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Bill of Complaint, Filed December 15, 1926.

IN CHANCERY OF NEW JERSEY.

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

10

The complainants, Fred Kienzlan and Percy L. Matthews, residing in the Borough of Keansburg, Monmouth County, New Jersey, respectfully show that:

FIRST CAUSE OF ACTION:

1. On or about the 27th day of August, 1926, the Board of Education of the Borough of Keansburg, Monmouth County, New Jersey, and James B. McGlashan, of the Borough of Keansburg, Monmouth County, New Jersey, entered into a certain agreement or contract whereby the said James B. McGlashan agreed to perform certain work and furnish certain materials in connection with the installation of plumbing in a certain structure or building which the said Board of Education was erecting, or having erected, and which is known as the addition to grade school building as Francis Place, Myrtle Avenue, Terrace Place and Ramsay Ave., in the Borough of Keansburg, Monmouth County, New Jersey. 30

2. Between September 20th, 1926, and November 17th, 1926, inclusive, the complainant, Fred Kienzlan, at the request of the said James B. McGlashan, furnished labor in connection with the actual performance of the contract hereinbefore mentioned between the said James B. McGlashan and the Board of Education of the 40

Bill of Complaint.

Borough of Keansburg, the said labor being in the value of Two Hundred Three Dollars (\$203.). No part of the said sum of Two Hundred and Three Dollars (\$203) has been paid, and the said James B. McGlashan is not entitled to any credits or deductions therefrom but the whole amount is now due and owing.

3. On or about the 15th day of November, 1926, there became due and owing to the said James B. McGlashan on account of the work and labor performed and materials furnished in connection with the aforementioned contract, the sum of Five Hundred Forty-eight Dollars and Twenty-five Cents (\$548.25)

4. Subsequent to November 17, 1926, Samuel Barron, one of the constables of the County of Monmouth and State of New Jersey by virtue of a writ of execution issued out of the District Court of the Second Judicial District of the County of Monmouth, State of New Jersey, entered a cause of action in which the Keansburg Lumber and Supply Company, Inc., was plaintiff, and James B. McGlashan was defendant, levied upon the moneys due to the said James B. McGlashan from the Board of Education of the Borough of Keansburg, Monmouth County, New Jersey, under and by virtue of the aforementioned contract for a judgment entered in the aforementioned cause of action amounting to \$454.04 damages, and \$59.71 costs.

5. On or about November 27, 1926, complainant, Fred Kienzlan, served upon the Board of Education, of the Borough of Keansburg, aforesaid, a notice of the amount due and owing to

Bill of Complaint.

him from the said James B. McGlashan, as aforesaid, which notice was served in accordance with the provisions of Chapter 280 of the Laws of New Jersey, for the year of 1918, approved March 5, 1918.

6. The M. O'Neil Supply Company, a corporation, organized and existing under the Laws of the State of New York, and duly authorized to do business in the State of New Jersey, with principal offices at Allenhurst, Monmouth County, New Jersey, has served said Board of Education of the Borough of Keansburg with a notice of a claim arising by reason of the furnishing by the said M. O'Neil Supply Company to the said James B. McGlashan of materials for the performance of the said aforementioned contract between the Board of Education of the Borough of Keansburg, Monmouth County, New Jersey, and James B. McGlashan, which claim amounts to the sum of Two Hundred Eighty Dollars and Thirty-three Cents (\$280.33)

Complainant now brings this action under and by virtue of the provisions of the said Chapter 280 of the Laws of New Jersey, for the year 1918, approved March 5th, 1918, and being without adequate remedy in the Courts of Law, prays:

(1) That the Board of Education of the Borough of Keansburg, Monmouth County, New Jersey, the Borough of Keansburg, Monmouth County, New Jersey, James B. McGlashan, the Keansburg Lumber & Supply Co., a corporation organized and existing under the Laws of the State of New Jersey, the M. O'Neil Supply Company, a corporation organized and existing under

Bill of Complaint.

the Laws of the State of New York, and Samuel Barron, a Constable of the County of Monmouth, and State of New Jersey, the defendants herein, may answer to this Bill of Complaint and each statement therein made.

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(2) That an injunction be issued out of this Court restraining the said Keansburg Lumber and Supply Co., Inc., a corporation as aforesaid, and Samuel Barron, Constable as aforesaid, from proceeding further in connection with the levy made under and by virtue of the writ of execution issued out of the District Court of the Second Judicial District of the County of Monmouth, New Jersey, in a cause of action wherein the Keansburg Lumber and Supply Company, Inc., was plaintiff and James B. McGlashan the defendant.

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(3) That the Court adjudicate and determine the rights and claims of the various parties in and to the said sum of money now due and owing from the Board of Education of the Borough of Keansburg, Monmouth County, New Jersey, under and by virtue of the said contract entered into on the 27th day of August, 1926.

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(4) That writs of subpoena may issue commanding the said defendants, The Board of Education of the Borough of Keansburg, Monmouth County, New Jersey, The Borough of Keansburg, Monmouth County, New Jersey, James B. McGlashan, The Keansburg Lumber & Supply Company, a corporation organized and existing under the Laws of the State of New Jersey, the M. O'Neil Supply Company, a Corporation organized

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Bill of Complaint.

and existing under the Laws of the State of New York, and Samuel Barron, a Constable of the County of Monmouth, and State of New Jersey, to answer this Bill of Complaint, and abide by such decree as this Court may make in the premises.

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(5) That the complainant may have such other relief to which he in equity and good conscience shall be entitled.

SECOND CAUSE OF ACTION:

1. Paragraph One of the First Cause of Action is repeated as though the same were herein specifically set forth.

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2. Between the 20th day of September, 1926, and the 13th day of November, 1926, inclusive, the complainant, Percy L. Matthews, at the request of the said James B. McGlashan, furnished labor and materials in connection with the actual performance of the contract hereinbefore mentioned between the said James B. McGlashan and the Board of Education of the Borough of Keansburg, the said labor and material being in the value of Two Hundred Twenty-four Dollars and Forty Cents (\$224.40). No part of the said sum of Two Hundred Twenty-four Dollars and Forty Cents (\$224.40) has been paid, and the said James B. McGlashan is not entitled to any credits or deductions therefrom, but the whole amount is now due and owing.

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3. Paragraph Three of the First Cause of Action is repeated as though the same were herein specifically set forth.

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Bill of Complaint.

4. Paragraph Four of the First Cause of Action is repeated as though the same were herein specifically set forth.

10 5. On or about November 26th, 1926, Complainant, Percy L. Matthews, served upon the Board of Education of the Borough of Keansburg, Monmouth County, New Jersey, a notice of the amount due and owing to him from the said James B. McGlashan, as aforesaid, which notice was served in accordance with the provisions of Chapter 280 of the Laws of New Jersey, for the year 1918, approved March 5, 1918.

20 6. Paragraph Six of the First Cause of Action is repeated as though the same were herein specifically set forth.

