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COMPLAINT.

Filed December 18, 1929.

Union County Circuit Court

GEORGE NOLTE, *Plaintiff,*	*Action at Law.*
vs.	*On Mechanics' Lien.*
SALVATORE MANNINO and GIOVANNINA MANNINO, his wife, *Defendants.*	*Complaint.*

Plaintiff, George Nolte, of the Town of Westfield, County of Union and State of New Jersey, says that:

(1) On or about March 30, 1928, one Nicola Perrucci as contractor entered into a contract with Salvatore Mannino for the erection and construction for Salvatore Mannino and Giovannina Mannino, his wife, as owners of a certain one-family two and one-half story dwelling situated upon a certain lot or curtilage of land in the Town of Westfield, County of Union and State of New Jersey, more particularly described as follows:

> BEGINNING at a point in the southeasterly side line of Park Street, distant 221 feet southwesterly from the corner formed by the intersection thereof with the southwesterly side line of Central Avenue, said point being the northeasterly corner of lands of Allen L. Price; thence (1) in a southeasterly direction and along the line of lands of Price 290.92 feet, more or less, to lands of Hobart

Mason and Frank M. Snyder; thence (2) in an easterly direction and along the line of lands of Mason and Snyder 121 feet, more or less, to the most southerly corner of lands of Howard A. Pease. thence (3) in a northwesterly direction and along the line of lands of Pease 147 feet, more or less, to an angle point in said line; thence (4) in a northwesterly direction and along the line of lands of Pease and parallel to course (1) a distance of 200 feet to the southeasterly side line of Park Street; thence (5) in a southwesterly direction and along the southeasterly side line of Park Street 60 feet to the place of BEGINNING.

(2) Thereafter said Nicola Perrucci entered into a contract with plaintiff for the plumbing work for the agreed price of $1,350.00.

(3) Said plumbing work was completed and partial payments were made on account of the contract price but leaving a balance due and owing by said Nicola Perrucci to plaintiff of $170.00.

(4) On November 27, 1929, plaintiff had a judgment against said Nicola Perrucci as contractor for said balance of $170.00.

(5) Said owners of said lands alleged that the contract was not completed as between the said owners and said Nicola Perrucci and subsequent to the entry of said judgment for said balance and on December 14, 1929, this plaintiff completed the work called for under his contract and alleged by said owners not to have been completed by said contractor Nicola Perrucci.

(6) Said debt is a lien upon said building and land by virtue of the provisions of an act en-

titled, as amended, "An Act to secure to mechanics and others payment for their labor and materials in erecting any building and in making certain improvements to land (Revision of 1896)," and the amendments thereof and supplements thereto.

Plaintiff demands as damages $170.00 together with lawful interest from December 14, 1929, and costs of suit to be taxed.

EDWARD SACHAR,
Attorney of Plaintiff.

ANSWER.

Filed December 21, 1929.

UNION COUNTY CIRCUIT COURT.

GEORGE NOLTE, *Plaintiff,* *vs.* SALVATORE MANNINO and GIOVANNINA MANNINO, his wife, *Defendants.*	*Action at Law.* *On Mechanics' Lien.* *Answer.*

The defendants, Salvatore Mannino and Giovannina Mannino, his wife, answering the plaintiff's complaint, say that:

(1) The allegations in paragraph (1) of the complaint are admitted.

(2) As to the allegations in paragraphs (2), (3), and (4) defendants have no knowledge and leave the plaintiff to his proof.

(3) Defendants admit that the plumbing work called for by the contract with Nicola Perrucci is now completed.

(4) Defendants deny that said alleged debt is a lien upon the building and land described in the complaint; and as an affirmative and separate defense defendants plead that said building and land are not liable to said alleged debt.

E. A. MERRILL,
Attorney of Defendants.

NOTICE OF MOTION.

Filed May 22, 1930.

UNION COUNTY CIRCUIT COURT.

GEORGE NOLTE, *Plaintiff,*	*Action at Law.*
vs.	*On Mechanics' Lien.*
SALVATORE MANNINO and GIOVANNINA MANNINO, his wife, *Defendants.*	*Notice.*

TAKE NOTICE, that on Saturday, January 11, 1930, I shall move before Honorable Peter F. Daly, Judge of the Union County Circuit Court, at the Court House, New Brunswick, New Jersey, or at his chambers in New Brunswick as the case may be, at 9:30 A. M., or as soon thereafter as counsel may be heard, that the answer filed herein be struck out on the ground that it is sham or frivolous, and that a summary special judgment be entered forthwith that the debt of the plaintiff be made out of the building and land of the defendants, with costs.

EDWARD SACHAR,
Attorney of Plaintiff.

To:
E. A. MERRILL,
Westfield, N. J.,
Attorney of Defendants.

AFFIDAVIT.

Filed May 22, 1930.

UNION COUNTY CIRCUIT COURT.

GEORGE NOLTE, *Plaintiff,* *vs.* SALVATORE MANNINO and GIOVANNINA MANNINO, his wife, *Defendants.*	*Action at Law.* *On Mechanics' Lien.* *Affidavit.*

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

GEORGE NOLTE, of full age, being duly sworn, on his oath deposes and says:

(1) I am the plaintiff in the above-entitled cause and I am the sub-contractor who contracted for the plumbing work with Nicola Perrucci who was the general contractor with the defendant Salvatore Mannino.

(2) I entered into a contract with said Nicola Perrucci for the plumbing work to be installed in the building being erected on the lands of the defendants by said Nicola Perrucci.

(3) The contract price was $1,350 and there still remains a balance of $170.00 due and owing for which I obtained a judgment against Nicola Perrucci on November 27, 1929.

(4) My contract has been completed, the above balance of $170.00 is due and payable, I have demanded the payment thereof but the same has not been paid nor any part of it. The

balance is justly due and owing to me from Nicola Perrucci.

(5) The last work done was done within four months prior to the filing of the lien claim.

(6) As the work done was contract work and the contract has been completed it necessarily follows that the work liened for is for labor and material actually going into this particular job.

(7) The work done by me for which a lien claim was filed was done in and about the building referred to in paragraph 1 of the lien claim and located upon the lot described in said paragraph, being otherwise known as No. 113 Park street, Westfield, New Jersey.

