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# New Jersey Court of Errors and Appeals

No. 48, October Term, 1926.

*Between*

HARRY H. WEINBERGER, *et als.*,
*Complainants-Appellants,*

*and*

MAX GOLDSTEIN, *et als.*,
*Defendants,*

*and*

ALBERT PASKEVITCH, *et als.*,
*Respondents-on-Appeal.*

*Between*

SIDNEY LOBSENZ,
*Complainant,*

*and*

MAX GOLDSTEIN, *et als.*,
*Defendants,*

*and*

HARRY H. WEINBERGER, *et als.*,
*Defendants-Appellants,*

*and*

ALBERT PASKEVITCH, *et als.*,
*Respondents-on-Appeal.*

*On Appeal from Chancery.*

*Sat Below* WALKER, *C.*

*Respondents' Motion to Dismiss Appeal.*

## BRIEF FOR APPELLANTS.

Opinion Below. Order Appealed From.

*Italics, etc., except where otherwise noted are mine.*

## Statement of the Case.

The motion to dismiss is solely upon the ground that appellants are not aggrieved by the order appealed from, all other reasons being waived, and the case on appeal having been, by consent, marked off for the term.

The order appealed from was made on March 30, 1926, and directed that respondents be admitted as parties to two certain causes in Chancery entitled—"Harry H. Weinberger, *et al.*, complainants, and Max Goldstein, *et als.*, defendants" and "Sidney Lobsenz, complainants, and Max Goldstein, *et als.*, defendants," to the end that they might file answers and counter-claims sufficient to put in issue between them and all parties to the suit, except Sidney Lobsenz, their claims to so much of the net proceeds of the sale of that portion of the mortgaged premises to which respondents had insisted their alleged lien claims attached, as remained after payment to Lobsenz and his wife.

The order further provided that adverse parties, appellants, might set up in their answers to the counter-claims any and all facts upon which they relied to establish, as against the lien claimants, loss by the latter of rights or defenses through waivers, extinguishments, laches, estoppel or fraud of any kind.

The order further provided, and it is insisted that, aside from all else, the provision here to be noted made the order appealable, that respondents might set up "any and all facts material to the issues, and which they might have pleaded, or set up, *had they been made originally parties to said causes, or either of them.*"

Under permission granted by this order respondents filed answers and counter-claims set-

ting up, among other things, *usury* in the mortgages held by appellants.

One of the contentions made below was that respondents were so circumstanced as that, if they were permitted to intervene, they should be restricted to equitable defenses. This contention the Chancellor overruled.

In *Vanderveer's Administrator* v. *Holcomb,* 22 N. J. E. 555, it was held that, where a complainant is entitled to an equitable answer and a defendant is permitted to file an answer setting up *usury,* etc., complainant is aggrieved and may appeal. This Court in that case dismissed the appeal but upon the ground that the order of the Chancellor did not permit the filing of an inequitable answer, and one having been filed, the Court would not presume that the Chancellor would not strike it out.

In the case at bar the matter as to whether the defense of usury should be permitted was argued *in extenso* before the Chancellor, and the order of the Chancellor distinctly provides that respondents may set up *all* facts material to the issue and which they *might have pleaded or set up had they been made originally parties to said causes,* which permits them to set up usury. The Chancellor disposed of the contention of appellants that the defenses of usury, and certain other claimed inequitable defenses, should not be set up, adversely to appellants.

In order to determine whether appellants are aggrieved by the order appealed from, it is necessary to consider, in some detail, the facts, the contentions made below, and the rulings of the Court thereon.

There is a full and complete opinion of the Chancellor reported in 4 N. J. Advance Reports 567 (not officially reported). Annexed hereto.

The headnotes of the opinion, prepared by the Chancellor, will indicate some of the questions of law which he decided.

Those headnotes read—

> "1. Persons claiming, as holders of filed mechanics liens, rights in mortgaged premises superior to complainant in foreclosure suit—where such liens were not and could not have been filed until after decree *pro confesso,* and application being made promptly after the filing of the liens—will be admitted as parties to the foreclosure suit and given leave to litigate, as against complainant and all other parties, their claims to the proceeds of sale of the mortgaged premises."
>
> "2. At the hearing on such an application the Court will not undertake a complete trial of petitioner's alleged rights; the issue is simply as to whether or not the petitioners are asserting *bona fide,* claims which they ought equitably to be permitted to have tried in the cause."
>
> "3. The chancery act of 1915 provided that the Chancellor shall by rules regulate and determine all questions as to parties, pleadings and procedure in chancery suits; such rules will therefore prevail over inconsistent provisions of the chancery act of 1902."

On May 7, 1924, Weinberger and Hartstein filed a bill, D. 55/659, to foreclose a mortgage made July 19, 1923, by Max Goldstein and Lena Goldstein, his wife, to Weinberger, to secure the payment of the sum of $80,000 on July 19, 1924, an interest in the mortgage having been assigned to Hartstein.

On June 19, 1923, Goldstein had given a mortgage to Samuel Slaff for $35,000 which was subordinated to the Weinberger mortgage and Slaff was made a party defendant. On October 19, 1923, Goldstein had given a mortgage to the Superior Finance Corporation and it was made a party. On December 21, 1923, the lands and premises had been conveyed by Goldstein to Slaff and Eichenbaum, and they were made parties defendants.

The bill recited that on November 27, 1923, the Paterson Glass Company had filed a mechanics' lien against Goldstein and Weinberger and Hartstein, and it was made a defendant.

On or about the 23rd day of June, 1924, a bill was filed on behalf of Sidney Lobsenz, D. 56/119, to foreclose a mortgage prior to that of Weinberger and Hartstein and the same parties were made defendants as in the Weinberger and Hartstein foreclosure.

Decrees *pro confesso* were taken against the defendants in both suits, and, in the Weinberger suit, there was a report of a master, filed on or about the 15th day of October, 1924, from which it appeared that there was due to Weinberger and Hartstein for principal and interest upon their mortgage the sum of $73,196.30; to the Superior Finance Company upon its mortgage the sum of $16,720; to Samuel Slaff, $37,776.67.

On the 27th day of September, 1924, before the Master, Judge Heisley, representing the respondents, alleged lien claimants, appeared, and said:

> "I do not think that the agreement of December 4, 1923, precludes my clients from filing liens. They have not been made parties to this foreclosure and therefore their rights are not affected. In the present

> status of the suit, they have no standing before the Master, and I conceive that their duty is to either apply to the Court for leave to be made parties and to file answers setting up their alleged priorities or else ignore the Chancery proceedings and file their mechanics' liens.''

In the Sidney Lobsenz case, D. 56/119 the Master's report was made on or about the day of . The amount found to be due to Sidney Lobsenz was fixed at $20,000; to Harry H. Weinberger and Hartstein $73,776.75, to Samuel Slaff $37,660, and to the Superior Finance Company $16.666.66.

The hearing before the Master in this case took place on the 9th day of September, 1924. There was no appearance by Judge Heisley or by any of the respondents, alleged lien claimants.

On or about the 14th day of October, 1924, in the case of Weinberger and Hartstein against Goldstein, 55/659, the Paterson Glass Company, which had been made a party defendant to that suit and against which a decree *pro confesso* had gone, presented its petition through Judge Heisley to Vice-Chancellor Foster. In that petition it set up, in substance, that; prior to November 27, 1923, it had furnished material toward the construction of the building located on the lands described in the complainants' bill, and that there was due to it the sum of $990, for which sum it had filed a lien on November 27, 1923, in the Clerk's Office of Passaic County, and on the 27th day of November, 1923, had caused a summons to be issued; its contract for the furnishing of materials was made before the giving of the Weinberger mortgage; a considerable portion of the material was actually used in the construction of the building prior to the giv-

ing of the Weinberger mortgage and by reason thereof it had a prior lien; none of the moneys represented or intended to be secured by the Weinberger mortgage were used in the erection of the building and that therefore it had a prior lien; although the bill of complaint alleged the entire sum of $80,000 due a much less sum was, in fact, due. It made the same charges with respect to the Superior Finance mortgage. It noted the conveyance made on December 21, 1923, from the Goldsteins to Slaff and Eichenbaum and charged that the conveyance, although in form a deed, was really given as a mortgage and pledge to secure * * * the payment to Slaff and Eichenbaum of a debt due from Goldstein to them. It set up (paragraph 15), that it had not filed an answer "because it believed, and it had been so advised by its attorney who filed said lien claim for it, that its interests in said mortgaged premises, by reason of the said lien, *were fully protected and safeguarded by the terms of a certain agreement made by and between various persons and itself, who had furnished material or labor for the erection of the said building,* as parties of the first part, thereto and the said Samuel Slaff and Samuel Eichenbaum as partes of the second part."