Complainant now brings this action under and by virtue of the provisions of the said Chapter 280 of the Laws of New Jersey, for the year 1918, approved March 5th, 1918, and being without adequate remedy in the Courts of Law, prays:

30 (1) That the Board of Education of the Borough of Keansburg, Monmouth County, New Jersey, The Borough of Keansburg, Monmouth County, New Jersey, James B. McGlashan, the Keansburg Lumber & Supply Co., a corporation organized and existing under the Laws of the State of New Jersey, the M. O'Neil Supply Company, a Corporation organized and existing under the Laws of the State of New York, and Samuel Barron, a Constable of the County of Monmouth, and State of New Jersey, the defendants herein, may answer to this Bill of Complaint and each statement therein made.

40 (2) That an injunction be issued out of this Court restraining the said Keansburg Lumber

Bill of Complaint.

and Supply Co., Inc. a corporation aforesaid, and Samuel Barron, Constable as aforesaid, from proceeding further in connection with the levy made under and by virtue of the writ of execution issued out of the District Court of the Second Judicial District of the County of Monmouth, New Jersey, in a cause of action wherein the Keansburg Lumber and Supply Company, Inc., was plaintiff and James B. McGlashan, the defendant.

10 (3) That the Court adjudicate and determine the rights and claims of the various parties in and to the said sum of money now due and owing from the Board of Education of the Borough of Keansburg, Monmouth County, New Jersey, under and by virtue of the said contract entered into on the 27th day of August, 1926.

20 (4) That writs of subpoena may issue commanding the said defendants, The Board of Education of the Borough of Keansburg, Monmouth County, New Jersey, The Borough of Keansburg, Monmouth County, New Jersey, James B. McGlashan, The Keansburg Lumber & Supply Company, a corporation organized and existing under the Laws of the State of New Jersey, the M. O'Neil Supply Company, a Corporation organized and existing under the Laws of the State of New York, and Samuel Barron, a Constable of the County of Monmouth, and State of New Jersey, to answer this Bill of Complaint, and abide by such decree as this Court may make in the premises.

(5) That the complainant may have such other relief to which he in equity and good conscience shall be entitled.

40 WILLIAM P. BRAUN,
Solicitor for and of
Counsel with Complainants.

Bill of Complaint.

State of New Jersey,
County of Essex—ss.:

FRED KIENZLEN, being duly sworn according to law on his oath deposes and says that:

10 (1) Between September 20th, 1926, and No-
vember 17th, 1926, he furnished at the request
of James B. McGlashan, certain labor in connec-
tion with the erection of a certain structure or
building which the Board of Education of the
Borough of Keansburg was erecting, or having
erected, and which is known as the addition to the
grade school building at Francis Place, Myrtle
Avenue, Terrace Place and Ramsay Avenue, in
20 the Borough of Keansburg, Monmouth County,
New Jersey, the said labor being in the value of
Two Hundred Three Dollars (\$203).

(2) Deponent has been informed and verily
believes that the said labor was performed for
the said James B. McGlashan in performance of
a certain contract between the Board of Educa-
tion of the Borough of Keansburg, Monmouth
County, New Jersey, and the said James B.
30 McGlashan, a copy of which, or what purported
to be a copy thereof, was exhibited to deponent
by C. B. Loschen, one of the members of the
Board of Education.

(3) On or about November 27, 1926, com-
plainant Fred Kienzlan, served upon the Board of
Education of the Borough of Keansburg, afore-
said, a notice of the amount due and owing to
him from the said James B. McGlashan, as afore-
40 said, which notice was served in accordance with

Bill of Complaint.

the provisions of Chapter 280 of the Laws of
New Jersey, for the year 1918, approved March
5, 1918.

(4) The said C. B. Loschen exhibited to de-
ponent what purported to be a writ of execution 10
issued out of the District Court of the Second
Judicial District of Monmouth County, New Jer-
sey, out of a cause of action in which the Keans-
burg Lumber & Supply Co., Inc., was plaintiff,
and James B. McGlashan, the defendant, for a
Judgment amounting to \$454.04 and costs amount-
ing to \$59.71, which writ of execution purported
to be issued to Samuel Barron, one of the Con-
stables of the County of Monmouth, State of New
Jersey. 20

(5) Deponent has also been informed and
verily believes that the M. O'Neil Supply Company
has served the said Board of Education of the
Borough of Keansburg, New Jersey, with a notice
of claim for materials furnished to the said James
B. McGlashan in connection with the performance
of the said contract for the installation of plumb-
ing work in the addition to the grade school
building located at Francis Place, Myrtle Avenue, 30
Terrace Place and Ramsay Avenue, in the Bor-
ough of Keansburg, State of New Jersey.

FRED KIENZLEN.

Sworn and Subscribed to
before me this 15th
day of December, 1926.

J. C. FITZSIMMONS,
Notary Public of New Jersey. 40

Bill of Complaint.

State of New Jersey,
County of Essex—ss.:

PERCY L. MATTHEWS, being duly sworn according to law on his oath deposes and says that:

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(1) Between the 20th day of September, 1926, and the 13th day of November, 1926, inclusive, he furnished at the request of James B. McGlashan, certain labor and materials in connection with the erection of a certain structure or building which the Board of Education of the Borough of Keansburg, was erecting, or having erected, and which is known as the addition to the grade school building at Francis Place, Myrtle Avenue, Terrace Place, and Ramsay Avenue, in the Borough of Keansburg, Monmouth County, New Jersey, the said labor and material being in the value of Two Hundred Twenty-four Dollars and Forty Cents (\$224.40).

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(2) Deponent has been informed and verily believes that the said labor was performed for the said James B. McGlashan in performance of a certain contract between the Board of Education of the Borough of Keansburg, New Jersey, and the said James B. McGlashan, a copy of which, or what purported to be a copy thereof, was exhibited to deponent, by C. B. Loschen, one of the members of the Board of Education.

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(3) On or about November 26, 1926, complainant, Percy L. Matthews, served upon the Board of Education of the Borough of Keansburg, aforesaid, a notice of the amount due and owing to him from the said James B. McGlashan, as aforesaid, which notice was served in accordance

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Bill of Complaint.

with the provisions of Chapter 280 of the Laws of New Jersey, for the year 1918, approved March 5, 1918.

(4) The said C. B. Loschen exhibited to deponent what purported to be a writ of execution issued out of the District Court of the Second Judicial District of Monmouth County, New Jersey, out of a cause of action in which the Keansburg Lumber & Supply Company, Inc., was plaintiff, and James B. McGlashan, the defendant, for a judgment amounting to \$454.04 and costs amounting to \$59.71, which writ of execution purported to be issued to Samuel Barron, one of the Constables of the County of Monmouth, State of New Jersey.

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(5) Deponent has also been informed and verily believes that the M. O'Neil Supply Company has served the said Board of Education of the Borough of Keansburg, New Jersey, with a notice of claim for materials furnished to the said James B. McGlashan, in connection with the performance of the said contract for the installation of plumbing work in the addition to the grade school building located at Francis Place, Myrtle Avenue, Terrace Place and Ramsay Avenue, in the Borough of Keansburg, State of New Jersey.