(8) Although the contract made by Nicola Perrucci was made with Salvatore Mannino and the lands are the lands of Salvatore Mannino and Giovannina Mannino, his wife, the said Giovannina Mannino consented to the work being done and has been familiar with its progress and knows that the work has been completed.

GEORGE NOLTE.

Subscribed and sworn to before me,
this 9th day of January, 1930.

ELSIE MAE HAMILTON,
Notary Public of N. J.

ORDER FOR SUMMARY JUDGMENT.

Filed May 22, 1930.

UNION COUNTY CIRCUIT COURT.

GEORGE NOLTE, *Plaintiff,* *vs.* SALVATORE MANNINO and GIOVANNINA MANNINO, his wife, *Defendants.*	*Action at Law.* *On Mechanics' Lien.* *Order for Summary Judgment.*

This matter being opened to the Court by Edward Sachar, attorney of the plaintiff, in the presence of E. A. Merrill, attorney of the defendants, and the Court having heard counsel thereon, and having read and considered the affidavit filed by the plaintiff, and no affidavit or other proof being offered by the defendants, and the said defendants openly refusing to present any affidavits or other proof, and the attorney for defendants having admitted that if the facts as alleged in plaintiff's affidavit are true, plaintiff is entitled to judgment, and from a consideration of the undisputed affidavit presented being of the opinion that the answer filed by the defendants is sham or frivolous, and that defendants have failed to show such facts as entitle them to defend:

It is, on this seventeenth day of May, 1930, on motion of Edward Sachar, attorney of the plaintiff, George Nolte, ORDERED that the answer filed by said defendants, Salvatore Mannino and Gio-

vannina Mannino, his wife, be and the same is struck out, and that a special and summary judgment be now entered in favor of said plaintiff, George Nolte, for the sum of $170.00 and interest from December 14, 1929, together with costs to be taxed, to be made of the building and land described in plaintiff's complaint.

PETER F. DALY,
Judge.

JUDGMENT.

Filed May 22, 1930.

UNION COUNTY CIRCUIT COURT.

GEORGE NOLTE, *Plaintiff,* vs. SALVATORE MANNINO and GIOVANNINA MANNINO, his wife, *Defendants.*	*Action at Law.* *On Mechanics' Lien.* *Special Judgment.*

The summons and complaint in this cause having been duly served upon the defendants, Salvatore Mannino and Giovannina Mannino, his wife, on December 18, 1929, and neither of said defendants having filed any answer within the time limited by the rules of Court:

It is ORDERED that judgment final be entered for the sum of $170.00 with costs of suit to be taxed, in favor of the plaintiff, specially to be made of the building and land in the complaint described.

Tax costs $35.75.

Rule entered this 22nd day of May, 1930.

On motion of

EDWARD SACHAR,
Attorney of Plaintiff.

NOTICE AND GROUNDS OF APPEAL.

Filed June 7, 1930.

NEW JERSEY SUPREME COURT ~~OF ERRORS AND APPEALS~~.

GEORGE NOLTE, *Plaintiff-Respondent,* *vs.* SALVATORE MANNINO and GIOVANNINA MANNINO, his wife, *Defendants-Appellants.*	*Notice and Grounds of Appeal.*

To Edward Sachar, Esquire, attorney of plaintiff-respondent.

TAKE NOTICE that the appellants, Salvatore Mannino and Giovannina Mannino, his wife, appeal to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this cause on the following grounds:

(1) Regarding the plea of "no lien" as a defense the answer sets up a statutory defense, and a statutory defense cannot be sham on its face.

(2) Regarding the plea of "no lien" as a defense the statutory defense set up in the answer is not frivolous, as the defense, if true, is a legal defense.

(3) Regarding the plea of "no lien" as a plea raising a special issue such plea is not subject to a motion to strike.

(4) Regarding the plea of "no lien" as a plea raising a special issue the statute requires the plaintiff to go forward with proof.

(5) The judgment is in violation of defendants' constitutional right of jury trial.

(6) The Court was without jurisdiction to order the entry of a special summary judgment. An action *in rem* to make the debt of another out of defendants' lands is not within the terms of the statute or the rules of the Court.

(7) The judgment deprives defendants of their property without due process of law.

For error in respect of the above reasons, and each of them, the motion for a special summary judgment should have been denied.

E. A. MERRILL,
Attorney of Defendants-Appellants.

NOTICE OF ARGUMENT.

Filed June 10, 1930.

NEW JERSEY COURT OF ERRORS AND APPEALS.

GEORGE NOLTE, *Plaintiff-Respondent,* *vs.* SALVATORE MANNINO and GIOVANNINA MANNINO, his wife, *Defendants-Appellants.*	*On Appeal from the Circuit Court.* *Notice of Argument.*

TAKE NOTICE that I shall move the argument of the above-entitled cause before the Court of Errors and Appeals of New Jersey, at the State House, Trenton, New Jersey, at 11 A. M., on Tuesday, October 21, 1930, or as soon thereafter as counsel may be heard.

E. A. MERRILL,
Attorney of Defendants-Appellants.

To:
MR. EDWARD SACHAR,
148 E. Front street,
Plainfield, N. J.,
Attorney of Plaintiff-Respondent.

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

New Jersey Court of Errors and Appeals

GEORGE NOLTE, *Plaintiff-Respondent,* *vs.* SALVATORE MANNINO and GIOVANNINA MANNINO, his wife, *Defendants-Appellants.*	*Action at Law.* *On Mechanics' Lien.*

BRIEF OF THE DEFENDANTS-APPELLANTS.

Statement.

The defendant Salvatore Mannino made a contract with one Nicola Perrucci for the erection of a dwelling on lands owned by defendants as tenants by the entirety.

The plaintiff George Nolte, claiming to be a subcontractor for the plumbing included in the Perrucci contract, alleges that he sued Perrucci for a balance of $170 on account of his sub-contract for the plumbing, and obtained a judgment for that amount. The defendants here were not a party to that alleged suit, and had no interest in it.

Subsequently, using this alleged judgment against Perrucci as a basis, plaintiff brought the instant action to impose a mechanics' lien upon the building and lands of the defendants, and to this action Perrucci is not made a party.

The defendants answered and set up the statutory defense or plea that the alleged debt is not a lien on their building and lands.

