OPINION.

BURLINGTON COUNTY CIRCUIT COURT.

MOORESTOWN SUPPLY CO.,
Plaintiff,
vs.
EUGENE L. BURNS,
Defendant.

MEMO.

PRESENT:

For Plaintiff: MR. GEORGE HILLMAN.
For Defendant: MESSRS. GASKILL & GASKILL.

CARROW, J.

The fifth ground of defense set forth in the amendment to the answer is overruled.

Judgment must go for plaintiff for $439.07 with interest to be computed.

NOTICE OF APPEAL.

(Filed Sept. 15, 1917)

BURLINGTON COUNTY CIRCUIT COURT.

MOORESTOWN SUPPLY COMPANY,
Plaintiff & Respondent,
vs.
EUGENE L. BURNS,
Defendant & Appellant.

NOTICE OF APPEAL.

To George M. Hillman, Esquire, Attorney of Plaintiff & Respondent:

Take notice that the defendant, Eugene L. Burns, appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

GASKILL & GASKILL,
Attorneys of Appellant.

Approved September 10th, 1917.

GASKILL & GASKILL,
Of Counsel with Appellant.

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

I, Harry L. Knight, clerk of the Circuit Court, do hereby certify that the foregoing is a full and complete copy of the notice of appeal in the case of Moorestown Supply Company against Eugene L. Burns, as the same is now on file in my office.

Witness my hand and seal of said court at Mount Holly, this thirteenth day of October, A. D. 1917.

HARRY L. KNIGHT,
Clerk.

(Seal)

GROUNDS OF APPEAL.

(Filed Oct. 6, 1917)

BURLINGTON COUNTY CIRCUIT COURT.

MOORESTOWN SUPPLY COMPANY,
Plaintiff & Respondent,
vs.
EUGENE L. BURNS,
Defendant & Appellant.

GROUNDS OF APPEAL.

To George M. Hillman, Esq., Attorney of Plaintiff:

Take notice that the following are the grounds of appeal from the judgment in this matter:

1. That the costs of completing the building is a first lien upon the sum in the owner's hands.

2. That the stop notice creditors are not entitled to priority in the distribution of this fund.

3. That the defaulting contractor was not entitled to the fund in the owner's hands, nor was this fund due to him when he defaulted.

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4. The stop notice creditors have no rights in the fund in the owner's hands until the owner has made good, with the approval of the architect, the cost of the deficiencies arising out of the neglect and default of the contractor.

5. That the plaintiff takes the place of and stands in the stead of the defaulting contractor, and since the latter has no legal right in the fund, the plain-
20 tiff likewise is barred of and from a right to recovery.

6. That the plaintiff has failed to make out a cause of action and judgment must go to the defendant.

GASKILL & GASKILL,
Attorneys of Defendant.

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SUMMONS.

(Filed July 6, 1916)

The State of New Jersey to Eugene L. Burns:

You are summoned to answer the annexed
(Seal) complaint of Moorestown Supply Company
a body corporate, &c., in an action at law
in the Burlington County Circuit Court, and

Take notice that unless you file your answer to said complaint with the clerk of the Burlington County Circuit Court at Mount Holly, New Jersey, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness Samuel Kalisch, Judge of the Burlington County Circuit Court, at Mount Holly, New Jersey, this twenty-first day of June, in the year of our Lord, one thousand nine hundred and sixteen.

HARRY L. KNIGHT,
Clerk.

G. M. HILLMAN,
Attorney.

COMPLAINT.

(Filed July 6, 1916)

Plaintiff, a corporation of the state of New Jersey, having its principal office at Moorestown, in the county of Burlington and state of New Jersey, says that:

1. At the times hereinafter stated, defendant was the owner of a lot of land, situate on the northerly side of Maple Avenue, adjoining lands late of Joseph T. Bacon, deceased, of Henry W. Doughten, deceased, and N. Newlin Stokes, deceased, in Moorestown, in the township of Chester, county of Burlington and state of New Jersey, and more particularly described in a deed from George C. Spooner, Sr., to defendant, dated March 27, 1915, and recorded in the clerk's office of Burlington County in Book 514 of Deeds, Folio 193, &c.

2. On July 26, 1915, the defendant and the Supplee Construction and Contracting Company, a body corporate, &c., hereinafter called the "contractor" entered into a contract for the construction by said contractor for said defendant, of a building on said lot of land, a copy of which said contract is hereto annexed, marked A.

3. On July 27, 1915, said contract together with the specifications therein referred to were duly filed in the office of the clerk of the county of Burlington.

4. Between August 3, 1915, and October 22, 1915, plaintiff at the request of said contractor sold and delivered to it the material stated in the schedule No. 1 hereto annexed to be used in the construction of said building and said contractor in consideration thereof undertook to pay plaintiff what said material was reasonably worth.

5. Said materials, so furnished as aforesaid, were reasonably worth the sum of $631.89.

6. Said material was furnished to and used by said contractor in the erection and construction of said building for said defendant.

7. Said contractor has not paid the said sum of six hundred and thirty-one dollars and eighty-nine cents ($631.89) or any part thereof (except the sum of $192.82) and the balance of said sum amounting to four hundred and thirty-nine dollars and seven cents ($439.07) is still due and unpaid.

8. On October 24, 1915, plaintiff demanded the said sum of four hundred and thirty-nine dollars and seven cents ($439.07) of said contractor and said contractor then refused and ever since has refused to pay or satisfy the same.

9. On October 28, 1915, plaintiff gave defendant notice in writing of said demand and refusal and the amount due plaintiff, as aforesaid, and demanded said defendant to retain said sum out of the money then due and that thereafter should become due from said defendant, to said contractor on said contract, and to pay the same to plaintiff, a copy of which said notice is hereto annexed, marked B.

10. Defendant was on the day last stated and ever since has been satisfied of the correctness of said demand of plaintiff.

11. At the time of the giving of said notice by said plaintiff to said defendant, there was due and owing from said defendant to said contractor, for the construction of said building, under the terms of said contract, a sum of money more than sufficient to pay and satisfy plaintiff's said demand.

12. After the giving of said notice and demand by said plaintiff to said defendant there fell due from the defendant to the contractor, for the construction of said building, under the terms of the contract aforesaid, a sum of money more than sufficient to pay and satisfy plaintiff's said demand.

13. Defendant has not paid said sum so due and demanded of plaintiff. Plaintiff demands as damages four hundred and thirty-nine dollars and seven cents ($439.07) with interest from October 28, 1915.

G. M. Hillman,
Attorney of Plaintiff.

AGREEMENT.

This Agreement made the 26th day of July, in the year Nineteen hundred and fifteen, by and between The Supplee Construction and Contracting Co., hereinafter called the Contractor, and E. L. Burns hereinafter called the Owner.

Witnesseth, that the Contractor and the Owner for the considerations hereinafter named agree as follows:

Article 1. The Contractor agrees to provide all the material and to perform all the work shown on the Drawings and described in the Specifications entitled Residence at Moorestown, New Jersey for Mr. Eugene L. Burns No. 6345 Drexel Road, Philadelphia, prepared by Coleman Sellers Mills, acting, as, and in these Contract Documents entitled the Architect, and to do everything required by the General Conditions of the Contract, the Specifications and the Drawings.

Article 2. The Contractor agrees that the work under this Contract shall be substantially completed one hundred (100) working days: (Saturdays to count as one-half working days); time allowance to be made for bad weather before roof is on.

Article 3. The Owner agrees to pay the Contractor in current funds for the performance of the Contract Thirty-seven hundred Sixty-five Dollars—($3765.00) subject to additions and deductions as provided in the General Conditions of the Contract and to make payments on account thereof as provided therein, as follows:

1. When first floor joists are set	$ 400.00
2. When Masonry is up to full height	1200.00
3. When building is ready for plastering	600.00
4. When plastering is completed	600.00
5. When building is completed	212.00
6. Thirty (30) days after completion of building.	753.00

Witness
7/14/15
M. Gubhart

Extra allowance of $190 00/100 for Electric Work to be added to the above contract price of $3765; making the contract price in total $3955.00.

Article 4. The Contractor and the Owner agree that the General Conditions of the Contract, the Specifications and the Drawings, together with this Agreement, form the Contract and that they are as fully a part of the Contract as if hereto attached or herein repeated; and that the following is an exact enumeration of the Specifications and Drawings;

1. General Conditions of the Contract and Specifications.
2. One tracing linen drawing of floor plans.
3. One tracing linen drawing of elevations.

The Contractor and the Owner for themselves, their successors executors, administrators and assigns hereby agree to the full performance of the covenants herein contained.

In Witness Whereof they have hereunto set their hands and seals the day and year first above written.

SUPPLEE CONSTRUCTION & CONTRACTING CO., INC.,
As to THRODON SHNEIDER, JR., (Seal)
As to NORMAN SUPPLEE,
Treas.
E. L. BURNS.

In Presence of
PAUL M. GERBART.
PAUL M. GEBHART.

BILL OF PARTICULARS.

Schedule No. 1.
Supplee Construction and Contracting Company
To
Moorestown Supply Company, Dr.,

1915.		
8/3	1000 sy ft 6″ N. C. Roofers @ 18.00	$18.00
	120 pec 2 x 4 18 Hem 1440′ @ 30.00	43.20
	2000 sy ft 6″ N. C. Roofers @ 18.00	36.00
	1 Keg 6 D nails	2.47
	1 " 10 D nails	2.30
	1 " 20 D nails	2.25
8/4	28 lbs #10 black wire .05	1.40
8/6	44 " #10 " " .05	2.20

8/9	12100 lbs 3 4″ pebbles 6 1.20 ton @ 1.70	10.28		
	10 BBL cement @ 1.95	19.50		
8/10	10 BBL cement @ 1.95	19.50		
	19750 lbs 3/4 pebbles 9 7.8 ton @ 1.70	16.79		
8/11	10 BBL cement, @ 1.95	19.50		
	16650 lbs 3/4″ pebbles 8 13/14 @ 1.70	14.15	$207.54	
				10
8/12	10 BBL cement, @ 1.95	19.50		
	6 loads sand @ 90	5.40		
	8400 lbs 3/4″ pebbles 4/5 ton @ 1.70	7.14		
	4000 lbs 3/4″ pebbles 2 ton @ 1.70	3.40	35.44	
8/13	8350 lbs 3/4″ trop rock 4 7/40 ton @ 2.00	8.35		
	5 BBL. Cement @ 1.95	9.75		20
	76 pcs. 3″ x 10″ 14′ hem 2660 @ 26.00	69.16		
	6 pcs. 3″ x 10″ — 16′ 240′ @ 26.00	6.24	93.50	
8/18	5 BBL cement, @ 1.95	9.75		
	2000 S and F. C. H Brick @ 9.20	18.40		
	5 cellar window frames 2.25	11.25	$39.40	
				30
8/24	4250 11s N & E T Dressing sand 2 1/8 ton @ 1.70	3.61		
	10 Bu lime @ .28	2.80		
	4 ft 8 x 8 fence liming @ .11	.44		
	4 ft 13 x 13 fence liming @ 20½	.82	7.67	

10/2	49 pcs. 3 x 8 — 16 hem 1568′ @ 27.50	42.34	
	23 pcs 3 x 8 — 18 hem 828 @ 29.50	24.43	
	34 pcs 3 x 8 — 14 Hem 852′ @ 26.00	24.75	
	12 pcs 3 x 10 20′ Hem 600′ @ 29.50	17.70	
	400 lin ft. 1 x 8 N C Box 267′ @ 22.50	6.01	
	19 pcs 3 x 10 — 18 Hem 855 @ 29.50	25.22	
	13 pcs 3 x 10—16 Hem 520 @ 27.00	14.04	
	26 pcs 2 x 6—18 Hem 468 @ 26.50	12.40	
	10 pcs 2 x 8—16 Hem 213 @ 26.50	5.65	
	10 pcs 2 x 8 —12 Hem 160 @ 25.25	4.04	
	24 pcs 2 x 8—14 Hem 448 @ 25.25	11.31	
	3800 Lin ft. N. C. Roofers lath 3800 @ 4.75	18.05	
	35 lbs 6 D Nails 25 @ .035	.88	206.82
10/4	10 pcs 2 x 6 15 Hem 160′ @ 27.00	4.32	
	400 Spruce lath 500M	2.00	6.32
10/7	335 Sq. ft 1 x 8″ 12′ N. C. Box @ 23.25	7.79	
10/15	18 pcs. 2 x 4—20 Hem 240′ @ 30.50	7.32	
	12 pcs 2 x 4—18 Hem 144′ @ 30.50	4.39	
	12 pcs 2 x 6—16 Hem 192′ @ 27.00	5.18	

	4 pcs 3 x 10—14 Hem 140′ @ 26.50	3.71	30.60
10/21	1 Keg 6 D Head nails	2.58	
	1 Keg 8 D Head nails	2.47	
	25 lbs 8 D Head nails 3 1/2	.88	
	25 lbs 6 D Head nails 3 1/2	.88	6.81
			$631.89

CREDITS

8/25	4 ft 13 x 13 Fence lining @ 20 1/2	.82	
8/25	170 Empty cement bags @ 10	17.00	
9/29	By cash	175.00	192.82
			$439.07

STOP NOTICE.