"16. That after the time limited by law and the rules of this Court for filing any answer had expired, to wit, *in the latter part of September, 1924, it became evident that the terms of the said agreement were not being fulfilled and that said agreement did not protect or safeguard petitioner's interest and that said agreement had, by its terms, become inoperative."* Shortly thereafter it was advised by its attorney that, due to the relations of its attorney with the

various parties to the said agreement, he could not act for it, and that it thereupon obtained another attorney. It asked leave to file an answer in the nature of a cross bill.

On presenting that petition, the Vice-Chancellor advised an order, in case 55/659, requiring the parties to show cause on November 5th, why the prayer of the petition should not be granted.

On the 31st day of October, 1924, and more than a month after Judge Heisley had appeared before the Master, a petition was presented by him, for and on behalf of Samuel Goldberg and Herman Simon and Isidore Simon, partners trading as Simon Brothers, setting forth that they had furnished labor and material and that the mortgages of Weinberger and Hartstein, Slaff and the Superior Finance Corporation were subsequent and subject to their liens and that they had filed liens, Samuel Goldberg for $9,000, October 24, 1924, and Herman Simon and Isidore Simon, partners trading as Simon Brothers, one for $1,200 and one for $1,300, October 24, 1924; that they were not made parties defendants to the bill and they prayed to be made such. They did not attack the mortgages in any way except by the general statement that their liens were prior to the liens of the mortgages.

Upon the presentation of this petition the Vice-Chancellor made an order, requiring the parties to show cause on November 5, 1924, why the prayer of *that* petition should not be granted.

In November, 1924, in Weinberger and Hartstein *v.* Goldstein, *et als.*, 55/169, a petition was presented by Judge Heisley on behalf of Albert Paskevitch, Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz & Schmidt, Ac-tin-o-lyte Roofing Co., a New Jersey

corporation, and Joseph Leschinsky and Stanislau Karpinsky, partners trading as New Jersey Fire Escape Railing and Construction Company, alleging that they had furnished materials, etc., setting up the mortgages and alleging that, because the contracts for labor, etc., were made before the mortgages were given and, because the moneys, the payment of which were intended to be secured by said mortgages, were not applied to the payment of bills for labor and material used in the erection and construction of the said building, their liens were prior to the liens of the mortgages and they set up that the lien claim of Albert Paskevitch was filed November 1, 1924, for $7,598; Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz & Schmidt for $5,000, November 1, 1924; Actin-o-lyte Roofing Co., for $945.76, filed November 3, 1924, and the claim of the New Jersey Fire Escape Railing and Construction Co. for $2,250, filed November 1, 1924, and they set up that they were not made parties defendant to the bill and prayed to be made such.

Upon the hearing of the orders to show cause, heretofore referred to, affidavits were read before Vice-Chancellor Foster. There were several hearings.

Appellants insisted that they were entitled to take testimony upon the issues raised before the applying lien claimants should be let in as parties whereupon a reference was made and testimony was taken which is contained in a book of some 300 pages, and this testimony was all considered before the Chancellor made the order appealed from. *The Chancellor could not have thought that the order rested in pure discretion or that appellants' rights would not be affected by the order.*

On or about February 1, 1925, a notice was given by Judge Heisley, representing respondents that he would apply for leave to file an answer and an answer in the nature of a counter-claim "setting up in addtiion to those facts and allegations which are set forth in the form of a proposed answer heretofore served upon you, the facts set forth in the annexed supplemental petition," and also to insert in the counter-claim a prayer for additional relief, *i. e.* "(1) That the deed from Max Goldstein to Samuel Slaff and Samuel Eichenbaum *is a trust deed* and in the nature of a mortgage *for the benefit of the said petitioners,* respondents, and that Max Goldstein is the real owner of said property, and that said deed is subsequent to the rights of the said petitioners in said property." "2. That the property embraced in the said mortgages shall be sold in parcels."

The supplemental petition set up *for the first time,* an agreement made on December 4, 1923, between respondents and Slaff and Eichenbaum. It recited the third and fourth paragraphs of that agreement, and charged, that, by reason of a violation of its terms by Slaff and Eichenbaum, respondents were relieved from its obligations.

An order was made in the Sidney Lobsenz suit which provided for the sale of the mortgaged property in parcels and for the payments of the amounts found to be due to Hartstein and Weinberger; the Superior Finance Corporation and Slaff, upon their giving a bond to the Chancellor in the sum of $40,000, conditioned to pay such moneys:

> "As the Court of Chancery, subject to appeal, may direct to be paid by the said Harry H. Weinberger and Benjamin A. Hartstein and Samuel Slaff and Superior Finance Corporation, to them or either of

them as the result of the determination of the rights of the said Harry H. Weinberger and Benjamin A. Hartstein and Samuel Slaff and Superior Finance Corporation and the Paterson Glass Company, Inc. [and then follows the names of the alleged lien claimants] as between themselves, arising out of the mortgage of said Harry H. Weinberger and Benjamin A. Hartstein and the mortgages of Samuel Slaff and Superior Finance Corporation."

The Master's report in the Sidney Lobsenz suit as to the amount due to Weinberger and Hartstein, Slaff and the Superior Finance Corporation was confirmed.

The property was sold and payments were made of the amount due to Weinberger and Hartstein, $77,395.14, and to Slaff, $35,343.29, less than the amount due him. These payments exhausted the fund.

It developed in the proofs upon which the order appealed from is based that: all of the respondents, contractors on the work, knew of the existence of the Weinberger and Hartstein mortgage; some time in the early winter of 1923 Goldstein, the owner, ran out of money, and conferences of the various contractors engaged on the work, including respondents, were held; Slaff and Eichenbaum represented two of the largest creditors; as a result of these conferences, on December 4, 1923, an agreement, to which all of the respondents were parties, was made; that agreement, among other things, provided:

"It is expressly covenanted and agreed as follows:

1. That the parties of the first part hereto (including the alleged lien claimants, respondents) do hereby assign, transfer and set over unto the said Samuel Slaff and Samuel

Eichenbaum, the said parties of the second part, all their right, title and interest in said property by reason of having furnished any labor or material or both so that whatever lien claim interest, right or liability of any kind that they may have against the said building *shall be and the same hereby is assigned, transferred and set over unto the said Samuel Slaff and Samuel Eichenbaum, the said parties of the second part hereto.*"

"10. It is understood and agreed that the object and intention on the part of the parties of the first part in granting and conveying unto the parties of the second part their entire interest as expressed in paragraph 1 of this agreement is to *obviate, eliminate and extinguish any interest or claim that the said parties of the first part may have in the Jefferson street property above referred to by reason of their lien claims, so as to vest a complete fee simple interest in the said parties of the second part.*"

* * * * * * *

"13. It is expressly covenanted and agreed that in the event that there shall be any breach or failure to comply with any of the terms and conditions of a bond of indemnity of even date herewith given by the parties of the second part to the parties of the first part or any of them, that then and in such event *the parties of the first part shall have the right to file a lien against the property above described, anything to the contrary herein contained notwithstanding;* provided, however, that in the event that any lien shall be filed by any of the parties hereto, that all right and recourse of the parties of the first part or any one of them upon the said bond shall be extinguished, and the parties of the second part shall be thereby released and discharged from any and all liability by reason of having entered into said bond."