On plaintiff's motion the answer was struck out and an order for a special summary judg-

ment made (Case, p. 8), and a special summary judgment was entered thereon "that judgment final be entered for the sum of one hundred seventy dollars ($170), with costs of suit to be taxed, in favor of the plaintiff, specially to be made of the building and land in the complaint described" (Case, p. 10).

The amount involved is relatively insignificant. The principles involved are of the highest consequence. Many an attorney has found to his cost that a failure to stand upon his rights at a critical moment has been construed as a waiver of those rights, or as a consent to proceed upon a theory the correctness of which he denied.

The statutory provisions in question are the following:

> "15. Subject to rules, any frivolous or sham defense to the whole or to any part of the complaint may be struck out." Chap. 231, Laws 1912, at page 380.
>
> "57. When an answer is filed in an action brought to recover a debt or liquidated demand arising—
>
> (a) Upon contract express or implied, sealed or not sealed or;
>
> (b) Upon a judgment for a stated sum; or
>
> (c) Upon a statute;
>
> the answer may be struck out and judgment final may be entered upon motion and affidavit as hereinafter provided, unless the defendant by affidavit or other proofs shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend." Chap. 231, Laws 1912, at page 394.
>
> "And all or any of said defendants may, jointly or severally, have any defence or plea to the (declaration) that might be had by the builder * * *; and *in addition*

thereto the owner or mortgagee may plead that said building or land are not liable to said debt; and in such case it shall be necessary for the plaintiff, to entitle him to judgment against the building and lands, to prove that the provisions of this act, requisite to constitute such lien, have been complied with.'' 3 C. S. Tit. Mech. Lien, Sec. 24, page 3309.

This language is re-enacted in Chap. 212, Laws 1930, at page 981.

Defendants appeal from the judgment on the following grounds (Case, p. 11):

(1) Regarding the plea of ''no lien'' as a defense the answer sets up a statutory defense, and a statutory defense cannot be sham on its face.

(2) Regarding the plea of ''no lien'' as a defense the statutory defense set up in the answer is not frivolous, as the defense, if true, is a legal defense.

(3) Regarding the plea of ''no lien'' as a plea raising a special issue such plea is not subject to a motion to strike.

(4) Regarding the plea of ''no lien'' as a plea raising a special issue the statute requires the plaintiff to go forward with proof.

(5) The judgment is in violation of defendants' constitutional right of jury trial.

(6) The Court was without jurisdiction to order the entry of a special summary judgment. An action *in rem* to make the debt of another out of defendants' lands is not within the terms of the statute or the rules of the Court.

(7) The judgment deprives defendants of their property without due process of law.

These seven grounds of appeal may be grouped in three classifications, based on three different points of view.

Grounds (1) and (2) assume, for the sake of argument, that the statutory plea that "the said building or land are not liable to said debt" is a *defensive* plea. Being pleaded the plaintiff must, in the words of the statute, "*prove* that the provisions of this act, requisite to constitute such lien, have been complied with." It is argued under Point IV that *affidavits* do not meet the requirements of *statutory* proof.

Grounds (3) and (4) assume, for the sake of argument, that the statutory plea is not defensive in character, but raises a *special issue* which bars the plaintiff of a motion to strike, but he must affirmatively, by competent and legal *proof,* meet defendants' denial of a lien.

Grounds (5), (6) and (7) raise constitutional and jurisdictional issues, and deny the applicability of the statute and rule to an action *in rem* to make the debt of another out of the lands of a defendant owner in a mechanics' lien suit.

Wherever italics are used they have been inserted by counsel unless otherwise noted.

POINT I.

As a defense the answer is not sham.

Section 24 of the Mechanics' Lien Act, 3 C. S. 3309, provides that

> "the owner or mortgagee may plead that said building or land are not liable to said debt, and in such case it *shall* be *necessary* for the *plaintiff,* to *entitle him to judgment* against the building and lands, to *prove* that the provisions of this act, requisite to constitute such lien have been complied with."

The defendant owners pleaded that they "deny that said alleged debt is a lien upon the land

and building described in the complaint" (Case, p. 4, l. 31).

To deny that an alleged debt is a lien is to deny each and every of the material allegations of the complaint *in the very words of the statute.*

> "A denial of a material allegation of the complaint in the form allowed by statute cannot be stricken out as sham." *Neuberger* v. *Webb,* 24 Hun. 347.

Defendants deny that the plaintiff entered into a written contract with Perrucci for the plumbing work (Case, p. 2, l. 19); proof of that allegation must be by the production and proof of the contract, and not by affidavit. Defendants admit that the plumbing work is *now* completed, but deny that it was completed either by the plaintiff or by Perrucci (Case, p. 2, ll. 22 and 35). The proof would have shown that Perrucci abandoned the contract with the plumbing unfinished and that the defendants completed the work. Defendants deny that the alleged judgment was for the plumbing work on *this job* (Case, p. 2, l. 27), and that is not a fact susceptible of proof or disproof by affidavit.

The issue presented is not as to the abstract right to strike a sham or frivolous defense, either under the common law or the statute, but is as to the right of the Court, *as a matter of law,* to reject as sham or frivolous a defense set forth in the very words of the legislative act giving and granting to a defendant owner that particular form of defensive answer.

A statutory defense cannot be "palpably or inherently false"; in its very nature a defense authorized by legislative enactment cannot be sham on its face, and there are no "plain or conceded facts in the case (which) must have been known to the party interposing them to be

false." *Fidelity, etc. Co.* v. *Wilkesbarre, etc. Co.*, 98 N. J. L. 507-510.

The effect of pleading this statutory defense is to relieve the defendant from any *obligation* to plead any other defense. He *may* plead other defenses, but the statutory plea is sufficient without more. If pleaded it shifts the burden of going forward with proof to the plaintiff. The plea denies "that the provisions of the act, requisite to constitute such lien, have been complied with," and not only raises an issue of fact with respect to each one of such provisions, but it places upon the *plaintiff* an obligation to produce *proof* of compliance.

Such being the effect of the statutory defense it would add nothing to the weight or sufficiency of the answer, and would be mere repetition and surplusage, to add categorical denials of compliance with each particular requisite.

The protection thus afforded the owner is no more than is his due. In hundreds, and perhaps thousands of instances, each year, purchasers buy houses either just before or just after completion and before the statutory lien period has expired. Under such circumstances it is often utterly impracticable to ascertain the names and addresses of all persons and corporations having inchoate liens, and (as purchasers have not infrequently discovered to their loss) the affidavit of the builder cannot always be relied upon. The same is true where the builder is contractor to the owner, as such owners have also to their sorrow learned when served with a summons in a lien action, notwithstanding the supposed protection of an affidavit.