To Eugene L. Burns:

You are hereby notified that the Supplee Construction and Contracting Company is justly indebted to Moorestown Supply Company, a corporation of the state of New Jersey, having its principal office at Moorestown, in the county of Burlington and state of New Jersey, in the sum of four hundred and thirty-nine dollars and seven cents ($439.07) for materials furnished by said Moorestown Supply Company to the said, the Supplee Construction and Contracting Company, and used in the erection of the brick dwelling house being erected on the land owned by you, and situate on the northerly side of Maple Avenue in Moorestown, in the township of Chester,

county of Burlington and state of New Jersey, pursuant to the written contract made between you and said Supplee Construction and Contracting Company and now on file in the Burlington County clerk's office at Mount Holly, New Jersey, and

You are further notified that said Moorestown Supply Company has demanded payment from the said Supplee Construction and Contracting Company of the said sum of money so due and owing as aforesaid, and that the said Supplee Construction and Contracting Company has refused to pay the said sum or any part thereof and you are therefore required to retain the said sum of money out of the amount owing by you to said Supplee Construction and Contracting Company on said contract or that may hereafter become due and owing from you to said Supplee Construction and Contracting Company on said contract and pay the same to said Moorestown Supply Company.

Dated October 25, 1915.

MOORESTOWN SUPPLY COMPANY,
By SAMUEL M. LISSAU,
(Seal) *President.*

ATTEST:

MAURICE L. BOYER,
Secretary.

ANSWER.

(Filed Aug. 9, 1916)

The defendant, a resident of Moorestown, in the county of Burlington and state of New Jersey, answering says:

1. He admits the matters stated in the first paragraph of the complaint.

2. He admits the matters stated in the second paragraph of the complaint.

3. He admits the matters stated in the third paragraph of the complaint.

4. He admits the matters stated in the fourth paragraph of the complaint.

5. He admits the matters stated in the fifth paragraph of the complaint.

6. He admits the matters stated in the sixth paragraph of the complaint.

7. He admits the matters stated in the seventh paragraph of the complaint, except that the sum of money stated is due from the defendant to the plaintiff.

8. He admits the matters stated in the eighth paragraph of the complaint.

9. He admits that the plaintiff gave defendant a notice in writing with demand to retain the said sum of money mentioned therein, but denies that that sum or any other sum of money, was or is due from the defendant to the plaintiff.

10. He denies the matters stated in the tenth paragraph of the complaint.

11. He denies the matters stated in the eleventh paragraph of the complaint.

12. He denies the matters stated in the twelfth paragraph of the complaint.

13. He denies that the sum of money mentioned in the thirteenth paragraph of the complaint is due from the defendant to the plaintiff.

First Ground of Defense:

That the said contractor, the Supplee Construction and Contracting Company, neglected to prosecute the work properly as mentioned in the said contract, and failed to perform the provisions of the said contract, whereupon the defendant, as owner, gave three days written notice to the said contractor as provided in the specifications forming a part of the said contract, and thereupon made good the deficiencies arising out of the neglect and failure of the contractor, and deducted the costs thereof from such payments as were then and thereafter earned by the said contractor, having first received the approval of the architect named in the contract to such action and the amount charged the contractor;

whereupon and whereby the said contractor and the plaintiff lost and forfeited all legal right of, to or in such payments as were then or thereafter earned by the contractor.

SECOND GROUND OF DEFENSE:

That the plaintiff takes the place of and stands in the stead of the contractor, and since the latter is deprived of all legal right to such payments as were or would become due upon performance of the said contract, the plaintiff is barred of and from a right to recovery.

THIRD GROUND OF DEFENSE:

That the complaint fails to state a cause of action.

FOURTH GROUND OF DEFENSE:

That the said stop notice is illegal and invalid.

GASKILL & GASKILL,
Attorneys of Defendant.

AMENDED ANSWER.

(Filed Mar. 5, 1917)

The defendant herewith amends the answer filed in this matter pursuant to an order made by the Honorable Howard Carrow, dated the twenty-fourth day of February, A. D. 1917, by adding an additional ground of defense as follows:

FIFTH GROUND OF DEFENSE:

1. That several laborers and materialmen, who supplied labor or furnished material under the contract mentioned in the complaint to the defendant upon and for the construction of the said building mentioned in the complaint, served stop notices in accordance with the law upon the defendant as owner as follows, and upon the dates set forth in connection with each of the said stop notices.

To Supplee Construction and Contracting Company:

You are hereby notified that I have been served with a notice, a copy whereof is as follows: "To Eugene L. Burns, owner, you are herebey notified, that Supplee Construction and Contracting Company is justly indebted to us, in the sum of $800.00 less retained 20%. This is a partial payment on our a/c. for wages due us for work and labor, on his employment, in the erecting and constructing, and for materials furnished, by us to him, and used in the erection of the 2½ story brick building, erected or being erected on land

owned by you, and situate on the northerly side of Maple Avenue in Moorestown, in the township of Chester, county of Burlington and state of New Jersey, bounded and described as follows: Beginning at a stake in the centre line of Maple Avenue aforesaid at the southeast corner of a lot of land of Joseph T. Bacon, and extending thence eastwardly along the centre line of Maple Avenue in front or breadth the distance of seventy (70) feet to a stake corner to lands now or late of Henry W. Doughten, thence extending northwardly of the width of seventy feet between parallel lines at right angles with the centre line of said Maple Avenue in length or depth the distance of two hundred thirty (230) feet more or less to the line of lands now or late of Dr. N. Newlin Stokes, bounded on the north by lands of said Stokes, on the south by Maple Avenue, on the east by lands of said Doughten, and on the west by lands of said Bacon, pursuant to the written contract, made between you and him, and on file in the Burlington County clerk's office; and you are further notified that we have demanded payment from the said Supplee Construction and Contracting Company of the said sum of money, so due and owing to us as aforesaid, and that he has refused to pay the same or any part thereof; and you are, therefore, required to retain the amount, so due and claimed by us, out of the amount owing by you on said contract, or that may hereafter become due and owing from you on said contract, and, on being satisfied of the correctness of our demand, to pay the same to us. Dated October 16th, 1915."

DORSEY & SMITH,
111 N. 7th St.

Served Oct. 16th, 1915, at 1.15 P. M.

To Eugene L. Burns:

You are hereby notified that the Supplee Construction and Contracting Company, is justly indebted to Moorestown Supply Company, a corporation of the state of New Jersey, having its principal office at Moorestown, in the county of Burlington and state of New Jersey, in the sum of four hundred and thirty-nine dollars and seven cents ($439.07) for materials furnished by said Moorestown Supply Company to the said the Supplee Construction and Contracting Company and used in the erection of the brick dwelling house being erected on the land owned by you, and situate on the northerly side of Maple Avenue in Moorestown, in the township of Chester, county of Burlington and state of New Jersey pursuant to the written contract made between you and said Supplee Construction and Contracting Company and now on file in the Burlington County clerk's office at Mount Holly, New Jersey, and

You are further notified that said Moorestown Supply Company has demanded payment from the said Supplee Construction and Contracting Company of the said sum of money so due and owing as aforesaid, and that the said Supplee Construction and Contracting Company has refused to pay the said sum or any part thereof, and you are therefore required to retain the said sum of money out of the amount owing by you to said Supplee Construction and Contracting Company on said contract or that may hereafter become due and owing from you to said Supplee Construction and Contracting Company on said contract and pay the same to said Moorestown Supply Company.

Dated October 25, 1915.

MOORESTOWN SUPPLY COMPANY,
By S. M. LISSAU,
President.

ATTEST:
MAURICE L. BOYER,
Secretary.
Served Oct. 28, 1915, 11 A. M.

To Eugene Burns, Owner:

You are hereby notified that the Supplee Construction & Contracting Company, Inc., is justly indebted to us in the sum of forty-one dollars and seventy cents ($41.70) for materials furnished by us to them and used in the erection of the dwelling house being erected on land owned by you and situate on Maple Avenue, Moorestown, New Jersey, pursuant to the written contract made between you and them, and on file in the Burlington County clerk's office and you are further notified that we have demanded payment from the said the Supplee Construction & Contracting Company, Inc., of the said sum of money so due and owing to us, and that they have refused to pay the same or any part thereof, and you are, therefore, required to retain the said sum of money out of the amount owing by you on said contract, or that may hereafter become due and owing from you on said contract, and pay the same to us.

Dated November 5th, 1915.

J. S. COLLINS & SON, INC.
IRVING A. COLLINS.

Served Nov. 12, 1913, at 3 P. M.

To Eugene Burns, Owner:

You are hereby notified that Supplee Construction Co., the contractor, is justly indebted to me, in the sum of twenty-five dollars and twenty cents ($25.20), for wages due to me for carpenter work in the erection of the dwelling house or brick building being

erected on the lot owned by you and situate on the northerly side of Maple Avenue between Chester and Chestnut Streets, in the village of Moorestown in the county of Burlington and state of New Jersey, and between the lot of Dr. Joseph Stokes and the property of Joseph Bacon, deceased, pursuant to the written contract made between you and said Supplee Construction Company and on file in the Burlington County clerk's office; and you are further notified that I have demanded payment from the said Supplee Construction Company of the said sum of money so due and owing to me and that it has refused to pay the same or any part thereof; and you are, therefore, required to retain the said sum of money out of the amount owing by you on said contract, or that may hereafter become due and owing from you on said contract, and pay the same to me.

Dated November 15th, 1915.

GEORGE L. HUGHES.

Served Nov. 15, 1915, at 3.45 P. M.

To Eugene Burns, Owner:

You are hereby notified that the Supplee Construction & Contracting Co., the contractor, is justly indebted to me in the sum of forty-two dollars and seventy-three cents ($42.73) for wages due to me for carpenter work in the erection of the dwelling house or brick building being erected on the lot owned by you and situated on the northerly side of Maple Ave. between Chester Ave. and Chestnut St. in the village of Moorestown in the county of Burlington and state of New Jersey, and between the lot of Dr. Joseph Stokes and the property of Joseph Bacon, deceased, pursuant to written contract made between you and Supplee Construction and Contracting Co., and on file in the Burlington County clerk's office;

and you are further notified that I have demanded payment from the said Supplee Construction & Contracting Co., of the said sum of money so due and owing to me and that it has refused to pay the same or any part thereof; and you are therefore required to retain the said sum of money out of the amount owing by you on said contract, or that may hereafter become due and owing from you on said contract, and pay the same to me.