Simultaneously with the making of this agreement a deed was given by Goldstein, the owner,

to Slaff and Eichenbaum, and Slaff and Eichenbaum gave a bond to faithfully comply with the terms of the agreement of December 4th.

Slaff and Eichenbaum, after taking title, proceeded to complete the building; some of the alleged lien claimants, if not all, proceeded, in part at least, with the performance of their contracts under the terms of the agreement.

Immediately upon the filing of the Weinberger and Hartstein bill, on May 4, 1923, there were conferences of the lien claimants, including respondents, with Slaff and Eichenbaum. *Respondents requested Slaff and Eichenbaum to secure a stipulation from Weinberger that he would not go on with his foreclosure for a month.* Weinberger acceded to this request, a formal stipulation being entered into on May 19, 1924, which extended the time to answer until July 20, 1924 (an extension of two months), and which provided:

> "* * * it being expressly understood and agreed that progress on the completion of the building shall proceed so that the building shall be entirely completed by July 1, 1924, and in the event that the said building shall not be completed by July 1, 1924, that then and in such event the complainants may proceed with the foreclosure and the defendants shall have twenty days from July 1, 1924, to file such answer, plea, or make such objection to the bill of complaint as they may be advised."

Weinberger waited until after the expiration of the time fixed and then proceeded, no answers being filed.

It was contended, and there was evidence to support the contention, that the lien claims were not filed until more than four months after the last work had been done, and that, for the pur-

pose of making it appear that work had been performed within the period, certain of the lien claimants, without orders or instructions and without right, pretended to perform certain work upon the building or to furnish certain materials for the express purpose of giving them the right to lien, and that their conduct amounted, in effect, to the fabrication of claims and was fraudulent.

Vice-Chancellor Foster died before he could determine the matter. The matter was then considered by the Chancellor and he decided it in the opinion reported in 4 N. J. Advance Reports 567, and made the order appealed from.

**The Contentions Below.**

Respondents relied upon section 58 of the Chancery Act, 1 C. S. of N. J., p. 432, which, so far as material, reads as follows:

> "In any suit for the foreclosure of a mortgage * * * all persons claiming an interest in or incumbrance or lien upon such property, by or through any conveyance or * * * *lien* * * * which, by any provision of law, *could be recorded* * * * or filed in any public office in this state, and which *shall not be so recorded* * * * *or filed at the time of the filing of the bill in such suit,* shall be bound by the proceedings in such suit, so far as the said property is concerned, in the same manner as if he had been made a party to and appeared in such suit, and the decree therein made against him as one of the defendants therein; but such person, upon causing such conveyance, or * * * lien, * * * to be recorded * * * or filed, as provided by law, may cause himself to be made a party to such suit by petition, in the same manner as is by this act provided in the case of persons acquiring an interest in the subject-matter of a suit after its commencement. * * *"

Section 29, which is the section referred to in section 58, 1 C. S. of N. J., p. 421, reads as follows so far as material:

> "Where, *after the filing of the bill,* any person shall acquire such an interest in the subject-matter of the suit as would have made him a proper or necessary party, if such interest had been possessed by him at the time of the commencement of the suit, it shall not be necessary to file a supplemental bill to make such person a party, but the same may be done by petition filed in the cause, and which petition, verified by oath, shall state the interest of such person, and the manner in which the same was acquired; and a copy of the petition and notice of the application shall be served on the complainant or his solicitor, etc., * * * and the chancellor may thereupon, *if it appear that such person is entitled to be made a party to the cause, and has acquired his interest from some party to the same, order that he be made a party thereto; but such person shall be bound by all orders and proceedings in the cause against the party whose interest he has acquired, and the cause shall not be delayed by the admission of such party, except for such time as it may seem to the chancellor to be necessary to take the evidence regarding such claim.*"

And section 30, 1 C. S. of N. J., p. 422, reads as follows:

> "In all causes in which it is provided in this act that a person may be made a party by petition after the commencement of the suit, such person may be made a party either before or after an interlocutory or final decree therein, *but such decree shall not be opened or set aside thereby,* and in all cases where the person so made a party does not dispute the claim of the complainant, or any part of it, the complainant, or any defendant whose prior right is not disputed, shall not be delayed by the admission of such

party; but his claim shall be fully heard and investigated in disposing of the residue of the subject-matter of the suit or of the proceeds thereof."

The objections taken by appellants to the making of the order applied for, as made in the court below, were as follows:

"1. The lien claimants are barred by reason of the signing of the stipulation of May 19, 1924, and the circumstances surrounding the making of that stipulation and by their laches from making the present application."

"2. By virtue of the agreement of December 4, 1923, the alleged lien claimants abandoned their lien claims. if they did not, at least the lien claims were held by Slaff and Eichenbaum during the foreclosure proceedings of Weinberger and Hartstein; Slaff and Eichenbaum were parties to the suit; the alleged lien claimants must come in, if at all, under the provisions of section *29*, and if they do, they are, by the express language of the statute, bound to the same extent as Slaff and Eichenbaum would be bound at the time they are permitted to intervene; therefore, they cannot be permitted to answer."

"3. The alleged lien claimants have not shown that the events set forth in paragraph 13 of the agreement of December 4, 1923, which, in terms, permits them to file liens upon the happening of certain events, have, in fact, occurred."

"4. The proofs show that the last work was performed and the last materials furnished by the various lien claimants more than four months prior to the filing of their lien claims and that some of them deliberately went to the building after their work had been completed or abandoned and without orders or instructions and without right pretended to perform certain work upon the buildings or furnish certain ma-

terials for the express purpose of giving them the right to lien and that their conduct amounted in effect to the fabrication of claims and was fraudulent, and that statements were made by them and positions taken in the proceedings in this cause contrary to the facts known to them, and that their conduct is so grossly inequitable as that, under the cases, they will not be heard in this court whatever may be their strict legal right."

"5. As ordinary judgment creditors the alleged lien claimants cannot come in. If they do come in as such they are bound by all of the proceedings before they come in and it is therefore useless for them to come in."

"6. If they are permitted to intervene their defences should be strictly limited.

(a) No advantage should be permitted to be taken of the payment of $5,000 by Slaff and Eichenbaum in accordance with the terms of the agreement of December 4, 1923, the benefit of which was received by three of the alleged lien claimants. The practical construction put upon the agreement by the parties should bind them.

(b) They should be prevented from pleading usury.

(c) Weinberger and Hartstein should not be compelled to follow the money advanced upon the mortgage into the property."

**Conclusions of the Court.**

The Court, construing sections 29, 30, of the Chancery Act, 1 C. S., of N. J. 431, 422, in conjunction with sections 3, 11 and 13 of the Chancery Act of 1915, and Chancery Rules 6 and 13, held that respondents were within the statute and might be admitted, and that they were not bound by the proceedings theretofore taken in the causes. The Court further held that, al-

though it appeared in the evidence that respondents, by the agreement of December 4, 1923, had assigned their rights to Slaff and Eichenbaum and that Slaff and Eichenbaum were parties defendant to the cause and had, at the request of respondents, obtained a stipulation extending the time to answer, respondents were not bound by the proceedings in the cause which had been taken against Slaff and Eichenbaum. The Court also held that their right to file liens was not extinguished by the agreement of December 4, 1923, and, if there had been a breach of that agreement, their rights to file liens were revived. It declined to, in any wise, limit the matters which they might set up.

## ARGUMENT.

I have received no memorandum from respondents moving to dismiss the appeal.

The basis of their application must be that an order, which merely permits a person to come in and defend and file a counter-claim is not appealable upon the ground that there is no person aggrieved. This may be so in an ordinary case but, in this case, respondents made their application under the provisions of the statute which permits applications on behalf (sec. 58) of "all persons claiming an interest * * * or lien upon such property, by or through any conveyance lien * * * which, by any provision of law, *could be recorded,* * * * or filed in any public office in this State, and which *shall not be so recorded,* * * * or filed *at the time of the filing of the bill in such suit,* * * *," in the manner provided by the 29th section.

