

Index.

	Page
Bill of Complaint—Tuttle vs. Harris.....	1
Demurrer—Tuttle vs. Harris.....	18
Demurrer; Memorandum—Tuttle vs. Harris.....	20
Order over-ruling Demurrer—Tuttle vs. Harris..	22
Answer of Harris—Tuttle vs. Harris.....	23
Replication of Benj. S. Harris—Tuttle vs. Harris..	27
Answer of Apgar Bros.—Tuttle vs. Harris.....	28
Replication of Apgar Bros.—Tuttle vs. Harris....	31
Stipulation—Tuttle vs. Harris.....	32
Testimony—Tuttle vs. Harris.....	33
Direct. Re-Direct. Cross. Re-Cross.	
William E. Tuttle.. 34	41
Arthur D. Tuttle... 35	
George Apgar 35, 54	38, 60 37, 56 61
Joshua D. Loizeaux . 43	53 46
Order to Open Proofs—Tuttle vs. Harris.....	
	42
Bill of Complaint—Harris vs. Larrabee	63
Order for Injunction—Harris vs. Larrabee.....	73
Order for Leave to File Supplemental Bill—Harris vs. Larrabee	74
Supplemental Bill of Complaint—Harris vs. Lar- rabee	75
Order for Injunction on Supplemental Bill—Harris vs. Larrabee	79
Order Denying Motion.....	80
Order Modifying Injunction.....	82
Answer of Larrabee.....	84
Affidavit of County Clerk.....	95
Answer of Tuttle Bros.....	96
Order for Leave to Amend Answer of Tuttle Bros.	102
Amended Answer of Tuttle Bros.....	103
Order to Admit Trustees of Apgar Bros.....	109
Answer of Trustees.....	111
Testimony—Harris vs. Larrabee.....	116

	Direct.	Re-Direct.	Cross.	Re-Cross.	Page
Benj. S. Harris.....	116				132
George R. Apgar..	134,174	141	138,174		141
Theodore Apgar ..	142,172	146	144,173		147
J. Henry Crane....	147				153
William E. Tuttle..	156,171				161,171
Arthur Tuttle	165	170	169		

EXHIBITS

	Offered Page	Printed Page
Exhibit C. 1—Contract	123	176
Exhibit C. 2—Six (6) Checks	123	177
Exhibit C. 3—Bill for extra work, balance due on contract, \$548.30.....	124	179
Exhibit C. 4—Release of Mechanics' Liens, Apgar Bros. to Benj. Harris...	124	179
Exhibit C. 5—Stop Notice, Tuttle Bros. to Benjamin Harris	124	181
Exhibit C. 6—Letter from Tuttle Bros. to Mr. Harris	124	182
Exhibit C. 7—Notice J. D. Loizeaux Lumber Company to Mr. Harris.....	125	183
Exhibit C. 8—Stop Notice W. L. Larrabee to Benjamin Harris	126	184
Exhibit C. 9—Assignment, Apgar Bros. to Wil- lard L. Larrabee	126	185
Exhibit C. 10—Notice of Stop Notice received from Tuttle Bros., Benjamin Harris to Apgar Bros.....	127	185
Exhibit C. 12—Notice of Stop Notice received from J.D.Loizeaux Lumber Co. Benj. Harris to Apgar Bros. (This is erroneously marked C 11 in testimony on page 127) ..	127	187
Exhibit C. 13—Benjamin Harris to Apgar Bros. Notice of letter received from Tuttle Bros.	127	188

	Page
Exhibit C.14—Benjamin Harris to Apgar Bros. Notice of Stop Notice received from W. L. Larrabee..	128 189
Exhibit C. 15—Summons and Declaration in suit on contract, New Jersey Supreme Court, Larrabee vs. Apgar Bros.	131 190
Exhibit C. 16—Lien Claim Summons, Middlesex Circuit Court, Tuttle Bros. vs. Benjamin Harris	196 196
Exhibit C. 16 (a)—Receipt from Clerk in Chancery for \$548.30	133 198
On Bill of Interpleader—Memorandum	199
On Bill of Interpleader—Order for Further Hearing	202
On Bill of Injunction—Conclusions	203
On Bill of Injunction—Order for Re-Argument...	212
On Rehearing—Memorandum	213
Final Decree	216
Notice of Appeal	220
Petition of Appeal—Benj. S. Harris.....	221
Petition of Appeal—Answer of Tuttle Bros.	224

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(Filed March 18, 1908.)
IN CHANCERY OF NEW JERSEY

Between

WILLIAM E. TUTTLE, Jr., et als.,
Complainants,

and

BENJAMIN S. HARRIS, et als.,
Defendants.

Bill of
Complaint

10

To the Honorable MAHLON PITNEY, Chancellor of
the State of New Jersey.

Humbly complaining shows unto your Honor your
orators, William E. Tuttle, Jr., and Arthur D. Tuttle. 20
Partners, trading as Tuttle Brothers, of the Town of
Westfield, in the County of Union and State of New
Jersey.

1. For a number of years last past your orators
were, and now are, engaged in business in said Town
of Westfield as dealers in lumber, sash, blinds, doors,
mouldings, porch columns, mill work and other ma-
terials and supplies.

2. That on and before the twenty-sixth day of
June, Nineteen hundred and seven, and to the date of 30
the filing of this bill, Benjamin S. Harris was seized,
in fee simple, of all that certain lot, tract or parcel
of land and premises, situate, lying and being in the
Township of Piscataway, in the County of Middlesex,
and State of New Jersey, near the line of the City of
Plainfield, described as follows:—

Beginning at a point in the center line of Clinton
Avenue, said point being distant Five hundred and
fifty-seven (557) feet in a southeasterly direction
from the center line of West Seventh Street; run- 40

Bill of Complaint—Tuttle vs. Harris

ning thence in a southwesterly direction and at right angles to Clinton Avenue a distance of Two hundred and twenty-five (225) feet to a point; thence in a southeasterly direction and parallel with Clinton Avenue a distance of Sixty (60) feet to a point; thence in a northeasterly direction and at right angles to Clinton Avenue a distance of Two hundred and twenty-
 10 five (225) feet to a point in the center line of Clinton Avenue aforesaid; thence along said center line of Clinton Avenue in a northwesterly direction a distance of Sixty (60) feet to the place of beginning.

3. That the said Benjamin S. Harris being desirous of erecting a dwelling house upon said lands, did, on the twenty-sixth day of June, Nineteen hundred and seven, enter into a certain contract, in writing, with Theodore Apgar and George I. Apgar, Partners, trading as Apgar Brothers, in and by which the
 20 said Apgar Brothers did agree to erect and construct the said building, and furnish the necessary materials and labor for that purpose, for the sum of Forty-one hundred dollars, and the said Benjamin S. Harris did agree to pay to said Apgar Brothers, for said work, the said sum of Forty-one hundred dollars, in six part payments, the sixth and final payment being the sum of Six hundred dollars, to be paid when the house is all completed.

4. That pursuant to the terms of said contract
 30 the said Apgar Brothers did commence the erection and construction of said building, and for that purpose did enter into a contract with your orators, on or about the thirty-first day of October, Nineteen hundred and seven, for the supply of certain sash, doors and mill work, for the sum of Five hundred and eighty-two dollars and seventy-seven cents, and that at the special instance and request of said Apgar Brothers, your orators did bargain, sell and deliver to the said Apgar Brothers other materials to be used
 40 in the erection and construction of said building,

Bill of Complaint—Tuttle vs. Harris

amounting to the further sum of One hundred and forty-four dollars and eighty-eight cents; all of which materials, so furnished by your orators to the said Apgar Brothers, were actually used and employed in the erection and construction of said dwelling house by the said Apgar Brothers, for the said Benjamin S. Harris.

5. That on or about the eleventh day of November, 10
 1917, Nineteen hundred and seven, the said building was completed, and the said Apgar Brothers were entitled to receive the last and final payment of Six hundred dollars, from the said Benjamin S. Harris; that thereupon, on said eleventh day of November, Nineteen hundred and seven, the said Theodore Apgar and George I. Apgar came to the office of your orators, in said Town of Westfield, and there met your orator, the said Arthur D. Tuttle, and explained to him that there was Five hundred and fifty dollars still 20
 remaining due and owing to them, from the said Benjamin S. Harris, for the erection and construction of the building hereinbefore mentioned; that the said Harris would not pay to them, the said moneys until they had obtained a release of lien from your orators; that your orators were not willing to execute said release of lien, and thereupon the said Theodore Apgar and George I. Apgar stated, that if your orator, the said Arthur D. Tuttle, would sign said release for his firm, they, the said Apgar Brothers, would present 30
 the release to said Benjamin S. Harris, and obtain said sum of Five hundred and fifty dollars from him, upon giving him said release signed by your orators, or the said Arthur D. Tuttle for your orators, and that the said Apgar Brothers would thereupon immediately pay to your orators, out of said sum of Five hundred and fifty dollars, so received, the sum of Five hundred dollars. That your orator, the said Arthur D. Tuttle, relying upon the said representation, and believing the same to be true, thereupon signed said 40

Bill of Complaint—Tuttle vs. Harris

release of lien upon said building, for your orators' said firm, with the understanding, however, that the said Apgar Brothers would immediately receive from said Benjamin S. Harris, the sum of Five hundred and fifty dollars, and forthwith, out of said sum, pay unto your orators the sum of Five hundred dollars, on account of their aforesaid indebtedness; that your orators charge and insist that the representations made to them, or to the said Arthur D. Tuttle, by the said Theodore Apgar and George I. Apgar, that they, the said Apgar Brothers, would receive the sum of Five hundred and fifty dollars, from the said Benjamin S. Harris, upon producing a release, executed by your orators, or one of them, and pay Five hundred dollars of that amount to your orators, were false and fraudulent, and made for the sole purpose of obtaining from your orators their signature to said release, without
20 ever intending to pay to them, the sum of Five hundred dollars; that in fact immediately upon obtaining the signature of your orator, the said Arthur D. Tuttle, to said release of lien, the said Apgar Brothers did proceed to interview one or more of their other creditors, who had furnished materials used in the erection and construction of said building, of the said Benjamin S. Harris, and did then and there make the same representation to each of the said persons, so interviewed by them, namely, that there was a certain
30 amount of money due and owing to them, the said Apgar Brothers, from the said Benjamin S. Harris, and that out of said sum the greater portion would be paid to each of the persons so interviewed by said Apgar Brothers; that your orators are informed, and believe it to be true, that said release of lien did not come into the possession of said Benjamin S. Harris until the twentieth day of November, Nineteen hundred and seven; that said information is obtained from a Bill of Complaint filed in this honorable Court,
40 by the said Benjamin S. Harris, in another cause.

Bill of Complaint—Tuttle vs. Harris

6. That your orators believed that the contract, so entered into by and between Apgar Brothers and the said Benjamin S. Harris, for the erection and construction of said building, as hereinbefore mentioned, had been duly filed in Office of the Clerk of the County of Middlesex, pursuant to statute, and thereupon, on the eighteenth day of November, Nineteen hundred and seven, your orators caused a notice to be served 10 upon the said Benjamin S. Harris, stating that there was due to them, for materials furnished and used in the erection of the dwelling house of said Harris, the sum of Seven hundred and twenty-seven dollars and sixty-five cents; that payment thereof had been demanded from Apgar Brothers and refused; a copy of which notice is hereto annexed, and marked Exhibit "A."

7. That on the twenty-first day of November, Nineteen hundred and seven, your orators did write 20 a letter to the said Benjamin S. Harris, in which they stated the understanding upon which said release of lien had been signed; that the same had been obtained by fraud, and notifying the said Benjamin S. Harris not to pay out any moneys on account of said release; a copy of which letter is hereto annexed, and marked Exhibit "B;" and your orators further show that a like notice of the fraudulent manner in which said release had been caused to be signed, by the J. D. Loizeaux Lumber Company, was also served upon said 30 Benjamin S. Harris; a copy of which notice is hereto annexed, and marked Exhibit "C."

8. That on or about the thirteenth day of November, Nineteen hundred and seven, the said Benjamin S. Harris did file, in this honorable Court, a bill of interpleader, making your orators and others parties defendant thereto, in which said bill of complaint the said Benjamin S. Harris alleged the making of said contract with said Apgar Brothers, that the work was completed, that there was a certain amount of money 40

Bill of Complaint—Tuttle vs. Harris

in the neighborhood of Five hundred and fifty dollars due and owing, and that he would not pay out the same until he had received releases, which said releases were received by him on the twentieth day of November, Nineteen hundred and seven; that he had also received the notices and letters mentioned in this bill of complaint, and that by reason of such notices
 10 he did not pay out the moneys in his hands, and that he was unable to determine to whom said moneys belonged, and offered to pay the same into Court; and afterwards filed a supplemental bill, setting up the filing of your orators' lien claim, as more particularly set forth in the next succeeding paragraph, and obtained from this honorable Court a temporary injunction, restraining your orators from proceeding with said lien claim suit.

9. That after the filing of said bill of complaint,
 20 by the said Benjamin S. Harris, your orators caused an examination to be made of the records in Middlesex County, in relation to the said property of said Benjamin S. Harris, and thereupon, for the first time discovered that the contract made and entered into by and between the said Apgar Brothers and the said Benjamin S. Harris, for the erection and construction of the dwelling of said Harris, had not in fact been filed, pursuant to the provisions of an Act entitled,
 30 "An Act to secure Mechanics and others payment for their labor and materials in erecting any building" (Revision of 1898); and therefore, your orators concluded that the stop notices, therefore, served by them and other creditors of said Apgar Brothers, were not within the purview of said Act and absolutely void; that the releases obtained from them, by said Apgar Brothers, being fraudulent, were also void, inasmuch as the said Benjamin S. Harris had never changed his position, or paid out one cent of money after receiving from the said Apgar Brothers, said fraudulent re-
 40 lease; and thereupon, on the tenth day of December,

Bill of Complaint—Tuttle vs. Harris

Nineteen hundred and seven, did cause to be filed, with the Clerk of the County of Middlesex, the County of Middlesex, the County in which said land is situated, a lien claim against the said building and lands of the said Benjamin S. Harris, making the said Theodore Apgar and George I. Apgar, Partners, trading as Apgar Brothers, defendants, as builders, and the said Benjamin S. Harris defendant as owner; that said 10
lien claim was filed within four months of the time of the furnishing of the materials by your orators, to the said Apgar Brothers, for the erection and construction of said dwelling house of said Benjamin S. Harris; and thereupon on said tenth day of December, Nineteen hundred and seven, a lien claim summons was issued against said defendants, upon said lien claim, returnable the twenty-seventh day of December, Nineteen hundred and seven; the issuance of which summons was endorsed on said lien claim, on 20
which it was founded, on said tenth day of December, Nineteen hundred and seven; that thereafter your orators filed their declaration in said cause; and afterwards the said Benjamin S. Harris did file his several pleas thereto, the first of which pleas is a plea of general issue, and the third the statutory plea that the building is not liable to lien; and the second plea being a plea of said release, so obtained as aforesaid. from your orators, by the said Theodore Apgar and George I. Apgar, in which said plea the said Benja- 30
min S. Harris alleges that by reason of said release, your orators are wholly barred from having their lien claim; that your orators have attempted to frame an issue upon said plea of release, that they are advised by counsel, and apprehend that if their replication to said plea is not struck out by the Court as improper, upon the trial of said cause, they will be precluded from offering any evidence thereunder, for the reason that it has often been decided that such evidence of fraud cannot be set up against an instru- 40

Bill of Complaint—Tuttle vs. Harris

ment under seal, pleaded as a defense. That the said defendants, Theodore Apgar and George I. Apgar, Partners, trading as Apgar Brothers, have not filed any plea to your orators' said declaration and said lien claim suit, and that their time for filing said plea has long since elapsed.

10. And your orators further show unto your
10 Honor that they are advised by counsel that the said release of lien, so as aforesaid executed by your orator, the said Arthur D. Tuttle, and delivered by the said Theodore Apgar and George I. Apgar, to the said Benjamin S. Harris is fraudulent and null and void, and ought to be delivered up to your orators to be cancelled and vacated, and not pleaded as a defense to their claim against the lands and buildings of said Benjamin S. Harris; no consideration having emanated from the said Benjamin S. Harris, for said
20 release, nor he having changed his position, or parted with anything of value, by reason of the execution of the same, by your orators, induced by the false and fraudulent representations of the said Theodore Apgar and George I. Apgar.

- And your orators well hoped that the said Benjamin S. Harris and Theodore Apgar and George I. Apgar would have complied with such reasonable request of your orators, and would have surrendered up and delivered to your orators for cancellation the said re-
30 lease aforesaid; and now so it is, may it please your Honor that the said Benjamin S. Harris, and Theodore Apgar and George I. Apgar not only refused to surrender up, to your orators, the said release of lien for cancellation, but the said Benjamin S. Harris insists upon all the benefits of said release of lien, and has actually pleaded the same as a defense and bar against the enforcement of your orators' said lien claim, against the said lands and building of said Benjamin S. Harris, for materials provided and furnished
40 therefor, by your orators at the special instance and

Bill of Complaint—Tuttle vs. Harris

request of said Apgar Brothers, notwithstanding that he, the said Benjamin S. Harris, has not paid out any money, or parted with anything of value since he received, from said Apgar Brothers, said release of lien, so executed by your orators, and that he, the said Benjamin S. Harris, has had the actual notice not only from your orators, but from the Loizeaux Lumber Company, that fraudulent representations and pre- 10
tenses were made, by the said Apgar Brothers, to induce the execution of said release by your orators, and the said Loizeaux Lumber Company; all of which actings, doings and pretenses of the said defendants are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orators.

In tender consideration whereof, and forasmuch as your orators are without adequate remedy in the premises, at and by the strict rules of the common 20
law, and without the aid and intervention of this honorable Court, where matters of this nature are properly cognizable and relievable. To the end, therefore, that the said defendants, Benjamin S. Harris, and Theodore Apgar and George I. Apgar, Partners, trading as Apgar Brothers, may, without oath, full, true, perfect and distinct answer make, to all and every the matters aforesaid, and that as fully and particularly as if the same were here again repeated, and that they thereto particularly interrogated, paragraph by para- 30
graph; and that the defendants, Theodore Apgar and George I. Apgar, may answer and declare to this honorable Court whether in fact, they did not represent to your orator, the said Arthur D. Tuttle, at the time of obtaining his signature to said release of lien, that they required said release to obtain the final payment from the defendant, Benjamin S. Harris, and upon obtaining such payment would immediately pay to your orators the sum of Five hundred dollars out of the moneys which they would receive, upon the presenta- 40

Bill of Complaint—Tuttle vs. Harris

tion of said release to the said Benjamin S. Harris; and that the said Benjamin S. Harris may answer, and set forth, whether in fact, he had not before acting upon said release of lien received a notice, in writing, from your orators, stating that the said release had been fraudulently and falsely obtained from them, and whether in fact he paid any consideration to your orators for said release, or parted with anything of value by reason of the making thereof, by your orators.

And that the said release of lien, so executed by your orator, the said Arthur D. Tuttle, on behalf of your orators' said firm, and delivered to the said Theodore Apgar and George I. Apgar, and by them delivered to the defendant, Benjamin S. Harris, may be declared to have been obtained through the false and fraudulent representations of said Theodore Apgar and George I. Apgar, and as such null and void, and without and consideration from the said Benjamin S. Harris, and that the same may be surrendered and delivered to your orators, to be cancelled; and that the said defendant, Benjamin S. Harris, may be restrained by the order and injunction of this honorable Court, from offering said release of lien in evidence in said lien claim suit, now pending in the Middlesex County Circuit Court, wherein your orators are plaintiffs, and the said Benjamin S. Harris and Apgar Brothers are defendants, or from further contending in said suit that said release of lien is a bar to your orators said lien claim, upon the lands and building of the said defendant, Benjamin S. Harris; or from delivering or transferring the said release of lien from his possession to any other person or persons whatsoever, or from in any other manner in anywise parting with the custody and possession of the same; and that your orators may have such further or other relief in the premises as the nature and circumstance of the case may require, and to your Honor shall seem meet and agreeable to equity and good conscience.