Dated Nov. 16th, 1915.

CHARLES B. CROXSON.

Served 11/20/15, 11.15 A. M.

To Eugene L. Burns, Owner:

You are hereby notified, that Supplee Construction and Contracting Company is justly indebted to us in the sum of $1030.00. On Oct. 16/15 we notified you that of that sum $640.00 was due as a partial payment for wages due us for work and labor, on his employment, in the erecting and constructing, and for materials furnished by us to him, and used in the erection of the 2½ story brick building, erected or being erected on land owned by you, and situate on the northerly side of Maple Avenue in Moorestown, in the township of Chester, county of Burlington and state of New Jersey, bounded and described as follows: Beginning at a stake in the center line of Maple Avenue aforesaid at the southeast corner of a lot of land of Joseph T. Bacon, and extending thence eastwardly along the centre line of Maple Avenue in front or breadth the distance of seventy (70) feet to a stake corner to lands now or late of Henry W. Doughten, thence extending northwardly of the width of seventy feet between parallel lines at right angles with the centre line of said Maple Avenue in length or depth the distance of two hundred

thirty (230) feet more or less to the line of lands now or late of Dr. N. Newlin Stokes, bounded on the north by lands of said Stokes, on the south by Maple Avenue, on the east by lands of said Doughten and on the west by lands of said Bacon, pursuant to the written contract made between you and him, and on file in the Burlington County clerk's office; and you are further notified, that we have demanded payment from the said Supplee Construction and Contracting Company of the said sum of money, so due and owing to us as aforesaid, and that he has refused to pay the same or any part thereof; and you are, therefore, required to retain the amount, so due and claimed by us, out of the amount owing by you on said contract, or that may hereafter become due and owing from you on said contract, and, on being satisfied of the correctness of our demand, to pay the same to us.

Dated Nov. 30th, 1915.

DORSEY & SMITH,
111 N. 7th St., Phila.

Served 11/29/15 at 5 P. M. by Smith.

To Eugene L. Burns, Owner:

You are hereby notified, that Supplee Construction and Contracting Company is justly indebted to me, in the sum of eighteen dollars and eighteen cents ($18.18) for wages due me for work and labor, on his employment, in the erecting and constructing, and for materials furnished, by me to him, and used in the erection of the 2½ story brick building, erected or being erected on land owned by you, and situate on the northerly side of Maple Avenue, in Moorestown, in the township of Chester, county of Burlington and state of New Jersey, bounded and described as follows: Beginning at a stake in the centre line

of Maple Avenue aforesaid at the southeast corner of a lot of land of Joseph T. Bacon, and extending thence eastwardly along the centre line of Maple Avenue in front or breadth the distance of seventy (70) feet to a stake corner to lands now or late of Henry W. Doughten, thence extending northwardly of the width of seventy feet between parallel lines at right angles with the centre line of said Maple Avenue in length or depth the distance of two hundred thirty (230) feet more or less to the line of lands now or late of Dr. N. Newlin Stokes, bounded on the north by lands of said Stokes, on the south by Maple Avenue, on the east by lands of said Doughten, and on the west by lands of said Bacon, pursuant to the written contract, made between you and him, and on file in the Burlington County clerk's office, and you are further notified, that I have demanded payment from the said Supplee Construction and Contracting Company of the said sum of money, so due and owing to me as aforesaid, and that he has refused to pay the same or any part thereof, and you are, therefore, required to retain the amount so due and claimed by me, out of the amount owing by you on said contract, or that may hereafter become due and owing from you on said contract, and, on being satisfied of the correctness of my demand, to pay the same to me.

Dated November 30th, 1915.

D. A. Sweeney, Jr.,
Moorestown, N. J.

Served 12/3/15, 3 P. M.

NOTICE UNDER LIEN ACT.

To Eugene L. Burns, Owner:

Pursuant to the provisions of an act of the legislature of the state of New Jersey, entitled, "An act to secure to mechanics and others payment for their labor and materials in erecting any building (revision of one thousand eight hundred and ninety-eight)." Approved June 14, 1893, and the acts supplementary thereto and amendatory thereof you are hereby notified that Supplee Construction & Contracting Co., contractor, are justly indebted to us, C. B. Coles & Sons Company, in the sum of three hundred twenty-two dollars and twenty cents, for lumber and materials furnished by us, the said C. B. Coles & Sons Co., to the said Supplee Construction & Contracting Co., contractors, at their request and used by them in the erection and construction of a certain frame dwelling house, owned by you located on the north side of Maple Avenue between Chester Avenue and Chestnut Street, in the village of Moorestown, in the township of Chester, county of Burlington and the state of New Jersey mentioned and described in a certain written contract made between you and the said Supplee Construction & Contracting Co. and on file in the clerk's office of the said county of Camden, and that we, the said C. B. Coles & Sons Company, have demanded payment of the said Supplee Construction & Contracting Co., contractor, the said sum of money so due and owing to us as aforesaid, and that the said Supplee Construction & Contracting Co., contractor, has refused to pay the same, or any part thereof to us.

You are therefore hereby notified and required to retain three hundred twenty-two dollars and twenty cents, the amount of money so due and

claimed by us out of the amount owing by you to the said Supplee Construction & Contracting Co., contractor, on the said contract, or which may hereafter become due from you to the said Supplee Construction & Contracting Co., contractor, upon said contract, and after you have given written notice to the said Supplee Construction & Contracting Co., contractor, of this notice and demand, and upon being satisfied of the correctness of our demand to pay the same unto us.

Dated Dec. 15, A. D. 1915.

C. B. Coles & Sons Co.
Wm. C. Coles,
President.

J. C. Spohn,
Asst. Secretary.

Served on Eugene L. Burns at 3325 Chestnut St., Phila., Dec. 15, 1915, at 4.15 P. M.

J. C. Spohn.

To Eugene L. Burns, Owner:

You are hereby notified that the Supplee Construction & Contracting Company, Inc., is justly indebted to us in the sum of one hundred and four dollars ($104.00), for material furnished by us to them and work and labor performed by us for them in the erection of the dwelling house being erected on land owned by you, and situate on Maple Avenue, Moorestown, New Jersey, pursuant to the written contract made between you and them, and on file in the Burlington County clerk's office; and you are further notified that we have demanded payment from the said the Supplee Construction & Contracting Company, Inc., of the said sum of money so due and owing to us, and that they have refused to pay the same or any part thereof, and you are, therefore,

required to retain the said sum of money out of the amount owing by you on said contract, or that may hereafter become due and owing from you on said contract, and pay the same to us.

Dated January 7th, 1916.

WARREN H. COBB AND FRED H. GREEN
TRADING AS COBB AND GREEN, BY
F. H. GREEN.

Given to Robert Burns at 6345 Drexel Rd. 1/10/16 at 7 P. M.

2. That the defendant as owner gave written notice of the said notices and demands to the contractor, Supplee Construction & Contracting Company, but did not pay the said laborers and materialmen giving the said notices and demands, because he was advised as matter of law, that there was no liability on the part of the owner to pay the same.

3. That the order of priorities as established by law is as follows: First, the demands of George L. Hughes for wages of twenty-five dollars and twenty cents ($25.20), Charles B. Croxson for wages of forty-two dollars and seventy-three cents ($42.73), D. A. Sweeney, Jr., for wages of eighteen dollars and eighteen cents ($18.18). Second, that the demands of Dorsey & Smith, as well as Cobb & Green, are for both material furnished and work and labor performed, without separating the one item from the other, wherefore the same are treated as subject to payment after liens for labor and in the order or priority of presentation. Third, that the first demand of materialmen is Dorsey & Smith for six hundred and forty dollars ($640), the second is the Moorestown Supply Company for four hundred and thirty-nine dollars and seven cents ($439.07), the

third is J. S. Collins & Son, Inc., for forty-one dollars and seventy cents ($41.70), the fourth is a second demand from Dorsey & Smith raising the amount demanded to one thousand thirty dollars ($1030), the fifth demand is C. B. Coles & Sons Co., for three hundred and twenty-two dollars and twenty cents ($322.20), and the sixth demand is Cobb & Green for one hundred and four dollars ($104).

4. That the said parties filing stop notices as aforesaid hold inchoate liens on the said property, and the said liens of George L. Hughes, Charles B. Croxson, D. A. Sweeney, Jr., and Dorsey & Smith to the extent of six hundred and forty dollars ($640) are prior liens to the lien of the plaintiff.

5. That the plaintiff, if entitled to judgment at all, cannot have thereby a lien prior to the inchoate lien of the said George L. Hughes, Charles B. Croxson, D. A. Sweeney, Jr., Dorsey & Smith to the extent of six hundred and forty dollars ($640).

6. That the complaint is defective, insufficient and does not present a cause of action, inasmuch as it fails to set forth the stop notices aforesaid and the orders of priority thereunder.

GASKILL & GASKILL,
Attorneys of Defendant.

REPLY.

(Filed Mar. 16, 1917)

The reply of plaintiff to the amendment to defendant's answer filed by defendant pursuant to an order dated February 24, 1917.

1. Plaintiff admits the giving of the notice to defendant by it as set forth in the first paragraph of the fifth ground of defense, but as to the other statements contained in said paragraph it has not any knowledge or information thereof sufficient to form a belief.

2. As to the statements in the second paragraph, plaintiff has not any knowledge or information thereof to form a belief.

3. It denies the third paragraph.

4. It denies the fourth paragraph.

5. It denies the fifth paragraph.

6. It denies the sixth paragraph.

Plaintiff contends and will object that the alleged fifth ground of defense in defendant's answer discloses no defense to matters set forth in plaintiff's complaint for the following reasons, and plaintiff will move to strike out the fifth ground of defense from defendant's answer, for the reasons aforesaid.

1. The fact that any other person, who supplied labor or furnished material under the contract mentioned in the complaint, served stop notices upon defendant, does not affect plaintiff's right of action.

2. The fact that defendant has given notice to Supplee Construction and Contracting Company of the service of said notices upon him does not affect plaintiff's right to recover.

3. The fact that defendant has not paid any of the laborers or materialmen giving said notices does not affect plaintiff's right of action.

4. It is not properly before this Court to determine the question of the rights of any other person or persons as against defendant, or as to any money due or to grow due from defendant to Supplee Construction and Contracting Company, or any other person.

5. The question of priorities or of the rights or interests of any person other than plaintiff or defendant is not properly before this Court and the same does not affect plaintiff's right of action.

6. This Court has no power or jurisdiction to render any judgment in this cause of the matters set forth in paragraph 5 of said fifth ground of defense.

G. M. Hillman,
Attorney of Plaintiff.

REQUESTS.

We therefore submit that this suit cannot be maintained and that the twelve hundred dollars ($1200) sum in question cannot be applied to the claims of the stop notice creditors, but that the completion of the building is a first lien thereon.

We request the Court to find.

1. That the cost of completing the building is a first lien upon the sum in the owner's hands.

2. That the stop notice creditors are not entitled to priority in the distribution of this fund.

3. That the defaulting contractor was not entitled to the fund in the owner's hands, nor was this fund due to him when he defaulted.

4. The stop notice creditors have no rights in the fund in the owner's hands until the owner has made good, with the approval of the architect, the cost of the deficiencies arising out of the neglect and default of the contractor.

5. That the plaintiff takes the place of and stands in the stead of the defaulting contractor, and since the latter has no legal right in the fund, the plaintiff likewise is barred of and from a right to recovery.