The 29th section is that dealing with the rights of persons "*who shall acquire an interest in the*

*subject matter of the suit as would have made him a proper or necessary party, if such interest had been possessed by him at the time of the commencement of the suit.''* That section provides that such person "shall be bound by all orders and proceedings in the cause *against the party whose interest he has acquired.''*

Before respondents could be admitted in the cause it was necessary to determine that they had claims falling within the provisions of these statutes, at least it is so contended by appellants. It was not contended that the *merits* of their claims should be determined but it *was* contended that it was necessary to reach a conclusion that they actually had claims *within the statute,* and that they were not barred, upon equitable grounds, from seeking admission to the cause at the late day they sought it.

It was contended: that respondents did not fall within the statutes, among other things, because they did not have claims which could have been recorded or filed, and which were not filed at the time of the filing of the bill for the reason that, by the agreement of December 4, 1923, which was in full effect at the time of the filing ofthe bill, they had parted with all their claims to Slaff and Eichenbaum, and had, in the language of the agreement, extinguished them; that they were not within the language of sections 29 and 30 because they had not, after the filing of the bill, acquired an interest in the subject matter of the suit, because their claims, once having been extinguished, could not be revived; that if they did acquire an interest in the subject matter of the suit, after the filing of the bill by reason of some conduct on the part of Slaff and Eichenbaum in not performing the conditions of the contract of December 4, 1923, they acquired that interest

from Slaff and Eichenbaum, who were parties to the suit, and, under the express terms of the statute, they would be bound "by all orders and proceedings in the cause against the party whose interest he has acquired"; that they were, in fact, represented, during the foreclosure proceedings, by Slaff and Eichenbaum and were bound by the stipulation which Slaff and Eichenbaum at their request, had obtained from Weinberger extending the time to answer for a period of two months; that they should not be permitted to intervene because they had deliberately elected to pursue Slaff and Eichenbaum on the bond which Slaff and Eichenbaum had given for the faithful performance of the terms of the agreement of December 4, 1923, and that, having so elected, they had deliberately let the proceedings in foreclosure go without answer filed, and, at the late hour that they were admitted, they had no right to re-elect; that they were guilty of conduct, in attempting to substantiate their claims, which would require the Court to deny them equitable relief.

Finally it was contended that, if they were permitted to intervene, in view of their conduct, they should not be permitted to plead the defense of usury.

These various contentions required a determination by the Court of principles of law and equity. The matter did not rest in pure discretion. If the contention of appellants were well founded, they were not subject to attack by respondents.

In the Court below, upon the issue that respondents were not within the statutes there were cited:

*Conard* v. *Mullison, et al.*, 24 N. J. E. 65;
*Mutual Life Insurance Co.* v. *Schwab*, 51 N. J. E. 204;

*Hewitt* v. *Montclair Ry. Co.*, 25 N. J. E. 100, affirmed by this Court, 27 N. J. E. 479;
*Shepard* v. *N. J. Consolidated Water and Light Co.*, 73 N. J. E. 578, at page 584.
*Pancoast* v. *Geishaker*, 58 N. J. E. 537, decided by this Court;
*Raymond* v. *Post*, 25 N. J. E. 447.

To the effect that respondents' defenses should be strictly limited there were cited,
*O'Neill* v. *Linowitz*, 92 N. J. E. 179;
*Vineland* v. *Maretti*, 93 N. J. E. 513;
*Campion* v. *Kille*, 15 N. J. E. 476.

All cases in this Court in which this Court has said that, when answer is permitted as matter of grace, the Court will not permit usury to be set up.

To the effect that they would not be permitted to intervene because they had not shown due diligence, there was cited—
*Raymond* v. *Post*, 25 N. J. E. 447.

To the effect that, because Slaff and Eichenbaum held their interests and were parties defendant to the suit, respondents were bound by the proceedings against Slaff and Eichenbaum, there was cited—
34 *Corpus Juris*, title "Judgments" Sec. 1420, page 999; Section 143, page 1003; Section 1442, page 1019.

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This Court has, in several cases, considered orders made by the Chancellor arising under these statutes.

In *Guest* v. *Hewitt*, 27 N. J. E. 479, two orders were made, one denying leave to intervene and one permitting intervention with a provision that

the intervenor be bound by the proceedings already taken.

In *Horner* v. *Corning,* 28 N. J. E. 254, this Court considered an order denying an application to intervene.

And so in *Davis* v. *Sullivan,* 33 N. J. E. 569.

The mere fact that, in form, this order merely gives respondents the right to file pleadings is not determinative upon whether it is appealable.

This Court has consistently reviewed orders of the Chancellor granting, or refusing to grant, permission to file bills of review or to proceed in the nature thereof.

*Jones* v. *Jones,* 84 N. J. E. 479;
*Engelhardt* v. *Schroeder,* 96 N. J. E. 383;
*Sparks* v. *Fortesque,* 75 N. J. E. 586.

in which case this Court reviewed and reversed the order of the Court of Chancery opening a decree and that notwithstanding that the appellants had not appeared upon the order to show cause.

A motion was made in *Mitchell* v. *Mitchell,* 96 N. J. E. 29, in the Court of Chancery; 97 N. J. E. 298 in this Court; to dismiss the appeal but this Court denied the application and decided the case upon the merits.

Appellants had rights adjudicated in the proceedings in Chancery which respondents sought to unsettle. If, after the answers and counterclaims were filed, appellants could raise the same questions as they might upon the application for leave to intervene a different question might be presented. Appellants are permitted by the form of the order to plead waiver, extinguishment, laches, estoppel or fraud, but, under the terms of this permission, they cannot urge that

respondents should not have been permitted to file the answers and counter-claims upon the grounds of delay in making the application, or that they had elected, during the course of the proceedings, to be bound thereby for the fact that respondents are permitted to intervene and to plead "any and all facts material to the issue, and which they might have pleaded, or set up, had they been made originally parties to said causes," would seem to preclude appellants from urging the matters aforesaid, nor can they set up that, as matter of law, respondents are bound by the proceedings against Slaff and Eichenbaum, nor that usury cannot be set up. This all goes to the substance of appellants' rights.

It is submitted that the order appealed from is not one of pure discretion, but of judicial discretion reviewable by this Court, and that the exercise of such judicial discretion could not be called in play until facts were made to appear to the Court which brought respondents within the language of the statutes, and it is denied that these facts appeared below.

A test, as to whether appellants are aggrieved is this: will respondents agree that, upon the final hearing, every objection that was made to the granting of leave to answer and file a counter-claim may be renewed, and may be considered upon the final hearing as if the order permitting the filing of answers and counter-claims had not been granted? If such a stipulation is entered into, I am content. If it will not be made it must be because respondents have obtained some right or advantage by the making of the order. But they could not have obtained a right or advantage without a corresponding disadvantage to appellants. To avoid an appeal, at this stage

of the proceedings, a suggestion was made that such a provision be inserted in the order so that the cause could come to this Court on one appeal from the final order which should be made. That suggestion was rejected by counsel for respondents and was not adopted by the Court.

There is handed to the Court herewith a copy of the order appealed from, together also with a copy of the opinion of the Chancellor.

Respectfully submitted,

MERRITT LANE,
Of Counsel for Appellants.

IN CHANCERY OF NEW JERSEY.