Bill of Complaint—Tuttle vs. Harris

May it please your Honor, the premises considered, to grant unto your orators, not only the State's writ of injunction issuing out of and under the seal of this honorable Court, to be directed to the said Benjamin S. Harris, restraining and enjoining him from offering the said release of lien, so executed by your orators, as aforesaid, in evidence in the said lien claim suit, now pending in the Middlesex County Circuit 10 Court, wherein your orators are plaintiffs, and the said Benjamin S. Harris and others, are defendants, or from further contending or insisting, in said suit, that said release of lien is a bar to the said lien claim of your orators, for their debt, upon the said lands and building of said Benjamin S. Harris, situate on Clinton Avenue, in the Township of Piscataway, in the County of Middlesex, and State of New Jersey, or from transferring or delivering said release of lien to any other person or persons, or from in any other manner, in anywise 20 parting with the custody and possession of the same, but also the state's writ of subpoena, issuing out of and under the seal of this honorable Court, to be directed to the said Benjamin S. Harris and Theodore Apgar and George I. Apgar, Partners, trading as Apgar Brothers, therein and thereby commanding them and each of them on a certain day and under a certain penalty therein to be expressed, personally to be and appear before your Honor, in this honorable Court. then and there to answer the premises, and to stand 30 to, abide and perform such decree therein, as to your Honor shall seem meet, &c.

And your orators, as in duty bound, will ever pray, &c.

PAUL Q. OLIVER,
Solicitor of Complainants.
SAMUEL KOESTLER,
Of Counsel.

Exhibit "A"

EXHIBIT "A"

To Benjamin Harris:

Take notice there is due us from George Apgar and Theodore Apgar, partners, trading as Apgar Brothers, contractors, the sum of Seven hundred twenty-seven dollars and sixty-five cents (\$727.65) for materials by
 10 us furnished and by them used in the erection of your dwelling house on the west side of Clinton Avenue, near Eighth street, in the City of Plainfield, Union County, New Jersey; that we have demanded of them payment of the same and they have refused to pay the same, and we therefore notify you to retain the amount so due out of the amount owing by you to said contractors, and to pay the same to us.

A bill of the said items of the said materials is here-
 to annexed.

20 Dated Nov. 18, 1907.

Tuttle Bros.
 Westfield, N. J.

1907

Oct. 31 No. 51 Sash, Doors & Mill Work per
 contract, estimate No. 2277 \$582.77

Extras

Aug. 9 1789 1415 ft. R. C. Siding 49.53

1756 1210 sq. ft. R. C. Siding \$2.53

8000 16" C. B. W. C. Shingles 40.00

82.35

30 " 12 1859 3 Cols. 8x8' staved 3.50 10.50

" 16 2008 18x8' Col. C. & B. 2.50

\$727.65

Exhibits "B" and "C"

EXHIBIT "B"

Westfield, N. J., November 21, 1907.

Mr. Benjamin Harris,
Plainfield,
New Jersey.

Dear Sir:—

A week or so ago at the request of Messrs. Apgar 10
Brothers, we signed a release of lien affecting your new
house on Clinton Avenue, in Plainfield, upon the un-
derstanding that the sum of money amounting to about
\$500.00 which he expected to receive from you on the
strength of the release was to be paid at once to us.

We find that Mr. Apgar also obtained signatures to
this from other parties, making the same representa-
tion.

As the release was obtained from us by fraud and
has never been delivered to us by us and as no money 20
has been paid to us on it, we hereby notify you to pay
no money to Apgar Brothers, or to any person for them
on account of the construction of this house.

Very respectfully yours,
Tuttle Bros.

EXHIBIT "C"

Mr. Benjamin Harris,
Plainfield, N. J.

30

Dear Sir:—

I hereby notify you that a paper purporting to be
a release of the building and curtilage owned by you
on Clinton Avenue near Eighth Street and signed by
J. D. Loizeaux Lumber Company, and delivered to
George Apgar, one of the firm of Apgar Brothers, was
procured from said J. D. Loizeaux Lumber Company
by false and fraudulent representation made to J. D.
Loizeaux, the Vice-President thereof, and upon the
strength of which said false and fraudulent representa- 40

Exhibit "C"

tions said paper, purporting to be said Release was signed, it, therefore, notifies you not to give any force and effect to the said Release and we hereby demand that if same is in your possession that you deliver same to us that we may cancel our signature therefrom.

Very truly yours,

J. D. Loizeaux Lumber Company.

10 Isaac P. Runyon,
Atty.

STATE OF NEW JERSEY }
COUNTY OF UNION } SS.

Arthur D. Tuttle, of full age, being duly sworn according to law, on his oath says, that he is a member of the firm of Tuttle Brothers, composed of deponent and William E. Tuttle, Jr.; that deponent's firm furnished to Apgar Brothers, composed of George I. Apgar and Theodore Apgar, various materials of the value of Seven hundred and twenty-seven dollars and sixty-five cents, to be used and employed by said Apgar Brothers, in the erection and construction of a building for Benjamin S. Harris, on the latter's lands, on Clinton Avenue, in Piscataway Township, Middlesex County, New Jersey; and that said materials were actually used in the erection and construction of said building; that under the contract, in writing, entered
20 into by and between the said Benjamin S. Harris and said Apgar Brothers, a final payment of Six hundred dollars was due and payable, upon the completion of said building; that said building was completed on or before November 11th, 1907, and on that day both George I. Apgar and Theodore Apgar came to this deponent, at his office, and requested him to sign a release of lien, which deponent at first refused to do, and thereupon, both of said Apgar Brothers represented that they were to get Five hundred and fifty dollars
30 from said Harris, but that he required the release of
40

Exhibit "C"

lien to be signed by deponent's firm; that said Apgar Brothers further represented that immediately upon delivering the said release of lien, to the said Benjamin S. Harris, signed by deponent for his firm, that they would receive from the said Harris the said sum of Five hundred and fifty dollars, and would forthwith bring to deponent's firm, as a part payment of their indebtedness, the sum of Five hundred dollars; that relying upon said representation, and believing it to be true, deponent thereupon signed said release on behalf of his firm. That both of said Apgar Bros. knew that the representations made by them, to deponent, were false and fraudulent, inasmuch as, they immediately went to the Loizeaux Lumber Company and made said representations to them, and procured the signature of said Company to said release of lien; that on the eighteenth day of November, Nineteen hundred and seven, deponent served upon said Benjamin S. Harris, by leaving with his wife, a stop notice, a copy of which is annexed to the bill of complaint as Exhibit "A;" that he is informed, by the admission of said Harris, that said Harris received the release of lien on November 20th, 1907; and not having received the Five hundred dollars, as promised by Apgar Brothers, on November 21st, 1907, deponent's firm caused a letter to be written to said Harris, stating that the release was fraudulently obtained by Apgar Brothers, and that said Harris should not pay any moneys; which letter is admitted by said Harris to have been received by him on that day.

Deponent further says that during all the time his firm was furnishing materials to be used on the Harris job, both he and his brother believed that the contract between Harris and Apgar Brothers had been duly filed, but that they afterwards were informed, by their Lawyer, Mr. Paul Q. Oliver, that the contract had not been filed; that all stop notices were void, and that deponent's firm had a right of lien against said building

Exhibit "C"

and lands, and that deponent's firm instructed their said lawyer to file a lien against said lands and building, and take the proceedings necessary to enforce the same.

Deponent further says that said release was obtained from him by fraud, and that since the execution thereof his firm has not received one cent, or any other consideration, for the execution of said release; that said Benjamin S. Harris has not parted with any money, or other thing of value by reason of the execution of said release, and should not be permitted to insist or contend that said release in any way bars the lien of deponent's firm for materials used and employed, by said Apgar Brothers, in the construction of the house of said Benjamin S. Harris.

Sworn and subscribed before
me this 9th day of March,

20 1908.

Arthur D. Tuttle.

A. K. Gale,
Notary Public.

STATE OF NEW JERSEY }
COUNTY OF UNION } SS.

Paul Q. Oliver, of full age, being duly sworn, according to law on his oath says, that he is the attorney of said complainants, Tuttle Brothers; that shortly before the tenth day of December, Nineteen hundred and seven, he ascertained, by an examination of the records in the County Clerk's Office of the County of Middlesex, in the State of New Jersey, that the contract between Apgar Brothers and Benjamin S. Harris, for the erection and construction of the dwelling upon the lands of said Benjamin S. Harris, on Clinton Avenue, in Piscataway Township, New Jersey, had not been filed; that thereupon he advised said Tuttle Brothers of said fact, and that their stop notices were absolutely void, and that they had a right of lien upon said

Exhibit "C"

lands and building; that pursuant to their instructions, on the tenth day of December, Nineteen hundred and seven, and within four months of the furnishing of the materials by Tuttle Brothers, to Apgar Brothers, for said building, deponent did file, for said Tuttle Brothers, their lien claim against the said lands and building of said Benjamin S. Harris, in the Office of the Clerk of the County of Middlesex, and on said day 10 summons was issued upon said lien claim, against the said Harris as owner, and the said Apgar Brothers as builders; the issuance of which said summons was endorsed on said lien claim on December 10th, 1907, pursuant to statute; and a declaration was filed in due course of law; and afterwards the said Benjamin S. Harris did file several pleas to said declaration, the second of which plea set forth an alleged release, executed on November 11th, 1907, by said Tuttle Bros., in and by which they did release and discharge the said building and lot or curtilage whereon the same is erected, 20 of and from all liens held by them thereon; which the said Benjamin S. Harris, in his plea, claimed to be an absolute bar to the said mechanic's lien action of Tuttle Brothers; and said Tuttle Brothers cannot safely go to trial upon the issue raised on said plea of release, because it is apprehended that the testimony of the lack of consideration, and of the fraudulent manner in which said release was obtained would not be permitted in evidence. 30

Sworn and subscribed before
me this 9th day of March
1908.

Paul Q. Oliver.

A. K. Gale,
Notary Public.

Demurrer—Tuttle vs. Harris

Filed May 2, 1908

IN CHANCERY OF NEW JERSEY

10 20	Between WILLIAM E. TUTTLE, Jr., et al., Complainants, and BENJAMIN S. HARRIS, et als., Defendants.	} Demurrer. On Bill, Etc.,
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The demurrer of Benjamin S. Harris, defendant, to the bill of complaint of William E. Tuttle, Jr., and Arthur D. Tuttle, partners, trading as Tuttle Brothers, 20 complainants.

This defendant, Benjamin S. Harris, not confessing all or any of the matters and things in the complainants' bill of complaint contained to be true in such manner and form as the same as therein set forth and alleged, does demur thereto and for cause of demurrer shows:

1. That the complainants have not in and by their said bill made or stated such a case as entitles them in this Honorable Court to any discovery from this defendant or to any relief against him as to the matters 30 contained in the said bill or any of such matters.

2. That the said bill of complaint does not set forth any facts which show that the said release of lien was obtained through false and fraudulent representation.

3. That the said bill of complaint does not show any connection between this defendant and the statements alleged to have been made to the complainants, or one of them, at the time of the signing of the re- 40 lease.

Demurrer—Tuttle vs. Harris

4. That the said bill of complaint shows on its face that the complainants have heretofore recognized the validity of said release and have acted accordingly and have obliged this defendant to act accordingly.

5. That the said bill of complaint shows on its face that the complainants have been guilty of laches.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant does demur thereto, and humbly prays the judgment of this Honorable Court whether he should be compelled to make any further or other answer to the said bill of complaint, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained. 10

J. HENRY CRANE,
Solicitor of Benjamin S. Harris,
Defendant.

STATE OF NEW JERSEY }
COUNTY OF UNION. } SS. 20

Benjamin S. Harris, of full age, being duly sworn, according to law, on his oath, says: That he is one of the defendants in the within suit, and the defendant named in the foregoing demurrer, and that the said demurrer is not interposed for the purpose of delay, but in good faith, for the causes therein set forth.

Subscribed and sworn
to, before me, this First
day of May, 1908, at
Plainfield, N. J. BENJAMIN S. HARRIS. 30
WILLIAM G. DeMEZA,
M. C. C. of N. J.

I hereby certify that I have perused the complainants' bill of complaint in the above-stated cause, and that the above demurrer is well founded in point of law.

W. S. ANGLEMAN,
Of Counsel with Benjamin S. Harris, Defendant. 40

Demurrer—Memorandum—Tuttle vs. Harris

(Sent to Counsel, but not filed)

IN CHANCERY OF NEW JERSEY

10	Between WILLIAM E. TUTTLE, et al., Complainants, and BENJAMIN S. HARRIS, et als., Defendants.	} On Bill and Demurrer.
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Mr. Oliver and Mr. Koestler for complainant.
 Mr. Crane and Mr. Angleman for demurrant.

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(MEMORANDUM)

Emery, V. C. On further consideration of this case, I adhere to the view which I expressed at the oral argument, that the allegations of the bill are sufficient to show an equitable case. The bill, taking its whole scope, does not rest merely or substantially on the breach of a mere promise by the Apgar Bros. to pay complainants \$500, to be obtained from the owner on delivering complainants' release of lien, but the case
 30 rests substantially on the allegation in the bill, that these promises and representations of Apgar Bros. as to their intentions with reference to the money "were false and fraudulent and made for the sole purpose of obtaining complainants' signatures to the release **without ever intending to pay them** the sum of \$500. This is followed by the further allegations that the Apgar Bros. immediately on procuring complainants' signatures to the release, made the same representations to other creditors. The representations made to such oth-
 40 er persons are admissible to establish the allegation of

Demurrer—Memorandum—Tuttle vs. Harris

the absence of any intention to pay, at the time of making the promise. The case, as to the right to revoke the contract, on the ground of fraudulent intent, at the time of making the promise or representations, which induced the execution of the contract, is analogous to the familiar case where a contract for sale, made on promises to pay either cash or at a future day may be revoked for fraud, if it be shown that at the 10 time of making the promises or representations as to payment, the buyer bought without intending at all to keep his contract for payment and bought "without ever intending to pay." This is the very allegation of this bill. In my judgment the bill is sufficient, and the demurrer is overruled.

At the hearing it was insisted that as it appeared (by the evidence in Harris vs. Larrabee) that Harris paid \$25 to Apgar Bros. on receiving the release and before complainant's notice to him of the alleged fraud, 20 that the release cannot now be rescinded as to Harris. That on any decree of rescission Harris would be protected for any bona fide payments, is no doubt true, but what effect such partial payment would have on complainants' claim cannot be determined, except on the hearing of an issue on that point. This bill alleges specially that Harris "has not paid out any money or parted with anything of value since he received the release, and that he has had actual notice of the fraud," and this must on demurrer be taken as the fact in the 30 case.

Decision on this point must therefore be reserved until the fact is presented in this case by answer or otherwise. The parties after answer may, to save expense, agree that the cause be heard on the evidence taken in the Harris vs. Larrabee case, so far as applicable.

I will advise order overruling demurrer.

Order Over-ruling Demurrer—Tuttle vs. Harris

(Filed July 28, 1909.)

IN CHANCERY OF NEW JERSEY.

10	Between WILLIAM E. TUTTLE, Jr., and ARTHUR D. TUTTLE, Partners, trad- ing as Tuttle Brothers, Complainants, and BENJAMIN S. HARRIS, et als., Defendants.	On Bill, &c. ORDER OVER-RULING DEMURRER
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20 The demurrer of the defendant, Benjamin S. Harris, in the above entitled cause, having been duly noticed for argument at the May Term, Nineteen hundred and nine, and said matter coming on to be heard before the Court, in the presence of Paul Q. Oliver and Samuel Koestler, of counsel with the complainants, and J. Henry Crane and Winfield S. Angleman, of counsel with the defendant, Benjamin S. Harris; and it appearing from the pleadings and argument of counsel that the said bill of complaint sets forth an equitable cause of action as against a general demurrer:

30 It is, thereupon, on this twenty-seventh day of July, Nineteen hundred and nine, on motion of Paul Q. Oliver, Solicitor of the complainants, ORDERED, that the demurrer of the said defendant, Benjamin S. Harris, be, and the same is hereby over-ruled and dismissed with costs.

It is further ordered that said defendant, Benjamin S. Harris shall have leave, within twenty days from the date of this order, to answer the bill of complaint of said complainants.

Respectfully Advised,

John R. Emery,

Vice Chancellor.

Mahlon Pitney,

C.

Answer of Harris—Tuttle vs. Harris

(Filed Aug. 17, 1909.)

IN CHANCERY OF NEW JERSEY

Between

WILLIAM E. TUTTLE, Jr., et als.,
Complainants,

and

BENJAMIN S. HARRIS, et als.,
Defendants.

On Bill, &c.

Answer of 10
Benjamin S.
Harris, Defen-
dant.

The answer of Benjamin S. Harris, one of the defendants, to the bill of complaint of William E. Tuttle, Jr., and Arthur D. Tuttle, partners, trading as Tuttle Brothers, complainants.

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This defendant answering says:

First: That he has no knowledge as to the business of the complainants or as to how long they have been in business, as set forth in paragraph one (1) of the said bill of complaint.

Second: That he admits that he was seized in fee simple of the tract of land and premises mentioned and set forth in paragraph two (2) of the said bill of complaint and was so seized at the time and times mentioned in the said paragraphs.

30

Third: That he admits that he made an agreement with Apgar Brothers for the erection of a dwelling house, which said agreement was of the general purport mentioned and set forth in paragraph three (3) of the said bill of complaint.

Fourth: That he knows nothing of any agreement claimed to have been made by the said Apgar Brothers with the complainants for the supply of certain materials, and as to the use said materials were put to, as mentioned and set forth in paragraph four (4) of the

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Answer of Harris—Tuttle vs. Harris

said bill of complaint, and that as to such matters he leaves the complainants to proof thereof.

Fifth: That he knows nothing of a conversation alleged to have taken place between Apgar Brothers and the said Arthur D. Tuttle, one of the complainants, and that he knows nothing of any interviews by the said Apgar Brothers with any other of their creditors, as
10 mentioned and set forth in paragraph five (5) of the said bill of complaint, and that as to all such matters, he leaves the complainants to the proof thereof.

Sixth: That he knows nothing of the belief entertained by the complainants as to whether the contract between this defendant and Apgar Brothers had been duly filed in the Middlesex County Clerk's Office, as mentioned and set forth in paragraph six (6) of the said bill of complaint, but that he admits the receipt of the notice mentioned and set forth in the said para-
20 graph, but he says that the said notice was not received by him until after the receipt of the said release and the payment of money by him on account of so receiving the said release. That he admits the receipt of letters or notices, similar to those mentioned in paragraph seven (7) of the said bill of complaint, but he says the said letters or notices were not received by him until after the receipt of the said release and the payment of money by him on account of so receiving said release.

30 Eighth: That he admits filing a bill of inter-pleader and a bill supplementary thereto in this court as mentioned and set forth in paragraph eight (8) of the said bill of complaint.