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PERCY L. MATTHEWS.

Sworn and Subscribed to before me this
15th day of December, 1926.

J. C. FITZSIMMONS,
Notary Public of New Jersey.

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Bill of Complaint.

Endorsed:

State of New Jersey,
County of Essex—ss.:

10 JOSEPH KOVACH, being duly sworn on his oath according to law, deposes and says: I served true copies of the within order, Bill and affidavits on Patrick Keelan, President of the Keansburg Lumber Supply Company, Inc. at Keansburg, and on Samuel Barron, at Long Branch, N. J., on December 16, 1926.

JOSEPH KOVACH.

Sworn and subscribed before me this
20 27th day of December, 1926.

E. A. WORK,
Notary Public of New Jersey.
(Notarial Seal)

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**Order to Show Cause and Restraining Order,
Filed December 15, 1926.**

IN CHANCERY OF NEW JERSEY.

Between FRED KIENZLAN and
PERCY L. MATTHEWS,
Complainants,
—and—

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BOARD OF EDUCATION OF THE
BOROUGH OF KEANSBURG,
MONMOUTH COUNTY, NEW
JERSEY; THE BOROUGH OF
KEANSBURG, MONMOUTH
COUNTY, NEW JERSEY; JAMES
B. MCGLASHAN; THE KEANS-
BURG LUMBER & SUPPLY CO.,
a corporation of New Jersey;
the M. O'NEIL SUPPLY COM-
PANY, a corporation of New
York, and SAMUEL BARRON,
a Constable of Monmouth
County, New Jersey.
Defendants.

On Bill, etc.

Order to Show
Cause and
Restraining
Order. 20

This matter being opened to the Court by
William P. Braun, Esquire, Solicitor for and
of Counsel with Complainant in the above en-
titled cause, and the affidavits thereto annexed,
it is on this 15th day of December, 1926. 30

ORDERED that the defendants, Keansburg Lum-
ber & Supply Co., and Samuel Barron, show cause
before the Chancellor, at the Chancery Chambers,
Industrial Office Building, in the City of Newark,
County of Essex, and State of New Jersey, on
the 28th day of December, 1926, at 10 o'clock in
the forenoon, or as soon thereafter as counsel 40
may be heard, why the said defendants should

Order to Show Cause.

not be restrained and enjoined according to the prayer of the Bill, and it is

10 FURTHER ORDERED that the said defendants, Keansburg Lumber & Supply Company, Inc., and Samuel Barron, their agents and servants, in the meantime and until the further order of this Court in the premises, be enjoined and restrained from proceeding or attempting to proceed, or taking any further steps or actions in or in connection with the levy made by virtue of the writ of execution issued out of the District Court of the Second Judicial District Court of Monmouth County in a cause of action in which the Keansburg Lumber & Supply Company, Inc., is the plaintiff, and James B. McGlashan, the defendant, insofar as the said levy made under and by virtue of the said writ of execution affects the right, title and interest of the said James B. McGlashan in and to any moneys due and owing from the Board of Education of the Borough of Keansburg, Monmouth County, New Jersey, by reason of a certain contract entered into between the said Board of Education, and the said James B. McGlashan on or about the 27th day of August, 1926, and it is

30 FURTHER ORDERED that a true but uncertified copy of said Bill of Complaint and affidavits there-to annexed, and this Order, be served upon the said defendants, Keansburg Lumber & Supply Company, Inc., and Samuel Barron. within 5 days from the date hereof.

EDWIN ROBERT WALKER,
Chancellor.

40 Respectfully advised:

ALONZO CHURCH,
V. C.

**Order Discharging Order to Show Cause
and Restraining Order, Filed December
31, 1926.**

This matter being opened to the Court by William P. Braun, solicitor for the complainants, and the Court having heard and considered the arguments of Ezra W. Karkus, solicitor for the defendants Keansburg Lumber & Supply Co., a corporation of the State of New Jersey, and Samuel Barron, a Constable of the County of Monmouth, New Jersey, and William P. Braun, Esq., solicitor for the complainants, on the return of the Order to Show Cause heretofore made on the Fifteenth day of December, Nineteen Hundred and Twenty Six, and returnable December Twenty-Eighth, Nineteen Hundred and Twenty Six, and the Court having been satisfied that sufficient cause has been shown, it is on this 31st day of December, 1926, ORDERED, that the Order to Show Cause and Restraining Order issued and made, be and the same hereby is discharged.

On motion of Ezra W. Karkus, solicitor for the defendants, Keansburg Lumber & Supply Co., and Samuel Barron.

E. R. WALKER,
C.

Respectfully advised:
MAJA LEON BERRY,
V. C.

Notice of Motion, Filed February 1, 1927.

To: Fred Kienzlan and Percy L. Matthews, complainants and William P. Braun, Esq., Solicitor for complainants, 738 Broad Street, Newark, N. J.

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PLEASE TAKE NOTICE that on Thursday, January Twenty Seventh, Nineteen Hundred and Twenty Seven, at the hour of ten o'clock in the forenoon or as soon thereafter as counsel can be heard at the Chancery Chambers in the City Hall at No. 244 Broadway in the City of Long Branch, County of Monmouth, New Jersey, I shall apply to the Chancellor for an order to strike out the bill of complaint filed in this case as to the defendants the Keansburg Lumber & Supply Co., a corporation of the State of New Jersey, and Samuel Barron, a constable of Monmouth County, and I shall rely on the following grounds:

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1. The bill of complaint filed herein does not set forth any equity as against these defendants.

2. The matters and things contained therein as concern these defendants, have been adjudicated and are therefore res adjudicata.

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And please take further notice that at the said time and place I shall apply for a counsel fee to be allowed to me by the Court from the Complainants.

Dated, January 19th, 1927.

EZRA W. KARKUS,
Solicitor for Defendants Keansburg
Lumber & Supply Co. and Samuel Barron.

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Conclusions, Filed February 21, 1927.

KARKUS & KARKUS, for the motion.

MCDERMOTT, ENRIGHT & CARPENTER, Contra.