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| *Between*<br>HARRY H. WEINBERGER, *et al.*, *Complainants,*<br>*and*<br>MAX GOLDSTEIN, *et als.*, *Defendants.* | *55-659.*<br>*On Bill, etc.*<br>**ORDER.** |
| *Between*<br>SIDNEY LOBSENZ, *Complainant,*<br>*and*<br>MAX GOLDSTEIN, *et als.*, *Defendants.* | *56-119.*<br>*On Bill, etc.*<br>**ORDER.** |

This matter coming on upon due notice to all parties on the petition and supplemental petitions of Albert Paskevitch, Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz & Schmidt; Samuel Goldberg; Herman Simon and Isadore Simon, partners trading as Simon Brothers; Ac-tin-o-lyte Roofing Company, a New Jersey Corporation, and Joseph Leschinsky and Stanislaw Karpinsky, partners trading as New Jersey Fire Escape Railing and Construction Company.....duly filed in said causes praying, among other things, that they may be admitted as parties to said causes and each of them, and the Chancellor having duly considered said petition and the various depositions taken pursuant to orders made in said causes, and having heard the arguments thereon of counsel of the respective parties, and being of opinion that the prayers of the said several

petitions should be granted and that an order should be made in each of said causes admitting said petitioners as parties in said causes to the end and for the purpose of asserting and enforcing their claims, if any, against so much of the net proceeds of the sale of that portion of the mortgaged premises to which their several mechanics' lien claims *prima facie* attached, as remains after the payments made by the Special Master to the said Sidney Lobsenz and his wife, and the Chancellor being also of the opinion that the said two causes should be consolidated and prosecuted as one cause,

It is on this 30th day of March, 1926, on motion of Wilbur A. Heisley, of counsel with the said petitioners, ORDERED, that the said petitioners, Albert Paskevitch; Louis Rabinowitz and Joseph Schmidt, partners trading as Rabinowitz & Schmidt; Samuel Goldberg; Herman Simon and Isadore Simon, partners trading as Simon Brothers; Ac-tin-o-lyte Roofing Company, a New Jersey Corporation, and Joseph Leschinsky and Stanislaw Karpinsky, partners trading as New Jersey Fire Escape Railing and Construction Company, and each of them, be admitted as parties in said causes to the end and for the purposes aforesaid and for those purposes may file any and all proper answers and counter-claims at and sufficient to put in issue between them and all parties to the suit, except Sidney Lobsenz, their claims to so much of the net proceeds of the sale of that portion of the mortgaged premises to which their lien claims *prima facie* attached as remained after payment to Lobsenz and his wife, as aforesaid. The adverse parties may set up in their counter-pleadings and and all facts upon which they rely to establish as against the lien claimants loss by

the latter of rights or defenses through waivers, extinguishment, laches, estoppel or fraud of any kind; and it is

FURTHER ORDERED, That the said lien claimants and all other parties are hereby permitted to plead, answer and set up in proper pleadings any and all facts material to the issues and which they might have pleaded, or set up, had they been made originally parties to said causes or either of them.

And it is FURTHER ORDERED that the lien claimants and each of them be and they are hereby restrained and enjoined from the further prosecution of their suits upon their respective lien claims until the further order of the Chancellor; the said claimants having the right to continue by postponement from term to term of the Passaic Circuit Court of their said suits until final disposition is made of these causes;

It is FURTHER ORDERED that the depositions heretofore taken in said causes before Nicholas W. Bindseil, Special Master, may be used by either parties on the final hearing, but this shall not limit or restrict either party from offering other and additional evidence to prove the same or other facts referred to in said depositions.

E. R. WALKER,

*C.*

IN CHANCERY OF NEW JERSEY.

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|---|---|
| *Between*<br>HARRY H. WEINBERGER, *et al.*, *Complainants,*<br>*and*<br>MAX GOLDSTEIN, *et al.*, *Defendants.* | *55-659.*<br>*On Bill, &c.*<br>**OPINION.** |
| *Between*<br>SIDNEY LOBSENZ, *Complainant,*<br>*and*<br>MAX GOLDSTEIN, *et al.*, *Defendants.* | *56-119.*<br>*On Bill, &c.* |

On petitions to be admitted as parties defendant, &c.

Mr. Wilbur A. Heisley for petitioners.

Mr. Merritt Lane for mortgagees Weinberger, *et al., contra.*

## SYLLABUS.

1. Persons claiming, as holders of filed mechanics' liens, rights in mortgaged premises superior to complainant in foreclosure suit—where such liens were not and could not have been filed until after decree *pro confesso,* and application being made promptly after filing of the liens—will be admitted as parties to the foreclosure suit and given leave to litigate, as against complainant and all other parties, their claims to the proceeds of sale of the mortgaged premises.

2. At the hearing on such an application the court will not undertake a complete trial of petitioner's alleged rights; the issue is simply as to whether or not the petitioners are asserting *bona fide* claims which they ought equitably to be permitted to have tried in the cause.

3. The Chancery Act of 1915 provides that the Chancellor shall by rules regulate and determine all questions as to parties, pleadings and procedure in Chancery suits; such rules will therefore prevail over inconsistent provisions of the Chancery Act of 1902.

WALKER, *C.*

May 8, 1924, complainants filed bill to foreclose a mortgage of $80,000 given by defendant Goldstein (then the owner of the mortgaged premises) to Weinberger (who later assigned a part interest to his co-complainant), dated July 19, 1923, bringing in as defendants Samuel Slaff, holding a $35,000 mortgage (one month prior in date but subordinated to complainants' mortgagee); Shelkowitz, a subsequent lessee; Superior Finance Company, holder of a subsequent $16,000 mortgage; Spindel, holder of a subsequent $5,000 mortgage; Samuel Slaff and Samuel Eichenbaum, as subsequent grantees under deed from Goldstein alleged to be only by way of security, and Goldstein and wife, as the alleged real owners of the equity of redemption; also Paterson Glass Company and Samuel Zaentz, mechanics' lien claimants.

After decree *pro confesso,* and reference, a master's hearing was held October 15, 1924, and report was filed October 20, 1924, that there was due to complainants $73,196.30; to Slaff, $37,-776.67; to Superior Finance Company, $16,720.00; to Spindel, $5,276.67; to Zaentz, $276.67.

Nothing further has since been done in this cause except the filing of the petitions of the parties applying to come in as defendants, and the interim proceedings on such petitions; this was because this Weinberger suit was, from a practical, if not a technical, standpoint superseded by a foreclosure suit commenced June 20, 1924, by Sidney Lobsenz, the holder of a mortgage of $30,000, comprising the same premises, and prior in lien to all of the encumbrances involved in the Weinberger suit. All the parties in the Weinberger suit (and one or two others) were brought in as defendants in the Lobsenz suit. Decree *pro confesso* was taken against all, and on a reference to a master, hearing was held September 9, 1924, and a report filed October 3, 1924, that there was due to Lobsenz $30,825.84; to Weinberger and Hartstein, $73,677.75; to Slaff, $37,660; to Superior Finance Company, $16,666.66. On this report final decree was entered February 16, 1925. Prior to that date the present applying lien claimants had petitioned to be made parties and for leave to file answers and counter-claims attacking the amounts due on, and priority of, the Weinberger, Slaff and Superior Finance Company mortgages. The final decree tentatively reserved to them such rights, if any, as they might prove to have. The *fi. fa.* directed that payment be made to Lobsenz for his mortgage; also (by consent) to his wife some $20,000.00 for the amount due on a mortgage held by her antedating all the others; and also to Weinberger, Slaff and Superior Finance Company on their giving bond of $40,000 conditioned to pay the present applying lien claimants such moneys, if any, as might be directed by this Court. The bond was given; the sale was had, and Slaff became the purchaser.

The proceeds of sale were not quite sufficient to pay Slaff in full; and of course not the Superior Finance Company.

The application of the lien claimants is based upon the allegation that they furnished labor and materials in the erection of a building on a portion of the mortgaged premises; that they commenced furnishing such labor and materials before the date of the Weinberger mortgage; that they had not completed the furnishing of such labor and materials until just prior to the filing of their lien claims; that they filed their lien claims for unpaid balances due them the last of October, 1924, and then promptly applied to be admitted as parties to this suit.

Weinberger and Hartstein, and Slaff, resist the application; and secondly insist that if the claimants be admitted they must be limited as to the defenses and claims which they may set up.