It is only reasonable and fair, therefore, that when a sub-contractor or material man attempts

to make the indebtedness of another out of the lands of an owner having no privity of contract with him, and usually with no way to check the correctness or validity of his claim, such sub-contractor or material man should be required to *prove* that such alleged indebtedness is, in fact, enforceable as a lien.

In the instant case it might appear, upon a trial, that the general contractor defaulted upon his contract, and that a part of the plumbing work was completed by the owner; it might further appear that the alleged indebtedness of $170 was on a running account between the contractor and sub-contractor on various jobs, and not a charge solely against this particular job. Whether the plaintiff did work for which a lien would lie within the four months prior to instituting suit is a matter peculiarly within the knowledge of the plaintiff as to which the defendants have a right of cross examination, and to compel the production of plaintiff's records.

It nowhere appears that the defendants were parties to the alleged judgment against the *contractor,* and it *does* appear that the contractor is not a party to the lien action. In this situation the alleged judgment, the basis of the lien claim, is not binding upon, or conclusive as to, defendants. As said in this court in *Shoemaker* v. *Maloney,* 102 N. J. L. 363:

> "While the judgment is conclusive as to the amount due *between the parties to the action* in which such judgment was rendered, it was without force as against Maloney 2d, *as owner* * * *. It was open to the latter to contest the correctness and cost of the items of materials supplied to Gough for the construction of the building."

The right of defendants to rest upon the statutory plea has been repeatedly recognized by

this court. In *Culver* v. *Lieberman,* 69 N. J. L. 341-344, this court remarked that "the owner or owners are made defendants, not that they are to answer for the debt, nor because they have contracted it, but to give them notice that, for the whole or some apportioned part of the debt, the land which they own is claimed to be specially liable to the plaintiff, * * * And at page 346: "*each owner may plead the statutory plea of land not liable* * * *." In *Vreeland Building Co.* v. *Knickerbocker Sugar Co.,* 75 N. J. L. 551-556, this court said that the statutory plea "*imposed upon the claimant* the burden of *establishing* that * * * the provisions of the act requisite to constitute the lien had been complied with." In *Thornton* v. *Fay,* 80 N. J. L. 104, affirmed 81 N. J. L. 427, the *necessity* of proof by the plaintiff where the statutory plea is filed is recognized by this court:

> "It is sufficient to say that *there is no statutory plea* (in the defendant's answer) that said buildings are not liable to plaintiff's debt, and it is only when such plea is filed that it *becomes necessary* for the *plaintiff* to *prove* that the provisions of the Mechanics' Lien Act had been complied with."

It seems impossible to read any meaning into the language quoted other than that upon setting out the plea of "no lien," without more, the plaintiff "*shall*" assume the burden of going forward with "*proof.*" The meaning and effect of the words "*shall*" and "*proof*" will be discussed later.

The order for summary judgment recites that defendants openly refused "to present any affidavits or other proof" (Case, p. 8, l. 26). That is true—the defendants rested on the statute. They not only were entitled to stand on their

statutory right, and are not subject to criticism for so doing, but any other course would have been inconclusive and would have settled nothing. In fact, had defendants submitted affidavits it might have been urged, to their prejudice, that they thereby waived their statutory right to require proof by the plaintiff, and consented to a trial by affidavit. The safe course, and the proper course if not the only course, for the preservation of their right was to refuse to be diverted from the statutory defense.

POINT II.

As a defense the answer is not frivolous.

A *statutory* defense cannot be *frivolous.* It cannot be "palpably insufficient as a *legal defense* to the action." A pleading is frivolous only when, on its face and although assumed to be true, it sets up no defense. It is a contradiction in terms to say that a plea made by the legislature a sufficient defense in the absence of *proof* to the contrary may be struck out on a motion, *without* proof, because "palpably insufficient as a *legal* defense." It is a legal defense if for no other reason than that it is made so by legislative enactment.

The act of the legislature established the standard by which this defense is to be judged, and no more than the statute calls for can be required.

The provisions of the present act allowing a defendant owner to interpose a plea of "no lien" goes back to the original, state-wide act of 1853. It is significant that during the intervening seventy-seven years no reported opinion will be found holding that a *statutory defense* is subject to attack by motion on the ground that

such defense is sham or frivolous as a matter of law.

When a defendant pleads "no lien" the statute requires the *plaintiff* to first submit *his* proofs, and *then only* does it become incumbent upon the defendant to go forward with proof to meet the plaintiff's case.

POINT III.

As a plea the plea that the building and land are not liable to the alleged debt is not subject to a motion to strike.

In his law dictionary, *sub nom* "Plea," Bouvier states that "there is a plea to the action which is not strictly either a general issue or a special plea in bar, and which is called a *special issue,* which *denies* only some *particular part* of the declaration which goes to the *gist* of the action." Citing Lawes, Pl. 110-145; Co. Litt. 126 a; Gould, Pl. 5th Ed. Chap. II, Sec. 38, and Chap. VI, Sec. 8.

Such *special issue* raises issues of fact not subject to a motion to strike based merely on affidavits, but calls for strict proof. It is affirmative, and not defensive, in character. It is in the nature of a declaration rather than an answer.

The dictum of the Court in *South Camden Trust Co.* v. *Stiefel,* 101 N. J. E. 41-43, is here applicable:

> "So far as I am aware no court has ever assumed to exercise the power to strike out as sham any pleading other than a purely defensive pleading, and no legislature appears to have ever given sanction to the exercise of such a power."

POINT IV.

As an affirmative plea the plea of "no lien," in the language of the statute, requires the plaintiff to go forward with proof.

The statute apparently differentiates between a "defense" and an affirmative "plea." The owner may have "any defense *or* plea" which the builder might have had, and, in addition, may have a further *plea* of no lien. The owner, then, may have both a defense and a plea, or he may rely upon either one, independently of the other.

If the owner rests upon his statutory *plea* of no lien, and irrespective of whether he rests on such plea alone or in conjunction with a *defense,* the statute denies the right of the plaintiff to enter *any* judgment, summary or otherwise, against such owner's lands unless and until the plaintiff *shall first "prove* that the provisions of this act, requisite to constitute such lien have been complied with."