Ninth: That he knows nothing as to the search which the complainants claimed they caused to be made of the Middlesex County records in relation to this defendant's property, or as to the discovery claimed to have been made as a result thereof or as to the conclusions reached in the premises by the complain-
40 ants as mentioned and set forth in paragraph nine (9)

Answer of Harris—Tuttle vs. Harris

of the said bill of complaint, and he denies that the said release was either fraudulent or void, and denies the said statement made in the said paragraph that he had not paid out any money after receiving the said release, but he says that the contrary thereof is true, and that he did pay out money relying on the validity of the said release, and before receiving any notice or intimation disputing the validity of the said release; 10 and that he knows nothing as to the filing of the lien claim alleged in the said paragraph to have been filed against his property, but admits that a lien claim summons was served on him at the suit of the complainants; and that he knows nothing of the endorsement of the issuance of the said summons on the said lien claim as mentioned and set forth in the said paragraph; and that admits the filing of the pleadings in the said suit.

Tenth: That he knows nothing as to the advise 20 given the complainants by counsel as set forth in paragraph ten (10) of the said bill of complaint, and denies the statements in said paragraph that no consideration emanated from this defendant for the said release, and he denies the statement in said paragraph that he has not changed his position or parted with anything of value by reason of the execution of the said release by the complainants; but he says that the contrary thereof is true, and that, a consideration for the said release did emanate from this defendant, and 30 that by reason of the execution of the said release by the complainants this defendant did change his position and did part with things of value.

And this defendant further answering says that he had relied upon the signature of the complainants to the said release and has acted on it and has parted with money on the strength of it, and that should the said release be now declared void he would be greatly damaged thereby.

Answer of Harris—Tuttle vs. Harris

And this defendant humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

J. Henry Crane,
Solicitor for and of Counsel with Benjamin S. Harris, Defendant.

W. S. Angleman,

Of Counsel.

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Replication—Tuttle vs. Harris

(Filed Aug. 27, 1909.)

IN CHANCERY OF NEW JERSEY

Between

WILLIAM E. TUTTLE, Jr.,
 and ARTHUR D. TUTTLE,
 Partners, trading as Tuttle
 Brothers,

Complainants,

and

BENJAMIN S. HARRIS, et
 als.,

Defendants.

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On Bill
 Replication

The complainants join issue on the answer of the
 defendant, Benjamin S. Harris. 20

Samuel Koestler,
 Solicitor of Complainants.

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Answer of Apgar Bros.—Tuttle vs. Harris

(Filed Aug. 18, 1909.)

IN CHANCERY OF NEW JERSEY

Between 10 WILLIAM E. TUTTLE, Jr., et als., Complainants, and BENJAMIN S. HARRIS, et als.,	}	On Bill, &c. Answer of Apgar Brothers, Defendants.
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The answer of Theodore Apgar and George I. Apgar, partners trading as Apgar Brothers, defendants, to the bill of complaint of William E. Tuttle, Jr., and Arthur Tuttle, partners trading as Tuttle Brothers, complainants.

These defendants answering say that they made a contract for the erection of a building for Benjamin S. Harris, one of the defendants herein, and that, when the final payment became due, they presented a release of lien to be signed by the complainants, according to the custom of the business; that the said release was

30 duly signed, and that no false or fraudulent representations were made to secure the signing of the same, and that no representations or promises of any kind were made to secure the signatures of the complainants to the said release, but that, upon request, the said release was signed and handed back, and that there was no agreement of understanding of any kind that the money to be received by these defendants from the said Benjamin S. Harris was to be turned over, either in whole or in part, to the complainants in consideration

40 of the signing by them of the said release, and that

Answer of Apgar Bros.—Tuttle vs. Harris

these defendants did not represent to the complainants, or to either of them, at the time of obtaining the complainant's signature to the said release, that upon obtaining payment from the said Benjamin S. Harris they would immediately pay to the complainants the sum of five hundred dollars out of the moneys which they would receive upon the presentation of the said release.

10

These defendants further answering say that no false or fraudulent representations were made by these defendants to any of their creditors to induce them to sign the said release, but that all the signatures to the said release were secured in the ordinary course of business simply by request, and that no promises were made to secure said signatures or, any of them, to the said release, and that no representations were made to any of the signers to the said release that out of the money due and owing to these defendants from the said Benjamin S. Harris the greater portion, or any portion, would be paid to the said persons so signing the said release.

20

These defendants further answering say that immediately upon handing the said release to the defendant Benjamin S. Harris, the said Benjamin S. Harris, relying upon the validity of the said release, gave them a check for a portion of the amount due and said that he would give them the balance in a short time.

These defendants further answering say that no fraud of any kind entered in any way into the obtaining of the said release, and that the same was obtained in the usual course of business the same as these defendants have been accustomed to obtain, and have obtained releases in many other instances, both from the complainants and from others signing the same.

30

Answer of Apgar Bros.—Tuttle vs. Harris

And these defendants humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

J. Henry Crane,
Solicitor for and of counsel with
Theodore Apgar and George I.
Apgar, partners trading as Apgar Brothers, Defendants.

W. S. Angleman,
Of Counsel.

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Replication—Tuttle vs. Harris

(Filed Aug. 27, 1909.)

IN CHANCERY OF NEW JERSEY

Between

WILLIAM E. TUTTLE, Jr., and
 ARTHUR D. TUTTLE, Part-
 ners, trading as Tuttle Broth-
 ers,

Complainants,

and

BENJAMIN S. HARRIS, et als.,
 Defendants.

On Bill
 Replication

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The complainants join issue on the answer of the
 defendants, Theodore Apgar and George I. Apgar,
 Partners trading as Apgar Brothers. 20

Samuel Koestler,
 Solicitor of Complainants.

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(Filed April 1, 1910.)

IN CHANCERY OF NEW JERSEY

	Between	
10	WILLIAM E. TUTTLE, Jr., et al., Complainant,	} On Bill, &c. Stipulation
	and	
	BENJAMIN S. HARRIS, et al., Defendant.	

The Court having suggested that the testimony taken in the case of Benjamin S. Harris, complainant, vs. Willard L. Larrabee, et als., be written up and used on the final hearing of the above entitled cause as far as the same may be applicable.

It is hereby stipulated and agreed by and between Paul Q. Oliver, Solicitor for the Complainant, and J. Henry Crane, Solicitor for the defendants, that the said testimony be written up and that the charge thereof be taxed in the cost and abide the event of the suit.

Paul Q. Oliver,
Solicitor for Complainant
J. Henry Crane,
Solicitor for Defendant.

Dated March 26th, 1910.

Testimony—Tuttle vs. Harris

IN CHANCERY OF NEW JERSEY

Between

WILLIAM E. TUTTLE, Jr., et als.,
Complainants,

and

BENJAMIN S. HARRIS, et als.,
Defendants.

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Testimony taken in above case before Hon. John R. Emery, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, on May 3, 1910, at 10 A. M.

APPEARANCES:—

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Mr. Paul Q. Oliver and Mr. Samuel Kotstler for
Tuttle Bros. and complainants.

Mr. Winfield S. Angleman and Mr. James Henry
Crane for defendants.

Mr. Francis J. Blatz for Trustees in Bankruptcy.

Mr. Koestler: I would like to have an adjournment because of the absence of Mr. Loizeaux in Europe.

Court: You can go on with the other evidence, and when all the evidence is in, I will hear an application 30 to allow the taking of the testimony of Mr. Loizeaux, and the case to stand over for that purpose. You haven't shown diligence enough in getting him here. The application to postpone because of the absence of the witness Loizeaux is denied, reserving leave, however, to the complainant to apply for opportunity to put in his evidence.

Mr. Koestler: We allege no consideration was paid for the release in the bill of complaint, and the answer shows a consideration. The evidence taken in the 40

Tuttle vs. Harris—William E. Tuttle—Direct

interpleader suit, which is now injected into this suit, shows that money was paid, but not to Tuttle Bros., and therefore at this time I desire to offer, if it is necessary as a condition for affirmative relief in this case, that we are willing either to repay that money, although we did not get it, or to give a credit on our bill, in case the mechanics' lien suit should ever be
10 tried.

Court: It is stipulated by counsel that the evidence taken in the case of Harris vs. Larrabee in this court on the 24th day of March, 1909, the same having been written from the stenographer's notes, shall be considered as evidence in this cause, so far as the same is applicable, and that of the witnesses called on that day, the following shall be considered as witnesses called by the complainant: William E. Tuttle and Arthur Tuttle, and that the witnesses Harris, the two
20 Apgars and Crane shall be considered as called and examined on behalf of the defendants.

WILLIAM E. TUTTLE, sworn for complainants.

Direct Examination by Mr. Koestler:

Q. You are one of the complainants in this case?

A. I am.

Q. Have you ever received on account of your bill for materials furnished to Apgar Brothers and used on
30 the Harris house, payment of any amount from either the Apgar Brothers or Mr. Harris? A. We have not.

Q. I understand the full amount of your bill is still owing? A. Yes.

Q. At the time you filed your bill of complaint in this cause, did you know that Mr. Harris had paid any money to Apgar Bros. or anyone else on account of the release which you signed? A. No, I did not.

Mr. Angleman: I call counsel's attention to the fact
40 that he hasn't proven any claim yet.

Tuttle vs. Harris**Arthur D. Tuttle and George Apgar—Direct**

Court: Mr. Angleman thinks the claim was not proved in the other suit.

The question as to the amount due is not a direct issue in the suit of Tuttle vs. Harris. The suit of Tuttle vs. Harris is to enjoin setting up the release, and the question as to whether the account will be due, if anything is due, will be settled on the lien if it goes on. This is only an action to enjoin their setting up 10 in the lien suit the execution of the release as a bar to the lien. You have a right to try whether there is anything due on the suit at law. The question I have to try is whether the release of the lien is a defence in the lien suit that he can set up.

No Cross Examination.

ARTHUR D. TUTTLE, sworn for complainants.

20

Direct Examination by Mr. Koestler:

Q. You are the other member of the complainants?

A. Yes, sir.

Q. Did you know at the time the bill of complaint in this case was filed whether Mr. Harris had paid any money on account of the release? A. No.

No Cross Examination.

30

GEORGE APGAR, sworn for complainants.

Direct Examination by Mr. Koestler:

Q. You are one of the Apgar Brothers? A. Yes.

Q. And under this contract, Exhibit C1, you and your brother performed work in the erection and construction of a house for Mr. Harris? A. We did, yes, sir.

Q. And that is the house on Clinton avenue, Plainfield? A. Yes, sir.

40

Tuttle vs. Harris—George Apgar—Direct

Q. That is right over the Plainfield line, isn't it?

A. Yes.

Q. Who supplied you with the mill work? A. Mr. Tuttle.

Q. Have you or your brother paid anything to Tuttle Bros. on account of that mill work? A. My brother came to me one day—

10 Q. Answer the question; have you or your brother paid anything to Tuttle on account of the mill work?

Court: Can you answer that yes or no?

Q. (Last question read to the witness).

Court: Have you or your brother paid anything to Tuttle Bros.? Not whether you paid to anybody else, but have you paid anything to them; that is the question.
20

Witness: I cannot answer that.

Q. What is the difficulty about answering it? A. There was a note come due that brother come to me and asked me if I wouldn't go and get the money from Mr. Harris and pay the note off of \$600.

Q. There was a note given to the Tuttles for \$600? A. Yes, by Apgar Brothers.

30 Q. That was on account of the work? A. I cannot say.

Q. The \$600, what was that given for? A. On account of the mill work they furnished for us; that was on account of material they had furnished for this house.

Q. When that came due, what happened? A. I went and got a note off of Mr. Harris for \$600—I mean check.

Q. You got a check from Mr. Harris for \$600? A.
40 Yes.

Tuttle vs. Harris—George Apgar—Direct—Cross

Q. What did you do with the check? A. Put it in the bank to meet the note.

Q. You owed Tuttle money on other jobs, didn't you? Isn't it a fact that you didn't pay Tuttle anything on account of the mill work furnished to the Harris house?

Mr. Angleman: Objected to; this is his own witness. 10

A. I cannot say, the check went there for that note of \$600.

Q. Did you give Tuttle a note on this particular Harris job, or some other job? A. I cannot answer that.

Q. Do you know what the amount of Tuttle's bill against you was for the mill work furnished on this Harris job? A. I cannot answer that. 20

Q. How much is it, according to your recollection? A. Something like \$650, wasn't it, Mr. Tuttle?

Mr. Angleman: I object to that; that is not competent evidence.

Court: Yes.

Q. Do you know whether it was over \$700? A. I do not. 30

Q. How much do you believe it was?

Objected to. Objection sustained.

Q. You cannot say now whether any money that you paid was on account of this job or on account of another job? A. I cannot, no.

Cross Examination by Mr. Angleman:

Tuttle vs. Harris—George Apgar—Re-Direct

Q. You had quite extensive dealings with the Tut-
tles, did you not? A. Yes, sir.

Q. And had a running account with them? A. Yes.

Q. And you had several notes with them? A. Yes,
sir.

Q. And the \$600 you got from Harris was to meet
one of the notes you had given for the running account
10 with Tuttle's? A. Yes.

Re-Rirect by Mr. Koestler:

Q. Do you remember the date of that note? A. No,
sir.

Q. Do you remember when you finished the work
on the Harris job? A. No, I don't remember.

Q. Wasn't it about the middle of November, 1907?

20 Mr. Angleman: That date is in the other case.

Mr. Koestler: We agree it was about the middle
of November.

A. October or November.

Q. The mill work which Tuttle furnished was
toward the time when the building was being complet-
ed, wasn't it? A. Yes, sir.

Q. That is, the mill work which they furnished is
30 about the last thing which goes into the building? A.
Not exactly, no.

Q. Their account against you for the mill work fur-
nished to the Harris job didn't become payable from
you to Tuttle Bros. until after the mill work had been
furnished, did it?

Objected to.

Court: You may ask what was the arrangement as
40 to the payment for the work on the Harris job.

Tuttle vs. Harris—George Apgar—Re-Direct

Q. When were you to pay for the material that you got on the Harris job from the Tutttles? A. We paid off on jobs as we go along.

Q. What do you mean—when you go along? A. My brother would generally do the paying.

Q. You were not to pay for it before it was furnished? A. No, sir, certainly not, and he would have a hard time getting it at that.

10

Q. Isn't it a fact that this note you speak of was given by you to Tuttle Bros. long before November, 1907? A. I don't think it was.

Q. Have you got the note? A. No, I haven't.

Q. Have you got the check which you paid Tuttle Bros.? A. No, I haven't got the check.

Q. Do you know where it is? A. No, sir.

Q. You wouldn't swear that that check was paid on account of the Harris job, will you? A. I cannot say.

20

Mr. Koestler: That is all the evidence I can offer now. It does not seem to me that the question of the amount due is particularly involved on the part of our case. It might be a question of defense here to show that the representation was not made, which we claim was made, and in reference to the testimony of Mr. Loizeaux, I would ask that the case be held open so we can get his testimony; he is now in Europe, and it is a very unfortunate matter, and it relates I think to one of the main features of the case, and I doubt whether any decree could justly be made in this case without hearing what that gentleman has to say. It is unfortunate that he has gone to Europe, otherwise we would have subpoenaed him.

30

Court: I do not think I can order this case over. It appears that the witness was allowed to go on the judgment of counsel after consulting with him, that the evidence of another witness would do as well. Now it 40

Tuttle vs. Harris
Statement by Court Regarding Evidence

is said that is a mistake. That witness is not produced here; there is no evidence about it, and I do not think I can order the case to stand over for the purpose of taking that evidence. It will have to go on the way it is.

COMPLAINANTS REST

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Mr. Angleman: We have no testimony except the testimony which is already in, in the other case.

Court: Have you any further evidence in rebuttal? If there is any question about the omission of the complainants to prove the amount of their claim by the books—the cases were down for two days—I would, if counsel desire to put in the proof of their claim, allow you to do that; I won't allow the case to be disposed
 20 of on a technicality of that kind.

Mr. Angleman: We want to cross examine Mr. Tuttle about some evidence.

Court: It is stipulated by defendants' counsel that proof of the amount of the claim of Tuttle Bros. against the Apgar Bros. as the same would appear by their books of account, is not required, and that so far as the amount of their claim against the Apgar Brothers is concerned, it shall be considered as if proved
 30 by the production of the books, and I will allow a sworn copy of those books to be put in as an exhibit, if it is desired by counsel on either side, with liberty to verify and correct the same by the books themselves. This stipulation is made, however, on the condition that the defendants' counsel be allowed to cross examine either of the complainants in reference to the present status of their claim with regard to bankruptcy proceedings against Apgar Bros.

40

Tuttle vs. Harris—William E. Tuttle—Cross

Mr. Koestler: I submit the two complainants for cross examination.

WILLIAM E. TUTTLE, recalled for

Cross Examination by Mr. Angleman:

Q. You remember the bankruptcy of Apgar Bros? 10

A. Yes.

Q. You were interested in that matter by reason of being creditors of Apgar Bros.? A. Yes.

Q. In that bankruptcy matter did you file a claim against the Apgar Brothers? A. We filed a claim against them, but omitted this Harris claim; that was entirely outside of our claim in the bankruptcy.

Q. Your books show what portion that was? A. Yes. My recollection is that the claim we put in to the Trustee in Bankruptcy was for notes that had ma- 20
tured.

Q. And none of those notes coming on the Harris job? A. No, sir, not at all; this job wasn't finished until November. I am not sure that that was all, but I remember that our claim in the court of bankruptcy could not be disputed; we had it in such shape there was no dispute on it.

Q. And was prepared on advice of counsel? A. Yes, sir.

Tuttle vs. Harris—Order to Open Proofs

(Filed July 2, 1910.)

IN CHANCERY OF NEW JERSEY

10	Between WILLIAM E. TUTTLE, Jr., an ARTHUR D. TUTTLE, Part- ners, trading as Tuttle Brothers, Complainants, and BENJAMIN S. HARRIS, et als., Defendants.	On Bill, &c. ORDER TO OPEN PROOFS
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Application being made to the Court by Paul Q. Oliver, of counsel with the complainants, for leave to open the proofs in the above entitled cause for the purpose of taking the evidence of J. D. Loizeaux, in the presence of W. S. Angleman, of counsel with the defendants.

It is, thereupon, on this Twenty-eighth day of June, Nineteen hundred and ten, ORDERED that the proofs in the above entitled cause be opened for the purpose of taking the evidence of J. D. Loizeaux as to the conversation that took place between him and one of the Apgar Brothers at the time of the signing, by said Loizeaux, of the release set forth in the complainants' bill of complaint, and for the taking on the part of the defendants of proofs in rebuttal of said evidence if taken.

Respectfully Advised

John R. Emery,
Vice Chancellor.

Mahlon Pitney,
C.

TUTTLE
vs.
HARRIS

Tuttle vs. Harris—Joshua D. Loizeaux—Direct

Continuation of testimony in above case, before Hon John R. Emery, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, on July 12, 1910, at 2 P. M., in the presence of counsel as before stated.

JOSHUA D. LOIZEAUX, sworn for complainants.

Direct Examination by Mr. Koestler:

10

Q. Where do you live? A. Plainfield, New Jersey.

Q. What is your business? A. Lumber merchant.

Q. Trading as what company? A. J. D. Loizeaux Lumber Co.

Q. Are you an officer of that company? A. Yes, sir.

Q. What officer? A. Vice president and treasurer.

Q. Did you in 1907 have any dealings with Apgar Bros.? A. Yes, sir.

20

Q. Did your company furnish any lumber to the Harris house? A. Harris barn on Clinton avenue and Piscataway Township.

Q. I show you a release, marked in this case Exhibit C4, and ask you if the signature thereto, J. D. Loizeaux, is your signature? A. Yes, sir.