6. That the plaintiff has failed to make out a cause of action and judgment must go to the defendant.

GASKILL & GASKILL,
Attorneys of Defendant.

These requests were found to be inconsistent with the general finding heretofore filed in favor of the plaintiff and are denied with full exceptions to defendant.

HOWARD CARROW,
Judge.

STIPULATION OF FACTS.

In accordance with the agreement made in open court in the above-stated cause, it is hereby stipulated and agreed between the plaintiff and defendant therein that the following are the facts in the case:

1. The defendant, Eugene L. Burns, was and is the owner of a lot of land situate on Maple Avenue in Moorestown, Burlington County, New Jersey.

2. On July 26th, 1915, he made a written contract with the Supplee Construction and Contracting Company for the erection by it of a dwelling house thereon for him.

3. Which contract together with the specifications was filed in the office of the county clerk of Burlington County on July 27th, 1915.

4. The annexed is a true copy of said contract and so much of the specifications as is pertinent to the questions here involved.

5. Between August 3, 1915, and October 22, 1915, the plaintiff sold and delivered to the Supplee Con-

struction and Contracting Company, merchandise used in the erection and construction of said house under said contract to the amount of six hundred and thirty-one dollars and eighty-nine cents ($631.89), of which amount the contractor paid one hundred and ninety-two dollars and eighty-two cents ($192.82), leaving a balance of four hundred and thirty-nine dollars and seven cents ($439.07) which is still unpaid.

6. On October 24, 1915, plaintiff demanded this sum of the Supplee Construction and Contracting Company and the payment of same was refused.

7. Whereupon on October 28th, 1915, plaintiff gave defendant a stop notice in proper form, a true copy of which is hereto annexed.

8. At the time of the service of the stop notice the Supplee Construction and Contracting Company had performed the work by which, under the contract, it had earned the second payment of twelve hundred dollars ($1200.00).

9. Subsequently the Supplee Construction and Contracting Company failed to prosecute the work under the contract and failed to perform the provisions of the same, whereupon the defendant in pursuance of the provisions contained in said contract lawfully ousted the contractor from the work under the specifications and procured another contractor to finish it and thereupon made good the deficiency arising out of the neglect and failure of the contractor and deducted the cost thereof from such payments as were then earned by said contractor with the approval of the architect.

10. The amount which defendant was obliged to pay the contractor to finish the work under the supplemental contract was in excess of the original contract price.

11. The defendant is holding said sum of twelve hundred dollars ($1200.00) for the purpose of satisfying either the stop notice creditors or the cost of completing the original contract.

12. That the defendant's answer be considered as amended by changing the phrase in the first ground of defense ("thereafter due the said contractor") to read ("thereafter earned by the said contractor"). Also the same change in the last line of the first ground of defense.

GASKILL & GASKILL,
Attorneys of Defendant.
GEORGE M. HILLMAN,
Attorney of Plaintiff.

BUILDING CONTRACT BETWEEN EUGENE L. BURNS AND SUPPLEE CONSTRUCTION AND CONTRACTING COMPANY.

This Agreement made the 26th day of July, in the year Nineteen Hundred and Fifteen by and between The Supplee Construction and Contracting Co., hereinafter called the Contractor, and E. L. Burns hereinafter called the Owner.

Witnesseth, that the Contractor and the Owner for the consideration hereinafter named agree as follows:

Article 1. The Contractor agrees to provide all the materials and to perform all the work shown on the Drawings and described in the Specifications entitled Residence at Moorestown, New Jersey for Mr. Eugene L. Burns #6345 Drexel Road, Philadelphia, prepared by Coleman Sellers Mills, acting, as and in these Contract Documents entitled the Architect, and to do everything required by the General Conditions of the Contract, the Specifications and the Drawings.

Article 2. The Contractor agrees that the work under this Contract shall be substantially completed one hundred (100) working days; (Saturdays to count as one-half working days); time allowance to be made for bad weather before the roof is on.

Article 3. The Owner agrees to pay the Contractor in current funds for the performance of the Contract Thirty-seven hundred Sixty-five Dollars ($3765.00) subject to additions and deductions as provided in the General Conditions of the Contract and to make payments on account thereof as provided therein, as follows:

1. When first floor joists are set	$ 400.00
2. When Masonry is up to full height	1200.00
3. When building is ready for plastering	600.00
4. When plastering is completed	600.00
5. When building is completed	212.00
6. Thirty (30) days after completion of building	753.00

Witness
7/14/15
M. Gubart

Extra allowance of $190 00/100 for Electric Work to be added to the above contract price of $3765; making the contract price in total $3955.00.

Article 4. The Contractor and the Owner agree

that the General Conditions of the Contract, the Specifications and the Drawings, together with this Agreement, form the Contract and that they are as fully a part of the Contract as if hereto attached or herein repeated; and that the following is an exact enumeration of the Specifications and Drawings;

1. General Conditions of the Contract and Specifications.

2. One tracing linen drawing of floor plans.

3. One tracing linen drawing of elevations.

The Contractor and the Owner for themselves, their successors, executors, administrators and assigns hereby agree to the full performance of the covenants herein contained.

In Witness Whereof they have hereunto set their hands and seals the day and year first above written.

Supplee Construction & Contracting Co., Inc.,
As to Theodore Shneider, Jr., (Seal)
As to Norman Supplee, Treas,
E. L. Burns.

In the presence of
Paul M. Gerhart
Paul M. Gerhart

EXTRACTS FROM INSTRUMENT STYLED "GENERAL CONDITIONS OF THE CONTRACT," ANNEXED TO AND FORMING PART OF THE SPECIFICATIONS AND REFERRED TO AND MADE PART OF THE CONTRACT.

"The Architect may withhold or on account of subsequently discovered evidence nullify the whole or a part of any certificate for payment to protect the owner from loss on account of

(a) Defective work not remedied.

(b) Claims filed or reasonable evidence indicating probable filing of claims.

(c) Failure of the Contractor to make payments properly to sub-contractors or for material or labor

(d) A reasonable doubt that the contract can be completed for the balance then unpaid. When all the above grounds are removed certificates shall at once be issued for amounts withheld because of them."

"If the contractor should neglect to prosecute the work properly or fail to perform any provision of this contract, the owner after three days written notice to the contractor may, without prejudice to any other remedy he may have, make good such deficiencies and may deduct the costs thereof from the payment then or thereafter due the contractor, provided however that the Architect shall approve both such action and the amount charged to the contractor."

"Neither the final payment nor any part of the retained percentage shall become due until the contractor, if required, shall deliver to the owner a complete release of all liens arising out of this contract and if required in either case, an affidavit that the releases and receipts include all the labor and material for which a lien might be filed, but the contractor may if any sub-contractor refused to furnish a release or receipt in full furnish a bond satisfactory to the owner to indemnify him against any claim by lien or otherwise. If any lien or claim remain unsatisfied after all payments are made the contractor shall refund to the owner all moneys that the latter may be compelled to pay in discharging such lien or claim including all costs and reasonable attorney's fee.

"Neither the contractor nor any sub-contractor, material man nor any other persons shall file or maintain a lien commonly called a mechanics' lien for materials delivered for use in or work done in the performing of this contract and the right to maintain such lien by any or all of the above-named parties is hereby expressly waived, except in the event of the failure or refusal of the owner to pay the amount called for by any certificates of the Architect within ten days of the date of its tender to the owner for payment. Then and in such case only, shall any of the above-named parties have the right to file and maintain a mechanics' lien."

To Eugene L. Burns:

You are hereby notified that the Supplee Construction and Contracting Company, is justly indebted to Moorestown Supply Company, a corporation of the state of New Jersey, having its principal office at Moorestown, in the county of Burlington and state of New Jersey, in the sum of four hundred and thirty-nine dollars and seven cents ($439.-07) for materials furnished by said Moorestown Supply Company to the said The Supplee Construction and Contracting Company and used in the erection of the brick dwelling house being erected on the land owned by you and situate on the northerly side of Maple Avenue in Moorestown, in the township of Chester, county of Burlington and state of New Jersey pursuant to the written contract made between you and said Supplee Construction and Contracting Company and now on file in the Burlington County clerk's office at Mount Holly, New Jersey, and

You are further notified that said Moorestown Supply Company has demanded payment from the said

Supplee Construction and Contracting Company of the said sum of money so due and owing as aforesaid, and that the said Supplee Construction and Contracting Company has refused to pay the said sum or any part thereof, and you are therefore required to retain the said sum of money out of the amount owing by you to said Supplee Construction and Contracting Company on said contract or that may hereafter become due and owing from you to said Supplee Construction and Contracting Company on said contract and pay the same to said Moorestown Supply Company.

Dated October 25, 1915.

Moorestown Supply Company,
by Samuel M. Lissau, President.

SUPPLEMENTARY TESTIMONY.

Session of Court, pursuant to adjournment, this third day of July, nineteen hundred and seventeen.

Court convened at 9.30 as fixed but as the official stenographer was not in attendance the Court waited until twenty minutes past ten o'clock and at which time, by consent, testimony was taken with Joseph McHenry as stenographer. By consent stenographer was not sworn.

No appearance was made by Dorsey & Smith.

No appearance was made by Daniel Sweeney, Jr.

Moorestown Supply Company made appearance by George M. Hillman, attorney.

J. S. Collins & Sons, Inc., made appearance by Wil-

fred B. Wolcott, attorney, and upon examination of books presented by Irving A. Collins, president, it was admitted by Mr. Hillman that the amount of $41.70 for materials furnished was correct and that the stop notice was served on November 12th, 1915, at 3 P. M.

George L. Hughes made appearance personally.

GEORGE L. HUGHES was duly sworn.

Examination by Mr. Gaskill.

Q. Is this your signature to this stop notice?
A. Yes, sir.
Q. Did you serve that?
A. I did.
Q. On November 15th, 1915?
A. Yes, sir.
Q. How much is the amount of your claim?
A. Twenty-five dollars and twenty cents ($25.20).
Q. What is that for?
A. Laborer, skilled laborer as a carpenter at forty-five cents per hour, fifty-six hours.

Cross-examined.

Q. When was that labor performed?
A. It was performed previous to the date of this stop notice.
Q. When was it done?
A. Done previous to November 15th.
Q. Can you state the date?
A. I positively can by borrowing Mr. Croxson's

time book. Week ending November 11th, we were not paid. Our week started on the preceding Thursday.

Q. Were you employed by Supplee Construction Company?

A. Yes.

Q. Or by Mr. Croxson?

A. Was hired by Mr. Croxson but was employed by Supplee Construction Company.

Q. Was Mr. Croxson employed by the Supplee Construction Company?

A. He was, was foreman.

Mr. Charles Croxson made appearance personally.

MR. CHARLES CROXSON was duly sworn.

Examination by Mr. Gaskill.

Q. I show you a stop notice here for $42.73, did you write that or was that written for you?

A. I wrote that myself.

Q. How much of this is for labor and how much is for material?

A. $3.13 for material and $39.60 for labor.

Q. Did you perform that labor yourself?

A. I certainly did.

Q. Has it been paid?

A. No.

Q. For what week was that labor?

A. For the week ending November 11th and the three and one-half days of the week following.

Cross-examined.

Q. Did you demand that money from the Supplee Construction Company?
A. Yes, sir.
Q. You were employed by the Supplee Construction Company?
A. I was.

C. B. Coles Company made appearance by John C. Spohn.

JOHN C. SPOHN was duly sworn.

Examination by Mr. Gaskill.

Q. Are you connected with the C. B. Coles Company?
A. I am.
Q. In what capacity?
A. Bookkeeper and collector.
Q. Did you sign, as assistant secretary, this stop notice that was served on Burns?
A. I did.
Q. What is the claim as stated in that stop notice?
A. $322.20.
Q. What was that for?
A. Material.
Q. Was that furnished the Supplee Construction Company for the Burns house?
A. Yes, sir.
Q. Has it been paid?
A. No, sir.
Q. Was this acocunt made up from your original books?
A. Yes, sir.