BERRY, V. C.:

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This bill is filed under the Municipal Lien Act by two creditors who have furnished labor and materials used in the performance of a contract for a public improvement. The defendant Keansburg Lumber & Supply Company obtained a judgment against the contractor, and the defendant Barron, a constable, by virtue of an execution issued on said judgment, levied on moneys in the hands of the defendant Board of Education and due the contractor. Subsequent to said levy the complainants served notice of their lien claim and then proceeded to file this bill. The sole question to be determined here is whether or not the judgment creditor is entitled to priority of lien over the complainants by virtue of the levy under the execution. In my judgment, my decision should be controlled by the case of *Strathmere Lumber Company v. Sea Isle City*, 4 N. J. Misc. Repts. 687. That case was decided by Vice-Chancellor Ingersoll on the authority of *Mack Manufacturing Company v. Citizens' Construction Company*, 85 N. J. Eq. 331, and cases therein cited. It involved the identical question raised in this cause and the decision on this point is binding on this court. But it is now urged on behalf of the complainants that *Mack Manufacturing Company v. Citizens' Construction Company* has no application to the present issue because that decision was made in view of the

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Conclusions.

provisions of the Municipal Lien Act as it then existed and that the law as it then stood has been materially changed by revision of the Municipal Lien Act in 1918 (1 Cum. Supp. to Comp. State. 1859). It is argued that as Section 6 of that act provides that lien claimants "shall have priority over any assignment by a contractor or subcontractor to any third person * * * notwithstanding such assignment may have been made prior to the filing of notice by any such laborers", etc., a judgment creditor levying on the fund under his execution is not entitled to priority, because the levy is, in effect, an assignment by operation of law, and that such assignment by the very terms of the act itself is postponed to the claim of the laborer or materialman.

An examination of the *Mack Manufacturing Company* case and cases therein cited, however, convinces me that this contention is unsound. The controlling reason for that decision was that there was no inchoate right of lien under the Municipal Lien Act and that that act expressly provided that the lien of the laborer or materialman should attach only from the time of its filing. In these respects the Municipal Lien Act has not been changed. Under the Mechanics Lien Act the lien of a judgment entered on a mechanic's lien claim relates back and takes effect as of the date of the commencement of the building and consequently becomes prior in lien to a levy under a judgment subsequently entered. By the express provision of the Municipal Lien Act the claim of the laborer or materialman takes effect as of the date of the filing of the claim. There is no relation back and therefore no inchoate right of lien.

As to the effect of the levy under execution as

Conclusions.

an assignment within the meaning of Section 6 of the Municipal Lien Act, I am of the opinion that if it had been the intention of the Legislature to include assignments by operation of law within this provision, appropriate and unmistakable language to accomplish that end would have been used. At the time of this revision the law had been settled to the effect that levy on personal property is seizure of the judgment debtor's right at the time of delivery of the execution to the sheriff.

Schneider v. Schmidt, 82 N. J. Eq. 81;
Agnew v. Paterson Board of Education, 83 N. J. Eq. 49, affirmed *Ibid*, 336.

The levy under the execution here places the fund in *custodia legis* and the subsequent filing of a lien claim gives the lien claimants no priority as to the fund seized. I will, therefore, advise an order striking out the bill of complaint as to these defendants.

Heard February 1, 1927.

Decided February 19, 1927.

**Order Dismissing Bill as to Defendants
Keansburg Lumber & Supply Co. and
Samuel Barron, Filed February 25, 1927.**

10 This matter being opened to the Court by Ezra
W. Karkus, Solicitor of the defendants Keans-
burg Lumber & Supply Co., a corporation of New
Jersey and Samuel Barron, a Constable of the
County of Monmouth, New Jersey, and in the
presence of McDermott, Enright and Carpenter,
Solicitor for the complainants, and the Court
having heard and considered the arguments of
counsel, and sufficient reason appearing,

20 It is on this Twenty-fifth day of February,
Nineteen Hundred and Twenty-Seven ORDERED
that the bill of complaint filed in this cause be
and the same hereby is dismissed as to the de-
fendants Keansburg Lumber & Supply Co., a
corporation of New Jersey, and Samuel Barron,
a Constable of Monmouth County, New Jersey.

It is further ORDERED that a counsel fee of Fifty
Dollars be and the same hereby is awarded to
Ezra W. Karkus, solicitor for the defendants
named herein together with the defendants' taxed
costs.

30 On motion of Ezra W. Karkus, solicitor for the
defendants Keansburg Lumber & Supply Co., a
corporation of New Jersey, and Samuel Barron,
Constable of Monmouth County, New Jersey.

Respectfully advised:

E. R. WALKER,
C.

40 MAJA LEON BERRY,
V. C.

**Order Staying Proceedings, Filed February
25, 1927.**

This matter being opened to the Court by
McDermott, Enright & Carpenter, of counsel with
the complainants, and it appearing that the com- 10
plainants have filed an appeal from the order
made in this cause on the 25th day of February,
1927,

It is on this 25th day of February, 1927,

ORDERED that the stay contained in the order
of this Court made in the above entitled cause on
the 15th day of December, 1926, be continued
pending the determination of said appeal by the 20
Court of Errors and Appeals, or until otherwise
ordered by said Court of Errors and Appeals.

Respectfully advised:

E. R. WALKER,
C.

MAJA LEON BERRY,
V. C.

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Notice of Appeal from Order Dated December 31, 1926, Filed March 3, 1927.

10 The complainants hereby appeal from the order made in the above entitled cause dated December 31, 1926, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

McDERMOTT, ENRIGHT & CARPENTER,
Solicitors for and of Counsel
with Complainants.

Dated, Feby. 1, 1927.

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

JOHN M. ENRIGHT,
Of counsel with Complainants.

Endorsed:

We hereby acknowledge service of the within notice of appeal this 28th day of February, 1927.

30 KARKUS & KARKUS,
Solicitors for defendants The
Keansburg Lumber & Supply
Company and Samuel Barron.

Notice of Appeal from Order Dated February 25, 1927, Filed March 3, 1927.

The complainants hereby appeal from the final order or decree made in the above entitled cause on _____, 1927, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes. 10

McDERMOTT, ENRIGHT & CARPENTER,
Solicitors for and of Counsel
with Complainants.

Dated, _____, 1927.

I conceive there is good cause for appeal in the above stated cause. 20

JOHN M. ENRIGHT,
Of counsel with Complainants.

Endorsed:

We hereby acknowledge service of the within notice of appeal this 28th day of February, 1927.

30 KARKUS & KARKUS,
Solicitors for defendants The
Keansburg Lumber & Supply
Company and Samuel Barron.

**Amended Notice of Appeal from Order
Dated December 31, 1926, Filed April
15, 1927.**

IN CHANCERY OF NEW JERSEY.

10 Between FRED KIENZLAN and
PERCY L. MATTHEWS,
Complainants,

and

20 BOARD OF EDUCATION OF THE
BOROUGH OF KEANSBURG,
MONMOUTH COUNTY, NEW
JERSEY; BOROUGH OF KEANS-
BURG, MONMOUTH COUNTY,
NEW JERSEY; JAMES B. MC-
GLASHAN, THE KEANSBURG
LUMBER & SUPPLY COMPANY,
a corporation; THE M. O'NEIL
SUPPLY COMPANY, a corpora-
tion, and SAMUEL BARRON,
Defendants.

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On Bill, &c.

Amended
Notice of
Appeal.

30 The complainants hereby appeal from the order
made by the Chancellor in the above entitled
cause, on the advice of Vice Chancellor Maja
Leon Berry, dated December 31, 1926, and from
the whole and every part thereof, to the Court of
Errors and Appeals in the last resort in all
causes.