Q. Who obtained that signature from you? A. George Apgar.

Q. At what place? A. In my office, 640 North avenue, Plainfield, New Jersey.

30

Q. Was there any conversation between you and George at the time you signed this paper? A. Yes, sir.

Q. Tell us what he said to you and what you said to him? A. That release was brought me, asking my signature for the company. I cannot quote the exact words, but the purport was—

Objected to.

Court: Go on and tell as nearly as you can what was said.

40

Tuttle vs. Harris—Joshua D. Loizeaux—Direct

A. (Continuing) —that there was an amount of money due us on the building, and wanted to know in case I signed this release what I could depend upon; he said that I could depend on that money before noon of that day; all he had to do was to get another signature or two. I thought that there was a plumber but I don't see it there, and thought I would get my
 10 money probably before noon on that day.

Q. Do you recall about what the amount of the indebtedness was to your concern from Apgar Bros? A. We went over the matter of the indebtedness to us and of the amount due them from Harris, which was more than enough to cover our bill.

Q. Do you recall about how much they expected to receive from Harris than the amount they owed you? A. I can only say in an approximate manner, that they had \$100 more due them.

20 Q. It was after you had this talk, that you signed the release? A. Yes, sir.

Q. Can you tell the date when you had that conversation with George Apgar and when you signed the release? A. No, sir.

Q. Do you recall whether you were at a meeting in Mr. Crane's office subsequently? A. I do.

Q. Can you form any opinion as to how long before the meeting at Mr. Crane's office it was that you signed the release? A. I could not give it in exact days.

30 Q. What is your best recollection?

Witness: I made a statement under oath about this whole matter at the time it was fresh in my memory; can that be referred to?

Court: You mean a paper you signed?

Witness: No doubt I signed it.

Q. You mean you made an affidavit in court? A.
 40 I made an affidavit when we made complaint of fraud.

Tuttle vs. Harris—Joshua D. Loizeaux—Direct

Mr. Koestler: The affidavit had no connection with this suit.

Witness: It is now near three years and I certainly cannot give any date.

Court: You cannot now tell how long before it was? Has this release a date? 10

Mr. Koestler: The release is dated November 11, 1907.

Court: Do you recall anything now about whether when you signed the paper, the date was in it or not.

Witness: I remember the date and I remember the signature of Tuttle Brothers before my eyes when I signed it, but the date I cannot give. 20

Q. The release shows also other signatures ahead of yours? A. Yes, mine was second to the last.

Mr. Koestler: There are only two following it. There are six signatures between Tuttle Bros. and the present signature.

Q. I show you another paper marked in this case Exhibit C7, and ask you if that is signed by you? A. 30 I believe it is. I certainly cannot recognize my signature in it.

Q. Do you know whose signature is here as attorney? A. Yes.

Q. Who was that? A. Isaac P. Runyon.

Q. Was he your attorney in this matter? A. Yes, sir.

Q. Did you authorize your attorney to sign that paper to Mr. Harris? A. Yes, sir, I believe we did.

Q. Did you before this paper was signed by your 40

Tuttle vs. Harris—Joshua D. Loizeaux—Cross

attorney to Mr. Harris have a consultation with your attorney? A. We certainly did.

Q. Can you tell how long before the consultation with your attorney it was that you signed the release which was formerly shown to you? A. I cannot say that.

Q. Was it before; did you sign the release before
10 your attorney signed that? A. This was only signed—when the money didn't come in as expected, we began to think there was something wrong.

Q. When did you expect to get the money with reference to the time of your signing the release? A. Within a few hours, supposedly by noon, and this was probably in the forenoon, probably nine or ten o'clock.

Q. I want to ask you if you can state any recollection at all as to how long before your attorney signed Exhibit C7, you signed the release? A. No, sir, I cannot.
20

Q. Was it a question of a day or couple of days or longer? A. If you ask me for my opinion, I would say a matter of two or three days, but I cannot state from memory.

It is admitted in the case that the Exhibit C7 was received by Mr. Harris through the mails on the 22nd day of November.

Q. Did you get your money from Apgar Bros. on
30 this Harris job? A. No, sir.

Q. It hasn't been paid to you up to the present time? A. No sir.

Cross Examination by Mr. Angleman:

Q. Did you include in the claim which you filed in the Apgar Bros.' bankruptcy the amount due you from Apgar Bros. on the Harris job? A. I cannot answer that, Mr. Angleman, from here; I have no data and I
40 cannot say.

Tuttle vs. Harris—Joshua D. Loizeaux—Cross

Q. Did you file a claim with the Trustees in Bankruptcy of Apgar Bros. for money owed you by them?

Mr. Koestler: Objected to.

Court: It is cross examination.

A. Mr. Angleman, I would like you to please ask 10 that question again.

Q. (Last question repeated.) A. I think our attorney filed it.

Q. Did you receive any money from the Apgar Bros. from the Harris job after you signed the release? A. No, sir.

Q. Were there any notes owing you by Apgar Bros. paid or taken up by Apgar Bros. after the signing of the release by you? A. Not that I know of.

Q. Was there not a note due that very day you 20 signed the release, which was taken up by Apgar Bros. that forenoon? A. I think not.

Q. Are you positive not? A. No, sir, I am not positive.

Q. There might have been? A. When I say I am not positive, we must say that there might have been, but I don't think so.

Q. Did not George Apgar when he secured your signature to this release, tell you that they would take up a note which was then due in the bank that day, by 30 means of your signing this release? A. I think not.

Q. Are you positive? A. I am as positive as I can be, when I say I think not, because I expected the money in my office before noon.

Q. Can you say whether or not there was a note due you that day from Apgar Bros.? A. I said awhile ago I didn't think so.

Q. How much money was due you on the Harris job on that day? A. I haven't looked that up from that time, but I say approximately \$500.

Tuttle vs. Harris—Joshua D. Loizeaux—Cross

Q. And that was all due for work done on the barn?

A. Not for work.

Q. For material? A. For material. I cannot say if it was all on the barn; I believe there was the house also.

Q. You said on the Harris barn, in answer to questions of counsel for the complainants? A. It may have
10 all been on the barn; I wouldn't say that it was or wasn't.

Q. What time of the day was it that this signature was obtained? A. In the forenoon.

Q. What time in the forenoon? A. I cannot answer you; I would say between nine and eleven.

Q. And who were present? A. George Apgar and myself.

Q. Any one else? A. No one.

Q. Was your bookkeeper there? A. No, sir, not in
20 my private office.

Q. It was in your private office? A. Yes, sir.

Q. And did you think, seeing all these previous names signed to the release, that you were to get all of the money coming from this job? A. I did; when I saw the releases in front of me. I thought they had all been settled; I didn't pay any attention to the other names, with the exception of Tuttle Bros. I knew they were furnishing material and I felt that they were heavy creditors and doubtless were settled with, or
30 they wouldn't have signed it.

Q. Why didn't you tell this story at the meeting of the creditors in Mr. Crane's office, when an attempt was made to settle the differences? A. What do you mean?

Q. Why did you not tell this story at the meeting of the creditors in Mr. Crane's office, where an attempt was made to settle the differences? A. I think I told the same story.

Q. Are you positive? A. I think so; it is three
40 years ago.

Tuttle vs. Harris—Joshua D. Loizeaux—Cross

Q. That is right; that is why I want to know whether you are so clear about it. Can you tell any of the actual conversation that took place between you and George A. Apgar about signing this release? A. Word for word, I wouldn't attempt to.

Q. You are only giving your version of what you thought it was? A. Yes, sir.

Q. Did any of this conversation take place before 10 you had signed or immediately after you signed? A. It was very likely entirely before I signed.

Q. It is a question of what you know? A. I won't answer that, Mr. Angleman, because when I make a statement, if I cannot positively swear that it was so, but the likelihood is that before I signed, I have my understanding of how I am going to get my money.

Q. You won't swear to that? A. No, sir.

Q. The money due you on the Harris job from the Apgars, was that included in any notes which had been 20 given you by the Apgars prior to your signing the release? A. I don't think so.

Q. Do you know? A. If I did, I wouldn't answer this way, Mr. Angleman.

Q. You can answer yes or no? A. I say I don't think so.

Q. It was your custom, however, to take notes from time to time from the Apgars? A. Yes, sir.

Q. And the amount due on the Harris job may have been included in some of the notes? A. My reason for 30 saying I think not, is because I don't think we had taken any note from the time that job was along in progress.

Q. When was the last note which you took from the Apgar Bros.? A. I cannot answer you.

Q. Can you give it approximately? A. My books will answer that, my account.

Q. Have you your books here? A. No, sir.

Q. How long was the running time of the notes which you usually took from the Apgars? A. I think 40

Tuttle vs. Harris—Joshua D. Loizeaux—Cross

usually two months notes; that is the usual run of notes.

Q. You made a complaint of fraud against the Apgar Bros. and had them arrested, I believe, in the Supreme Court action? A. We made a complaint of fraud; I cannot say in what court.

Q. And they were arrested? A. Yes.

10 Q. And the matter was dismissed by Judge Swayze, was it not? A. Well, I cannot say in whose court.

Q. It was some Judge? A. Yes, sir.

Q. And that action was based on this transaction? A. Yes, sir.

Q. In the affidavit which you made in that action did you swear to the same state of facts to which you are swearing here today? A. At the time everything was fresh in my mind and I made a statement which I swore to, which I believed was true. I wish to make
20 the same statement now. I haven't seen it nor read it nor heard from it for three years practically, therefore I am only saying as best as my memory gives me.

Q. You say that this money which was to have been secured by the Apgars on the presentation of this release to Harris, was to be handed over to you, for the full amount of your bill, by noon of that day? A. Yes, sir, I expected it by noon of that day. There was this contingency, that was always the case, and that is, sup-
30 posing one of the releasors couldn't be found, it couldn't be done.

Q. Then between the time of the signing of your release and the time of the serving of this notice prepared by your attorney, did you make any attempt to get word to Mr. Harris or Apgar Bros. relative to the failure of the Apgar Bros. to keep this agreement with you? A. Unless I am greatly mistaken, that very afternoon I searched for them myself personally.

Q. Did you see them? A. No, sir.

Tuttle vs. Harris—Joshua D. Loizeaux—Cross

Q. (By the Court.) Searched for whom, the Apgar Bros.? A. Yes, sir.

Q. Then this notice, C7, prepared by your attorney, was the first actual notice given by you relative to your claim under the release signed by you? A. The first one that Mr. Harris received, you mean?

Q. No, I mean the first actual notice given by you? 10
A. I don't understand you.

Q. Here you have signed a release on a day in the morning, the money was to be paid to you by noon; none came and you didn't get the money; several days elapsed and you didn't get the money, and then later on you sent this notice; what I wish to know is, what you did between the time of the failure to pay according to agreement, that is, the noon of the day on which the release was signed, and giving of this notice, to give notice to Mr. Harris that you hadn't received the 20 money, or to give notice to the Apgar Bros. of their failure to keep their agreement? A. My best recollection is, that on the failure of the money appearing when I expected it, I immediately went to our attorney and put the matter before him, and as far as I know, this was sent out almost immediately, within a very short time.

Q. You said on direct examination, between two and three days? A. That is what I would say.

Q. You wouldn't call that immediately? A. Yes, I 30 would, because if I hunted for them that day and the next morning, it would be very easy for a couple of days to go by. I cannot say days, I didn't start out to state that, because I don't know; I am only quoting as best I can from memory.

Q. When did you first receive notice from your attorney that he had sent this notice marked C7? A. I cannot answer that; I don't know.

Q. What means did you take, other than the serving of this notice by your attorney, Exhibit C7, to take 40

Tuttle vs. Harris—Joshua D. Loizeaux—Cross

your name from this release, if any? A. So far as I know, none other.

Q. You were willing then to abide by your signature as shown on the release? A. I beg your pardon; when we sent that notice, that showed our name was not being abode by, but it was to be taken off.

10 Q. Can you tell me then why it was you did not follow up this notice by action to have your name expunged from the release? A. I don't know what action could have been taken; I know why we didn't, but what we did I can answer.

Q. Did not your counsel advise you that there was no fraud? A. No, sir, he believed there was, the same as we did.

20 Q. After Judge Swayze had dismissed the action, did not your counsel then advise you there was no fraud? A. I guess we had to accept the judgment of the Judge, no matter what we thought.

Q. When the interpleader was filed, which you remember, by Mr. Harris? A. I remember meeting in Mr. Crane's office, if that is what you refer to.

Q. No, later. I call your attention to the meeting at Mr. Crane's office; at that time, did not your counsel advise you that you would have to abide by your signature to the release? A. I cannot say that; I don't think so.

30 Q. Can you tell us why you did not put in an appearance and answer in the interpleader suit? A. No, sir, I cannot answer; it is in the hands of our attorney, and I cannot tell you anything about it.

Q. This notice served by your attorney, Exhibit C7, states that this release was procured from your company by false and fraudulent representations made to you; can you tell us exactly what those false and fraudulent representations were? A. The pith and point was, that we were to receive the amount of money due us on the job, which we didn't receive.

Tuttle vs. Harris—Joshua D. Loizeaux—Re-Direct

Q. That was a promise regarding something in the future, then? A. Future was that very day.

Q. Was there any representation made to you as to things in the past which induced you to sign this release? A. I don't think that I can answer that.

Q. (Last question repeated.) A. I don't think so.

Q. This notice, Exhibit C7, says: We do therefore notify you not to give any force and effect to the said release, and we hereby demand that if same is in your possession, that you deliver same to us that we may cancel our signature therefrom. Why after giving that notice did you not file a lien on the property to secure your money? A. I cannot answer that; that is my attorney's business. I cannot say. A question you asked me a few moments ago brings something to my mind now, in which you said was there any reference made to the past; do you want me to answer something there? 10

20

Court: Go on.

Witness: I believe it was this: if there was anything referred to the past, it was because the account was not satisfactory as it had been in the past, and we were not signing a release without knowing where our money was coming from. I believe that had come up at that time.

30

Q. That wasn't any false representation in the matter of the past? A. No, sir.

Q. I asked you about false representation. A. I didn't hear that.

Re-Direct by Mr. Koestler:

Q. The only representation made to you is the representation that upon signing this release, he would get another signature to it and get the money and pay 40

Tuttle vs. Harris—George Apgar, Recalled—Direct

the amount due you? A. A signature or signatures, I am not sure which, but I understood there was some one else to go on the release and then I would get my money.

Q. Was it upon that representation that you placed your signature to the release? A. Pure and simple.

10 Q. At the time of signing this release, were Apgar Bros. interested in the J. D. Loizeaux Lumber Co. in moneys other than for goods furnished to the Harris property? A. Yes, sir.

Q. To a large extent? A. Rather large amount, yes, sir.

Mr. Koestler: I understand the case was opened only to produce this one witness.

GEORGE APGAR, recalled by defendants.

20

Direct Examination by Mr. Angleman:

Mr. Apgar, you are one of the firm of Apgar Bros.?

A. Yes, sir.

Q. Who had the Harris job concerning which inquiry has been made? A. Yes, sir.

Q. Do you remember going to Mr. Loizeaux, of the Loizeaux Lumber Co., and securing his signature to this release, Exhibit C6? A. Yes, sir.

30 Q. Will you please state the conversation which took place between you and Mr. Loizeaux at the time you obtained this signature? A. I met Mr. Loizeaux about 11 o'clock, between eleven and twelve, and I went to the main office and he was sitting by the desk, and I asked Mr. Loizeaux if he would sign this release; he said, "Will you pay that note off?" or let my brother come over, and asked me if I would go down to Mr. Harris to get \$75 to meet the note in the bank of Mr. Loizeaux, and I went over to Mr. Harris
40 and got \$75 and put it in the bank to meet that note,

Tuttle vs. Harris—George Apgar, Recalled—Direct

and that was all that was said; I wasn't there five minutes.

Q. Mr. Loizeaux says that you promised him, according to his recollection, to get the money which you were to get on the giving up of this release, and bring enough back to him to pay him all the money coming to him on the job, which amounted according to his recollection to about \$500; is that true? A. I 10
did not, no sir.

Q. Did you keep the promise that you did make to him, to take up the note? A. I did, yes, sir.

Q. Who were present beside Mr. Loizeaux at that time, anyone? A. No, sir.

Q. Can you state for what job the note was given which you were to take up that morning? A. No, sir; there were several. I could not.

Q. Could you tell us whether there had been any notes given the Loizeaux Company on account of material furnished on the Harris job? A. I cannot say. 20

Q. When you had secured the necessary signatures to this release and took it back, did you take it to your brother Theodore first? Did you show it to your brother Theodore, or had your brother Theodore given you instructions what to do with it when you got the signatures? A. No, I took it back and gave it to Mr. Harris.

Q. Why did you do that? A. Because it had all the signatures on it.

Q. So as to get the money to pay the Loizeaux note? 30
A. Yes, sir.

Q. Then all the money you got from Mr. Harris when you first presented the release, which was \$75, you had to put in the bank to make up the amount necessary to meet the Loizeaux note? A. Yes, sir.

Q. Has Mr. Loizeaux from the time of the signing of this release up to the present time ever told you this story about that he was to get all of the money? A. No, sir.

Tuttle vs. Harris—George Apgar, Recalled—Cross

Q. Had you ever heard that before? A. This was the first time.

Q. Had he ever said anything along that line at the meeting of creditors? A. No, sir.

Q. Ever hear anyone else say it? A. No, sir.

Cross Examination by Mr. Koestler:

10

Q. Tell me when you had Mr. Loizeaux sign this release? A. What date?

Q. Yes. A. No, I could not.

Q. Can you tell me the date you had Tuttle Bros. sign it? A. I could not.

Q. You got six persons to sign the release between the Tuttle Bros. and Loizeaux; are those six signatures of material men or people who worked for you? A. Material men.

20 Q. All of them; what is Clawson? A. A mason.

Q. Is he one of your workmen or doing it under sub-contract? A. Sub-contract.

Q. How much was due Clawson? A. I cannot tell you.

Q. Did you pay Clawson anything at the time you got his signature to the release? A. Most all of it.

Q. What is Larrabee, material man? A. Yes, sir.

Q. He was also a sub-contractor? A. Yes.

Q. Did you pay Larrabee? A. No, sir.

30 Q. He is the person to whom you assigned the moneys due under your contract with Harris? A. Yes.

Q. Who was William Baker? A. He is a carpenter employed by me.

Q. Did you owe him anything at the time the release was signed by him? A. No, sir.

Q. Who is Thorne? A. Employed, too.

Q. Did you owe him anything at the time he signed the release? A. No, sir.

Q. E. Daniel; is he also in your employ? A. Yes.

40 Q. Did you owe him anything? A. No, sir.

Tuttle vs. Harris—George Apgar, Recalled—Cross

- Q. Charles C. Graves, was he an employee of yours?
A. No.
- Q. What was he? A. A slater, under sub-contract.
- Q. How much did you owe him at the time he signed the release? A. I don't know.
- Q. Did you owe him anything? A. I cannot tell you.
- Q. Had he been paid? A. I cannot tell you that 10 even.
- Q. Who had charge of that? A. My brother.
- Q. Did you obtain Graves' signature? A. I did.
- Q. Did you have any talk with him? A. Not at that time, no, sir.
- Q. You handed him the paper and he signed it without any conversation between you and him? A. Yes, sir.
- Q. Did Mr. Clawson sign the paper without any conversation with you? A. He did. 20
- Q. Did Mr. Larrabee? A. He did.
- Q. Did you make any promise to Larrabee? A. No, sir.
- Q. You did make a promise to Tuttle? A. I did not.
- Q. Did your brother Theodore show you this release the day he obtained Tuttle's signature? A. Yes, I think he did.
- Q. How many days after that was it that you obtained Clawson's signature? A. Two or three days after. 30
- Q. How many days after Tuttle Brothers signed did you obtain the signature of the J. D. Loizeaux Lumber Company? A. A couple of days.
- Q. About how many? A. About two days.
- Q. Your name appears as the witness to the signature between Tuttle Bros. signature and the Loizeaux Lumber Company signature? A. Yes.
- Q. Did you obtain all of the signatures that are in between? A. All except two. 40

Tuttle vs. Harris—George Apgar, Recalled—Cross

Q. Which two did you not obtain? A. Mr. Tuttle's and Henry Apgar's.

Q. You obtained the six between Tuttle and Loizeaux Lumber Co.? A. Yes.

Q. And also the Loizeaux Lumber Co.? A. Yes.

Q. How much time did it take you to obtain the signatures of Clawson, Larrabee, Baker, Thorne, Daniel
10 and Graves; didn't you do that all in one day? A. I think I did.