Cross-examined.

Q. Did you demand payment of that bill from Supplee Construction Company?
A. Yes.
Q. Did they refuse to pay it?
A. Yes.

Cobb and Green made appearance by Charles H. Crawford.

CHARLES H. CRAWFORD was duly sworn.

Examination by Mr. Gaskill.

Q. Are you employed by or connected with Cobb & Green?
A. Yes, sir.
Q. And in what capacity?
A. Estimater.
Q. Do you know the signature of F. H. Green to this stop notice?
A. Yes, sir; that is his signature.
Q. What is the amount of the claim?
A. $104.00.
Q. What is that for?
A. Labor and material.
Q. How much is labor and how much is material?
A. About $30.00 of labor.
Q. We must know how it is divided.
A. $45.64 is material and $58.36 is labor.
Q. Has that been paid?
A. No, sir.

Cross-examined.

Q. What is the business of Cobb & Green?
A. Electrical contractors.
Q. Did you have a contract with Supplee Construction Company for the electrical work on this house?
A. Yes, sir.
Q. What was your contract price?
A. $130.00.
Q. Did you perform all of the work?
A. No, sir, 80% of the work.
Q. And this $104.00 represents 80% of the contract price?
A. I believe it does.
Q. Cobb and Green were individual contractors?
A. What do you mean?
Q. They were partners, they were independent contractors of this work?
A. Subcontractors.
Q. Cobb and Green employed men to do the work?
A. Yes, they performed it themselves and employed men.
Q. And then paid the laborers who they employed?
A. Yes, mechanics.
Q. How much of this did you say is represented by material?
A. $45.64 and the balance from $104.00 is labor.
Q. Who performed that labor?
A. Cobb and Green.
Q. What was the individual name who performed it?
A. I didn't bring the name of the man who performed it.
Q. Do you know?
A. No, I do not.

Q. Does Mr. Cobb know himself?
A. I think he does.
Q. Did he do it all himself?
A. I don't know.
Q. Did Mr. Green?
A. Either them or their men.
Q. Did Mr. Green do any of that work himself?
A. Yes, I think he did.
Q. How many men did they have employed there?
A. I can't say as to that.
Q. You do not know who did perform the labor?
A. I can say this much that a mechanic performed the labor.
Q. Is Mr. Cobb a mechanic?
A. Yes.
Q. Does he do the electrical work on a job like this?
A. Yes.
Q. Does he superintend it?
A. Yes.
Q. Does the claim of Cobb and Green or any memorandum which you have, show whose wages make up this account which you say was due for labor?
A. Yes, but I didn't bring the books with me. I saw the job in the state of completion.
Q. When was this work done?
A. Done prior to January 11th, the filing of the stop notice.
Q. How far prior to that?
A. It was done in December and January.
Q. December of 1915 and January of 1916?
A. Yes.
Q. Is that your answer?
A. As near as I can give you.

Q. Did you demand payment of this money from Supplee Construction Company?

A. Yes, sir.

Q. When did you demand that?

A. October 30th, 1915.

JOSEPH MCHENRY, stenographer, above, having been duly sworn says that he mailed a letter, by registered mail, a copy of which is hereto attached, to the various stop notice creditors named above and personally put the said notices in the mail box at the post office in Camden.

Mr. Hillman moves to strike out all of the testimony upon the ground that the same is immaterial.

Plaintiff offers no testimony on this branch of the case.

It is agreed that this testimony shall be considered as though taken in the presence of the Court. The trial Judge being obliged to be absent. It is also agreed that the trial Judge shall dispose of all questions presented upon considering the briefs.

Mr. Hillman waived the marking of the stop notices as exhibits in the case.

GASKILL & GASKILL,
Attys. of Deft.
GEORGE M. HILLMAN,
Atty. of Pltff.

June 29th, 1917,

Moorestown Supply Co., vs. Burns.

Dear Sir:

The Moorestown Supply Company is endeavoring to obtain Judgment against E. L. Burns upon its Stop Notice. The Plaintiff's Counsel denies the

correctness of the amount stated in your Notice. In order to give you a chance to prove the correctness of your account, for such purpose as it may be material in the case, Judge Carrow adjourned the hearing until Tuesday morning, the third day of July at 9.30 o'clock, at the Court House in the City of Camden in order that you and the other claimants might have an opportunity to be present with your Books of account and prove that the money stated in the Stop Notices was due you by the Supplee Construction and Contracting Company.

In the event of your failure to appear the Judge will conclude, probably, that your account is not correct.

Very truly yours,

TLG/JMH.

JUDGMENT.

(Filed Oct. 10, 1917)

BURLINGTON COUNTY CIRCUIT COURT.

MOORESTOWN SUPPLY COMPANY,
Plaintiff,
vs.
EUGENE L. BURNS,
Defendant.

ACTION AT LAW.
JUDGMENT ON VERDICT.
GEORGE M. HILLMAN, ATTORNEY.

This action was tried before Judge Howard Carrow without a jury in the presence of the counsel of the respective parties.

The cause having been heard and submitted to the Court, the Court thereupon found in favor of the plaintiff for the sum of $487.37.

Whereupon it is adjudged that the plaintiff, Moorestown Supply Company, recover of the defendant, Eugene L. Burns, the sum of $487.37 and its costs which are taxed at the sum of $47.42, making in the whole the sum of five hundred and thirty-four dollars and seventy-nine cents ($534.79).

Judgment entered August 2nd, 1917.

I. F. Huntzinger Co., Appellate Printers, Camden, N. J.

New Jersey Court of Errors and Appeals

Moorestown Supply Co.,
Plaintiff and Respondent,
vs.
Eugene L. Burns,
Defendant and Appellant.

BRIEF OF APPELLANT

This suit was brought on a stop notice against the owner of a building to recover moneys due from the defaulting contractor to the plaintiff.

The case was tried before Judge Carrow without a jury upon a stipulation, depositions, argument, and requests on the part of the defendant for findings by the Court. The Judge refused the requests of the defendant and gave judgment for the plaintiff (page 1).

The grounds of appeal are the requests of the defendant for findings (see pages 4 & 32). They are as follows:

1. That the cost of completing the building is a first lien upon the sum in the owner's hands.

2. That the stop notice creditors are not entitled to priority in the distribution of this fund.

3. That the defaulting contractor was not entitled to the fund in the owner's hands, nor was this fund due to him when he defaulted.

4. The stop notice creditors have no rights in the fund in the owner's hands until the owner has made good, with the approval of the architect, the cost of the deficiencies arising out of the neglect and default of the contractor.

5. That the plantiff takes the place of and stands in the stead of the defaulting contractor, and since the latter has no legal right in the fund, the plaintiff likewise is barred of and from a right to recovery.

6. That the plaintiff has failed to make out a cause of action and judgment must go to the defendant.

The complaint stated and the defendant's answer admits that the defendant was the owner of the lot of land whereon the building in question was erected. That on July 26th, 1915, the defendant and the Supplee Construction and Contracting Company (hereafter called contractor) made a contract for the construction of the house in question. That the contract and specifications were filed in the clerk's office of Burlington County. That the plaintiff sold and delivered to the contractor some material used in the construction of the building of the value stated in the judgment. That the plaintiff gave the defendant a stop notice on Oct. 28th, 1915.

The defendant by its answer (pages 15, etc.) denied that the said sum was due and owing from the defendant to the plaintiff.

The first and second grounds of defense are as follows:

"That the said contractor, the Supplee Construction and Contracting Company, neglected to prosecute the work properly as mentioned in the said contract, and failed to perform the provisions of the said contract, whereupon the defendant, as owner, gave three days' written notice to the said contractor as provided in the specifications forming a part of the said contract, and thereupon made good the deficiencies arising out of the neglect and failure of the contractor, and deducted the costs thereof from such payments as were then and thereafter earned by the said contractor, having first received the approval of the architect named in the contract to such action and the amount charged the contractor; whereupon and whereby the said contractor and the plaintiff lost and forfeited all legal right of, to or in such payments as were then or thereafter earned by the contractor."

Second Ground of Defense:

"That the plaintiff takes the place of and stands in the stead of the contractor, and since the latter is deprived of all legal right to such payments as were or would become due upon performance of the said contract, the plaintiff is barred of and from a right to recovery."

The third ground states that the complainant failed to state a cause of action and the fourth states that the stop notice was illegal. This latter defense was not pressed. The fifth ground of defense (pages 18 to 29) sets forth the various stop notices served upon the defendant and that the defendant as owner

gave written notice thereof to the contractor, in accordance with the statute, and that he did not pay the same because he was advised as a matter of law that there was no liability on the part of the owner to pay the same. It further sets forth the order of priorities and that the plaintiff, if entitled to judgment at all, cannot have a lien prior to the inchoate liens of antecedent stop notice creditors.

We understand that proper pleading requires this ground of defense in order to found a suit in chancery to determine the priorities of the judgment lien and the liens of the stop notices; and that the trial Court will not dispose of that question.

The stipulation of facts (page 33) covers all the facts upon which the case can be determined under the first grounds of defense. The depositions cover the matters arising under the fifth ground of defense and are not material to this discussion.

The stipulation states:

1. That the defendant is the owner of the land in question.

2. That he made a written contract with the Supplee, etc., Co. on July 26th, 1915, for the erection of a dwelling house on said lot of land.

3. That the contract and specifications were filed in the county clerk's office on the following day.

4. That annexed is a true copy of the contract and so much of the specifications as is pertinent to the questions involved.

5. That between August 3rd, 1915, and October 22nd, 1915, the plaintiff sold and delivered to the con-

tractor materials put into the construction of the house to a certain value, upon which a payment was made, leaving a balance of $439.07 still unpaid by the contractor to the plaintiff.

6. That the plaintiff demanded this sum on October 24th, 1915, of the contractor and payment was refused.

7. Whereupon the plaintiff gave the defendant, four days later, a stop notice in proper form, of which a copy is annexed.

8. That the contractor had performed at that time the work by which, under the contract, it had earned the second payment of $1200.00.

9. Subsequently the contractor failed to perform the work under the contract and failed to perform the provisions of the same, whereupon the defendant in pursuance of the provisions contained in said contract lawfully ousted the contractor from the work, and procured another contractor to finish it, and thereupon made good the deficiency arising out of the neglect and failure of the contractor, and deducted the cost thereof from such payments as were then earned by said contractor, with the approval of the architect.

10. The amount which the defendant was obliged to pay the new contractor to finish the work under the supplemental contract was in excess of the original contract price.

11. That the defendant is holding the said sum of $1200.00 for the purpose of satisfying either the stop

notice creditors, *or the costs of completing the original contract.*

This stipulation is necessarily complete in its recital of facts upon which the contending parties must rely. Facts essential to the success of the plaintiff cannot be implied.

The eighth paragraph of the stipulation (page 34) is one upon which the plaintiff strongly relies; viz., that the contractor had performed the work by which, under the contract, it had earned the second payment; because the plaintiff contends that if it had done the work which earned the money, that as a consequence the money was due. This is not true for the money could not be due without a certificate from the architect, and there was no certificate by the architect or else the stipulation would have so stated. (See p. 38, ll. 7-10.)

The plaintiff makes a vigorous contention that under the ninth paragraph of the stipulation it is admitted that it was subsequent to the giving of the stop notice that the contractor failed to prosecute the work and perform the contract. However, carrying the burden of the proof, it was the duty of the plaintiff to establish this as a fact by stipulation before the Court. We submit, however, that a reading of these two paragraphs shows that the ninth is not predicated upon the giving of the stop notice but the performance of the work which earned the second payment. The seventh paragraph recites the giving of the stop notice, and the eighth alludes to that incidentally, but the fact set out is the performance of work. The ninth paragraph refers to that. Undoubtedly the plaintiff had no doubt about getting its money from the contractor until it learned that the contractor had failed.