McDERMOTT, ENRIGHT & CARPENTER,
Solicitors for and of Counsel
with Complainants.

Dated, March 15, 1927.

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

JOHN M. ENRIGHT,
Of Counsel with Complainants.

Amended Notice of Appeal from Order.

Endorsed :

We hereby acknowledge service of the within
notice of appeal (amended) this 22nd day of
March, 1927.

KARKUS & KARKUS, 10
Solicitors for defendants Keans-
burg Lumber & Supply Company
and Samuel Barron.

**Amended Notice of Appeal from Order
Dated February 25, 1927, Filed April
15, 1927.**

IN CHANCERY OF NEW JERSEY.

20 Between FRED KIENZLAN and
PERCY L. MATTHEWS,
Complainants,

and

BOARD OF EDUCATION OF THE
BOROUGH OF KEANSBURG,
MONMOUTH COUNTY, NEW
JERSEY; BOROUGH OF KEANS-
BURG, MONMOUTH COUNTY,
NEW JERSEY; JAMES B. MC-
GLASHAN, THE KEANSBURG
LUMBER & SUPPLY COMPANY,
a corporation; THE M. O'NEIL
SUPPLY COMPANY, a corpora-
tion, and SAMUEL BARRON,
Defendants.

62—648

On Bill, &c.

Amended
Notice of 30
Appeal.

The complainants hereby appeal from the final
order or decree made in the above entitled cause
by the Chancellor, on the advice of Vice Chan- 40

Amended Notice of Appeal from Order.

cellor Maja Leon Berry, dated February 25, 1927, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

10 McDERMOTT, ENRIGHT & CARPENTER,
Solicitors for and of Counsel
with Complainants.

Dated, March 15, 1927.

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

JOHN M. ENRIGHT,
Of Counsel with Complainants.

20 Endorsed :

We hereby acknowledge service of the within amended notice of appeal this 22nd day of March, 1927.

KARKUS & KARKUS,
Solicitors for defendants The
Keansburg Lumber & Supply
Company and Samuel Barron.

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Petition of Appeal from Order Dated December 31, 1926, Filed April 15, 1927.

NEW JERSEY COURT OF ERRORS AND APPEALS.

FRED KIENZLAN and PERCY L. MATTHEWS,
Complainants-Appellants,

—against—

BOARD OF EDUCATION OF THE BOROURH OF KEANSBURG,
JAMES B. McGLASHAN,
KEANSBURG LUMBER & SUPPLY COMPANY, M. O'NEIL SUPPLY COMPANY and SAMUEL BARRON,
Defendants-Appellees.

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On Appeal
from
Chancery.

Petition of
Appeal.

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

The petition of Fred Kienzlan and Percy L. Matthews, the appellants in the above entitled cause, respectfully shows: that your petitioners find themselves aggrieved by an order made in the Court of Chancery by his Honor the Chancellor on the advice of Vice-Chancellor Maja Leon Berry, dated December 31, 1926, in a cause wherein said petitioners are complainants and the Board of Education of the Borough of Keansburg, James B. McGlashan, Keansburg Lumber & Supply Company, M. O'Neill Supply Company and Samuel Barron are defendants, in this re-

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Petition of Appeal from Order.

10 spect, to wit: that said order discharges the order to show cause theretofore made in above cause and the restraint therein provided, and permits the defendants or some of them, viz.: Keansburg Lumber & Supply Company and Samuel Barron, constable, to proceed with a certain execution against moneys due or growing due from the Board of Education of the Borough of Keansburg to James B. McGlashan, upon which complainants claim a prior lien.

And your petitioners humbly appeal from said order upon the ground that the said defendants should have been restrained pendente lite, pursuant to the prayer of the bill.

20 Your petitioners theretofore pray that said order may be reversed and that your petitioners may have such relief in the premises as to the Honorable Court shall seem meet.

McDERMOTT, ENRIGHT & CARPENTER,
Solicitors for and of Counsel
with Appellants.

Endorsed:

30 Service of copy of within petition of appeal hereby acknowledged March 22, 1927.

KARKUS & KARKUS,
Solicitors for appellees Keansburg
Lumber & Supply Company and
Samuel Barron.

**Answer to Petition of Appeal from Order
Dated December 31, 1926, Filed April
12, 1927.**

NEW JERSEY COURT OF ERRORS AND
APPEALS.

FRED KIENZLAN and PERCY L.
MATTHEWS,
Complainants-Appellants,

—against—

BOARD OF EDUCATION OF THE
BOROUGH OF KEANSBURG,
JAMES B. MCGLASHAN,
KEANSBURG LUMBER & SUPPLY
COMPANY, M. O'NEILL SUP-
PLY COMPANY and SAMUEL
BARRON,
Defendants-Appellees.

On Appeal
from
Chancery.

Answer to
Petition of
Appeal. 20

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The answer of Keansburg Lumber & Supply Company and Samuel Barron, two of the above named appellees, to the petition of appeal of Fred Kienzlan and Percy L. Matthews, the above named appellants.

30 These appellees, not admitting the truth of all or any of the matters in said petition of appeal contained for answer thereto nevertheless admit that an order was, on December Thirty First, Nineteen Hundred and Twenty Six, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purposes in said petition mentioned and as therein set forth, but as to the substance and form of said order, these appellees beg leave to refer thereto when the same shall be produced. 40

Petition of Appeal from Order.

These appellees are advised and believe that the said order is agreeable to equity; and they pray that the same may be affirmed with costs and counsel fee to be taxed in favor of these appellees.

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KARKUS & KARKUS,
Solicitors for Appellees.

JACOB S. KARKUS,
Of Counsel with Appellees.

Petition of Appeal from Order Dated February 25, 1927, Filed April 15, 1927.

NEW JERSEY COURT OF ERRORS AND APPEALS.

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FRED KIENZLAN and PERCY L. MATTHEWS,
Complainants-Appellants,
—against—

BOARD OF EDUCATION OF THE BOROUGH OF KEANSBURG, JAMES B. MCGLASHAN, KEANSBURG LUMBER & SUPPLY COMPANY, M. O'NEILL SUPPLY COMPANY and SAMUEL BARRON,
Defendants-Appellees.

On Appeal
from
Chancery.

Petition of
Appeal.

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

The petition of Fred Keinzlan and Percy L. Matthews, the appellants in the above entitled cause, respectfully shows: that your petitioners find themselves aggrieved by a final decree made

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Petition of Appeal from Order.

in the Court of Chancery by his Honor the Chancellor on the advice of Vice-Chancellor Maja Leon Berry, dated February 25, 1927, in a cause wherein said petitioners are complainants and the Board of Education of the Borough of Keansburg, James B. McGlashan, Keansburg Lumber & Supply Company, M. O'Neill Supply Company and Samuel Barron are defendants, in this respect, to wit: that said decree adjudges that the bill of complaint be dismissed as to the defendants Keansburg Lumber & Supply Company and Samuel Barron, with costs and counsel fee against the complainants.