Q. Was it on the same day that you obtained the signature of the Loizeaux Lumber Co.? A. I don't think it was.

Q. The next day? A. I don't know; I cannot say.

Q. Was it a day or two after you obtained the six signatures that you obtained the signature of the Loizeaux Lumber Co.? A. I cannot answer that.

Q. You were anxious at this time to get all of the
20 signatures, so you could close up with Harris, weren't you? A. Yes.

Q. All of those people were in the neighborhood of Westfield and Plainfield, in that region? A. Yes.

Q. And could be seen very readily by you? A. Yes, sir.

Q. I want to know if you can tell us within how many days of the obtaining of the signature of Tuttle Bros., the signature of the J. D. Loizeaux Lumber Company was obtained you you? A. I cannot answer that;
30 I know Mr. Loizeaux's was obtained on Monday; I don't know when Mr. Tuttle signed it.

Q. Are you sure it was signed on Monday by Mr. Loizeaux? A. Yes.

Q. And Tuttle signed the end of the preceding week, didn't he? A. Yes, sir.

Q. When did Tuttle sign, on Friday? A. I cannot answer.

Q. What makes you say that Mr. Loizeaux signed on Monday? A. I took it up there on a Monday.

40 Q. What is it fixes in your mind that Loizeaux

Tuttle vs. Harris—George Apgar, Recalled—Cross

signed on a Monday? A. I took it up there on a Monday.

Q. How do you know that? A. Because I know I did.

Q. Whom did you see when you went to Mr. Loizeaux's office to have this release signed? A. Mr. Loizeaux.

Q. Did you go into his private office? A. I did. 10

Q. At that time how much did the Apgar Bros. owe the Loizeaux Lumber Co. on jobs other than the Harris job?

Objected to.

A. I cannot answer that; I don't know.

Q. Wasn't it over \$3,000? A. I cannot tell you.

Q. You wouldn't say it was less, would you? A. I don't know. 20

Q. Do you know how many notes of Apgar Bros. the Loizeaux Lumber Co. held at that time? A. No, I know there were several of them; I don't remember.

Q. And you wouldn't swear that they held any note on the Harris job at all, would you? A. I cannot tell you now.

Q. What did you say to Mr. Loizeaux when you went into his office to have this release signed? A. I asked him to sign that release.

Q. What did he say to you? A. He asked me if I would pay that note off. 30

Q. What note? A. Mr. Loizeaux's note.

Q. Which one of them? A. I cannot tell you.

Q. You didn't know what he was talking about, did you? A. Yes, I know he had notes.

Q. You didn't know which note he meant? A. No, there were several of them.

Q. Did he mention the amount of the note? A. No.

Q. Did he mention on what job it was? A. No.

Q. What did you say? A. I said yes. 40

Tuttle vs. Harris—George Apgar, Recalled—Re-Direct

Q. What did you say when he asked you if you were going to pay off the note? A. I told you "yes" I told him.

Q. Did you know how much the note was for? A. No, I did not.

Q. You say that he didn't ask you a word about the money coming from the Harris job? A. He did not,
10 no, sir.

Re-Direct by Mr. Angleman:

Q. That note which he asked you to pay was the note which both of you knew was due that day, was it not? A. Yes, sir.

Q. You didn't have to specify it by amount?

Court: Don't argue with him.
20

Q. What did your brother tell you about that note?

Objected to, unless it was in the presence of complainants.

Objection sustained.

Court: He has already said he did not know; your question now implies that he did know, because his
30 brother told him.

Q. I show you one of the six checks marked Exhibit C2, being check dated November 18, 1907, payable to the order of Apgar Bros. for \$75, and signed by Benjamin S. Harris, and endorsed as paid at the First National Bank on November 18, and ask you if you can say whether this was the check for the \$75 which was given to you upon the presentation of the release to Mr. Harris? A. Yes, sir, it was.

Tuttle vs. Harris—George Apgar, Recalled—Re-Cross

Q. Was that presented at the bank the same day it was drawn by Mr. Harris? A. It was, yes, sir.

Q. Can you state whether or not the date on the check was the date which you received it from Mr. Harris? A. It was.

Court: All that is in the previous evidence in the case. 10

Re-Cross by Mr. Koestler:

Q. What did you do with this release after the J. D. Loizeaux Lumber Co. signed it? A. I gave it to Mr. Harris.

Q. How soon after? A. About half an hour after.

Q. The same day? A. The same day.

Court: Is that Monday? 20

Witness: Yes, sir.

Q. After it was delivered to Mr. Harris, it was re-delivered to you again, wasn't it?

Court: Did you get it back in your possession again after you gave it to Mr. Harris?

Witness: Yes, sir. 30

Q. And you obtained two more signatures?

Mr. Angleman: Is this cross examination?

Court: Yes, sir, but it is not re-cross.

Q. Your release shows the signatures of Apgar Bros. and Harry H. Apgar after the J. D. Loizeaux Lumber Company; I want to know whether those sig- 40

Tuttle vs. Harris—George Apgar, Recalled—Re-Cross

natures were added after you had first delivered the release to Mr. Harris? A. I cannot answer that.

Q. (By the Court.) You have no recollection about that? A. No.

By the Court:

10

Q. Did you sign as a witness to the signatures of those two names which are after Mr. Loizeaux's? A. Yes.

Mr. Koestler: The paper shows otherwise; one was in the presence of Benjamin S. Harris, the defendant, and the other in the presence of Mr. Crane.

20 Q. Have you any personal recollection about getting their signatures to the release after the Loizeaux Company released? A. No, sir.

By Mr. Koestler:

Q. This signature "Apgar Bros" is your own signature? A. Yes.

Q. When did you sign that with reference to the time you got \$75 from Mr. Harris? A. In Mr. Crane's office.

30 Q. When, before or after you got the check? A. After I got the check.

Q. How many days after? A. I cannot tell you.

Q. Is Harry H. Apgar related to you? A. No, sir.

Q. What did he have to do with this job? A. Electrician.

Q. Did you obtain his signature, or your brother? A. No.

BOTH SIDES REST.

40

Bill of Complaint—Harris vs. Larrabee, et als.

(Filed Dec. 3, 1907.)

IN CHANCERY OF NEW JERSEY

Between

BENJAMIN S. HARRIS,
Complainant,

and

WILLARD L. LARRABEE, et als.,
Defendants.

On Bill.

10

To His Honor, William J. Magie, Chancellor of the
State of New Jersey:

Your orator, Benjamin S. Harris, brings this his
bill of complaint against Willard L. Larrabee, and Wil-
liam E. Tuttle, Jr., and Arthur Tuttle, partners in 20
trade, doing business under the firm name and style of
Tuttle Brothers, and the J. D. Loizeaux Lumber Com-
pany, a corporation organized under and by virtue of
the laws of the State of New Jersey; and thereupon
respectfully shows, as follows:

1. The complainant above named is a citizen and
resident of the Township of Piscataway, in the County
of Middlesex, and State of New Jersey.

2. On the Twenty-Sixth day of June, Nineteen Hun-
dren and Seven, the complainant made a certain agree- 30
ment with the firm of Apgar Brothers, a partnership
composed of Theodore Apgar and George Apgar, in
and by which said agreement the said Apgar Brothers
were to build a certain house for the complainant on
Clinton Avenue, in the said Township of Piscataway,
near the City limits of the City of Plainfield, in the
County of Union, for a certain sum of money therein
specified.

3. The said Apgar Brothers have completed their
work under the said agreement, and there remains 40

Bill of Complaint—Harris vs. Larrabee, et als.

due under the said agreement for balance on the contract price thereof and for extras the sum of Five Hundred and Forty-Eight Dollars and Thirty Cents (\$548.30), and the said work was so completed and the money so due prior to the Twentieth day of November, Nineteen Hundred and Seven.

4. The Complainant refused to pay over the said
10 balance due as aforesaid until the said Apgar Brothers should furnish complainant with a release of lien from all who might have a lien on the building by reason of work done or materials furnished for the erection or construction thereof, which release of lien so required as aforesaid was duly furnished the complainant by the said Apgar Brothers, and which said release of lien was duly verified on the Twentieth day of November, Nineteen Hundred and Seven.

5. The said sum of Five Hundred and Forty-Eight
20 Dollars and Thirty Cents (\$548.30) so due as aforesaid, has not been paid to the said Apgar Brothers on account of the serving of certain notices and other papers on the complainant as herein noted.

6. On the Twenty-First day of November, Nineteen
Hundred and Seven, the defendants William E. Tuttle, Jr., and Arthur Tuttle, partners as aforesaid, served a notice on the complainant, claiming that the sum of Seven Hundred and Twenty-Seven Dollars and Sixty-Five Cents (\$727.65) for materials furnished the said
30 Apgar Brothers in the erection of the said house was due and owing them from the said Apgar Brothers, and notifying the complainant to retain the said amount from the amount owing by the complainant to the said Apgar Brothers, a copy of which said notice is hereto annexed and marked Exhibit A, and is hereby referred to with the same effect as if herein set forth at length; and on the day following the service of the said notice the complainant received a letter from the said firm of Tuttle Brothers in relation to the
40 said release of lien, claiming that the said release was

Bill of Complaint—Harris vs. Larrabee, et als.

obtained by fraud, a copy of which said letter is hereto annexed and marked Exhibit B, and is hereby referred to with the same effect as if herein set forth at length.

7. On the Twenty-Second day of November, Nineteen Hundred and Seven, the complainant received a notice from the defendant J. D. Loizeaux Lumber Company, claiming that the said release of lien was obtained by false and fraudulent representations, a copy of which said notice is hereto annexed and marked Exhibit C, and is hereby referred to with the same effect as if herein set forth at length. 10

8. After receiving the said notice from the said J. D. Loizeaux Lumber Company, and on the same day, the complainant received a notice from the defendant Willard L. Larrabee, claiming that Five Hundred and Forty-Three Dollars (\$543) was due him from the said Apgar Brothers for material and labor furnished them by him in the erection of the said house and notifying the complainant to retain the said amount from the amount due by the complainant to the said Apgar Brothers, a copy of which said notice is hereto annexed and marked Exhibit D, and is hereby referred to with the same effect as if herein set forth at length. 20

9. On the Twenty-Third day of November, Nineteen Hundred and Seven, the complainant served three notices on the said Apgar Brothers, respectively setting forth the receipt and a copy of the three notices hereinbefore referred to as having been respectively received from Tuttle Brother, J. D. Loizeaux Lumber Company, and Willard L. Larrabee. 30

10. On the Twenty-Sixth day of November, Nineteen Hundred and Seven, the defendant Willard L. Larrabee served on the complainant an assignment made by the said Apgar Brothers of all their right, title and interest in the said contract made by the said Apgar Brothers with the complainant, together with the moneys due thereon, a copy of which said assign- 40

Bill of Complaint—Harris vs. Larrabee, et als.

ment is hereto annexed and marked Exhibit E and is hereby referred to with the same effect as if herein set forth at length.

11. A meeting of the defendants, Willard L. Larrabee, J. D. Loizeaux Lumber Company, and Tuttle Brothers and the said Apgar Brothers, and the complainant, was held at the office of complainant's solicitor, J. Henry Crane, in the said City of Plainfield, on the Twenty-Sixth day of November, after the service of the said assignment as aforesaid, and which said meeting was called by the complainant for the purpose of obtaining an amicable adjustment of the matters in dispute and an agreement by which the complainant could with safety to himself pay over the said sum so due from the complainant on account of the said contract as aforesaid without resorting to the courts for relief; but at the said meeting the said defendants
- 20 Willard L. Larrabee, J. D. Loizeaux Lumber Company and Tuttle Brothers severally claimed priority and the first right to the said sum so due.

12. On the Twenty-Seventh day of November, Nineteen Hundred and Seven, the defendant, Willard L. Larrabee, through his attorney, William L. Stillman, caused an action in contract to be instituted in the Supreme Court of New Jersey against the complainant, based on the said assignment to recover the amount due on the said contract made by the complainant with
- 30 the said Apgar Brothers. The summons and declaration in which said action were personally duly served on the complainant on the Twenty-Ninth day of November, Nineteen Hundred and Seven, and on which said summons and declaration was endorsed the usual notice to file an affidavit of merits within ten days after service thereof and a plea or demurrer within twenty days after service thereof, or in default thereof judgment by default would be entered against the complainant.

- 40 13. The complainant has been unable to determine

Bill of Complaint—Harris vs. Larrabee, et als.

to whom of right the said sum of money in his hands belongs, each of the said defendants claiming the first right to the same.

14. The complainant has always been willing to pay the said sum of money in his hands to such person, partnership, or corporation as should be lawfully entitled to receive the same, and to whom he could pay it with safety; and the complainant hereby offers to 10 pay the same into this court.

15. The complainant does not in any respect conclude with the defendants, or with any, or with either of them, touching the matters in this cause; and the complainant has not been indemnified by the defendants, or by any, or by either of them, but brings this suit of his own free will and to avoid being molested and injured touching the matters contained in this bill.

Wherefore, and as the complainant can only have adequate relief in this court: To the end that the said 20 defendants may answer this bill and interplead and settle their right to the said sum of money; and that the complainant may be at liberty to pay the same into this court; and that the said Willard L. Larrabee may be enjoined and restrained from further proceeding in the suit at law so as aforesaid commenced by him against the complainant; and that the complainant, upon payment into court of such amount, the procuring said defendants to interplead according to the course of this court, may be decreed to be discharged from 30 all liability to such defendants in the premises, and may have all his costs therein:

May it please your Honor to grant unto the complainant not only the State's writ of injunction, issuing out of and under the seal of this honorable court, to restrain the said Willard L. Larrabee from proceeding at law against the complainant touching the matters aforesaid, but also a writ or writs of subpoena, also issuing out of and under said seal, to be directed to the said Willard L. Larrabee, and William E. Tuttle, Jr., 40

Bill of Complaint—Harris vs. Larrabee, et als.

and Arthur Tuttle, partners in trade, doing business under the firm name and style of Tuttle Brothers, and J. D. Loizeaux Lumber Company, therein and thereby commanding them and each of them, on a certain day and under a certain penalty therein to be inserted, to be and appear before your Honor in this honorable court, and then and there to answer all and singular
 10 the premises aforesaid, and to stand to, perform and abide such order, direction, and decree therein as to your Honor shall seem meet.

And the complainant will ever pray, etc.

J. HENRY CRANE,

Solicitor for and of Counsel with Complainant.

COUNTY OF UNION. }
 STATE OF NEW JERSEY } SS.

Benjamin S. Harris, of full age, being duly sworn,
 20 according to law, on his oath, says, That he is the complainant in the foregoing bill named, and that he has exhibited his said bill of interpleader against the defendants in the above-stated cause without any fraud or collusion between him and the said defendants, but merely of his own accord, for relief in this court; and that the bill is not exhibited at the request of the said defendants, or any, or either of them; and that the complainant is not indemnified by the said defendants, or by any, or either of them. And the complainant has
 30 exhibited said bill with no other intent but to avoid being sued or molested by the said defendants touching the matters contained in said bills.

Sworn and subscribed to,
 before me, this 2d day of

December, 1907, at Plain- BENJAMIN S. HARRIS.
 field, N. J.

W. R. Coddington,
 M. C. C. of N. J.

Exhibit "A"

EXHIBIT "A"

To Benjamin Harris:

Take notice there is due us from George Apgar and Theodore Apgar, partners, trading as Apgar Brothers, contractors, the sum of Seven Hundred Twenty-Seven Dollars and Sixty-Five Cents (\$727.65) for materials 10 by us furnished and by them used in the erection of your dwelling house on the west side of Clinton Avenue near Eighth Street, in the City of Plainfield, Union County, New Jersey; that we have demanded of them payment of the same and they have refused to pay the same, and we therefore notify you to retain the amount so due out of the amount owing by you to said contractors, and to pay the same to us.

A bill of the said items of the said materials is here- 20 to annexed.

Dated Nov. 18th, 1907.

Sgd. Tuttle Bros.,
Westfield, N. J.

1907

Oct. 31. No. 51 Sash, Doors & Mill Work per
contract, estimate No. 2277.....\$582.77

Extras

Aug. 9.	1789 1415 ft. R. C. Siding.....	49.53	30
	1756 1210 sq. ft. R. C. Siding	\$42.53	
	8000 16" C.B.W.C. Shingles	40.00	
		82.35	
Aug. 12	1859 3 Cols. 8x8" staved	3.50	10.50
Aug. 16	2008 1 8x8" Col. C. & B.....		2.50
		\$727.65	

Exhibits "B" and "C"

EXHIBIT "B"

Westfield, N. J., November 21, 1907.

Mr. Benjamin Harris,
Plainfield,
New Jersey.

10 Dear Sir: A week or so ago at the request of Messrs. Apgar Brothers, we signed a release of lien affecting your new house on Clinton Avenue, in Plainfield, upon the understanding that the sum of money amounting to about \$500.00 which he expected to receive from you on the strength of the release was to be paid at once to us.

We find that Mr. Apgar also obtained signatures to this from other parties, making the same representation.

20 As the release was obtained from us by fraud and has never been delivered to you by us and as no money has been paid to us on it, we hereby notify you to pay no money to Apgar Brothers, or to any person for them on account of the construction of this house.

Very respectfully yours,

Tuttle Bros.

EXHIBIT "C"

30 Mr. Benjamin Harris,
Plainfield, N. J.

Dear Sir: I hereby notify you that a paper purporting to be a release of the building and curtilage owned by you on Clinton Avenue near Eighth Street and signed by the J. D. Loizeaux Lumber Company, and delivered to George Apgar, one of the firm of Apgar Brothers, was procured from said J. D. Loizeaux Lumber Company by false and fraudulent representation made to J. D. Loizeaux, the Vice President thereof, and upon the strength of which said false and fraudulent representations said paper purporting to be said release

40

Exhibit "D"

was signed, it, therefore, notifies you not to give any force and effect to the said release and we hereby demand that if same is in your possession that you deliver same to us that we may cancel our signature therefrom.

Very truly yours,

J. D. Loizeaux Lumber Co.

Isaac P. Runyon, Atty.

10

EXHIBIT "D"

To Benjamin Harris,

You are hereby notified that Theodore Apgar and George Apgar, partners as Apgar Brothers., are justly indebted to me in the sum of five hundred and forty-three dollars, for material and labor furnished by me to them, and used by them in the erection of a two story and a half frame dwelling house, erected or being 20 erected on the land owned by you, and situated on Clinton Avenue in the township of Piscataway, County of Middlesex and State of New Jersey, nearly opposite Eighth Street, pursuant to the contract made between you and them, and you are further notified that I have demanded payment from the said firm of Apgar Bros., of the said sum of money, so due and owing me as aforesaid, and that they have refused to pay any part of same, and you are therefore required to retain the amount so due and claimed by me out of the amount 30 owing by you on said contract, or that may hereafter become due and owing from you on said contract and on being satisfied of the correctness of my demand, to pay the same to me. Said sum being balance due a sub-contract made by me as sub-contractor with said firm of Apgar Brothers. for plumbing and tinning work and heating.