The language of the statute is clear and imperative. Having pleaded the statutory plea the defendant is secure from molestation pending affirmative action on the part of the plaintiff.

Only recently this court said that:

> "Whenever a statute limits a thing to be done in a specified way, it necessarily includes in itself a negative; namely, that the thing shall not be done otherwise." *Absecon Land Co.* v. *Keernes,* 101 N. J. E. 227-231.

It has been repeatedly held that:

> "Where an act is plain and unambiguous in its terms the rule is fundamental that there is no room for judicial construction, since the language employed is presumed to evince the legislative intent." *In re City of Passaic,* 94 N. J. L. 384-386.

In such case the express language of the statute becomes the sole and imperative guide for the Court.

At the most there are, in the statute, but two words the meaning of which may call for definition—the words "shall" and "prove."

Sutherland lays down the rule that:

> "The word 'shall' in its ordinary sense is imperative. 'When the word *shall* is used in a statute, and a right or benefit to any one depends upon giving it an imperative construction, then that word is to be regarded as peremptory,' " unless the spirit and purpose of the act *require* that the word be construed as permissive. *Sutherland on Statutory Construction,* Sec. 640.

In *Haythorn* v. *Van Keuren & Son,* 79 N. J. L. 101-105, the Court said that

> "The presumption is that the word 'shall' in a statute is used in an imperative and not in a directory sense. If a different interpretation is sought it must rest upon something in the character of the legislation or in the context which will justify a different meaning."

It seems clear that the word was here used in an imperative and peremptory sense.

And what must the plaintiff *"prove?"* He must prove:

1. That the work or material liened for was work or material for which the owner was liable to the contractor.
2. That the date when the last work was done or material furnished was within the four months' period immediately preceding the filing of the lien claim.
3. That the amount liened for was the actual amount owed to the claimant by the contractor for the very work or ma-

terial described in the lien claim and in the complaint.

4. That the sum so owing was due and payable by the contractor to the claimant at the time the lien claim was filed.
5. That the amount alleged to be due and owing by the contractor to the claimant was the reasonable value of the labor or material, the subject of the lien claim.

An answer denying a lien raises these *substantial issues of fact,* and they are not susceptible of "proof" by affidavit.

What is *"proof"* within the statutory meaning of the term?

In *Inglis* v. *Schriener,* 58 N. J. L. 120, the Court said, after citing numerous cases,

> "these and many other cases hold, with respect to divers statutes, that the word 'proof,' when used in a legislative enactment means 'competent and legal evidence,' or, in other words, *testimony* that conforms to the fundamental rules of proof."

In *Githens* v. *Mount,* 64 N. J. L. 166, the Court said that:

> " 'proof,' when used in a legislative enactment, means legal evidence, upon which judicial action may be rested."

In *Jaudel* v. *Schoelzke,* 95 N. J. L. 171-177, this court said that:

> "It is too well settled in this State so as to warrant any debate on the subject that when a legislative act requires *proof* to be made of the existence of certain facts, for example, as the statute does in the present instance, (attachment), it means *competent evidence—such testimony* as would be admissible in the trial of a case in a court of justice."

In *Davis* v. *Alvord,* 94 U. S. 545; 24 L. Ed. 283, the Court holds that persons having an interest in the

> "property against which such a lien is sought to be enforced have a *right* to call for *strict proof* of all that is essential to the creation of the lien. * * * This proof must be furnished by the party who asserts the existence of the lien."

This provision of the statute, when pleaded, *bars the use of affidavits* in lieu of proof.

The defendants having been given this statutory *right* cannot be criticized for relying upon it, and no unfavorable inference can be raised because, choosing to rely on it, they remain passive; nor can the condition be imposed that they, instead of the plaintiff, shall go forward with proof.

POINT V.

The judgment is in violation of defendants' constitutional right of jury trial.

By Section 7 of the Constitution of the State "the right of trial by jury shall remain inviolate."

Of course, if there is no issue to be tried there can be no right of trial, whether by jury or otherwise, and the Court has jurisdiction to inquire, and determine, whether there is, in fact, a triable issue; the Court, cannot, however, in a summary proceeding, *try* an issue of fact.

> "In this State the procedure (motion to strike answer as sham or frivolous) is regarded as merely an inquiry whether there is an issue of fact to be tried, a distinction being recognized between the determination whether there is a real issue to be tried and the trial of an issue upon a motion; whether

> what is in form an issue is a real issue." *South Camden Trust Co.* v. *Stiefel,* 101 N. J. E. 43.

As already stated the plea of "no lien" raised issues of fact which the statute requires the "plaintiff" to "prove"; no obligation rests upon the defendant in this respect, and the facts required by the statute to be proved by the plaintiff could not be proved without testimony:

> "When, to decide the question, it becomes necessary to take testimony to enable the Court to determine the relative merits of the controversy, or the justice or injustice of the defense, the defendant's *constitutional right* to a jury trial requires that the motion to deprive him of his defense be denied." *Muhlenbeck* v. *Hoboken,* 2 Miscl. 7.

Schmidt v Marc[oni] Wireless Tel. Co, 86 NJL 183 — Sec. Nat. Bk v Am[...] 91 NJL 531-537

Without the *proof* called for by the statute, the Court was powerless to entertain the motion to strike, and so long as the answer should stand the defendants had a *constitutional right* to a jury trial.

This *necessity* for proof has been recognized from the earliest times. In 1856, three years after the passage of the first state-wide act, in *Tomlinson* v. *Degraw,* 26 N. J. L. 73, the Court interpolated the very language of the act in their opinion:

> "If the owner of the land intends to question the validity of the lien, the plea prescribed by statute is, that the house or land are not liable to the debt, and it thereupon becomes *necessary* for the *plaintiff,* to entitle him to judgment against the real estate, to *prove* that the provisions of the act requisite to constitute such lien have been complied with."

In *Cornell* v. *Matthews,* 27 N. J. L. 522-525, the Court said:

> "It was not the design of that plea to put the plaintiff upon proof that the person sued

as owner is owner, but that his estate in the land, whatever it is, is chargeable with the lien; that the lien was properly filed; that the lumber was furnished for and went into the house—in short, everything necessary to show that the land is chargeable with the debt, on the supposition that the owner is a party to the action."