A little simplification may help in the solution of the question. At the time the present application was made the situation was essentially this: A bill to foreclose by a first mortgagee (Weinberger) against a second mortgagee, a third mortgagee and the owner; decree *pro confesso;* master's report adjudicating the rights accordingly; application by lien claimants to become parties to the suit and to litigate their claim to the proceeds of sale against the first, second and third mortgagees and the owner; the claim of the lien claimants being that they furnished labor and materials for the construction of a building on lands comprised in the mortgage, under contracts made (and work commenced) prior to the giving of the first mortgage, which contracts were not completed by them until after the decree *pro confesso;* and that immediately upon completing their contracts they had filed

lien claims under the statute for the moneys due them and promptly applied to be admitted in the cause; and that the moneys for which the mortgages purport to be security were not used to pay for labor and materials in the construction of the building.

Assuming the facts as to the lien claims to be as above set forth, it seems clear that the lien claimants are entitled to be admitted as parties and given an opportunity to establish their claims, for their rights or liens would be superior to those of complainant first mortgagee and all other parties. To deny the application might result in depriving them of the superior right given them by the mechanics' lien act.

If they did not come in to this suit could they enforce their lien claims against the purchaser at the foreclosure sale? If they could not, it would be obviously unjust to deny them admission; and even if they could, it would be better for all concerned to admit them. The purchaser at foreclosure sale might well know nothing of the lien claims and bid a price which would not take them into account. The claims might be invalid, but in a subsequent suit by them against the purchaser the latter would find it difficult to procure the evidence to prove them invalid.

That these lien claimants have a right (unless forfeited or lost by them in some way) to litigate their claims to the proceeds of sale as against all parties to these suits (except Lobsenz) there can be no doubt. *Stiles* v. *Galbreath,* 69 N. J. Eq. 222 (aff'd 71 *Id.* 299). The present case is even stronger than that one, for there apparently the lien claimants had liens which could have been, but were not, recorded at the time of the filing of the foreclosure bill, while

here (*prima facie*) the lien claims could not have been filed until just before the present application was made. I think it is also quite apparent from that decision (see 69 N. J. Eq. at 233), and section 58 of the Chancery Act that these claimants could have the right to be admitted to this suit for the purpose of such litigation of their claims, even if their lien claims had been recordable at the time of the filing of the bill: so much the more must they have that right when their claims could not have been filed until after the foreclosure bill.

It is contended that under sections 29 and 30 of the Chancery Act, the claimants, if admitted, are precluded from asserting claims adverse to the complainants. Not so. Section 30 provides only that decrees already made shall not *ipso facto* be opened or set aside by the subsequent admission of a party—it does not prevent the Court from opening or setting aside such decrees by special order for the benefit of the admitted party, where such a course is requisite or equitable.

The provision in section 29 that the admitted party shall be bound by all orders and proceedings in the cause against the party whose interest he has acquired applies only where that interest was acquired after suit was commenced. The lien claimants acquired their interest from the owner, but they acquired that interest in inchoate form, prior to the foreclosure bill, to wit, when the owner contracted with them to do the work and furnish the materials. The filing of the lien claim was not the transfer of interest from the owner, but the perfecting of his inchoate lien. I have no hesitation in holding that section 29 does not mean that a lien claimant admitted under such circumstances as those now being

considered must be so bound by the prior proceedings and orders as to prevent his being able to litigate his claim to rights in the proceeds of sale superior to those of the complainant. But even if I took a contrary view on this point, section 29 would be no barrier in view of sections 3, 11 and 13, of the Chancery Act of 1915, and the present Chancery Rules hereinafter referred to.

In *Riverside Building & Loan Association* v. *Bishop,* 3 N. J. Adv. 1846, it was held by Vice-Chancellor Buchanan that one who, pending foreclosure suit, recovers judgment against the mortgagor is entitled to be admitted as a party even after final decree in order that he may have an opportunity to have determined his interest and priority as against the other defendants. The petitioning party there claimed to have acquired priority over senior judgment creditors because he had levied and they had not. In the present instance the application simply goes one step further—to admit petitioner to litigate his claim of rights superior to those of complainant. The difference is not one of principle but is a question merely of convenience and orderly prosecution of suits. If a trustee in bankruptcy of a mortgagor, appointed after decree *pro confesso;* or even final decree, in a foreclosure suit, applied for admission and for leave to file counter-claim to set up that complainants' mortgage was in fraud of creditors, is there any good reason why he should not be permitted to do so? If denied admission, he would assuredly have the right to file an original bill, and undoubtedly on his application the proceeds of sale would be impounded in the foreclosure suit pending the determination of his separate bill. So in the present instance, the lien claimants have a right

to have their claims as against the complainant Weinberger litigated in some suit, and since it may be done in this suit, conveniently and without prejudice to other parties, it should be done here.

Counsel have referred to a number of reported cases, prior to 1915, as authority for the denial of this application, which however are not now controlling in view of the Chancery Act of 1915. By section 3, of that act it is provided that the Chancellor, by rules, may regulate and determine all questions relating to the subject of parties to all suits and proceedings in Chancery, and all pleadings and proceedings in such suits. Chancery Rules 6, 13, paragraph 3, 23, 24 and 28 (all of which had their origin in the Chancery Act of 1915, appendix) afford ample authority for the conclusion herein reached.

It is said however that the petitioners have lost their right to become parties, for several reasons—first, because by agreement among themselves and Slaff (the mortgagee) and Goldstein (the owner) Goldstein conveyed the property to Slaff and Eichenbaum as trustees, and the present petitioners assigned or purported to assign to the same trustees, December 4, 1923, all their right, claim or interest as inchoate mechanic lien holders, in order to extinguish all such lien claims, so that the trustees might manage the property for the interests of all parties to that agreement, and mortgage or sell it to raise money to pay all the claims. The agreement however expressly provides in case of breach of agreement by the trustees, the right to file lien claims should revive in the lien claimants. There are disputed questions of fact as to whether or not the trustees did breach the agreement in several instances. It does not seem that the

agreement should necessarily prejudice them so far as concerns the Weinberger-Hartstein mortgage, since it appears that it was not intended to be an irrevocable extinguishment of the lien claims under all circumstances. Moreover Weinberger and Hartstein were no parties to the agreement; it was in nowise intended for their benefit; nor is there any showing of facts to raise an estoppel in favor of Weinberger and Hartstein because of the agreement. Nor should it necessarily prejudice them so far as the Slaff mortgage is concerned, for Slaff was one of the trustees, and he cannot be permitted to take a position contrary to the interests of his *cestuis que trustent* which is contrary to his express agreement in the trust instrument.

It is contended that there was no breach of the agreement so as to revive the lien claims. The claimants say there were a number of such breaches. There are thus disputed questions of fact on these issues under the affidavits and depositions before the Court on this motion. Those issues however are fairly in dispute and it is not the function of the Court to determine them on this motion. The hearing on this motion is not intended to be an actual trial of the applicants' whole case. All that the Court is required to do—all that it should do—is to satisfy itself that the petitioners have a *bona fide* claim of or to such an interest as entitles them to be made parties to the suit—that they are asserting *bona fide* a claim which they ought equitably to be permitted to have tried out. This was the law under the old practice—*Conard* v. *Mullison,* 24 N. J. Eq. 65, at 68; it is equally true under the present practice—*Boehm* v. *Rieder,* 96 N. J. Eq. 167, at 171, 172; aff'd 3 N. J. Adv. 1679.

It is further contended that by virtue of this trust agreement Slaff and Eichenbaum as trus-

tees holding the lien claims, legally represented the lien claimants in the foreclosure suit; that the latter were thereby in legal contemplation actually brought into court in the persons of Slaff and Eichenbaum, and hence are bound by the decree *pro confesso* against Slaff and Eichenbaum.