W. L. Larrabee.

Dated November 21, 1907.

40

Exhibit "E"

EXHIBIT "E"

KNOW ALL MEN BY THESE PRESENTS, that we, Theodore Apgar and George Apgar, partners, as Apgar Bros. in consideration of the sum of one dollar to us in hand paid, the receipt whereof is hereby acknowledged, do hereby assign, transfer and set over
 10 to Willard L. Larrabee and his assigns, all our right, title and interest in and to a certain contract made with us with Benjamin Harris for construction of house on Clinton Avenue, opposite West Eighth Street, near the city line of Plainfield, New Jersey, together with all moneys now due or to become due thereon, and we hereby authorize and empower said Benjamin Harris to pay to said Willard L. Larrabee, or his assigns, all moneys now due to us or that may become due by virtue of said contract and this shall be sufficient warrant
 20 and discharge for him in the premises.

In witness whereof we have hereunto set our hands and seals this twenty-second day of November, 1907.
 Signed, sealed and delivered
 in the presence of
 George Peney.

Theodore Apgar (L.S.)
 George L. Apgar (L.S.)

Order for Injunction—Harris vs. Larrabee, et als.

(Filed Dec. 5, 1907)

IN CHANCERY OF NEW JERSEY.

Between

BENJAMIN S. HARRIS,

Complainant,

and

WILLARD L. LARRABEE

et als.,

Defendants.

10

On Bill, etc.,
Order for Injunction.

On reading and filing the bill of complaint in the
above-stated cause and the affidavit thereto annexed, 20

It is, on this Third day of December, Nineteen Hun-
dred and Seven, on motion of W. S. Angleman, of coun-
sel with complainant, ordered that, upon the complain-
ant depositing in this court the sum of Five Hundred
and Forty-Eight Dollars and Thirty Cents (\$548.30)
mentioned in said bill, an injunction issue pursuant to
the prayer of said bill.

W. J. MAGIE, C.

Respectfully advised,

JOHN R. EMERY,

Vice-Chancellor.

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Filed Dec. 19, 1907.

IN CHANCERY OF NEW JERSEY.

10 Between BENJAMIN S. HARRIS, Complainant, and WILLARD L. LARRABEE, et als., Defendants.	} On Bill of Interpleader. } Order for Leave to File Supplemental Bill.
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It appearing that, since process of subpoena to answer was issued and served in the above-entitled cause, William E. Tuttle, Jr., and Arthur Tuttle, partners in trade, doing business under the firm name and style of Tuttle Brothers, two of the defendants in the said cause, have brought suit on their claim mentioned and set forth in the bill of complaint herein, founded on an alleged mechanics' lien, and have caused a summons to be issued out of the Middlesex County Circuit Court against Benjamin S. Harris, the complainant herein, as owner, returnable on the Twenty-Seventh day of December, instant, and application being made by the complainant for leave to file a supplemental bill setting forth the facts in relation thereto, and praying for an injunction to restrain the said suit.

It is, on this Seventeenth day of December, Nineteen Hundred and Seven, on motion of W. S. Angelman, of counsel with the complainant, ordered that the said complainant have leave to file his supplemental bill in this suit.

Respectfully advised,

JOHN R. EMERY.

Vice-Chancellor.

**Supplemental Bill of Complaint—Harris vs. Larrabee,
et als.**

(Filed Dec. 17, 1907.)

IN CHANCERY OF NEW JERSEY.

Between

BENJAMIN S. HARRIS,

Complainant,

and

WILLARD L. LARRABEE,

et als.,

Defendants.

10

On Bill of

Interpleader.

Supplemental Bill.

To His Honor William J. Magie, Chancellor of the
State of New Jersey:

Your orator, Benjamin S. Harris, brings this sup- 20
plemental bill of complaint and respectfully shows:

1. On the Third day of December, Nineteen Hun-
dred and Seven, the complainant filed his original bill
of complaint in this honorable court against Willard
L. Larrabee, and William E. Tuttle, Jr., and Arthur
Tuttle, partners in trade, doing business under the firm
name and style of Tuttle Brothers, and the J. D. Loi-
zeaux Lumber Company, a corporation organized under
and by virtue of the laws of the State of New Jersey,
therein stating that a certain sum of money held by 30
him, being the last payment due on a certain building
contract, was severally claimed by the defendants, and
that the defendant, Willard L. Larrabee, had instituted
suit to enforce his claim, and praying to be allowed to
pay the said money into court, and that the defendants
should answer the said bill and should interplead and
settle their right to the said money, and that the com-
plainant might be decreed to be discharged from all
liability to the defendants in the premises, and also
praying for an injunction restraining the said Willard 40

**Supplemental Bill of Complaint—Harris vs. Larrabee,
et als.**

L. Larrabee from prosecuting further his said suit and for subpoenas directing the defendants to answer the said bill.

2. At the time of filing the said bill of complaint an order was made by this honorable court that, upon the complainant depositing the said money in this court, an injunction should issue pursuant to the prayer in
10 said bill.

3. On the Fifth day of December, Nineteen Hundred and Seven, the complainant deposited the said money in this court and an injunction was issued pursuant to the said order, returnable on the Sixth day of January, next, and subpoenas to answer directed to all the defendants were also issued at the same time, returnable on the Nineteenth day of December, instant; and the said injunction and the said subpoena to answer were served on the defendant, Willard L. Larrabee, by the Sheriff of the County of Middlesex, on the
20 Ninth day of December, Nineteen Hundred and Seven, and the said subpoena to answer was served on the defendants, William E. Tuttle, Jr., and Arthur Tuttle, partners as aforesaid, and on the defendant, J. D. Loizeaux Lumber Company, by the Sheriff of the County of Union, on the Seventh day of December, Nineteen Hundred and Seven.

4. On the Tenth day of December, Nineteen Hundred and Seven, the defendants, William E. Tuttle, Jr., and Arthur Tuttle, partners as aforesaid, through
30 their attorney, Paul Q. Oliver, caused an action in contract on mechanics' lien to be instituted in the Circuit Court of the County of Middlesex, in this State, against the complainant as owner, based on their claim for moneys due from the builder as set forth in the original bill of complaint herein; and the summons in the said action was served on the complainant by the Sheriff of Middlesex County on the Eleventh day of December, Nineteen Hundred and Seven.

**Supplemental Bill of Complaint—Harris vs. Larrabee,
et als.**

To the end, therefore, that the said defendants, William E. Tuttle, Jr., and Arthur Tuttle, partners as aforesaid, may, if they can, show why the complainant should not have the relief hereby prayed, and may, but without oath, answer the premises as fully as if the same were here again repeated, and they particularly interrogated thereto.

And that the complainant may have the same relief 10
against the said defendants, William E. Tuttle, Jr., and Arthur Tuttle, partners as aforesaid, as he might have had if the facts hereinbefore stated and charged by way of supplement had been stated in the complainant's original bill; and that the said William E. Tuttle, Jr., and Arthur Tuttle, partners in trade, doing business under the firm name and style of Tuttle Brothers, may be enjoined and restrained from further proceeding in the suit at law so as aforesaid commenced by them against the complainant; and that the complain- 20
ant may have such other and further relief in the premises as the circumstances of the case may require and to your Honor shall seem meet.

May it please your Honor to grant unto the complainant not only the State's writ of injunction, issuing out of and under the seal of this honorable court, to restrain the said William E. Tuttle, Jr., and Arthur Tuttle, partners in trade, doing business under the firm name and style of Tuttle Brothers, from proceeding at law against the complainant touching the matters 30
aforesaid and as set forth in the complainant's original bill of complaint; but also a writ of subpoena, also issuing out of and under said seal, to be directed to the said William E. Tuttle, Jr., and Arthur Tuttle, partners in trade, doing business under the firm name and style of Tuttle Brothers, therein and thereby commanding them and each of them, on a certain day and under a certain penalty therein to be inserted, to be and appear before your Honor in this honorable court, and then and there to answer all and singular the premises 40

**Supplemental Bill of Complaint—Harris vs. Larrabee,
et als.**

aforesaid, and to stand to, perform, and abide such order, direction, and decree therein as to your Honor shall seem meet.

And the complainant will ever pray, etc.

J. HENRY CRANE,
Solicitor for and of Counsel with Complainant.

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Order for Injunction—Harris vs. Larrabee

(Filed Dec. 19, 1907.)

IN CHANCERY OF NEW JERSEY.

Between

BENJAMIN S. HARRIS,

Complainant,

and

WILLARD L. LARRABEE,

et als.,

Defendants.

10

On Bill, etc.
Order for
Injunction.

On reading and filing the supplemental bill of complaint in the above-stated cause, and the money in dispute having been deposited in this Court, 20

It is, on this Seventeenth day of December, Nineteen Hundred and Seven, on motion of W. S. Angelman, of counsel with complainant, ordered that an injunction issue pursuant to the prayer of said supplemental bill.

Respectfully advised.

JOHN R. EMERY,

Vice-Chancellor.

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Motion Denied—Harris vs. Larrabee

Filed Jan. 2, 1908.

IN CHANCERY OF NEW JERSEY.

10	Between	}	
	BENJAMIN S. HARRIS,		
	Complainant,		Interpleader.
	and		On Bill of
	WILLARD L. LARRABEE,		Order Denying
	et als.,		Motion.
		Defendants.	

20 Application having been made to strike out the original bill of complaint and the supplemental bill of complaint filed herein as against the defendants, William E. Tuttle, Jr., and Arthur Tuttle, partners in trade, doing business under the firm name and style of Tuttle Brothers, and the Court having heard Paul Q. Oliver, solicitor for the said defendants, William E. Tuttle, Jr., and Arthur Tuttle, partners as aforesaid, in support of the motion, and W. S. Angleman, of counsel with complainant, in opposition thereto, and the Court having considered the matter.

30 It is, on the Thirty-First day of December, Nineteen Hundred and Seven, on motion of W. S. Angleman, of counsel with complainant, ordered that the said motion be, and the same hereby is, denied.

And it is further ordered that the injunction granted herein against the said defendants be so far modified as to allow the said defendants to file pleadings, but not to proceed to trial without further order of this court.

And it is further ordered that the defendants have leave to make a new motion to dissolve the injunction

Motion Denied—Harris vs. Larrabee

on the coming in of the answer, and to dismiss the bill
and supplemental bill.

Respectfully advised,

JOHN R. EMERY,

Vice-Chancellor.

W. J. MAGIE, C.

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Injunction Modified—Harris vs. Larrabee

(Filed Sept. 17, 1908.)

IN CHANCERY OF NEW JERSEY.

10	Between BENJAMIN S. HARRIS, Complainant, and WILLARD L. LARRABEE, et als., Defendants.	} On Bill, &c. Order Modifying Injunction.
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20 This matter being opened to the Court by Samuel Koestler, of counsel with the defendants, Tuttle Brothers, in the presence of J. Henry Crane, Solicitor of the complainant, and it appearing that the defendants, Tuttle Brothers, are entitled to have the injunction, heretofore granted against them, modified so as to permit them to make application to the Middlesex County Circuit Court, to extend their time in which to prosecute their lien claim suit:

30 It is, thereupon, on this Eighth day of September, Nineteen hundred and eight, on motion of Samuel Koestler, of Counsel with the defendants, Tuttle Brothers, ORDERED, that the injunction, heretofore issued in the above stated cause on the Twentieth day of December, Nineteen hundred and seven, and as modified by the order of December thirty-first, Nineteen hundred and seven, be further modified so as to permit the said defendants, Tuttle Brothers, to make such application or applications to the Middlesex County Circuit Court, for the extension of time to prosecute their lien claim suit against the said complainant, Benjamin

Injunction Modified—Harris vs. Larrabee

S. Harris, as owner, as may be necessary to keep said lien claim in existence, pursuant to the statutes in such cases made and provided.

Respectfully advised,

FREDERIC W. STEVENS, V. C.

MAHLON PITNEY, C.

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Answer of Larrabee—Harris vs. Larrabee, et als.

(Filed Jan. 4, 1908.)

IN CHANCERY OF NEW JERSEY.

10 Between

BENJAMIN S. HARRIS,
Complainant,

and

WILLARD L. LARRABEE,
et als.,

Defendants.

On Bill of
Interpleader, etc.
Answer of
Defendant Larrabee.

20 The answer of Willard L. Larrabee, one of the defendants in the above-entitled cause to the bill of complaint and to the supplementary bill of Benjamin S. Harris, the complainant:

30 This defendant answering says, that he admits that the complainant above named is a citizen and resident of the township of Piscataway, in the County of Middlesex and State of New Jersey, and that on the twenty-sixth day of June, Nineteen hundred and seven, or on some other day, the said complainant made a certain agreement with the firm of Apgar Bros., a partnership composed of Theodore Apgar and George Apgar, in and by which said agreement the said Apgar Brothers were to build a certain house for the complainant on Clinton Avenue, in the said township of Piscataway, near the city limits of the city of Plainfield, in the County of Union, for a certain sum of money therein specified; that said Apgar Brothers completed their work under said agreement and that there remains due under said agreement, for balance on the contract price thereof, and for extras, the sum of five hundred and forty-eight
40 dollars and thirty cents, and that said work was com-

Answer of Larrabee—Harris vs. Larrabee, et als.

pleted and the money due thereon prior to the twentieth day of November, Nineteen Hundred and Seven.

And this defendant further answering says that as to whether complainant refused to pay over said balance due as aforesaid until the said Apgar Brothers should furnish complainant with a release of lien from all who might have a lien on the building by reason of work done or materials furnished, for the erection or construction thereof, and whether said release of lien so required as aforesaid was duly furnished the complainant by said firm of Apgar Brothers, duly verified on the twentieth day of November, Nineteen Hundred and Seven, this defendant has no knowledge or information sufficient to form a belief and would leave the complainant to his proofs. 10

And this defendant further admits that the said sum of Five Hundred and Forty-Eight Dollars and Thirty Cents has not been paid to the said firm of Apgar Brothers, as set out in said bill of complaint, but whether the same was not paid on account of the serving of certain notices and other papers on the complainant, as hereinafter noted, this defendant has no knowledge and would leave the complainant to his proofs. 20

And this defendant further answering says that as to whether on the Twenty-first day of November, Nineteen Hundred and Seven, the defendant, William E. Tuttle, Jr., and Arthur Tuttle, partners as Tuttle Brothers, served a notice on the complainant, claiming that the sum of Seven Hundred and Twenty-seven Dollars and Sixty-five Cents for materials furnished the said Apgar Brothers, in the erection of said house was due and owing to them from said Apgar Brothers, and notifying the complainant to retain the said amount from the amount owing by the complainant to the said Apgar Brothers, a copy of which notice is purported to be annexed to said bill, and marked Exhibit A and on the following day service of said notice the com- 30 40

Answer of Larrabee—Harris vs. Larrabee, et als.

plainant received a notice or letter from said firm of Tuttle Brothers in relation to said release of lien, claiming that the said release was obtained by fraud, a copy of which said letter is purported to be annexed to said bill, and marked Exhibit B, this defendant has no knowledge and will neither admit or deny the same, but leaves said complainant to his proofs.

- 10 And this defendant further answering says that as to whether on November Twenty-Second, Nineteen Hundred and Seven, the complainant received from the defendant, J. D. Loizeaux Lumber Company, a notice claiming that the said release of lien was obtained by false and fraudulent representations, a copy of which notice is purported to be annexed to said bill and marked Exhibit C, this defendant has no knowledge and neither admits nor denies the same but leaves the complainant to his proofs.

- 20 And this defendant further answering says, that he admits that he served a notice on said complainant, claiming that Five Hundred and Forty-Three Dollars was due him from said Apgar Brothers, for material and labor furnished them in the erection of said house and notifying the complainant to retain the amount from the amount due by the complainant to said firm of Apgar Brothers, a copy of which notice is duly annexed to said bill and marked Exhibit D, but complainant alleges that in serving said stop notice he did so
- 30 under wrongful information given him that the contract referred to in said bill of complaint between the complainant and said firm of Apgar Brothers had been duly filed in the office of the Clerk of Middlesex County.

- This defendant further answering admits that on the twenty-third day of November, Nineteen Hundred and Seven, the complainant served three notices on the said Apgar Brothers, respectively setting forth the receipt and copy of the three notices hereinbefore referred to as having been respectively received from
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Answer of Larrabee—Harris vs. Larrabee, et als.

Tuttle Brothers, J. D. Loizeaux Lumber Company, and this defendant, and that on the twenty-sixth day of November, then instant, this defendant served on the complainant an assignment made by said firm of Apgar Brothers of all their rights, title and interest, in and to said contract made by said firm of Apgar Brothers with the complainant, together with the moneys due thereon, a copy of which said assignment is duly annexed to said bill of complaint and marked Exhibit E, and on the twenty-seventh day of November, instant, this defendant, through his attorney, William M. Stillman, caused an action on contract to be instituted in the Supreme Court of New Jersey, against the complainant, based on said assignment, to recover the amount due on said contract made by the complainant with said Apgar Brothers, and that the summons and declaration were personally served on complainant, on November Twenty-Ninth, on which summons and declaration was endorsed the usual notice to file an affidavit of merits within ten days after service thereof, and a plea or demurrer within twenty days after service thereof, or in default thereof judgment by default would be entered against the complainant. 10 20

This defendant further answering admits that a meeting of said defendants, J. D. Loizeaux Lumber Company, Tuttle Brothers and this defendant, was held at the office of complainant's solicitor, J. Henry Crane, in said city of Plainfield, on November Twenty-Sixth, the instant, called at the instance of said complainant, to secure an amicable adjustment of the matters in dispute, and that no settlement or adjustment was made or could be made at said meeting and that at said meeting this defendant did claim priority in payment as to said sum of money in said bill mentioned. 30

And this defendant further answering says that as to the matters set forth in complainant's supplemental bill that the said firm of Tuttle Brothers have caused 40

Answer of Larrabee—Harris vs. Larrabee, et als.

an action in contract on mechanics lien to be instituted in the Circuit Court of Middlesex County, in this state, against the complainant as owner, based on their claim for moneys due from the builder as set forth in the original bill of complaint, and that the summons in said action was served on the complainant by the Sheriff of Middlesex County on the eleventh day of December, 10 then instant, this defendant has no knowledge and will neither admit nor deny the same and will leave the complainant to his proofs.

And this defendant further answering says that he admits that on the Fifth day of December, Nineteen Hundred and Seven, the complainant deposited the said money in this court, and that an injunction issued pursuant to said order returnable January Sixth, instant, and that subpoenas to answer directed to all of said defendants were also issued returnable as in said bill 20 mentioned, and were duly served by the Sheriff of Middlesex County as therein set forth.

And this defendant now and at all times hereafter saving and reserving to himself all and all manner of exception to the many errors, imperfections and uncertainties in the bill and supplemental bill of complaint contained for further answer thereto or unto such part thereof as this defendant is advised is or are material for him to answer, further answering says, that after serving said stop notice on said complainant as in said 30 bill mentioned he caused a search to be made in the office of county clerk of Middlesex County, which said search was made by the Clerk thereof, to see if the contract referred to in complainant's bill of complaint between said complainant and said firm of Apgar Brothers, to construct said house, had been filed therein, with the result that he ascertained the fact to be, as appears by the deposition of said County Clerk, hereto annexed, and forming part of this answer, that no contract whatever had been filed in said office between said 40 complainant and said firm of Apgar Brothers, and that

Answer of Larrabee—Harris vs. Larrabee, et als.

said building had been erected without filing the contract therefore or the specifications thereof, in said office.