POINT VI.

The Court was without jurisdiction to order the entry of a SPECIAL summary judgment. An action IN REM to make the debt of another out of defendants' land is not within the statute or the rules of the Court.

The question raised by this point is of the highest importance, and seems never to have been directly passed upon in this State.

The pertinent portion of the statute, Sec. 15 (a) of Chapter 151 of the Laws of 1928, page 306, reads.

> "*Subject to rules,* any frivolous or sham defense to the whole or to any part of the complaint may be struck out."

That the statutory defense here interposed can be neither sham nor frivolous has already been argued. But under this point we go further, and urge that the statute permitting sham and frivolous defenses to be struck out on motion has no application to the instant case because the statute and the rule confer upon the Court no jurisdiction in actions of this character.

An answer may be struck out and summary judgment entered under the statute only "subject to rules." Rule 57 of the Practice Act, adopted as Rule 80 by the Supreme Court, limits the

right to strike the answer and enter a summary judgment as follows:

> Sec. 57. When an answer is filed in an action brought to recover a debt or liquidated demand arising:
>
> (a) Upon contract express or implied, sealed or not sealed; or,
>
> (b) Upon a judgment for a stated sum; or,
>
> (c) Upon a statute;
>
> the answer may be struck out and judgment final may be entered upon motion and affidavit as hereinafter provided, unless the defendant by affidavit or other proofs shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend.

In the first place, the statute and the rule deal with the practice in *actions at law,* and not with *chancery* actions. So far as the lien on the lands of the owner is concerned it is a *chancery* action and merely incidental to the action at law fixing the debt.

> "The proceeding under the mechanics' lien law is, in its very nature, partly a common law and partly a *chancery* proceeding. So far as relates to the debtor it is a common law proceeding—so far at it relates to the enforcement of the lien it is *necessarily a chancery proceeding.*" *Edwards* v. *Derrickson,* 28 N. J. L. 39-61.

In the second place, whatever may be the scope of the *statute* (Section 15, *supra*) standing alone, *the statute and the rule,* taken together, deal only with actions *in personam;* but, as to the owner, the lien action is *in rem.*

> "So far as the owner is concerned the proceedings are *in rem.*" *Washburn & Campbell* v. *Burns,* 34 N. J. L. 18-22.
>
> "A 'special' judgment operates *in rem.*" *Smith* v. *Colloty,* 69 N. J. L. 365-368.

> "The two actions are fundamentally different in character. One is *in personam* and the other *in rem.*" *Shoemaker* v. *Maloney,* 102 N. J. L. 363-366.

Millberg v. *Keuthe,* 98 N. J. L. 779, is neither an exception nor an authority to the contrary. That was an action at law in *ejectment* and no question of *debt* or *liquidated demand* was involved. The decision rests upon the common law practice, and has no relevance to the instant case where the motion rests upon the statute *and* the rule, and the issue affecting the defendant owners is a *chancery* issue and not an issue at law.

The very language of the rule, moreover, indicates the purpose of the legislature to confine its application to those cases where the action to recover the debt, or liquidated demand, is brought against the very *person* liable. It has *no* application as against *lands.* It is the *debt* of a *person* (a) arising upon a contract by and between plaintiff and defendant, or their privies; or (b) arising upon a *judgment* obtained by the plaintiff against the defendant; or, (c) "upon a statute." The meaning of the last provision has been elucidated by this court in *Van Emburgh* v. *Freeholders of Bergen,* 87 N. J. L. 637, where, at page 638, the Court remarked that

> "Rule 80 of the Supreme Court provides that when an answer is filed in an action brought *to recover a debt arising* '(*C*) *upon a statute*' the answer may be struck out," etc.

Clearly a lien claim against lands is not a "*debt,*" and, therefore, a proceeding to make the "debt" of *another* out of the *defendants'* lands is not a proceeding to recover a debt arising upon a statute. The *debt* arose out of a *contract* to which the defendants were strangers, and not out

of any statute imposing a *personal liability* upon the defendant owners. There can be a relation of debtor and creditor only between (legal) *persons.*

The *rule,* then, gives no jurisdiction to the Court to summarily impose a liability upon the lands of one defendant to answer for the debt of another defendant, there being no privity of contract between such defendants.

Appellants' insistment that the statute *and* the rule contemplate only actions of debt directed against the debtor finds ample support and corroboration in their derivation, and in the practice in other states.

The common law practice of striking out sham and frivolous pleas existed in England "from time immemorial"; but

> "It is only by virtue of a special statutory jurisdiction that final judgment can be obtained *summarily* in an action. By the common law a plaintiff has no right to obtain a judgment summarily, and if he wishes to avail himself of the statutory jurisdiction, he is bound to comply strictly with the requirements of the Rules." *Cassidy* v. *M'Loon,* L. R. 32 Ir. 368 (1893).

The first statutory recognition of the practice in England was embodied in an act passed in 1855, for "the recovery of money due on bills and notes." This practice was extended until, in its first three sections, it took substantially the form later adopted in several of the states of the United States, notably New Jersey and New York.

Under the English rule a plaintiff may now move to strike a sham or frivolous plea in "all actions where the plaintiff seeks to recover only a

debt or liquidated demand in money, payable by the defendant, with or without interest, arising:

(a) On a contract, express or implied; or

(b) On a bond or contract under seal for the payment of a liquidated amount in money; or

(c) On a statute where the sum sought to be recovered is a fixed sum or in the nature of a debt other than a penalty."

Attention is particularly directed to paragraph (c), the language of which specifically ties the "debt or liquidated demand" to the "statute." Also note that such debt or liquidated demand is "payable by the defendant," as a *personal* obligation.

Under the English rule

> "The plaintiff may, on affidavit made by himself, or by any person who can swear positively to the facts, verifying the cause of action, and the amount claimed * * *, and stating that in his belief there is no defense to the action, apply to a judge for liberty to enter a final judgment * * *. The judge may thereupon, unless the defendant by affidavit, by his own *viva voce* evidence, or otherwise, shall satisfy him that he has a good defense to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to enter judgment accordingly." "Leave to defend may be given unconditionally, or subject to such terms * * * as the judge may think fit."