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And your petitioners humbly appeal from said decree and every part thereof, upon the ground that the same is erroneous and that said bill should have been sustained and the complainants given an opportunity to prove the allegations thereof upon final hearing, and that the complainants under the allegations of said bill are entitled to the relief against said defendants as prayed for.

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MCDERMOTT, ENRIGHT & CARPENTER,
Solicitors for and of Counsel
with Appellants.

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Endorsed:

Service of a copy of within petition of appeal hereby acknowledged March 22, 1927.

KARKUS & KARKUS,
Solicitors for appellees Keansburg Lumber & Supply Company and Samuel Barron.

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**Answer to Petition of Appeal from Order
Dated February 25, 1927, Filed April 12,
1927.**

**NEW JERSEY COURT OF ERRORS AND
APPEALS.**

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FRED KIENZLAN and PERCY L.
MATTHEWS,
Complainants-Appellants,
—against—

BOARD OF EDUCATION OF THE
BOROUGH OF KEANSBURG,
JAMES B. MCGLASHAN,
KEANSBURG LUMBER & SUPPLY
COMPANY, M. O'NEILL SUP-
PLY COMPANY and SAMUEL
BARRON,
Defendants-Appellees.

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On Appeal
from
Chancery.

Answer to
Petition of
Appeal.

The answer of Keansburg Lumber & Supply
Company and Samuel Barron, two of the above
named appellees, to the petition of appeal of Fred
Kienzlan and Percy L. Matthews, the above named
appellants.

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These appellees, not admitting the truth of all
or any of the matters in said petition of appeal
contained, for answer thereto, nevertheless, admit
that a decree was, on February Twenty Fifth,
Nineteen Hundred and Twenty Seven, made and
entered in the Court of Chancery of New Jersey,
in the above entitled cause, for the purposes in
said petition mentioned and as therein set forth,
but as to the substance and form of said decree,

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Answer to Petition of Appeal from Order.

these appellees beg leave to refer thereto when the
same shall be produced.

These appellees are advised and believe that the
said decree is agreeable to equity; and they pray
that the same may be affirmed with costs and
counsel fee to be taxed in favor of these appellees. 10

KARKUS & KARKUS,
Solicitors for Appellees.

JACOB S. KARKUS,
Of Counsel with Appellees.

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New Jersey Court of Errors
and Appeals.

On Appeal from the Court of Chancery.

Between

FRED KIENZLAN and PERCY L. MATTHEWS,
Complainants-Appellants,

—and—

BOARD OF EDUCATION OF THE BOROUGH OF
KEANSBURG, *et als.,*
Defendants-Appellees.

**BRIEF FOR COMPLAINANTS-
APPELLANTS.**

The appeals in this case bring up an order of the Court of Chancery advised by Vice Chancellor Berry, made upon order to show cause, denying a restraining order *pendente lite*; also a final decree dismissing complainants' bill on the same grounds as moved the Court to deny the preliminary restraint.

The final decree dismissing the bill was made on motion without final hearing, and the sole question involved is the proper construction to be given to the present Municipal Lien Law, Chapter 280, Laws of 1918.

The bill shows that the defendant, James B. McGlashan, entered into a contract with the Board of Education of the Borough of Keansburg, under date of August 27, 1926, for the erection of a public school building.

Complainant Kienzlan performed labor between September 20th and November 17th, 1926, in the erection of the building for the contractor McGlashan, for which he has not been paid.

Complainant Matthews performed labor and furnished materials between September 20th and November 13th, 1926, entering into the building, likewise for the contractor McGlashan, for which he has not been paid.

On November 27, 1926, Kienzlan served a notice of lien upon the Board of Education for the moneys due him, pursuant to Chapter 280, Laws of 1918.

Complainant Matthews likewise served notice of lien upon the Board of Education for the moneys due him under date of November 26, 1926.

There is no question raised respecting the sufficiency of these notices.

Defendant M. O'Neil Supply Company has likewise served a notice of lien upon the Board of Education for the amount alleged to be due to it for materials furnished toward the performance of the contract, which materials were likewise furnished to the contractor McGlashan.

Defendant Barron, as Constable, subsequent to the furnishing of the labor and materials of the complainants, but prior to the service of notice of lien therefor, levied an execution on the moneys alleged to be due to the contractor McGlashan from the Board of Education under said contract, which execution issued upon a judgment recovered by the Keansburg Lumber & Supply Company against McGlashan.

The moneys due to Keansburg Lumber & Supply Company, for which said judgment was recovered, have no relation to the public improvement in question.

It is alleged that a sum of money became due on or about November 15, 1926, to the contractor

McGlashan from the Board of Education (p. 2, par. 3), but the amount thereof appears to be insufficient to pay the claims of the complainants and the M. O'Neil Supply Company, due for labor and materials.

Complainants file their bill for relief under the provisions of the Mechanic's Lien Act, praying that the Court may adjudicate and determine the rights and claims of the various parties in and to the moneys due from the Board of Education to the contractor McGlashan, and that the defendants Samuel Barron, Constable, and Keansburg Lumber & Supply Company, Inc., may be restrained from proceeding under the levy upon the judgment of Keansburg Lumber & Supply Company, Inc., against said fund.

Upon the continued hearing upon the order to show cause with preliminary restraint, the Court made its order December 31, 1926, discharging the order to show cause, and thereafter counsel for the Constable and judgment creditor moved to dismiss the bill for lack of equity, which motion was granted and an order made February 25, 1927, dismissing the bill as to the defendants Keansburg Lumber & Supply Company and Samuel Barron, Constable (p. 20).

This order was made upon a memorandum of the Vice Chancellor in which he says:

"The sole question to be determined here is whether or not the judgment creditor is entitled to priority of lien over the complainants by virtue of the levy under the execution. In my judgment, my decision should be controlled by the case of *Strathmere Lumber Company v. Sea Isle City*, 4 N. J. Misc. Reports, 687" (134 Atl. p. 286). "That case was decided by Vice Chancellor Ingersoll on the authority of *Mack Manufacturing Company v. Citizens' Construc-*

tion Company, 85 N. J. Eq., 331, and cases therein cited. It involved the identical question raised in this cause and the decision on this point is binding on this court."

The Court then proceeds to apply the reasoning of the *Mack Manufacturing Company* case to the present case notwithstanding the change in the statute.

POINT I.

Under the present Mechanics' Lien Law, revision of 1918, the claims of materialmen and laborers, upon moneys due a contractor for a public improvement, when perfected by the statutory proceedings, have priority over an execution levied before service of the lien notice.

There can be no doubt that the decision in *Mack Manufacturing Co. v. Citizens' Construction Company*, 85 N. J. Eq. 331, establishes the contrary proposition in applying the mechanics' lien statute as it existed prior to 1918.

The old statute was, however, expressly repealed in its entirety (P. L. 1918, p. 1049), and was superseded by the revision of 1918, Chapter 280, Laws of 1918, page 1041.

This new statute changes the old statute in many respects and was obviously designed to provide a complete legislative scheme.