And this defendant further answering says, that after finding that no contract had been filed for the erection of said house between said firm of Apgar Brothers and said complainant he secured from said firm of Apgar Brothers for full value received an assignment of all their right, title, and interest in said contract with all moneys due or to become due thereunder, and that a true copy thereof is duly annexed to the complainant's bill and that the true consideration of said agreement, as appears by the affidavit of 10

Apgar, one of the firm of said Apgar Brothers, hereto annexed and forming a part of this answer, was that the same was given in payment for the heating, plumbing and tinning work, done by this defendant on said house, including both the labor and material therefore, and for which this defendant has received not one cent in payment, from said firm of Apgar Brothers or anyone else, and this defendant denies any and all fraud or want of good faith in said transaction, but on the contrary avers that said assignment was bona-fide and made for full value received, and that he is the true, sole and absolute owner by virtue of said assignment, of all the moneys due and unpaid under said contract from said complainant to said firm of Apgar Brothers. 20

And this defendant further answering says that the complainant is not entitled to a bill of interpleader in this cause and is not entitled to enjoin this defendant from continuing his action at law against said complainant for the moneys due to him by virtue of said assignment, because said complainant is interested in the fund in question, for the reason that he has not yet paid to his said contractors, Apgar Brothers, the full amount due them for the construction of said house, being the last payment above set forth due under said 30 40

Answer of Larrabee—Harris vs. Larrabee, et als.

contract and for further reason that the defendant, J. D. Loizeaux Lumber Company, have made no claim whatsoever against the fund in question either before or since bill filed, and that the defendants, Tuttle Brothers, do not look to this fund in question, for payment of their claim, but that their claim is much larger than the fund in question, and for which they have
 10 filed a lien against the house and premises in question, as admitted and set forth in complainant's supplemental bill of complaint, and that said firm of Tuttle Brothers look to and have a right to look to payment of their claim to the house in question and can not be confined to the fund in question.

And this defendant further answering says that all the stop notices served on complainant in this cause, copies of which are attached to said bill of complaint, are void, because the contract for building between said
 20 complainant and said firm of Apgar Brothers, referred to in said bill of complaint, was not filed in the office of the County Clerk of the county where said building and lands in question were situated, and by virtue thereof the said complainant was put to no hazard in paying this defendant the said sum of five hundred and forty-eight dollars and thirty cents, and that said defendants, Tuttle Brothers and J. D. Loizeaux Lumber Company had no lien either in law or in equity on said fund of five hundred and forty-eight dollars and thirty
 30 cents, but that the same was the sole property of this defendant, by virtue of said assignment.

And this defendant further answering says that the complainant is not entitled to a bill of interpleader in this cause because the only defendant who filed a stop notice against the claim in question has since filed a mechanics' lien against the premises and is seeking to recover his money in a court of law, and that if said complainant has any defence to the claims of said defendants, Tuttle Brothers and J. D. Loizeaux Lumber
 40 Company, he has full and complete remedy in a court

Answer of Larrabee—Harris vs. Larrabee, et als.

of law, and that this court has no jurisdiction whatsoever as to the said defendants, J. D. Loizeaux Lumber Company and Tuttle Brothers.

And this defendant submits to this Honorable Court that all and every of the matters in said complainant's bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the said complainant is not entitled to any relief in this court; and this defendant hopes he shall have the same benefit of this defence as if he had demurred to the said complainant's bill. 10

All of which matters and things this defendant is ready and willing to aver and maintain and prove as this Honorable Court shall direct and this defendant humbly prays that the injunction issued in this cause against him may be dissolved with costs and that he may be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained. 20

WILLIAM M. STILLMAN,
Solicitor for complainant.

STATE OF NEW JERSEY, }
COUNTY OF UNION } SS.

Willard L. Larrabee the defendant in the foregoing answer, being first duly sworn on his oath says, that the matters and things set forth and contained in the foregoing answer so far as relate to his own acts and deeds are true, and so far as they relate to the acts and deeds of other persons, he believes them to be true, and further that deponent was the sub-contractor employed by Theodore Apgar and George Apgar partners as Apgar Brothers, a firm of builders and contractors doing business at the borough of Dunellen in the county of Middlesex and State of New Jersey, and who had the contract to erect the house and stable for the complainant, Benjamin S. Harris, on his lot on Clinton 30 40

Answer of Larrabee—Harris vs. Larrabee, et als.

Avenue, near the city line of the city of Plainfield, New Jersey, but situate in the township of Piscataway, Middlesex County, to do the heating, plumbing and tinning work on said house of complainant near the city line of the city of Plainfield, New Jersey, described in the bill of complaint: that deponent made a contract with said firm of Apgar Brothers to do said work on or about
10 the twenty-fourth day of June, Nineteen Hundred and Seven, for the sum of Five Hundred and Seventeen Dollars and Forty Cents, and that in addition to the completion of said work according to his contract on said house he also performed extra work to the amount of Twenty-Three Dollars, all of which work and labor was performed and material furnished between said dates of June twenty-fourth and the filing of the bill in this cause: that deponent never received one cent for any of such contract or extras: that under the sup-
20 position that a contract had been filed at the clerk's office in Middlesex County he served the stop-notice described in and attached to said bill of complaint: that subsequently he caused a search to be made in said Clerk's office as to whether said contract with the specifications had ever been filed therein, and on learning from said Clerk that none had been filed, he secured from the said firm of Apgar Brothers an assignment of the contract between them and said complainant for the construction of said house: that at the time
30 said assignment was secured, said house was fully completed and the amount due the said contractors from the owner was the sum of Five Hundred and Forty-Eight Dollars and Thirty Cents, as set out in said bill and that said firm of Apgar Brothers thereupon as a means of payment of defendant's claim as sub-contractor for his work, labor and material on said house and in full payment thereof, together with interest that may have accrued thereon and other assigned said claim to this deponent together with all their rights in
40 and under said contract to deponent: that said trans-

Answer of Larrabee—Harris vs. Larrabee, et als.

action was without fraud and made in good faith and for full value received and that deponent is now the owner thereof in his own right, and entitled to stand in the shoes of said Apgar Brothers as to said last payment of Five Hundred and Forty-Eight Dollars and Thirty Cents and is the true and only owner thereof.

Sworn and subscribed to before
me, this January 3d, 1908.

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W. L. LARRABEE.

Arthur J. Hamley,
Notary Public.

STATE OF NEW JERSEY, {
COUNTY OF MIDDLESEX { SS.

'George Apgar being the first duly sworn says that he is a member of the firm of Apgar Brothers who constructed the house on Clinton Avenue, near the city line of Plainfield, for Benjamin S. Harris owner: that on or about the twenty-fourth day of June last past he made a contract with said Willard L. Larrabee to do the heating, plumbing and tinning work on said house for the sum of Five Hundred and Seventeen Dollars and Forty Cents: that said Larrabee fully performed said work to the satisfaction of said firm and to the owner, and agreeably to his contract and also extra work thereon to the amount of twenty-three dollars: that said firm of Apgar Brothers did not pay said Larrabee one cent on account of said contract or extras, and as a means of payment therefore and for other work done for them by said Larrabee, they assigned said contract between themselves and said Benjamin S. Harris for the construction of said house with all moneys due or to become due thereunder to said Larrabee as in said bill of complaint mentioned, in good faith and without fraud, and for the express purpose of paying him for his work, labor and material per-

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Answer of Larrabee—Harris vs. Larrabee, et als.

formed and furnished in and about said house of complainant and that said firm of Apgar Brothers have no remaining interest whatever in said contract or the moneys due thereunder, said assignment being absolute and complete and given for full consideration and as a strict business transaction.

Sworn and subscribed to before

10 me this third day of January,
1908.

GEORGE APGAR.

ARTHUR J. HAMLEY,
Notary Public.

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Affidavit of County Clerk Stating No Contract Filed

IN CHANCERY OF NEW JERSEY.

Between

BENJAMIN S. HARRIS,

Complainant,

and

WILLARD L. LARRABEE et als.,

Defendants.

On Bill for
interpleader. 10STATE OF NEW JERSEY, }
COUNTY OF MIDDLESEX. } SS.

John H. Conger being first duly sworn according to law, on his oath says, that he is the County Clerk of Middlesex County, and that has made search in his office for the purpose of ascertaining whether any building contract, with or without specifications was ever filed therein for construction of a house for Benjamin S. Harris owner and Theodore Apgar and George Apgar, partners as Apgar Brothers, builders, for construction of a house on Clinton Avenue near the city line of the city of Plainfield, in the township of Piscataway, in said county of Middlesex, with the result that deponent states that no such contract, with or without specifications, has ever been filed in his office, during three years last past. 20

Sworn and subscribed to before
me this third day of January,
1908.

JOHN H. CONGER.

ROBT. W. HELM,
Notary Public, N. J.

Answer of Tuttle Bros.—Harris vs. Larrabee, et als.

(Filed Jan. 21, 1908.)

IN CHANCERY OF NEW JERSEY.

10	Between, BENJAMIN S. HARRIS, Complainant, and WILLARD L. LARRABEE, et als., Defendants.	} On Bill of interpleader.
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Answer of defendants, William E. Tuttle, Jr., and Arthur D. Tuttle, partners, etc.

The answer of William E. Tuttle, Jr., and Arthur D. Tuttle, partners trading as Tuttle Brothers, to the bill of complaint and to the supplemental bill of Benjamin S. Harris, complainant.

These defendants answering say: They admit that the complainant is a citizen and resident of the Township of Piscataway, County of Middlesex and State of New Jersey, and that at the time set forth in said bill, or on some other day, the said complainant made a certain agreement with the firm of Apgar Brothers, composed of Theodore Apgar and George I. Apgar, in and

30 by which said agreement the said Apgar Brothers were to build a certain house for the complainant on Clinton Avenue, in the Township of Piscataway, near the City limits of Plainfield, in the County of Union, for a certain sum of money, therein specified.

These defendants further answering admit that the said Apgar Brothers have completed their work under the said agreement for balance of contract price and for extra work, and as to when the said money became due, these defendants have no knowledge, but leave

40 the complainant to his proof.

Answer of Tuttle Bros.—Harris vs. Larrabee, et als.

These defendants further answering admit that the complainant has refused to pay over the money due to the said Apgar Brothers until the said Apgar Brothers should furnish complainant with a release of lien from all who might have a lien on the building by reason of work done or materials furnished for the erection or construction thereof, and that said release of lien was duly furnished the complainant by said Apgar Brothers and duly verified as stated in said bill. 10

These defendants further answering admit that no money has been paid by the complainant to the said Apgar Brothers since the said release was delivered to them, and believe it to be true that the complainant refused to pay said moneys was on account of the serving of certain notices and other papers on the complainant as stated in said bill.

These defendants further answering admit that on the twenty-first day of November, Nineteen Hundred and Seven, these defendants served a notice on the complainant claiming that the sum of seven hundred and twenty-seven dollars and sixty-five cents (\$727.65) for materials furnished the said Apgar Brothers in the erection of the said house was due and owing them from the said Apgar Brothers, and notifying the complainant to retain the said amount from the amount owing by the complainant to the said Apgar Brothers, a copy of which notice is attached to the said bill and marked Exhibit "A," and that on the day following the service of the said notice the complainant received a letter from these defendants in relation to the said release of lien, claiming that the said release was obtained by fraud and that Exhibit "B" annexed to the bill of complaint is a copy of the said letter. 20 30

As to whether on the twenty-second day of November, Nineteen hundred and seven, or on any other day, the complainant received a notice from the defendant J. D. Loizeaux Lumber Company, claiming that the said release of lien was obtained by false and fraudulent 40

Answer of Tuttle Bros.—Harris vs. Larrabee, et als.

lent representation, these defendants have no knowledge other than that gained from a perusal of the bill of complainant and leave the complainant to his proof.

As to whether at any time the complainant received a notice from the defendant, Willard L. Larrabee, to the tenor and effect as set forth in paragraph eight of the bill of complaint, these defendants have no knowl-
 10 edge other than is gained from a perusal of the bill of complaint and leave the complainant to his proof.

As to whether at any time the complainant served notice on the said Apgar Brothers setting forth the receipt of a copy of the three notices received by complainant from Tuttle Brothers, J. D. Loizeaux Lumber Company and Willard L. Larrabee, these defendants have no knowledge other than is gained from a perusal of the complainant's bill and leave the complainant to his proof.

As to whether at any time the defendant, Willard L. Larrabee, served on the complainant an assignment made by the said Apgar Brothers of all their right, title and interest in the said contract made by the said Apgar Brothers with the complainant, together with the moneys due thereon, these defendants have no knowledge other than is gained from a perusal of the bill of complaint and leave the complainant to his proof.

These defendants further answering admit that a
 30 meeting of these defendants, Willard L. Larrabee, J. D. Loizeaux Lumber Company, Apgar Brothers and the complainant, was held at the office of the complainant's solicitor, J. Henry Crane, in the City of Plainfield, on the twenty-sixth day of November, as set forth in the bill of complaint, and admit that at said meeting they did claim priority as to the right to any balance due to Apgar Brothers from the complainant.

As to the action at law, alleged to have been brought by the defendant, Willard L. Larrabee,
 40 against the complainant these defendants have no

Answer of Tuttle Bros.—Harris vs. Larrabee, et als.

knowledge, except as is gained from a perusal of said bill, and leave the complainant to his proof.

For answer to the supplemental bill filed by the complainant in this cause these defendants admit that the complainant deposited in this court the sum of money as stated in said bill; that subpoenas were issued, returnable as stated therein, and that a subpoena to answer was served on these defendants at the time 10 and in the manner stated in said bill.

And these defendants further answering admit that on the tenth day of December, Nineteen hundred and seven, they, through their attorney, instituted an action in contract on mechanics lien, in the Circuit Court of the County of Middlesex, in this State, against the complainant as owner, based on their claims for moneys due from the builder as set forth in the original bill of complaint herein, and that the summons was served on the complainant at the time and in the manner 20 stated.

These defendants further answering say, that at the time of the filing of the original bill of complaint herein, the time within which these defendants might file their lien claim against the lands and premises of the complainant for the money so due to them from the said firm of Apgar Brothers, has not expired, and that at the time of serving upon the complainant the notices of which exhibits "A" and "B" are copies, these defendants were not aware that the contract for the 30 erection of the said building had not been filed in the office of the Clerk of the County of Middlesex, and that immediately upon learning that said contract had not been filed these defendants filed their lien claim and instituted their action upon the said claim as set forth in the said supplementary bill.

And these defendants further answering say that their claim against Apgar Brothers on account of materials furnished for said building has never been disputed, either as to the correctness of the same or to the 40

Answer of Tuttle Bros.—Harris vs. Larrabee, et als.

fact that the materials charged for therein were used in the erection of the said building of the complainant, and that the release of lien heretofore signed by these defendants affecting the said premises was obtained by the said Apgar Brothers by fraudulent representations and that no consideration for the said release was ever received by these defendants, either from Apgar Brothers or from the complainant nor has the complainant ever paid any money to Apgar Brothers or either one of them, or to these defendants, since the signing of the said release by these defendants.

And these defendants further answering say, that they do not look to the fund in question for the payment of their claim but that they look to the lands and premises of the complainant described in the bill of complaint and in their lien claim for payment of their said claim against Apgar Brothers, and they admit that their notice, of which schedule "A" annexed to the original bill of complaint is a copy, is void and of no effect.

And these defendants further answering say that the complainant is not entitled to a decree compelling these defendants to interplead with the other defendants in said bill named, because it appears from the original bill and from the supplemental bill that the only defendant who claims any right or lien to or upon the fund of money in question is the defendant, Willard L. Larrabee.

And these defendants submit that the complainant is not indifferent between this defendant and the defendant Willard L. Larrabee, because these defendants claim a lien upon defendant's premises for an amount larger than the fund at issue in this suit, and that all and every of the matters in the said complainant's bill and in the supplemental bill mentioned and complained of, are matters which may be tried and determined at law and with respect to which the complainant is not entitled to any relief in this court.

Answer of Tuttle Bros.—Harris vs. Larrabee, et als.

And these defendants hope they shall have the same benefit of this defense as if they had demurred to the complainant's bill and supplemental bill.

All of which matters and things these defendants are ready and willing to aver, maintain and prove as this honorable court shall direct.

And these defendants humbly pray that the injunction issued in this cause against them may be dissolved with costs; and that they may be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained. 10

PAUL Q. OLIVER,

Solicitor for defendants, William E. Tuttle, Jr., and Arthur D. Tuttle, partners trading as Tuttle Brothers.

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**Order for Continuing Motion and for Leave to Amend
Answer—Harris vs. Larrabee, et als.**

(Granted, but not filed.)

IN CHANCERY OF NEW JERSEY.

10	Between BENJAMIN S. HARRIS, Complainant, and WILLARD L. LARRABEE, et als., Defendants.	} On Bill, etc.
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**ORDER CONTINUING MOTION AND FOR LEAVE
TO AMEND ANSWER.**

20 Application being made to the Court by Paul Q. Oliver and Samuel Koestler of counsel for Tuttle Brothers, in the presence of W. S. Angleman, of counsel with the complainant, to dismiss the bill of complaint and dissolve the injunction:

It is thereupon on this tenth day of March, 1908, ordered that said motion and application be continued to the time of final hearing in the above stated cause, and that the defendants Tuttle Brothers have leave to amend their answer to the bill of complaint in the

30 above cause, within twenty days from the date hereof. Costs of this application to abide the event of this suit.

Respectfully advised,

JOHN R. EMERY,
Vice Chancellor.

**Amended Answer of Tuttle Bros.—Harris vs. Larrabee,
et als.**

(Filed March 24, 1908.)

IN CHANCERY OF NEW JERSEY.

Between BENJAMIN S. HARRIS, Complainant, and WILLARD L. LARRABEE, et als., Defendants.	} On Bill, etc.	10
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Amended answer of defendants, Tuttle Brothers.

The amended answer of William E. Tuttle, Jr., and Arthur D. Tuttle, partners trading as Tuttle Brothers, 20 to the bill of complaint and the supplemental bill of the complainant, Benjamin S. Harris.

These defendants answering so much of said bill of complaint and the supplemental bill as they are advised is necessary and material for them to make answer thereto, answering say, that they admit the matters and facts set forth in paragraphs 1 and 2, but they aver, charge and insist that said contract, mentioned in the second paragraph, was never filed in the office of the Clerk of the County of Middlesex, in the manner 30 required by an Act of the Legislature of the State of New Jersey, entitled, "An Act to secure to Mechanics and others payment for their labor and materials in erecting any building," (Revision of 1898), and the supplements and amendments thereto.

That they admit that said Apgar Brothers have completed their work under said agreement, and that a balance of said contract price remains due and owing to them, but that these defendants have no knowledge of the amount, except that the contract states the fi- 40

**Amended Answer of Tuttle Bros.—Harris vs. Larrabee,
et als.**

nal payment to be the sum of Six Hundred Dollars, instead of Five Hundred and Forty-Eight Dollars and Thirty Cents as alleged in said bill of complaint; that these defendants believe it to be true that the said complainant refused to pay to Apgar Brothers said sum of money, and aver, and in fact say, that they did execute a release of lien, as mentioned in said bill of

10 complaint, but that said release was obtained from them by certain false and fraudulent pretenses and representations, as hereinafter more specifically set forth; that the matters and facts set forth in paragraph 6 are substantially true; that these defendants have no knowledge of the matters and facts set forth in paragraphs 8, 9, 10 and 12, except as contained in said bill of complaint, and leave the complainant to make such proof thereof, as he is advised is material and necessary in the premises.