The New York rule for summary judgments is substantially the same as the New Jersey rule. It reads as follows:

> "Rule 113 (of the Rules of Civil Practice). Summary Judgment. When an answer is served in an action to recover a debt or liquidated demand arising,

(1) On a contract, express or implied, sealed or not sealed; or

(2) On a judgment for a stated sum;

the answer may be struck out and judgment entered thereon on motion, and the affidavit of the plaintiff or of any other person having knowledge of the facts, verifying the cause of action and stating the amount claimed, and his belief that there is no defense to the action; unless the defendant by affidavit or other proof, shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend."

In this State there are relatively few reported cases of summary judgments, and in none is the particular question here raised commented upon. But in New York there are *scores* of reported cases, and the comments of the Court, influenced doubtless by the English practice, as citations of English cases are frequent, leave no doubt as to the limitations there considered proper, as appears in the following citations.

In *Norwich Pharmacal Co.* v. *Barrett,* 205 A. D. 749, the Court said:

"We think that these applications for summary judgment under that rule (113) should not be extended beyond an action for debt or for one of those counts in *indebitatus assumpsit,* when the action is brought 'on an executed consideration for a fixed sum agreed to be paid for such execution.' "

In *Poland Export Corp.* v. *Marcus,* 204 A. D. 302, the Court said:

"The cases to which rule 113 is applicable are express contracts for the payment of money, or where the agreement to pay arises out of a contract relation, as on a *quantum meruit* or *quantum valebat,* and not those where a promise to pay is implied from the violation of a duty, by reason of which in equity and good conscience the money should not be withheld."

In *King Motor Sales Corp.* v. *Allen,* 204 N. Y. S. 555; 209 A. D. 281, the Court said:

> "If it appears that under any one of several defenses a genuine and substantial issue was created, defendant is entitled to a trial in regular order. * * * If there is *one* good issue, which must await trial, the purpose of the rule—to save delay—falls."

In *Rogan* v. *Consolidated Coppermines Co.,* 117 Miscl. 718-721, the Court said:

> "Since the rule does not attempt to define the right to defend, it cannot be interpreted as conferring upon the court the power to deny to a party the right to defend in any case where *by statute* or common law such right exists."

And at page 727:

> "Under rule 113 a defendant may properly, in certain cases, be compelled to state his version of the matter in litigation, but where he shows that *he has no knowledge or information in regard to any material allegation* made by the plaintiff, he cannot be compelled to accept the plaintiff's version, and the court, under such circumstances, cannot strike out the answer."

In *Peninsular T. Co. v. Greater Britain Ins. Corp.,* 193 N. Y. S. 886-891; 200 A. D. 695, the Court remarked that

> "Where it is not perfectly plain that there is no substantial issue to be tried a motion under rule 113 to strike out the answer and for judgment should be denied,"

citing numerous English cases.

In *L. R. Munoz & Co.* v. *Sav. Sugar Ref. Corp.,* 193 N. Y. S. 422; 118 Misc. 24, the Court said:

> "It is clear to me that it was not the intention of the makers of this rule that the court should try out contested issues in an action upon affidavits, although, from the numerous motions under it brought during

this term, a contrary opinion seems to prevail in many quarters."

In *Curry* v. *Mackenzie,* 239 N. Y. 267 (Opinion by Cardozo, *J.*), the Court remarked that

> "Civil Practice Rule 113 permits summary judgment at times in favor of a plaintiff though material averments of his complaint have been traversed by the answer. To that end there must be supporting affidavits proving the cause of action, and that clearly and completely, by affiants who speak with knowledge. There must be a failure on the part of the defendant to satisfy the court 'by affidavit or other proof' that there is any basis for his denial or any truth in his defense. The case must take the usual course if less than this appears. To justify a departure from that course and the award of summary relief, the court must be convinced that the issue is not genuine, but feigned, and that there is in truth nothing to be tried."

The Connecticut practice is also based on the English rule in sections comparable with the New Jersey practice. With other provisions not here relevant it provides for summary judgment on motion in "All actions to recover a debt or liquidated demand in money, with or without interest, arising:

> (a) On a negotiable instrument, or contract under seal, or a recognizance; or
>
> (b) Any other contract, express or implied, excepting quasi contracts; or
>
> (c) On a judgment for a stated sum; or
>
> (d) On a statute where the sum sought to be recovered is a fixed sum or in the nature of a debt.

The same practice is followed in the other states which have authorized the entry of a summary judgment upon motion, and counsel has

failed to find a single case where, under these or similar provisions, such judgment has been entered in other than an action upon a debt or liquidated demand for which the party defendant against whom the judgment was entered was *personally* liable.

Where a statutory rule is based upon, and substantially follows the very language of, the long established statutory rule of another jurisdiction, and where the language clearly expresses the purpose and extent of the rule, there arises a pretty conclusive presumption that the legislative intent was based upon the procedure and application of the rule found in the reports of the jurisdiction of origin.

In *State* v. *Cortese,* 104 N. J. L. 312-315 this Court said:

> "Every statute must be considered according to what appears to have been the intention of the legislature."

In *Com. Roofing Co.* v. *Riccio,* 81 N. J. E. 486, this Court said:

> "Whenever there is a debatable question as to the proper construction of a statutory provision, the contemporaneous and long continued exposition exhibited in the usage and practice under it requires the construction thus put upon it to be accepted by the court as the true one."

POINT VII.

The judgment deprives defendants of their property without due process of law.

The judgment deprives the defendants of their property. *It no-where appears by admissions or by legal evidence* that the plaintiff had a contract with the builder, that his contract, if he had one,

was not completed more than four months before the lien claim was filed, that the alleged debt was for work done in defendants' dwelling, that the alleged debt was a debt for the work liened for, that the contract price has not been paid, that the plaintiff had a judgment against the builder, or that such judgment, if any, was a legal basis for the lien claim. All of these matters it was encumbent upon the *plaintiff* to *prove* before he could have a summary judgment, if he could have a summary judgment under the statute under any circumstances in a proceeding of this character. Defendants not having had their day in court, and having been denied a trial of the meritorious issues, it necessarily follows that the judgment despoils them of their property without due process of law, contrary to the Constitution of this State, and of the United States.