This new statute was in effect at the time of the decision in *Strathmere Lumber Co. v. Sea Isle City*, *supra*, by Vice Chancellor Ingersoll, but the

essential changes in the new law do not appear to have been called to the attention of the Vice Chancellor, and he decided the case wholly upon the authority of the *Mack* case, as though the old law were still in force.

There is no doubt that the facts involved in the present case are essentially identical with those involved in the *Strathmere* case, and the essence of the decision of Vice Chancellor Berry is involved in the sentence:

"It" (the *Strathmere* case) "involved the identical question raised in this cause and the decision on this point is binding on this court."

We contend, however, that an essential change has been made in the statute law respecting the priority of labor and material creditors, for the following reasons:

The Old Law.

The old law provided, Section 5 (Vol. 3 Comp. Stats., p. 3319):

"The lien shall attach from the time of filing thereof to the extent of the liability of the contractor for the claim preferred upon any funds which may be due, or to grow due, to said contractor from said" (municipality) &c.

Section 8, page 3321, provided that the Court in which the action to foreclose the lien is brought shall determine the validity of the lien, the amount due from the debtor to the contractor, and from the contractor to the respective claimants, and shall render judgment directing the municipality to pay over to the claimants whose claims or liens

it shall hold to be valid and just, "*in the order of their priority as determined by said court*", to the extent of the funds due from the municipality to the contractor.

Section 9 provided that:

"* * * rights and priorities shall be determined as follows: persons standing in equal degrees as co-laborers or persons furnishing materials shall have *priority according to the date of the filing of their liens*; but laborers shall have a lien prior to other liens, upon filing their notices," etc.

There is no provision respecting the status of assignees under the contractor.

Under this statute it was held that the right of an assignee from the contractor was superior to the right of a mechanic's lien creditor who filed his notice of lien subsequent to the assignment.

Cope v. Walton Co., 77 N. J. Eq. 512;
U. S. Fidelity & Guaranty Co. v. Newark, 76 N. J. Eq. 230.

Also, that the title of a trustee in bankruptcy of the contractor's estate was superior to the lien claim of laborers and materialmen subsequently filed for labor and materials furnished before the bankruptcy.

Garretson v. Clark, 57 Atl. Rep. 414.

Also, that the title of a receiver of a corporate contractor appointed under the New Jersey Corporation Act was superior to lien claims subsequently filed for materials previously furnished.

Mack v. Citizens' Const. Co., 85 N. J. Eq. 331.

The general scheme of the old Act was to relate all rights of claimants to the filing of the notice of lien, and expressly to give claimants priority according to the dates of filing their respective notices, and (as construed by the Courts) to give assignees, whether by conventional assignment or by operation of law, priority over liens subsequently filed, although covering prior work and material.

The New Law—Revision of 1918.

This general scheme has been essentially changed by the revision of 1918.

Section 5 of the 1918 revision retains the language of the prior Act, viz.:

"The lien shall attach from the time of the filing thereof * * * upon any funds which may be due, or to grow due, to the said contractor from the municipality," etc.

Section 6, however, provides that the lien of any laborer or materialman when filed:

"shall have priority over any assignment by a contractor or subcontractor to any third person or persons of any money due or to grow due to such contractor or subcontractor for any labor or material furnished * * * notwithstanding such assignment may have been made prior to the filing of notice by any such laborer," etc., "provided such money shall not have been paid to such assignee at the time of the filing of such notice."

Section 10 provides that the Court of Chancery shall determine the validity of the lien of the complainants and defendants and all other liens which may be filed within the time prescribed by

the Act, and the amount due from the municipality to the contractor under the contract and from the contractor or subcontractor to the respective claimants, and shall make a decree directing the municipality, out of the moneys due from it to the contractor, to pay over to the several claimants the sums found due to them respectively upon claims for work done and materials furnished in the execution of the contract, but, if the amount due from the municipality to the contractor is not sufficient to make such payments in full,

“then distribution shall be made ratably, without regard to the priority in filing the claims, * * * provided, however, that laborers shall have a lien” (prior) “to other liens upon filing notices under this Act at any time before payments are due and made, and the lien of any laborer filed under this Act shall have priority over any assignment by a contractor or subcontractor to any third person * * * notwithstanding the assignment may have been made prior to the filing of the notice by the laborer.”

Section 16 provides that the term “contractor” as used in the Act shall be construed as meaning the person with whom the contract with the municipality is made “his assigns or legal representatives”.

It seems to us impossible to give to the language of Section 5 of the new Act, providing that the lien shall attach from the time of filing thereof, the same effect as given to similar language in the old Act, for the reason that the new sections of the Act now expressly provide that the several lien claimants shall be paid “ratably, without regard to the priority in filing the claims”, and, also, expressly provide that the lien, when filed, “shall have priority over any assignment * * * notwithstanding the assignment may have been made prior to the filing of the notice”.

It is plainly the intent of the Legislature to abolish the old rule of priority depending on date of filing and to put the liens of all claimants of the same class upon an equal footing, regardless of the date of filing, and, also, to secure the benefit of the Act to laborers and materialmen, even against prior assignments to third parties, so long as the liens are filed within the statutory period.

Since assignments known to the law may be by operation of law as well as by conventional instrument or other voluntary act, and the same reason exists for preferring these mechanics’ liens to all classes of assignments, whether by operation of law, or otherwise, we submit that the Act should be construed to mean that the word “assignment” as used in the sixth section includes assignments by operation of law such as liens and titles acquired by levy of execution.

We further submit that the present law does, in effect, give an inchoate right of lien, which, when perfected by the statutory notice, relates back to the doing of the work or furnishing of the material, for any other construction is inconsistent with the express provisions giving all liens of the same class equal priority, without regard to the date of filing, and further providing that the liens when filed shall have priority over antecedent assignments.

A less significant change in the Mechanics’ Lien Law relating to notices to the owner was held to have such effect in *Slingerland v. Binns*, 56 N. J. Eq. 413 (E. & A.).

The decree should, therefore, be reversed and the execution creditor and the Constable should be restrained from further proceeding under the judgment.

McDERMOTT, ENRIGHT & CARPENTER,
Solicitors for and of Counsel with Appellants.

21 OCT. T. 1927

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

On Appeal from the Court of Chancery.

Between

FRED KIENZLAN and PERCEY L. MATTHEWS,
Complainants-Appellants,

and

BOARD OF EDUCATION OF THE BOROUGH OF
KEANSBURG, et als.,

Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES.

The defendants-appellees accept the facts outlined in the brief of complainants-appellants, herein, as being the facts to be submitted to the court for its determination of the issues raised.

AN EXECUTION LEVIED BEFORE SERVICE OF THE LIEN NOTICE UNDER THE MUNICIPAL MECHANIC'S LIEN ACT HAS PRIORITY OVER THE CLAIMS OF MATERIAL MEN AND LABORERS UPON MONEY DUE A CONTRACTOR FOR A PUBLIC IMPROVEMENT.