It does not seem to me that this contention is sound, because, for one reason, on the showing made by the claimants, their right to file liens did not accrue until after the decree *pro confesso.* Suppose they had made no attempted assignment, and suppose they had held mortgages entirely dissociated from their lien claims and had been made parties defendant as such mortgagees—could their application now, having become lien holders of record, to set up claims by virtue of such mechanics' liens be denied on the ground that a prior decree *pro confesso* against them as mortgagees also barred them on lien claims which they could not then have set up because not then existent? I think not. A decree is *res adjudicata* it is true not only on matters set up in the pleadings but also on matters not set up which could have been set up—but not on matters which could not have been set up.

It is also contended that it appears from the affidavits and depositions that these lien claimants filed their lien claims fraudulently. There seems ground for grave suspicion in this behalf, but I think it is not so clear as to require denial of their application to be heard on a plenary trial.

They will be given leave to be admitted as parties defendant in both suits, and to file answers and counter-claims apt and sufficient to put in issue between them and all parties to the suits except Lobsenz, their claims to so much

of the net proceeds of the sale (of that portion of the mortgaged premises to which their lien claims *prima facie* attached) as remained after payment of Lobsenz and his wife. The adverse parties may set up in their counter-pleadings any and all facts upon which they rely to establish as against the lien claimants loss by the latter of rights or defenses through waiver, extinguishment, laches, estoppel or fraud of any kind.

I am inclined to think it may be advisable to consolidate the two suits. The form of order may be settled on notice. Costs will abide the result on final hearing.

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

# New Jersey Court of Errors and Appeals

*Between*

HARRY H. WEINBERGER, *et als.*,
*Complainants-Appellants,*

*and*

MAX GOLDSTEIN, *et al.*,
*Defendants-Respondents.*

*Between*

SIDNEY LOBSENZ,
*Complainant-Appellant,*

*and*

MAX GOLDSTEIN, *et al.*,
*Defendants-Respondents.*

*On Appeal from an Order made by the Chancellor.*

**Motion to Dismiss Appeal.**

## BRIEF OF RESPONDENTS.

This is case No. 48 at October Term, 1926, and comes before Court upon motion to dismiss the appeal on the ground that the order appealed from is not appealable.

On the opening day of the term, the Court granted both parties leave to submit it upon briefs within ten days.

The order appealed from directed that certain parties (the respondents) who had furnished labor and materials of the value of approximately $35,000 used in the erection of a building, should be made parties to these causes, being foreclosures of mortgages which were placed on the property after the erection of the building had been commenced.

The order and the Chancellor's opinion upon which it is based, form a part of appellants' brief.

**The Order Appealed from was Non-Appealable.**

(Italics are ours.)

The case of *Vanderveer* v. *Holcomb,* 22 Equity 555, cited by appellants, shows nothing to the contrary. The first paragraph of the syllabus says, "Where the defendant answers *by favor* of the Court, he must be restricted to an equitable answer; where he has a right to answer, such limitation cannot be imposed." In that case Holcomb was given leave *when he was in laches* in filing an answer to file "only an equitable defense." Subsequently the Court modified that order by striking out the reference to equitable defense and from that order Vanderveer appealed on the ground that Holcomb intended to set up usury.

The distinction between the case *nisi* and the case referred to is that in the case *nisi we did not ask to be made parties as a matter of grace* but *insisted upon it as* a *matter of right.* At page 558 the Court in substance says that if the Chancellor had permitted as a matter of grace Holcomb to have filed a plea of usury it *would have been so contrary to the settled law of the land that it would be clearly illegal* and Holcomb would have been aggrieved (see middle of p. 558). At 559, speaking of the appealable quality of an order, the Court says, "where, as in this case, the discretion of the Chancellor is controlled and governed by fixed and determined rules, the failure to apply which would substantially affect legal and equitable rights of the complainant, an appeal cannot lie. * * *" At 557, near the bot-

tom, the Court says, "the plea of usury when interposed in season, is not available because it is equitable, but because it is the strict legal right of the defendant to set it up. * * *"

Although the Chancellor had modified the order, from which one might infer that he intended to permit Holcomb to file an inequitable answer, yet this Court said at page 559, "this Court will presume that in this general order the defendants will be held to a strictly equitable defense."

We submit there is nothing in the case *nisi* to indicate that the respondents-lienors were contemplating inequitable defenses, but even if they had filed an inequitable defense like usury (although they have not done so) this Court held at the bottom of page 559 that these appellants would not be aggrieved thereby, until *"the Chancellor shall refuse to strike it out."*

In the case of *Doland,* 69 Equity 802, at page 808, the Court held that the order in question did not determine the appellant's guilt of contempt, "but only to determining that she was 'apparently guilty' and for that reason an attachment should be issued against her, upon the return of which according to the ordinary practice of the Court, she would have a further hearing upon the question of her guilt * * * she was not in a legal sense aggrieved * * * and not entitled to appeal."

In the case *nisi* the Chancellor has not determined that the respondents-lienors have meritorious claims which must triumph over the mortgagees; he has concluded that they have "apparently" claims that should be adjudicated by their being made parties and that later there will be a hearing upon the merits of their claims, precisely as *in re Doland.*

In the case of *Coryell* v. *Holcomb,* 9 Equity 650, cited by appellant, this Court held there could be no appeal from Chancery's order directing parties to be brought in to answer for contempt and at the top of page 653 it says, "the order appealed from in this case is nothing more than an order directing process to *bring in the parties to answer for alleged contempt.* An appeal from an order awarding process of subpoena could lie with quite as much propriety. It cannot be said that the party is aggrieved by such an order."

In *Adams* v. *Adams,* 80 Equity 175 (E. & A.), the same principle is enunciated. In that case there were proceedings for contempt and an order issued requiring him to show cause. The Chief Justice, at page 178, says in substance that no appeal lay from such an order, "the reason is that it adjudicates nothing against him and he, therefore, cannot be said to be aggrieved by it" following Coryell *v.* Holcomb and Doland's case.

We observe that if a party may not appeal from an order requiring him to show cause why he should not be imprisoned, it is difficult to see how an appeal lies from this order which merely permits parties who have furnished nearly $40,000 of materials for this building and who claim a preference over these mortgagees, to have their day in court. Nothing is adjudicated against the complainants or in favor of the lienors. They may be annoyed by this litigation, but that is not being "aggrieved" in the statutory sense.

If the mortgagees eventually win, they will recover cost; these respondents-lienors would be aggrieved if their petition was denied. *Vander-*

*veer* v. *Holcomb, ~~infra~~,* at 559, distinctly says that if these lienors filed inequitable answers that the mortgagees-appellants would not be aggrieved "until the Chancellor had refused to strike out such answers."

The question of what the word "aggrieved" as used in this connection means, has often been considered, and we respectfully refer the Court to the following:

> "A party is aggrieved when the order or decree operates prejudicially and directly upon the property or pecuniary rights or interest, or upon his personal rights, and only when it has such effect." 3 *Corp. Juris,* p. 632, and note 17 b. on p. 633.

The Prerogative Court, of this State, has said in *Andres* v. *Andres,* 46 Equity 530, that the grievance must be a real grievance.

We do not think the cases cited in appellant's brief of 75 Equity, p. 586, 84 Equity, p. 479, 96 Equity 383, 96 Eq. 29 and 97 Equity, p. 298, are at all pertinent, because in those cases the appellant had secured *a right by virtue of an adjudication which was disturbed* or set aside and, therefore, his right and interest was affected. It is true there was a final decree in these causes, but it was consented *to only upon condition that appellants give a bond;* it was entered so a sale of the property might be had but it was in no way "final" as to the rights of these appellants or respondents; that question was left open.