The motion was that "the answer filed herein be struck out on the ground that it is sham or frivolous, and that a summary special judgment be entered forthwith that the debt of the plaintiff be made out of the building and lands of the defendants." Obviously the motion looks to the statute conjoined with the rule. There is no other authority for a motion for a summary judgment. That a motion for a summary *special* judgment, *in rem,* against the lands of one not a party to the contract the basis of the debt, and for which the defendant owner could not be adjudged liable in any event, must be denied, and that a judgment entered upon such motion must be set aside as not being within the statute, have been sufficiently argued.

But, assuming that the motion be regarded as a motion merely to strike the answer under the common law practice, or under the statute apart

from the rule, because sham or frivolous, the judgment must still be set aside.

The provision in the mechanics' lien act allowing a defendant owner to plead "no lien," and requiring the plaintiff thereupon to "prove" his case raises a *statutory condition precedent.* This provision establishes an exception to the common law rule, as well as to the statutory rule, and the plaintiff cannot have "judgment against the building and lands" until that condition precedent has been complied with. Otherwise the provision is valueless to the defendant.

An owner has a *right* to stand upon his statutory privilege, he cannot be required to do more, and he cannot be criticised for remaining passive pending the affirmative action enjoined upon the plaintiff by the statute. The exception is for that specific purpose, and with good reason. To render it unavailing or nugatory would be to invite the grossest fraud.

If claimants propose to exact from the lands of an owner the indebtedness of another, over which indebtedness such owner had no control, or for which he could not be held personally liable, it is but fair and just that the liability of his lands should be clearly proved, and such proof should be produced by the persons who have it—*i. e.,* by the lien claimants. If a claimant can suppress or conceal the owner's proper defense, and enter a judgment that the alleged debt of another be made of the owner's lands, based upon fraudulent affidavits, a premium will be placed upon perjury and false swearing—and there seems to be plenty of that without a premium. The statute, very properly, places the burden of proof where it naturally and clearly belongs—upon the claimant having the proof in

his possession—and it should not be removed therefrom. In fact, it cannot be shifted without doing violence to the plain terms and purpose of the statute.

The answer raises substantial issues of fact and presents a legal defense—it was error to strike it out. *Hillel* v. *Edgewater,* 150 A. 385 (not officially reported). The defendants did all that the statute requires to maintain their constitutional right to a jury trial, but are met by a summary judgment without having had any opportunity to submit their case to a jury.

The procedure to be followed by a claimant under the Mechanics' Lien Act is statutory and there *must* be strict compliance with its terms. To meet the requirements of the statute it was incumbent upon the plaintiff to establish his claim by competent and credible *proof.* This he did not do.

For the above reasons, and for each of them, the judgment entered should be set aside and for nothing holden.

Respectfully submitted,

E. A. MERRILL,
Attorney for and of Counsel
with Defendants-Appellants.

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

New Jersey Court of Errors and Appeals

GEORGE NOLTE, *Plaintiff-Respondent,* *vs.* SALVATORE MANNINO and GIOVANNINA MANNINO, his wife, *Defendants-Appellants.*	*Action at Law.* *On Mechanics' Lien.*

BRIEF OF THE PLAINTIFF-RESPONDENT.

Statement.

The plaintiff, a plumber, contracted with one Nicola Perrucci for the plumbing work in a residence being erected for the defendants by Perrucci as general contractor.

Perrucci failed to pay plaintiff a balance of $170 due on his contract for the plumbing work, and plaintiff thereupon sued Perrucci and obtained a judgment for this balance.

Unable to collect from Perrucci, plaintiff subsequently brought this lien action against defendants in order to make the indebtedness out of defendants' lands.

Defendants filed an answer admitting that the plumbing work had been completed, but leaving plaintiff to his proof as to the principal allegations in the complaint, and denying that their lands were liable.

Thereupon plaintiff moved to strike the answer on the ground that it was sham or frivolous, and the motion was supported by an affidavit (Case, p. 6). No affidavit was filed by the defendants, and at the oral argument their counsel refused to submit any affidavit, but insisted upon relying

upon what he claimed was the statutory right of defendants to a jury trial.

After hearing the oral argument, reading plaintiff's affidavit, and considering memoranda filed by counsel for both parties, plaintiff's motion was granted (Case, p. 8), and judgment duly entered (Case, p. 19).

Plantiff's motion was properly granted.

There seems to be no necessity for extended argument. The question is one of law for the Court, and counsel has found no reported case on this point which may be cited as a precedent.

Under the common law the Court has an inherent right to strike out any answer or plea which is sham or frivolous and this right is necessary in order to protect both the Court and parties from unnecessary, vexatious, and costly litigation, and it should not be defeated by technicalities and subleties of argument. Under the statute the right of the plaintiff is equally clear.

Section 15 of the Practice Act, Chapter 231 of the Public Laws of 1912, page 380, provides that, subject to rules, any frivolous or sham defense to the whole or any part of the complaint may be struck out, and rule 80 of the Supreme Court Rule provides:

> "When an answer is filed in an action brought to recover a debt or liquidated demand arising—
>
> (a) Upon contract express or implied, sealed or not sealed, or,
>
> (b) Upon a judgment for a stated sum; or,
>
> (c) Upon a statute;
>
> the answer may be struck out and judgment final may be entered upon motion and

affidavit as hereinafter provided, unless the defendant by affidavit or other proofs shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend (Rule 57, Pr. Act 1912)."

Our case is upon a contract (the contract between Mannino and Perrucci), and upon a statute (the Mechanics' Lien Act), so that we come under (a) and (c) of this rule. Just because a statute or rule says that a certain answer or defense may be filed it cannot be presumed that the mere filing of such a defense or answer can stand if sham or frivolous. The rules provide, for instance, that a defendant may deny all of the allegations of a complaint, and if the defendant's contention is correct all that a defendant would have to do would be to rest upon this rule, which gives him a right to file a general denial, to prevent justice and by so doing delay the trial, and no answer or defense could ever be stricken out.

If the defendants in this case had any real defense, or even a defense that would entitle them to defend on terms, it would seem to me that they should have disclosed it either in their answer or by affidavit, or if not by affidavit then at least at the hearing of the motion to strike. From their very silence in this matter we can reach but one conclusion that they have no defense and the plea is imposed for the purpose of delay only.

The plaintiff respectfully submits that the answer filed was properly stricken out, and the order entered for summary judgment properly made. The order of the trial judge should, therefore, be affirmed.

EDWARD SACHAR,
Counsel of Plaintiff-Respondent.