The contention of counsel for the plaintiff is simply this—that the terms of the contract cannot be considered in determining whether or not the money was due the contractor when it had done the work which would have earned it, if it had not defaulted. The defendant's contention is that altho the contractor had done the work which earned the money, he was not entitled to that money nor was that money due him because of his default, and the rights of the owner arising therefrom in accordance with the terms of the contract. The defendant's rights as owner are stated in the first ground of defense. All these facts are admitted.

Consequently the defendant as owner had a legal right to make good the deficiencies arising out of the failure of the contractor and deduct the costs thereof from such payments as had been earned by the contractor, having first received the approval of the architect to such action and to the amount charged the contractor. These facts, while briefly stated, are admitted, as they are fully covered by the term in the stipulation—"*Lawfully ousted with the approval of the architect.*"

As stated our contention is that these stop notices did not become effective as against the twelve hundred dollars ($1200) or second payment because of the contractor's default, but that the cost of completing the building is a prior claim upon that sum.

By the terms of the contract, the owner had the right to retain the moneys earned and not paid, and to make deduction from that amount for the cost of completing the building.

It is admitted in the stipulation that the specifications form a part of the contract and are part of the facts in this case. That the specifications provide as follows (page 38, line 10):

> "If the contractor should neglect to prosecute "the work properly, or fail to perform any pro- "vision of this contract, the owner after three "days' written notice to the contractor may, "without prejudice to any other remedy he may "have, *make good such deficiencies and may "deduct the cost thereof from the payment then "or thereafter due the contractor*; provided "however, that the architect shall approve both "such action and the amount charged to the "contractor."

All the details of this provision were complied with, and thereupon the owner made good the deficiencies by replacing the contract with another firm, upon the approval of the architect.

Clearly this stipulation justifies the failure of the architect to give the required certificate, because such action would be contradictory. Counsel in his brief in the lower court has made much of our contention that the failure of the architect to give the certificate bars the plaintiff of a right of recovery. He contends that such failure was fraudulent and quotes *Chism vs. Schipper,* 22 Vroom, 1 and other cases. But there is nothing in that contention. In the case of *Bradner vs. Roffsell,* 28 Vroom, 412, on page 417, the Court said that the courts must exercise watchful judicial supervision over the determination of juries on this question. That to instruct a jury that they may find fraud from the withholding of such a certificate without a substantial reason, is to permit them to determine what are substantial reasons, and if in their judgment there are none, then, though the architect's judgment may be honestly otherwise, to convict him of fraud. Clearly there is not the slightest foundation for

counsel to reflect upon the integrity of the architect. It is only camouflage.

Counsel for the plaintiff made a vigorous contention in the lower court also on the doctrine that a stop notice is an assignment on the part of the contractor to the materialmen of his claim against the owner, and cites the case of *Reeve, et al., vs. Elmendorf,* 9 Vroom, 125, as his authority. The case does not hold that or anything of that kind.

The case is interesting however. We quote from page 130:

> "The statement of the general principle, that "the statutory section in question does not at all "modify the contract between the contractor and "the owner, except in the one particular that "authorized certain portions of the money "earned to be paid to the workmen and material- "men, appears to afford an answer to the ques- "tions here propounded. The owner cannot be "compelled to pay to the workman or material- "man any moneys which, by force of his con- "tract, he was not compellable to pay to the "contractor. Upon notice given, the workman or "materialman, to the extent of his demand, "takes the place of the contractor, so that if the "owner, as against the latter, can withhold the "payment of the moneys earned, he can do so, "in like manner, against the demands of the "former. The test is, whether a suit for the "money in question will lie by the contractor "against the owner. If it will not, the owner is "not liable to a suit by the workman or material- "man. The result therefore is, that if, *by the "terms of the contract in this case,* the owner "had the right to retain the moneys earned

> "until the completion of the building, and then
> "to make deduction from such sum on account
> "of the delay in the doing of the work, such
> "right will be of equal avail, whether the suit
> "is at common law by the contractor, or under
> "the statute by the workman or materialman."

Nothing can be clearer than that in the case at bar, the contractor was not entitled to the second payment from the owner because his default had put a heavy financial burden upon the owner, for he was obliged to relet the contract to a new party at an increased price. The case at bar is totally different from the Reeve case in that the latter turned by the terms of the contract upon the right of the owner to retain the moneys owed until the completion of the building, etc., that right is not claimed by the defendant in this case. Simply that the default on the part of the contractor disengaged the defendant from the terms of payment and terminated the rights thereto of the contractor and the materialmen who stand with him.

Counsel for the plaintiff has made a vigorous contention also that the facts in the case at bar are identical with those in the case of *Stone Post Co., vs. Corcoran*, 51 Vroom, 549, and that the Corcoran case disposes of the case at bar. We submit, however, that the facts are quite dissimilar in essential details. In the Corcoran case, the owner admitted that the payments in question were due the contractor at the time the stop notice was served, and that at a later time the contractor ceased work on the building and the owner completed it. The Court decided the Corcoran case upon the application of the Reeve case, *upon the admission that the moneys were due*

the contractor. It was this admission that the Court properly construed to be a waiver on the part of the owner of the necessity of producing a written certificate under the hand of the owner—and not as in this case under the hand of the architect.

It is the principle in the Corcoran case and not the assumed similarity of facts that controls. The Court said, "The criterion is whether the contractor under the circumstances stated, could sue for the moneys demanded, and that question would obviously depend on the force of the contract between the owner and the contractor."

Now, the contract includes the specifications in this case, and we find that it was the duty of the architect to protect the owner from all claims, liens, etc., by withholding his certificate. The plaintiff's claim is subject thereto (see stipulation, pages 37 to 39). A brief extract of the specifications was annexed to the stipulation as a part thereof and as a part of the whole contract. The first paragraph quoted is as follows (pages 37-38):

> "The architect may withold or on account of "subsequently discovered evidence nullify the "whole or a part of any certificate for payment "to protect the owner from loss on account of
>
> "(A) Defective work not remedied.
>
> "(B) Claims filed or reasonable evidence in- "dicating probable filing of claims.
>
> "(C) Failure of the contractor to make pay- "ments properly to subcontractors or for "material or labor.
>
> "(D) A reasonable doubt that the contract "can be completed for the balance then unpaid. "*When all the above grounds are removed cer- "tificates shall at once be issued for amounts "witheld because of them.*"

In other words, the withholding of the certificate of payment for the second payment was neither negligent nor fraudulent, since the architect was bound to protect the owner from a double payment on the cost of the building by withholding his certificate, in order to protect the owner from claims filed, or *reasonable evidence* indicating the probable filing of claims, or the arising of a *reasonable doubt* that the contract could be completed for the balance then unpaid. The actual default of the contractor is sufficient justification of the action of the architect in withholding his certificate, for he must have had the best kind of reasonable evidence of the probable filing of claims and of reasonable doubt that the contract could be completed for the balance then unpaid.

The specifications go so far as to provide (page 38) for protection against all liens arising out of the contract. The plaintiff endeavored to create a lien by his stop notice and is now endeavoring to perfect that lien by a judgment. We submit he has no right to do so in the face of the contract. We submit further that nothing can be more obvious than that the owner endeavored, by the terms of this contract, to protect himself from double payment on the cost of his house, and that the contractor agreed there should be no recourse to the owner beyond the contract price. This case presents a situation that has not been adjudicated in other causes.

We submit that the judgment for the plaintiff must be reversed with costs.

GASKILL & GASKILL,
Of Counsel with Appellant-Defendant.

NEW JERSEY COURT OF ERRORS AND APPEALS

MOORESTOWN SUPPLY COMPANY,
Plaintiff and Respondent,
vs.
EUGENE L. BURNS,
Defendant and Appellant.

ACTION AT LAW

BRIEF OF PLAINTIFF AND RESPONDENT

This is an appeal from a judgment recovered by plaintiff against defendant in The Burlington County Circuit Court. The suit was upon a stop notice, given pursuant to Section 3 of the Mechanics' Lien Act (Compiled Statutes of N. J. page 3294), and was tried before Honorable HOWARD CARROW, Circuit Court Judge, without a jury. The case was submitted upon an agreed state of facts embodied in a stipulation (State of Case, pages 33 - 35). From this stipulation it appears that defendant Eugene L. Burns being the owner of a lot of land in Moorestown, N. J. made a written contract with the Supplee Construction and Contracting Company for the erection thereon of a dwelling house; this contract was filed in the County Clerk's Office; by its terms it was provided that the Contracting Company should erect a house for $3765, payable in six installments, the second of $1200. when the masonry was up to full height.

Moorestown Supply Company, the plaintiff in this cause, furnished material to the Supplee Construction and Contracting Company used by it in the erection of this house, for a part of which, amounting to $439.07, the Construction Company never paid plaintiff. On October 28, 1915 plaintiff having demanded this sum of the Construction Company and the demand having been refused, served a stop notice on the defendant. At the time of the service of the stop notice the Supplee Construction and Contracting Company had performed the work by which, under the contract it had earned the second payment of $1200.00, which had not been paid by Burns to the Construction Company. Subsequently the Supplee Construction and Contracting Company having failed to properly prosecute the work under the contract, the defendant, Burns, lawfully, in pursuance of the provisions contained in the contract, and with the approval of the Architect, ousted the Construction Company from the work and employed another contractor to finish the job. The amount which Burns was obliged to pay the Contractor to finish the work exceeded the balance of the contract price due from him to Supplee Construction and Contracting Company.

I

Plaintiff's contention is that it is entitled to have paid it by defendant out of this second payment of $1200. (earned but not paid) the amount of its claim.

Defendant's contention is that by reason of the facts set forth in the stipulation, he is justified in refusing to pay plaintiff's claim, and has the right to apply, upon the cost of completing the building, in accordance with his original contract with the Supplee Construction and Contracting Company, not only the money which by the

terms of said contract would have thereafter become due, but also the second payment of $1200. which had been earned and was due, before the default of the Construction Company. It is respectfully submitted that the second payment of $1200. having been earned by and being due to the Supplee Construction and Contracting Company, before it defaulted, plaintiff by virtue of its stop notice is entitled to have its claim paid out of this money, and that no claim of the defendant against the Supplee Construction and Contracting Company, arising out of anything which occurred after the Supplee Construction and Contracting Company once became entitled to the $1200.00 is any justification of defendant's refusal to honor plaintiff's stop notice and pay it the amount therein stated. This case appears to be identical with that of the Stone Post Company vs. Corcoran, 51 Vroom, 549, and a reading of that case would seem to dispose of the case now before the Court. Since the opinion in the Stone Post case is not lengthly it is quoted in full and is as follows:

"This action was brought under the third section of "the Mechanics' Lien act, to recover money due to the 'plaintiff from William Mosher. The contract price for "the building was $2,500, payable in installments, as fol- "lows: $500 when the frame was up; $700 when the sides "and roof were on; $500 when the floors were laid, par- "titions set and rough plumbing in; $400 when the out- "side work was finished and one coat of paint on, the "leaders up and the plumbing fixtures on the premises; "and the final payment of $400 when the building was "completed and accepted by the owner. The contract "contained the usual clause, permitting the owner to pro- "vide material and workmen to finish the work and de- "duct the expense from the amount of the contract in "case of default by the contractor. No question is raised

"as to the validity of the notice by the plaintiff. The con-
"test is over the amount due from Corcoran to Mosher,
"applicable to the plaintiff's claim. The state of the case
"shows that the first payment of $500 was made; that
$500 was paid on account of the second payment, leaving
"$200 thereof unpaid; that shortly after service of the
"notice Corcoran admitted service of the notice and
"that there was due Mosher $700; that at that time
"Mosher had completed sufficient work on the building
"to entitle him to the $200 due on the second payment
"and the full amount of the third payment. Some time
"after this Mosher ceased work on the building, and Cor-
"coran completed it at an expense of $1,457. Deducting
"from the contract price this amount and the $1,000 al-
"ready paid, the balance left would be only $43. The
"plaintiff's claim was $475, and for that amount and in-
"terest the District Court gave judgment."