A conclusive answer to appellants' contention is this: Under the proofs before the Chancellor it appeared that these lienors had commenced furnishing and had furnished thousands of dollars of labor and material before complainants' mortgages were executed and under Section 15

of Mechanics' Lien Act, they had a priority over these mortgages, unless the mortgagees could show that the moneys secured by the mortgage were actually applied by them to the payment of bills for the construction of the building. The hearing upon these petitions was protracted while the mortgagees took three hundred pages of depositions and a further delay was occasioned by the untimely death of *V.-C.* Foster; by consent the property was sold and the moneys were paid on these mortgages only after their executing a bond to the Chancellor to secure the payment to the lienors of any sums which the Chancellor may find due the lienors. So it is evident that the only forum or court to which these lienors may appeal for relief is by hearing before the Chancellor. These causes have been referred by him to *V.-C.* Lewis and a day has been set for the final hearing, therefore, the lienors filed their petitions, but not as Holcomb did, asking for the favor of the Court, but respectfully asserting their right to be made parties and let us suggest with the greatest respect to the Chancellor, that if they showed a *prima facie* case which placed them within the provisions of Section 58 of the Chancery Act, that then it became the absolute duty of the Chancellor to make the order of admission and when once admitted as parties, these lienors would have the right to file any answer consistent with the usual practice of the Court of Chancery and that such right could not be limited by his Honor, the Chancellor; if they were in court under Section 58 their pleas and the time of filing them would be governed absolutely by the usual practice of equitable procedure and the Chancery Act.

**But these Petitioners have not Pleaded Usury.**

We are astonished by the statement on page 2 at bottom of respondents' brief reading: "under permission granted by this order respondents filed answers and counter-claims, setting up, among other things, usury in the mortgages held by the appellants."

This is unqualifiedly false—not intentionally so, but false *in toto* as there *is no suggestion of usury in the answers and counter-claims filed.*

We print verbatim paragraphs of lienors' answer, being the only references to the amounts due on these mortgages:

> "5. That any indebtedness due from Goldstein to said mortgagees, or any of them, and intended to be secured by said mortgages, was not for moneys advanced and paid, by the said mortgagees, or any of them, to said mortgagor, or to any one for his use, and applied to the erection of said building, as required by the provisions of said statute in order to give such mortgagees, or any of them, any lien or right prior to the liens aforesaid of the respective answering defendants, but, on the contrary, any such indebtedness and said mortgages and the liens thereof are subsequent and subject, in all respects, to the said liens of the said several answering defendants."

> "9. As to the mortgages of the said complainants, Weinberger and Hartstein, Samuel Slaff and Superior Finance Corporation, and each of them, these answering defendants say that each and all of said mortgages were made, executed and given for sums of money largely in excess of any indebtedness due, or to grow due, from Goldstein to the said several mortgagees, or any or either of them; that said indentures of mortgage were made and executed after the commencement of the erection of the said building and after

these answering defendants, and each of them, had furnished labor and material which was used in the erection and construction of said building, and with full knowledge and notice of that fact and that the consideration, if any, paid or advanced by the said mortgagees, or any of them, or benefit or consideration received by the said Goldstein, or any for his use, was not for moneys advanced to or paid to the said Goldstein, or any one for him, and applied to the erection of the said building, and, therefore, if said mortgages, or any of them, constitute a lien upon the said building and premises, or the proceeds of sale thereof, they are, by virtue of the provisions of the said statute, subsequent and subject, in all respects, to the said several liens of these answering defendants upon said premises and upon the proceeds of sale thereof."

"10. That said mortgages, and each of them, were given and accepted for the purpose of asserting and enforcing the payment of sums of money alleged to be due the said mortgages from the said Goldstein, but for sums largely in excess of any indebtedness due from him to said mortgagees, or either of them, and for the purpose of improperly and unlawfully giving such mortgagees a lien prior to the lien of the said several answering defendants upon the premises or the proceeds of said sale and for the purpose of defeating and extinguishing the right and validity of the liens of the said answering defendants and of making said liens subject and subsequent to the liens of the said several mortgagees."

under which allegations respondents-lienors will show that the mortgages were executed to secure future advances of money by Weinberger and of materials by Slaff and that the full amount was never furnished. This is borne out by the fact the Weinberger mortgage called for $80,000 and yet, eighteen months after its date, his decree

was for only $73,196.30. See Chancellor's statement, bottom of page 29 of appellants' brief.

This false allegation of usury is the cornerstone of appellants-mortgagees' appeal.

It is their attempt to place the case *nisi* within the principles of *Vanderveer* v. *Holcomb* (~~*infra*~~). ante

It is in the same class as certain other loose statements made in their brief.

I refer to the unproven statement, that "usury was argued *in extenso* before the Chancellor," page 3 of appellants' brief.

To the allegation (p. 13 of appellants' brief) that lienors requested Weinberger's stipulation for extension of mortgage which is absolutely false as shown by the affidavit of Mr. Loeb, the solicitor of Paterson Glass Co., but not the solicitor of these lienors—he did not represent these lienors, but did get a written signed stipulation. (A portion of the alleged stipulation being printed in the brief which failed to print the signatures thereto.) (P. 13 of appellants' brief.) *It did not purport to bind or affect respondents.*

It is unfortunate that counsel of mortgagees has undertaken to give his recollection and version of records, instead of printing them, but as we believe they would be wholly irrelevant, even if printed, we will refrain from falling into a similar error.

We say they would be irrelevant because, it would still rest with the Chancellor to say what he thought of the merits of these records and his order of admission certainly would be non-appealable, unless appellants-mortgagees put it within *Vanderveer* v. *Holcomb*, ~~*infra.*~~ ante It can't be possible that an appeal lies to all orders of admission of parties.

This motion should be decided upon the record —not statements of counsel, and we are content to rely upon the statements of fact and conclusions of law enunciated by the learned Chancellor in his opinion.

We suggest, however, the impropriety of the appellants-mortgagees' counsel copying certain portions of the agreement of December 4th, pp. 11 and 12, and omitting other important clauses beneficial to respondents.

The same observation applies to his statements of what was done before *V.-C.* Foster. What relevancy to this motion has his version of what was stated in the petition of Paterson Glass— which is not one of these respondents?

However, it is important to consider, on the question of pleading usury, paragraph 3 of defendants' prayer, which alleges the purpose of mortgagees. Also that the Chancellor states what defenses we desired to interpose and *does not intimate usury as one* (p. 31 of appellants' brief).

These respondents, as set out on page 3 of appellants' brief, *did not set up usury. They did, however, specify grounds,* as set forth in the appellants' brief, which then says *"They did not attack the mortgages in any way, except by the general statement that their liens were prior to the liens of the mortgagees"* (p. 8 of appellants' brief).

Appellants evidently quite doubtful of being able to invoke *Vanderveer* v. *Holcomb* (~~*infra*~~ *ante*) *proceed to discuss the merits of the Chancellor's conclusion* and the statutes and rules he considered. This is an abandonment of *Vanderveer* v. *Holcomb* and a procedure for which appellants-mortgagees cite no authority.

We are not presumptious enough to try to support the Chancellor's reasoning. It needs no support and his conclusion seems irresistible.

But assuming he fell into error, his error—in the form of this order—is non-appealable *at this stage of the litigation,* for an order permitting a party to plead, "adjudicates nothing against any one."

Permitting a citizen to present his claim in court against another does not "aggrieve" the latter for the obvious reason, that we are all presumed to be desirous that justice may be administered and the presumption is *that justice will be done both parties.*

If justice fails, *then and not till then,* is there any grievance—and *that* may be corrected by appeal to the highest court where the presumption is conclusive.

We conclude with this observation as to the propriety of the order in question (although we think it irrelevant on this motion). The respondents-lienors had furnished nearly $35,000 of labor and material used in the building. They did so in the belief they had a preferred lien under the Mechanics' Lien Act. After the building was well advanced, these appellants chose to place mortgages *with full knowledge of the law and facts.* They foreclosed these mortgages, have extinguished the lien of respondents, acquired the property, made a general clean-up of everything seizable; since then their energies have been devoted to this unconscionable, prolonged and desperate attempt to prevent these lienors from having *any* court consider their claim. For two years this delay has existed and depositions consuming many days and three hundred pages (p. 9, bottom of appellants' brief)

have been taken by these mortgagees for reasons so plain that they need not be stated.

If success attends their efforts, these lienors lose every dollar due them.

Confident that there will be no such failure of justice, we respectfully submit this brief.

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