POINT 1.

"THE LIEN SHALL ATTACH FROM THE TIME OF FILING THEREOF".

Paragraph five of the Municipal Mechanic's Lien Act, Chapter 280, Laws of 1918, on page 1043 provides;—"The Lien shall attach from the time of filing thereof"

In *Strathmere Lumber Co. vs. Sea Isle City*, et al., 134 Atlantic 286, the Court says:

"The only question for determination * * * is: Do the claims filed by the defendants after the levy made by the Sheriff take priority thereto?" * * *

And after quoting from the opinion of the Court in *Mack Manufacturing Co. vs. Citizens Construction Co.*, 85 N. J. E. 331, the Court continues:

"The levy being prior to the filing of the claim, the judgment creditor's right to the fund became attached prior to the right of the defendant by reason of the filing of the claim."

It is unlike the Mechanic's Lien Act, which gives the lien claimant an inchoate lien from the time of furnishing the labor or material.

The Courts have repeatedly and consistently held that the statutory provision above quoted is destructive of the idea of an inchoate lien prior to the time of filing the claim.

In the case of *Board of Education etc. vs. Zink*, N. J. Advance Reports, Vol. 5, No. 25 at page 976, the Court said:

"The lien claims filed after the appointment of the receiver do not attach to the fund, *Mack Manufacturing Co. vs. Citizen's Construction Co.*, 85 N. J. E. 331; affirmed 86 N. J. E. 254; *Agnew Co. vs. Paterson Board of Education*, 83 N. J. E. 49. These cases were decided upon the statute as it stood prior to the act of 1918, P. L. p. 1043. The new act does not alter the law of the cases."

The attention of the Court is respectfully directed to the numerous cases cited in *Mack Manufacturing Co. vs. Citizen's Construction Co.*

POINT 2.

THE PROVISION OF THE ACT WITH REGARD TO RATABLE DISTRIBUTION OF CLAIMS IS NOT APPLICABLE IN THIS CASE.

Section 10 of Chapter 280 of the Laws of 1918 provides:

"The Court of Chancery shall determine the validity of the lien of the complainants and defendants but if the amount due from the Municipality to the contractor is not sufficient * * * then distribution shall be made ratably, without regard to the priority in filing the claims * * * and the lien of any laborer shall have priority over any assignment by a contractor or sub-contractor to any third person of any money due to such con-

tractor or sub-contractor for any labor or material furnished for any public improvements referred to in this act, notwithstanding the assignment may have been made prior to the filing of the notice by the laborer; *provided, such moneys shall not have been paid to the assignee prior to the time of the filing of the notice.*" Counsel have underlined the last clause of the above extract of the statute because of its great importance in the case now before the court.

It is urged that this section includes within its purview only laborers and material men and as between *them* ratable distribution shall be made of the funds. It is reasonable to infer that it was intended that this provision relates only to the lien claimants whose claims are filed within the time prescribed by the Act.

POINT 3.

A JUDGMENT IS NOT SUCH AN ASSIGNMENT AS IS CONTEMPLATED BY THE ACT.

It is respectfully submitted that by the proviso in section 10 of the said act, preferring the liens of laborers over any assignment by the contractor to any third person, of any moneys due to such contractor, notwithstanding the assignment may have been made prior to the filing of the notice by the laborer, it was intended to protect laborers from the fraudulent assignment of the funds of the contractor and contemplates therefor as a necessary consequence, the actual, in-

tended assignment by the contractor. The seizure of the funds by the constable, was not an assignment such as was contemplated by the said statute. In holding that a judgment was not an assignment, it was said in *Breading vs. Boggs*, 20 Pa. 33, that as assignment operated by way of an agreement and not by operation of law.

Poe vs. Prescott, 3 Hun 419 lays down the following:

"Neither a sheriff who has levied a writ of attachment on chattels, nor the attaching creditor, is an assignee of the debtor within the meaning of the statute prohibiting a party from testifying as a witness to a transaction with the decedent in an action between the witness and the executor or assignee of such decedents."

POINT 4.

SEIZURE BY THE CONSTABLE REMOVED THE FUNDS BEYOND THE SCOPE OF ANY LIEN OF THE LABORERS OR MATERIAL MEN.

The seizure by the constable is analogous to the appointment of the receiver by operation of the Federal Bankruptcy or State Insolvency Laws. These officers, it has been frequently held have a superior right to the funds due to the contractor. *Agnew Co. vs. Paterson Board of Education*, cited above.

The seizure of the funds under an execution is such an act which forthwith divests the judgment debtor of his title to the funds placing them

immediately in the custody of the law. Claims of laborers and material men, when filed effect only the funds of the contractor and can have no effect upon funds the right to which has been taken from the contractor and are in custodia legis.

As was said by the Court in *Mack Manufacturing Co. vs. Citizen's Construction Co.*,

“The insolvency provision of our Corporation Act renders it clear that upon the appointment of a receiver in insolvency the title of the insolvent corporation to its assets are divested and forthwith vested in the receiver subject only to liens *then existent* to the end that an equal distribution of the assets may be made among general creditors. The assets are thus placed in custodia legis for the purposes stated.”

Counsel therefore submit that there was not, in the case sub judice, such an assignment as was contemplated by the said statute. But, were the hypothesis accepted to the contrary, the provision of section 10 above set forth expressly excepts such moneys as shall have been paid to the assignee prior to the time of the filing of the notice.

In *Schneider vs. Schmidt*, 82 N. J. E. 81, the Court held:

“This distinction as to the time when the judgment creditor's right attached is important, and in the present case is vital. For the levy on personal property is a seizure of the judgment debtor's rights at the time of the delivery of the execution to the sheriff.”

So in the case now before this Court, the right to the funds in question has passed from the contractor and within the intendment of the above-mentioned proviso in section 10 of the said Act, the funds have been removed beyond the scope of any claim or lien of the laborers or material men whether inchoate or in ease.

CONCLUSION.

Counsel respectfully summarize their contentions as follows:

1. Paragraph five of the Act Provides “The lien shall attach from the time of the filing thereof.”
2. Judicial precedent has firmly established that the new act does not alter the old act with regard to the issues under consideration.
3. That prior to the filing of the notice no inchoate lien existed on behalf of the laborers and material men.
4. That the statute contemplates ratable distribution only among lien claimants who have filed their claims within the time prescribed by the Act.
5. That a judgment is not such an assignment by law as is contemplated by the provisions of the Act.
6. That seizure by the constable divested the contractor of his rights in the funds.
7. That the funds are in custodia legis.

8. That even if the judgment creditor be deemed the assignee of the contractor by operation of law, the moneys were no longer within the control of the contractor and therefore come within the exception of that portion of section 10 of the Act which reads: "Provided that such moneys shall not have been paid to the assignee prior to the time of the filing of the notice."

THE DECREE SHOULD, THEREFORE, BE AFFIRMED.

KARKUS AND KARKUS,
Solicitors for and of counsel with Appellees.