"Shortly stated, the question to be decided is
"whether the cost of completing the building is a first
"lien upon the unpaid balance of the contract price, or
"whether it is subject to the amount which the plaintiff
"sought to impound by his stop notice. The precise ques-
'tion does not seem to have been heretofore presented.
"We think the solution, however, is not difficult, in view
"of the principles laid down in Reeve V. Elmen-
"dorf, 9, Vroom 125, and followed by all the courts
"since that time. Chief Justice Beasley there said: "Up-
"on notice given, the workman or materialman, to the
"extent of his demand, takes the place of the contractor,
"so that, if the owner, as against the latter, can withhold
"the payment of the moneys earned, he can do so, in like
"manner, against the demands of the former. The test
"is, whether a suit for the money in question will lie by
"the contractor against the owner. If it will not, the
"owner is not liable to a suit by the workman or material-

"man. The result, therefore, is, that if, by the terms of "the contract in this case, the owner had the right to re- "tain the moneys earned until the completion of the "building, and then to make deduction from such sum on "account of the delay in the doing of the work, such "right will be of equal avail, whether suit is at common "law by the contractor, or under the statute by the work- "man or materialman.' And he added: 'The criterion is 'whether the contractor, under the circumstances stated, 'could sue for the moneys demanded, and that question 'would obviously depend on the force of the contract 'between the owner and contractor.' This language "makes it clear that the right of the owner to deduct his "claim in preference to the right of the materialman un- "der the stop notice, depends upon whether or not the "owner had the right to retain the moneys earned until "the completion of the building. In this case he clearly "had no such right. The payments were made in install- "ments as the work progressed, and for each installment "the contractor had a right of action as soon as it was "due, and was not obliged to wait for the completion of "the building. Jones v. Whittier, 48 Id. 715. "Since the materialman, by the service of the notice, "stood in the same position as the contractor, he also had "the right to sue. The case differs from St. Peter's "Catholic Church v. Vannote, 21 Dick, ch. Rep. 78, „where the owner was entitled to retain twenty per "cent of each estimate until the final payment. In "substance, what the defendant claims in this case is a "right to retain moneys already due until a date later than "that fixed in his contract for the payment, for the pur- "pose of meeting a contingency which has not arisen and "may not arise. If such a construction were adopted, it "would be open to the owner in any case to postpone the "time for payment of the installments due under the con-

"tract, and thus, at his own option, to make an entirely "different agreement, for he could, in any case, set up the "possibility of a subsequent default on the part of the "contractor. We think such a contention has never been "suggested before, and the language of the court, in the 'cases, while not decisive, is inconsistent with this con- "struction."

"There is no substance in the contention that the "money was not due for the reason that Mosher had "never produced an Architect's certificate as required by "the contract. The contract was unusual, in that it 'named A. M. Simpson as architect, but provided for "certificates under the hand or Corcoran, the owner; and "while the subsequent provision of the contract is that a "certificate shall be produced, signed by the architect, it is "quite evident that this inconsistency arises from the fail- "ure to change a printed blank to accord with the pro- "vision requiring a certificate under the hand of Cor- 'coran. Corcoran was himself the owner, and his sub- "sequent admission to the plaintiff that the amount of "$700 was due to Mosher, was a waiver on his part of the "necessity of producing any written certificate under his "own hand, if a waiver had been necessary."

"The trial court allowed the plaintiff interest, and it "is said that Corcoran is not chargeable with interest. 'This contention overlooks the real situation. The plain- "tiff is seeking to recover a debt due from Mosher. On "that debt he is entitled to interest. In theory of law "Corcoran does not pay the debt out of his own money, "but he pays it out of money due to Mosher, and is en- "titled to credit for it in his settlement with Mosher. "There seems to be no reason why the plaintiff should not 'have interest out of the fund which is more than suffi- "cient to pay the whole amount for which the District "Court rendered judgment."

"The judgment is therefore affirmed, with costs, and "the plaintiff may enter judgment in this Court for the 'amount."

The decision in the above case is dispositive of the matter now before this Court for determination. Upon the service of the stop notice plaintiff became thereby the assignee of the rights and claims of the Supplee Construction and Contracting Company, against Eugene L. Burns, as the same existed at the time of such service. The second payment of $1200. was then due the Construction Company from Burns and it could have successfully maintained a suit against him for the same. Jones vs. Whittier 48 Vr. 715; Stone Post Company vs. Corcoran 51 Vr. 549-551. Nothing which might subsequently occur could change the fact of the money being due. Something which happened afterward might form the basis of a counter-claim against a suit or demand for the money earned, but could not obliterate the fact that the money had in fact been earned, and was then due. In a suit for this money by the Construction Company against Mr. Burns, the latter could not have answered that the money had not been earned, because of some subsequent dereliction on the part of the contractor. Mr. Burns could not have denied liability. His defense would have been by the way of counter-claim, recoupment or set off; admitting the fact that the money had been earned, but resisting its payment, by setting off the damages he had sustained by reason of a subsequent breach by the contractor, of other provisions of the contract.

By force of the giving of the stop notice, the plaintiff became the assignee of the claim of the Construction Company, for this second payment of $1200, or so much of it as was necessary for the payment of plaintiff's claim, just as effectually as though the Construction

Company had executed to it a formal assignment thereof. In a suit on such assignments Mr. Burns in his defense would have been limited to such matters of set off or counter-claim against the Construction Company as existed at the time the assignment was made, and he had notice thereof. Obviously when the stop notice was served upon him it was notice of the assignment. "All choses "in action arising on contract shall be assignable at law "and the assignee may sue thereon in his own name but "in such action there shall be allowed all set offs, dis- "counts and defenses, not only against the plaintiff but "against the assignor before notice of such assignment "shall be given to the defendant." Compiled Statutes of N. J. page 4056, section 19. In as much as the default of the Supplee Construction Company occurred subsequent to the giving of the stop notice, which was both an assignment of the claim and notice thereof to Mr. Burns, such default can not be made a defense to plaintiff's claim in the present instance.

II

Counsel in his brief (with a copy of which I have been favored) advances now for the first time a new contention. The stipulations (State of Case, pages 33, 34 and 35) recite the different elements in the case such as the ownership of the land; the making of the contract; filing of the same; incurring of plaintiff's claim; demand thereof; service of stop notice and fact that the second payment of $1200 had been earned. Then in the 9th paragraph he facts therein stated are preceded by the word "subsequently." The only reasonable construction to be placed upon the language is that all the facts stated in the 9th paragraph occurred in point of time after all of the facts set forth in the preceding paragraphs. With-

out the use of the word subsequently, this would be the natural construction. The facts are set forth in cronological as well as logical order. Defendant now contends that this 9th paragraph can be construed as having relation only to the 8th paragraph, and that the stipulation can be interpreted to mean that the default of the contractor occurred after the earning of the second payment of $1200 but not necessarily after the giving of the stop notice. Defendant does not assert that such default of the contractor did in fact occur prior to the giving of the stop notice, but contents himself with urging that the stipulation does not set forth that the default occurred after the service of the stop notice. The case was tried in the Circuit Court upon the theory that the stipulations meant what they said. No suggestion was then made that the default of the contractor occurred before the giving of the stop notice. Counsel does not even suggest now that the stop notice was given after the default, but naively suggests that it is possible to so construe the language of the stipulation as to leave in doubt the question as to whether the default of the contractor occurred before or after the giving of the stop notice. It will be noticed by reference to the stipulation that the first seven sections are as to facts which unquestionably occurred before the giving of the stop notice. The seventh paragraph sets forth the giving of the notice, with the date of service. The eighth section is rather as to a condition existing at the date of a certain other event, to wit: the giving of the notice, than the setting forth the happening of an occurrence. Counsel's ingenious insinuation that the 9th paragraph is predicated solely upon the 8th paragraph and not the 7th is palpably absurd. Had the fact been that the default of the contractor occurred prior to the giving of the stop notice it is inconceivable that the shrewd counsel for defendant would

have failed to have had such fact plainly set forth in a stipulation which he entered into and signed. It is respectfully submitted that the only reasonable construction to be placed upon the stipulation is that the default occurred subsequent to the giving of the stop notice and consequently subsequent to the condition existing at the time the notice was given.

III

Defendant further contends and earnestly argues that the second payment of $1200 was not due Supplee Construction Company, and consequently did not pass to plaintiff as assignee by reason of the giving of the stop notice, because notwithstanding his admission that the *money had been earned,* there is no admission in the stipulation that any certificate had been given by the Architect.

The obvious reply to this contention is that there is no admission in the stipulation that any certificate from the Architect was required or was necessary. It nowhere appears in the case that a certificate from the Architect was necessary to entitle the Construction Company to this second payment. By article 3 of the contract (State of Case, page 36, lines 15 to 30) it is provided that the second payment of $1200 shall be made "When the masonry is up to full height," (it is admitted this much work was done), but nothing is said about the giving of any certificate by the architect. The contract between Burns and the Construction Company appears in full on pages 35 to 37 of the State of the Case, and it does not even mention the giving of any certificate by the architect. On pages 37 to 39 of the State of the Case appear extracts from an instrument styled "General conditions of the contract" which is made a part of the speci-

fications and contract. These extracts are stipulated (State of Case, page 33, lines 31 to 41) to be "so much of the specification "as is pertenant to the question here involved." Although in these extracts mention is made of the withholding by the architect of his certificates under certain circumstances, yet it nowhere appears that the making of any payment is dependent upon the giving of a certificate by the architect or that the production of such certificate is a condition precedent to the demanding of a payment. Had the "general conditions of the contract,' or the specifications contained such provision, which counsel for defendant appears now to regard as so important, it is improbable that he would have failed to set them forth in the stipulation; for as counsel himself says in his brief "this stipulation is necessarily complete in its recital of facts upon which the contending parties must rely." Facts essential to the success of the defendant can not be implied. It is not unlikely that the contract and "general condition" are the work of a layman, who had before him a form of contract which he attempted to modify to suit the present case, and in to which he endeavored to incorporate certain provisions copied from other building contracts, but without having regard to the relation of the different parts to each other. The provision set forth on page 37, lines 30 to 35 and page 38 lines 1 to 10 was perhaps copied from another contract, which elsewhere made provision for the giving of an architect's certificate and made the same a sine qua non to the payments to the contractor. Just as it is evident that the clause on page 38, lines 21 to 25 providing for a retained percentage, (for which absolutely no provision was made in the present contract), was copied from some other contract which did provide elsewhere for the retention of a percentage of the contract price until completion. Notwithstanding the allusions to archi-

tect's certificate contained in the "general conditions of the contract," and defendant's adroit argument on the subject, the fact remains that there is no evidence before the Court that a certificate from the Architect was required before the contractor became entitled to his payments.

