2 of the earlier acts. For example, P. L. 1909, chapter 171, section 2, provides for the notice "stating the amount claimed, from whom due, and if not due, when it will be due, giving the amount of the demand after deducting all just credits and off-sets . . .". The same language is employed in P. L. 1892, chapter 232 and other earlier statutory enactments for the creation of municipal mechanic's liens.

The notice prescribed by the statute is not to be deemed a pleading or a paper which must be drawn with technical accuracy. The sufficiency of a notice is mainly to be determined by a con-

sideration of the objects of the notice. *Agnew Co.* v. *Paterson Board of Education,* 83 N. J. E. 49, 60.

POINTS V, VI and VII.

Proof that respondent furnished the materials for performance of the contract between A. C. Windsor, Inc. and the municipal body, and that such materials were actually used in the erection of the municipal building was clear and undisputed.

The witness McNish testified that he had charge of the handling of the sub-contract for Galm and that the materials furnished by the claimant were applied to the building. (Record, page 37, lines 1-12). He stated of his own knowledge that all of the materials called for under the main contract and the order for extras were furnished by the claimant to Galm and were all used in the erection of the school. (Record, page 28, lines 15-21).

The witness Heimus testified that the items furnished by the claimant were determined by "drawing off" from the plans for the erection of the building all the items that required hardware. (Record, page 20, lines 22-29). There was further testimony that the hardware was manufactured specially to fit the building and that "it would be necessary to furnish all that list of hardware in order for A. C. Galm, Inc. to complete their contract with the general contractor." (Record, page 28, lines 27-34).

Throughout the testimony are found references to the main contract and Windsor as the main contractor. (Record, page 29, lines 22-33; page 25, lines 37-40; page 28, lines 14-20). The appellants

admitted by their answer (Record, page 16, line 29) that the receiver sold and assigned to the Appellant Trube the accounts receivable of Galm, including the claim against A. C. Windsor, Inc. and/or the Board of Education of the City of Newark, for work performed and/or materials furnished to said public building by A. C. Galm, Inc. as sub-contractor.

The failure of the municipal body and main contractor to contest the claim is further evidence that the materials were furnished in accordance with the main contract between A. C. Windsor, Inc. and the municipality. In the absence of any dispute as to whether the materials complied with the provisions of the main contract, further details as to the contents of the contract with the municipality would have been surplusage.

POINT VIII.

The proof clearly showed that Galm was indebted to the American Hardware Corporation of New York.

Appellants' point appears to have been based upon part of a statement made by the witness Helmus, (Record, page 22), to the effect that the contract was made between Galm and P. & F. Corbin. The witness proceeded, in explanation of that statement, to say that P. & F. Corbin is a division of the American Hardware Corporation of New York and that the materials were actually furnished by this corporation. (Record, pages 23 and 24). As to indebtedness, the former Secretary of A. C. Galm, Inc., testified that a certain amount

was due from Galm to the American Hardware Corporation of New York upon the contract price. (Record, page 27, lines 20-25).

POINT IX.

The claimant's action was commenced within sixty days of the filing of notice.

The notice was filed April 19, 1929. Appellants are in error in stating that the Bill of Complaint was filed June 19. The bill was filed June 14, 1929, which is within sixty days of the earlier date, and a subpoena was issued within that period.

POINT X.

Failure to include another lien claimant in this suit does not affect respondent's right to a decree.

The Assistant Secretary of the Board of Education testified that the amount in the hands of the Board was more than sufficient to cover the sums claimed by respondent and by the sole other lien claimant remaining unpaid. (Record, page 25, lines 36-40; page 26, lines 1-25). If the conceded amount due from the municipality to the contractor is more than sufficient to satisfy the claims of parties to the cause of action pending in the Court of Chancery, the Court will not determine the amount due from the municipality to the contractor, for such determination is not necessary to settle the rights which the Court is called upon to settle under the Municipal Mechanic's Lien

Act. *Commonwealth Quarry Co.* vs. *Gougherty,* 105 N. J. E. 642.

The Record shows adequate reason for not including the other mechanic's lien claimant as a party to this suit. (Page 26, lines 10-22). A suit to enforce mechanic's lien claims which was commenced before the instant action, named the other municipal mechanic's lien claimants but did not include respondent as a party. Section 9 of the Act provides merely that "the claimant *first* bringing an action . . . must make parties to the suit all who have filed claims". The respondent had the choice of joining in the earlier action as a party defendant or of commencing an independent action. In view of the complications caused by the receivership of Galm, it chose the latter course.

POINT XI.

The failure to give the full corporate name of the main contractor in the notice of lien claim does not affect the validity of respondent's claim.

Section 2 of the act specifically provides that "No variance as to the name of the contractor or sub-contractor or name of the municipality shall affect the validity of said claim or lien."

POINT XII.

The defendant Catherine Trube was properly charged with costs of suit.

Section 12 of the Municipal Mechanic's Lien Act provides as to costs that "The cost shall rest in the discretion of the Court and shall be awarded against complainants or defendants or any or either of them as the Court may think just."

In *Agnew* v. *Paterson Board of Education,* 83 N. J. E. 49, 70, aff. id. 339, it was said:

> "The costs and reasonable counsel fees of the defendants who, according to the decree of this court, are successful in their struggle over the fund, will be charged against their defeated adversaries. These costs, expenses of litigation, rendered necessary by the contest to establish claims of defendants, upon the fund which this court has rejected, should not be allowed to deplete the fund so as to cut off or diminish the amount which any claimant would have received if the defeated contestants had not prosecuted their unsuccessful litigation. . . . I am unable to discover any ground on which it would be deemed just either to deny the successful defendants their costs, including reasonable counsel fees, in accordance with the present practice of the court, or to permit this substantial amount of money to be taken out of the fund instead of from the parties whose unsuccessful litigation was the sole cause of the outlay."

In the present case application was made by respondent for costs against both appellants but costs were allowed only against the appellant Catherine Trube, for the reason that the other

appellant was a receiver appointed by the Court of Chancery. Appellants' litigation was "the sole cause of the outlay" in this case, as neither the main contractor nor the municipal body contested respondent's claim.

The most novel point connected with this appeal is the prosecution thereof by a receiver who can in nowise benefit as such from such action. The receiver filed no notice of lien claim against the fund and, prior to the commencement of this suit, sold and assigned all accounts receivable of the insolvent corporation including the amount due, if any, upon the sub-contract. The purchaser likewise failed to file a lien claim.

We respectfully submit that the decree of the Court of Chancery should be affirmed.

PITNEY, HARDIN & SKINNER,
Solicitors of complainant-respondent.

WM. H. OSBORNE, JR.,
Of Counsel.