It is respectfully submitted however that if the necessary work had been done to entitle the contractor to this second payment, and by the stipulation defendant admits this to be the case, the issuing of the architect's certificate was unnecessary, even had the contract provided that the payments thereunder should be made only upon certificate of the architect. The purpose of the certificate is merely to furnish the owner evidence that a certain amount of work has been done, whereby in accordance with the terms of the contract, the contractor is entitled to a payment. But when the owner is satisfied and admits, as he has done, that this work (the performing of which entitled the contractor to the second payment) had been performed, he admits that the second payment was due and it is a waiver on his part of the necessity that the second payment had been earned is sufficient to sustain plaintiff's suit even though an architect's certificate had been required and though defendant does not admit that any had been given, or even if as a matter of fact no such certificate had been given. Defendant's admission amounts to a waiver of the production of such certificate. This defendant could do. Stone Post Company vs. Corcoran 51 Vr. 549, at page 552. The production of the architect's certificate is not always essential, even when the contract provides that payments shall only be made upon the production of architect's certificate. If the contractor had performed the work which entitled him to the second payment (and defendant admits that he had) then if the architect

withheld the certificate, such withholding on his part was fraudulent, and the Construction Company or the plaintiff as its assignee, could not be prejudiced thereby. Chism vs. Schipper 22 Vr. 1. Bradner vs. Roffsell 28 Vr. 412, Rizzolo vs. Poysher 4 Gummere 618-625. All parties to a building contract which provides for the issuance of architect's certificate prior to payment are bound by such provision subject to the implied condition that the decision of the architect shall be an honest one. Chism vs. Schipper 22 Vr. 1; Welsh vs. Hubschmitt Company 32 Vr. 57-64. It would be an amazing thing if the owner of a house could successfully resist payment for its construction upon the sole ground that the architect had never given any certificate, notwithstanding the work had been done. It is inconceivable that any trial court would permit an owner to evade payment for work, which he openly at the trial admitted had been done, merely because the architect had failed to give a certificate. "Whether in the exercise of a fair and "reasonable judgment the owner and architect should "approve and accept the work and materials, is a ques- "tion which the defendant has a right to submit to a "jury." Welch vs. Hubschmitt Company 32 Vr. 57-65. And where it appears by the admission of the defendant himself that the work has been done and the payment earned there is but one construction which could be placed by any jury upon the action of the architect under such circumstances in refusing to give a certificate. That construction would of necessity be that such refusal was fraudulent, and the contractor entitled to recover notwithstanding the absence of the architect's certificate. Counsel for defendant merely insinuates that the certificate of the architect for this second payment *may* have been withheld. He does not assert that it was withheld.

IV.

Counsel for defendant quotes from the specifications forming a part of the contract (State of Case page 38, lines 10 to 20) to the effect that in the event of contractor's default the owner may make good deficiencies and deduct the cost thereof from the payment then or thereafter due the contractor. He loses sight of the fact that by the assignment of contractor's claim, worked by the giving of the stop notice, the money constituting the second payment, or so much thereof as was necessary to answer plaintiff's claim, was not then or thereafter due to the contractor, but was due to Moorestown Supply Company, the plaintiff.

V

Defendant further seeks to differentiate between the second payment of $1200, having been earned and being due. Although it is conceivable that under some circumstances this distinction might exist, yet in the present case to concede that a payment had been *earned* is to concede that it is *due*. Had the contract between Mr. Burns and the Supplee Construction Company provided that the different payments were to be made at the expiration of different periods after a certain amount of the work had been completed, there would have been a difference between the payment having been earned and being due. Reference to the contract however (State of Case, page 36, lines 15 to 30) shows that by its terms the several payments were to be made when a certain amount of work had been done. Not at any specified time thereafter, but *when the work had been done.* Therefore by the terms of this contract an admission that the work required to be done to entitle contractor to the second

payment under the contract, had been done or an admission that the second payment had been earned, is an admission that the payment was due.

VI.

Defendant calls attention to the clause in the "general conditions of the contract" which provides that the architect may withhold his certificate because of:

A.—Defective work not remedied.

B.—Claims filed or reasonable evidence indicating probably filing of claims.

C.—Failure of the contractor to make payments properly to sub-contractors or for material or labor.

D.—A reasonable doubt that the contract can be completed for the balance then unpaid.

Although this is not pertinent, in view of the fact that the building contract failed to make the issuance of any certificate necessary yet it may be observed that there is no contention that there was any defective work on the part of the Supplee Construction Company, nor that there was any reasonable doubt that the contract could not be completed for the balance unpaid, at the time when the work had been done which entitled contractor to the second payment of $1200 and the stop notice served. As to reasons B. and C. which provided for the withholding by the architect of his certificate, the most which could have been intended, assuming merely for the sake of argument that the withholding by the architect under any circumstances of his certificate had any potency, was that the owner should be enabled to retain the money due from him to the contractor, to enable him to answer the claims which might thus be filed. It was certainly not intended that because a claim was filed, Mr. Burns should be thereupon permitted to himself pocket the

money, which the contractor had earned, and pay neither the contractor nor the other claimant. There could be no mechanics' liens filed by any sub-contractor or materialman. The Statute precluded this because the contract was filed. Upon the service of the stop notice upon the owner he was required by law to withhold the money from the contractor, irrespective of any architect's certificate; but to withhold it not for his own behoof, but to pay it to the person giving the stop notice. The point which defendant is apparently endeavoring to make, by reference to this provision, is that notwithstanding the money had been earned by the Construction Company, yet upon the service of the stop notice the owner was permitted to retain the money, not for the purpose of answering the claims of the stop notice creditors but for his own private advantage. The mere statement of such contention is sufficient to show its absurdity. Defendant's counsel further argues that the contract provides protection against all liens arising thereout. The reason for this argument is not all together apparent. By the filing of the contract plaintiff as materialman was precluded by the operation of the statute from filing a mechanics' lien. The builder itself appears by the terms of the contract to have been likewise precluded save under certain circumstances. This is not a mechanics' lien suit however. It is a suit upon a stop notice. Counsel seeks to give to this language of the building contract a force sufficient to prevent any sub-contractor or materialman from maintaining any suit or taking any proceedings to collect money due him, over-riding all the provisions of the laws covering such matters, and rendering defendant immune from all attempts on the part of any one to collect from him any part of the cost of the erection of his dwelling.

Defendant's counsel seeks to draw an argument

from what he states to be a fact, that it is obvious that the defendant endeavored by the terms of his contract to protect himself from double payment on the cost of his house, and that the contractor agreed that there should be no recourse to the owner beyond the contract price. It is natural that defendant as owner should have desired to so entrench himself. He no doubt thought that he had done so in the arrangement which he made concerning the payments. He might perhaps have effectually accomplished this purpose, by providing in the contract that no payment whatever should be made until the building was entirely completed, or by making the payments during the progress so inconsiderable as to amount to the same thing. In such case the contractor might have been unable to secure credit for labor or material and been unable to prosecute the work, and perhaps knowing the difficulties which would confront him in his efforts to obtain credit, refused to make such an agreement, and insisted upon the defendant making payments as the work progressed. Plaintiff had the right to look for the recovery of its claim. No doubt it was upon the strength of the same, that plaintiff extended credit, it had access to the filed contract as a public record. It was precluded by the statute from enforcing its claim by mechanics' lien but had its remedy upon stop notice. This argument by defendant is merely the usual lamentations of one who conceives too late that he has made a bad bargain.

VII.

After the case had been argued and submitted to the Trial Judge, the defense interposed being that just discussed, and as set forth in the answer (State of Case, pages 15, 16 and 17), defendant obtained permission

from the Court to amend his answer and then set up an additional or fifth ground of defense (State of Case, pages 18 to 29). In this amended answer defendant alleged that certain other creditors of the Supplee Construction and Contracting Company, had served upon him stop notices, and that the claims of some of these creditors were entitled to priority over plaintiff. Under the issue as raised by the original pleadings, the plaintiff was entitled to judgment for the full amount of its claim or else defendant was entitled to a judgment of no cause of action. By this amended answer defendant interjected another element into the case, and asked the Court to render judgment in a form unknown in the law. He did not abandon his first contention, he still insisted that he owed plaintiff nothing, and did not admit liability to any of the other stop notice claimants, nor assert that the amounts claimed were due. But he asked, in the alternative, that if the Court found the plaintiff to be entitled to recover, that its judgment should be subordinated to the claims of certain other persons *not parties to the suit*, who he alleged had served stop notices on him, and asked the Court in this suit to determine the question of priority as among plaintiff and several other alleged stop notice claimants and determine the validity of the claims of persons not before the Court. This defense was in the nature of a bill of inter pleader. Defendant however did not place himself in a position to entitle him to maintain an inter pleader. To do so he should have filed a bill in Chancery. He was not in position to do that however, because to do so, it was necessary, that he take the position that there was so much money in his hands, representing a payment due on his contract, with his contractor; that he had no interest in the matter or in the fund, other than to pay the money to the person rightfully entitled thereto; that there were

several claimants to the money; and that he was in doubt as to those properly entitled thereto; and then ask to be allowed to pay the money into Court, there to be contended for by the several claimants, and to be relieved from further concern in the matter. He can not however take the position that he is entitled to the fund himself and ask the Court to so decide, and then further ask the Court in the alternative, in the event of its decision that he is not entitled to the money, to determine which of certain other persons, not parties to the suit, other and in addition to the plaintiff are entitled to the same. Williams vs. Mathews 2 Dick, 196, Illingworth vs. Rowe, 7 Dick. 360.

By permission of the Court defendant introduced testimony in support of his fifth ground of defense (State of Case, pages 40 to 48). This testimony was that certain stop notices had been served upon defendant. As to whether the money mentioned in these stop notices was for labor and material actually used in the erection of the building; whether the same was due or whether payment had been demanded of the contractor and refused, did not appear save as to the claims of George L. Hughes, Charles Croxton, B. B. Coles & Sons Company, Cobb and Green and J. S. Collins & Son. It appeared conclusively that the stop notice of J. S. Collins & Son was served after the stop notice of plaintiff (page 41, lines 1 to 8). That the claim of C. B. Coles & Sons Company was likewise served after the stop notice of plaintiff appeared by the answer (State of Case page 27, lines 10 to 20.) Testimony was offered concerning the claims of George L. Hughes and Charles Croxton whose claims amounted to $25.20 and $42.73 respectively, and of Cobb and Green amounting to $104.00. Conceding these claims to be valid and correct and entitled to priority in payment over plaintiff's claim, there would still be ample

of the second payment of $1200.00 after satisfying these claims to pay plaintiff in full. Furthermore the claim of Cobb and Green was for electrical work, and by the contract (page 36, lines 32 to 38) $190.00 was to be paid for this, in addition to the original contract price for the house, so that this claim is not entitled to payment out of the second payment of $1200.00. No testimony was offered as to any other claims represented by stop notices served. It appears from the fifth ground of defense in the answer that all other stop notices were served after the stop notices of plaintiff with the exception of that of Dorsey and Smith for $640.00. Whether there is any foundation for that claim does not appear in the case. Conceding that the claim is correct and that it was entitled to priority over plaintiff's claim, there is still sufficient of the $1200.00 after paying the claims of Hughes and Croxton and also the claim of D. A. Sweeny, Jr., for $18.18 to pay thereout this claim as well as the plaintiff's. Defendant dose not claim that he has paid any of these stop notice creditors, on the contrary it appears by the eleventh paragraph of the stipulation (page 35, lines 5 to 10) that he has not done so. Plaintiff in his reply to the fifth ground of defense (pages 30 to 31) gave notice that he would move to strike out the same. This defense was over-ruled by the Court (page 1) and this action does not appear to have been included in defendant's grounds of appeal, neither has he urged this defense in his brief. After full consideration of the case the Trial Judge decided that plaintiff was entitled to $439.07 with interest and judgment was according entered in its favor for $487.37 and costs. This judgment should be affirmed.

Respectfully submitted,

G. M. HILLMAN,

Attorney of Plaintiff and Respondent.