- 20 These defendants admit that there was a meeting, as stated in paragraph 11 of said bill of complaint, and that at that time these defendants claimed priority and the first right to said sum of money; they insist that at the time of said meeting they had no knowledge that the contract, mentioned in the second paragraph of said bill of complaint, had not been filed as required by law.

- And these defendants further answering say that they admit that on the tenth day of December, Nine-
- 30 teen hundred and seven, they did file, with the Clerk of the County of Middlesex, a lien claim against the building erected for the complainant, by said Apgar Brothers in pursuance of the agreement mentioned in the second paragraph of the bill of complaint, and against the lands upon which said building was erected; and that under said lien claim a summons was issued on said day, and the issuance thereof endorsed on said lien claim, and said summons was served upon the defendants therein, on the eleventh day of December,
- 40 Nineteen hundred and seven; that in said suit the said

**Amended Answer of Tuttle Bros.—Harris vs. Larrabee,
et als.**

complainant, Benjamin S. Harris, was made a defendant, as owner, and the said Theodore Apgar and George I. Apgar, partners trading as Apgar Brothers, were made defendants as builders; that a declaration was filed in due course of law, and the said complainant, Benjamin S. Harris, did file three certain pleas thereto, to wit, a plea for general issue, the statutory plea that the building was not subject to lien, and a 10
plea setting up the release, mentioned in the fourth paragraph of the bill of complaint, and claiming that said release was an absolute bar to the lien suit of these defendants, and defeated their right to lien; that issue was joined upon said pleas, setting up fraud in the obtaining of said release, as hereinafter set forth.

That these defendants aver, charge and insist that the said release, mentioned and set forth in said fourth paragraph of the complainant's bill of complaint, was obtained from them by Apgar Brothers under the fol- 20
lowing false pretenses and representations; that on the eleventh day of November, Nineteen hundred and seven, the said Theodore Apgar and George I. Apgar came to the office of these defendants, in the town of Westfield, and there met this defendant, the said Arthur D. Tuttle, and explained to him that there was about Five hundred and fifty dollars still remaining due and owing to them, from the complainant, for the erection and construction of the building, mentioned in the second paragraph of the bill of complaint; that said Har- 30
ris would not pay to them, the said Apgar Brothers, the said moneys until they had obtained a release of lien from these defendants; that these defendants previously, and at that time had expressed their unwillingness to execute said release of lien, unless they received some money on account of the payment of their bill, and thereupon, on the eleventh day of November, Nineteen hundred and seven, at the office of these defendants, the said Theodore Apgar and George I. Apgar did state to the defendant, Arthur D. Tuttle that if he 40

**Amended Answer of Tuttle Bros.—Harris vs. Larrabee,
et als.**

would sign said release for his firm, they, the said Apgar Brothers, would take and deliver said release to the said complainant, and upon so delivering said release to said complainant, he would pay to said Apgar Brothers the said sum of Five hundred and fifty dollars immediately, and they, the said Apgar Brothers, would forthwith pay to these defendants out of said
10 moneys, the sum of five hundred dollars; that relying upon said representations, this defendant, Arthur D. Tuttle, for the firm of Tuttle Brothers, did thereupon sign and execute said release of lien, and give the same to Apgar Brothers, with the understanding that upon the release executed by these defendants, or the said Arthur D. Tuttle, for these defendants, they, the said Apgar Brothers, were to receive from Benjamin S. Harris immediately the sum of Five hundred and fifty dollars, and forthwith pay to these defendants the sum
20 of Five hundred dollars on account of the indebtedness of Apgar Brothers to these defendants; that these defendants, or the said Arthur D. Tuttle, believed the representations made by said Apgar Brothers, to be true and relied upon the same, but these defendants charge and insist that at the time said Apgar Brothers made said representations they, the said Apgar Brothers, knew the same to be false and fraudulent, and they, the said Apgar Brothers, knew that the said Benjamin S. Harris not only required the signature of
30 these defendants, but of all other persons who had furnished materials upon said building; that on the eighteenth day of November, Nineteen hundred and seven, these defendants caused a notice to be served upon said complainant, stating that there was due to them, from said Apgar Brothers, the sum of Seven hundred and twenty-seven dollars and sixty-five cents, for materials furnished and used in the erection of complainant's building; that demand had been made therefor upon Apgar Brothers and payment refused; and
40 that on the twenty-first day of November, Nineteen

**Amended Answer of Tuttle Bros.—Harris vs. Larrabee,
et als.**

hundred and seven, upon ascertaining the fraud practised upon these defendants, by said Apgar Brothers, the defendants did immediately write a letter to said Benjamin S. Harris informing and advising said Harris of the fraud practiced by said Apgar Brothers upon these defendants did immediately write a letter to said S. Harris, not to pay out any moneys on account of the erection and construction of his said house; copies of which notice and letter are annexed to the bill of complaint as Exhibits "A" and "B." 10

That these defendants aver and insist that the release, executed by them by virtue of the false representations made by Apgar Brothers, was not delivered by said Apgar Brothers to the said complainant until on or about the twentieth day of November, Nineteen hundred and seven; and that the letter written by these defendants, to the said Harris, was received by him on the following day; that the said Harris did not pay out any money to these defendants, to Apgar Brothers or to any other person by virtue of the execution of said release, but on the contrary, the said Benjamin S. Harris filed the bill of complaint in this suit shortly after the second day of December, Nineteen hundred and seven, and therefore that it is unequitable and unjust that the said Harris should be permitted to restrain these defendants from the prosecution of their lien claim suit, or to plead as a defense thereto the said release, so fraudulently obtained, and for which no consideration was given. 20 30

And these defendants further aver that on the eighteenth day of March, Nineteen hundred and eight they did file in this honorable Court their bill of complaint against the said Benjamin S. Harris and Theodore Apgar and George I. Apgar, partners trading as Apgar Brothers, setting forth the facts in reference to the obtaining of said release of lien, and the status of said lien claim suit, and praying that said release might be set aside as fraudulent, and the said Harris enjoined

**Amended Answer of Tuttle Bros.—Harris vs. Larrabee,
et als.**

and restrained from offering the same in evidence in said lien claim suit, or from insisting that said release is a bar to the lien claim of these defendants; that process of subpoena has been issued in said suit, and these defendants insist that the issue to be raised, under their said bill of complaint, should be first determined before final hearing upon the bill of complaint, of said complainant herein.

10

That these defendants do not believe that the stop notice so served upon the said complainant on the eighteenth day of November, Nineteen hundred and seven, creates any lien or claim against the fund of money in Court, but they are advised by counsel that the question is one of doubt and difficulty, and they therefore pray that this honorable Court may adjudicate and decree whether or not they are proper parties defendant in said interpleader suit, and whether, by reason of the facts that the contract was not filed, and that they have fraudulently been induced to execute a release and have served a stop notice are sufficient to entitle them to any claim against the funds in Court; they further say that by filing this answer they do not intend to elect that their remedy is against the funds in Court, instead of on the lien claim that they filed, but they leave all of said matters for the determination of this honorable Court.

20

And these defendants say that the matters and facts set forth in said bill of complaint and supplemental bill are not sufficient in equity to entitle the said complainant to maintain his bill of complaint against these defendants, and they pray the same benefits as if they had demurred to the said bill of complaint and supplemental bill, and that they may be hence dismissed and the said injunction dissolved, with their costs and charges in this behalf most wrongfully sustained.

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PAUL Q. OLIVER,

Solicitor of defendants, Tuttle Brothers.

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Order to Admit Trustees—Harris vs. Larrabee, et als.

(Filed July 22, 1908.)

IN CHANCERY OF NEW JERSEY.

Between

BENJAMIN S. HARRIS,

Complainant,

and

WILLARD L. LARRABEE,

et als.,

Defendants.

10

Order.

This matter being opened to the Court, by Francis J. Blatz, Solicitor for William Newcorn, Alvah H. Gray and Mulford Scudder, Trustees of the Estate of Theodore Apgar and George I. Apgar, individually, and as partners trading as Apgar Brothers, Bankrupts, the petitioners above named, and it being represented that the defendant, Willard L. Larrabee, has assigned all his right, title and interest in and to the above suit, to the Board of Trustees of Apgar Brothers, Bankrupts as aforesaid; and it appearing since the filing of the Bill of Interpleader in this cause by Benjamin Harris; the said Theodore Apgar and George I. Apgar, the Assignors of Willard L. Larrabee, have been adjudicated Bankrupts, and that William Newcorn, Alvah H. Gray and Mulford Scudder have been appointed Trustees of the Bankrupts Estate, and have qualified as Trustees in accordance with said appointment;

30

IT IS on this Twenty-first day of July, A. D. 1908, ordered that the said William Newcorn, Alvah H. Gray and Mulford Scudder, Trustees of the Estate of Theodore Apgar and George I. Apgar, individually and as partners trading as Apgar Brothers, Bankrupts, be ad-

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Order to Admit Trustees—Harris vs. Larrabee, et als.

mitted as parties, in said suit in place of the defendant, Willard L. Larrabee, and that they be hereby authorized to appear in said suit, subject to all the rights and interests that the said Willard L. Larrabee may have in said suit, and that they may be permitted to file such answer or answers to the said bill of complaint as filed, as they shall see fit.

10 Respectfully advised,

FREDERIC W. STEVENS, V. C.

MAHLON PITNEY, C.

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Answer of Trustees—Harris vs. Larrabee, et als.

(Filed Aug. 28, 1908.)

IN CHANCERY OF NEW JERSEY.

Between

BENJAMIN S. HARRIS,

Complainant,

and

WILLARD L. LARRABÉE

et als.,

Defendants.

10

On Bill, etc.
Answer.

The answer of William Newcorn, Alvah H. Gray and Mulford Scudder, Trustees of the Estate of Theodore Apgar and George I. Apgar, individually, and as partners trading as Apgar Brothers, Bankrupts, they, the said trustees, having been admitted as a party defendant in this cause and permitted to file an answer by order of this Court, made on the twenty-first day of July, one thousand nine hundred and eight, is as follows:

20

These defendants answering admit paragraphs one and two of the bill of complaint.

These defendants further answering as to paragraph three of the bill of complaint admit that the building is completed and that there was money due Apgar Brothers at the time of the filing of this bill, but these defendants say it is largely in excess of the amount of five hundred and forty-eight dollars and thirty-eight cents (\$548.38) as set forth in the bill.

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These defendants further answering as to paragraph four of the bill of complaint admit that the said releases were furnished by the said Apgar Brothers to the said complainant.

40.

Answer of Trustees—Harris vs. Larrabee, et als.

These defendants further answering as to paragraph five of the bill of complaint admit that the said amount of five hundred and forty-eight dollars and thirty-eight cents (\$548.38) or any other amount due as the last payment on said house has not been paid to said Apgar Brothers or their assigns or these defendants.

These defendants further answering as to paragraph six of the bill of complaint say, that they know nothing of their own knowledge of the facts set forth in paragraph six, but understand on information and belief that Tuttle Brothers did serve such a notice as is therein described by these defendants. That these defendants, or complainant or Willard L. Larrabee would not in any manner be affected by the fraud of said Apgar Brothers, if any, because they are innocent parties without notice of any fraud of said Apgar Brothers.

20 These defendants further answering as to paragraph seven of the bill of complaint say that they have no knowledge of any fraud of the Apgar Brothers, if any there was, in the obtaining of the release from the said J. D. Loizeaux Lumber Company and they are, therefore, not affected by the same, if it be true there was any fraud on the part of the said Apgar Brothers in obtaining the release from the said J. D. Loizeaux Lumber Company; and charge that the statements made to said Tuttle Brothers and J. D. Loizeaux Lumber Company do not amount to fraud and are insufficient to avoid the release signed by them.

30 These defendants further answering as to paragraphs eight and nine of the bill of complaint admit them to be true.

These defendants further answering as to paragraph ten of the bill of complaint say they know nothing of the matter therein contained.

These defendants further answering as to paragraph twelve of the bill of complaint say they admit 40 it to be true.

Answer of Trustees—Harris vs. Larrabee, et als.

These defendants further answering as to paragraph thirteen of the bill of complaint say that the remedy of the complainant is clear in that the complainant has the release of all the persons that furnished materials or labor on the said house for the said Apgar Brothers and that said release was delivered to complainant without any notice of fraud, and the said sum of money due and owing to said Apgar Brothers 10 under the contract should have been paid over to the said Willard L. Larrabee, assignee of the said Apgar Brothers, which said moneys now belong to these defendants.

These defendants further answering say that subsequent to the twenty-second day of November, nineteen hundred and seven, the date of the assignment, in writing by said Apgar Brothers to said Willard L. Larrabee of the moneys due from Benjamin S. Harris, the complainant, to said Apgar Brothers, and 20 within four months thereafter, to wit, on the twenty-fourth day of February, nineteen hundred and eight, in the District Court of the United States, for the District of New Jersey, the said Theodore Apgar and George I. Apgar, trading as Apgar Brothers, were adjudged involuntary bankrupts and on the twenty-second day of April, nineteen hundred and eight, at an adjourned meeting of the creditors held at New Brunswick, before James Parker, Esq., referee in bankruptcy; by consent of all the creditors on the day last afore- 30 said, the said James Parker, referee, appointed William Newcorn, Alvah H. Gray and Mulford Scudder trustees of the Estate of Theodore Apgar and George I. Apgar, individually and as partners trading as Apgar Brothers, after which said appointment of the aforesaid trustees and in the month of April, nineteen hundred and eight, the said trustees duly qualified as such trustees and subsequently, to wit, on the thirteenth day of July, nineteen hundred and eight, demanded of the defendant, Willard L. Larrabee, that the 40

Answer of Trustees—Harris vs. Larrabee, et als.

surrender to them all rights under said assignment of Apgar Brothers, and the said Willard L. Larrabee, realizing that the money or rights under the assignment he held of Apgar Brothers of the said money was void and the moneys due thereunder belonged to the trustees of the said Apgar Brothers, he then made an assignment of and surrendered to the defendant all his interest in and to the moneys due from Benjamin Harris to said Apgar Brothers and assigned by said Apgar Brothers, to him, to the trustees in bankruptcy, these defendants, which said assignment was in writing and under seal, reference thereunto had and will fully at large appear, and these defendants beg leave to refer if necessary so to do, a true copy of said assignment is hereto annexed and marked "Exhibit 1."

These defendants further answering say that they claim all the rights, benefits and interest of Willard L. Larrabee, defendant, as set up in his answer in this cause as fully as if the statements in said answer were herein again repeated or incorporated herein.

The defendants further answering say that the bill of complaint shows no equity and the complainant has a full, clear and complete remedy at law and these defendants hope they may have the same benefit of the defense as if they had more formally and technically demurred to the bill of complaint for want of equity.

These defendants further answering say that as to all the matters in the original bill of complaint and the supplementary bill of complaint, that were not specifically answered or admitted, they deny.

And these defendants humbly pray that they may be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

FRANCIS J. BLATZ,

Solicitor for Defendants, William Newcorn, Alvah H. Gray, Mulford Scudder, Trustees, &c.

Exhibit 1

EXHIBIT 1.

That I, Willard L. Larrabee, of the Borough of Dunellen, in the County of Middlesex and State of New Jersey, in consideration of the sum of one dollar and other valuable consideration to me in hand paid, receipt whereof is hereby acknowledged, do hereby assign, transfer and set over to William Newcorn, Alvah H. Gray and Mulford Scudder, Trustees of the estate of Theodore Apgar and George I. Apgar, individually and as partners trading as Apgar Brothers, Bankrupts, and to their assigns, all my right, title and interest in and to the sum of money paid into the Court of Chancery in a suit pending between Benjamin S. Harris, complainant, and Willard L. Larrabee, et als., defendants, on a bill of interpleader, together with all my right, title and interest to a certain contract made by the said bankrupts with Benjamin S. Harris, for the construction of a house on Clinton Avenue, opposite West Eighth street, near the city limits of Plainfield, New Jersey, which right, title and interest was assigned to me by the said Theodore Apgar and George I. Apgar on the 22d day of November, 1907, together with all moneys now due or to become due thereon. 20

And I do hereby authorize and empower the said William Newcorn, Alvah H. Gray and Mulford Scudder, Trustees as aforesaid, to receive the said money and give acquittance therefor and to institute, prosecute such action or actions as may be requisite for the recovery of the aforesaid money due under the said assignment at their own proper costs and charges for the benefit of the estate of said bankrupts. 30

In witness whereof, I have hereunto set my hand and seal this thirteenth day of July, Nineteen Hundred and Eight.

W. L. LARRABEE.

Signed, sealed and delivered in the presence of
BERTHA E. PECK.

Testimony—Harris vs. Larrabee

IN CHANCERY OF NEW JERSEY .

10	Between BENJAMIN S. HARRIS, Complainant, and WILLARD L. LARRABEE, Defendant.
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Transcript of shorthand notes of testimony and proceedings taken in the above entitled cause before Hon. John R. Emery, Vice Chancellor, at Chancery Chambers, Newark, N. J., on March 24, 1909.

20 APPEARANCES:—

Mr. Winfield S. Angleman and Mr. James Henry Crane for complainant.

Mr. Francis J. Blatz for Trustees in Bankruptcy.

Mr. Paul Q. Oliver and Mr. Samuel Koestler for Tuttle Brothers.

BENJAMIN S. HARRIS, sworn,

30 Direct examination by Mr. Angleman:

Q. You are the complainant in this interpleader suit? A. I am.

Q. I show you a paper dated June 26, 1907, purporting to be a contract for the erection of a building, between you and Apgar Brothers, and ask you if that was the contract under which your house in Plainfield was built by Apgar Brothers in 1907? A. Yes, sir.

Q. In that contract I notice that the first payment is \$600, and opposite that there is a cross in pencil;
 40 what does that mean, and who put it there? A. It sig-

Benjamin S. Harris—Direct

nifies that it was checked off as I paid it. Probably this was for the house and barn, not merely for the house.

Q. I show you check of June 24, 1907, for \$600; was that the first payment of \$600? A. Yes, sir.

Q. The second payment noted on the contract is for \$800, and that also has a cross; was that paid? A. Yes, sir.

Q. And the cross put there at the time? A. Yes, sir. 10

Q. That was paid by check August 1, 1907? A. Yes, sir.

Q. The third payment is for \$800, and that also has a cross; was that paid? A. Yes.

Q. I show you check of August 22, 1907, for \$800, and ask if that was the check which paid the third payment? A. Yes, sir.

Q. The fourth payment was for \$900, and that also has a cross; was that paid? A. Yes, sir.

Q. I show you a check dated October 10, 1907, for \$900, and ask if that was the check which paid the fourth payment? A. The \$900 paid the fourth payment. 20

Q. The fifth payment was for \$400, and that also has a cross; was that paid? A. That was paid, yes, sir.

Q. Was that paid by this check which you have just examined, dated November 7, 1907? A. It was.

Q. The last payment under the contract was for \$600; has that been paid? A. No, that has not been paid, except over to the court, with the exception of a part of it. 30

Q. And what part was it? A. \$75.

Q. I show you a check dated November 18, 1907, for \$75; was that a part payment on this last payment of \$600? A. That was a part payment, at the time I received the release for \$75.

The Court: That makes \$3,575 altogether?

Mr. Angleman: Yes, that is right. 40

Benjamin S. Harris—Direct

Q. I show you a paper purporting to be a bill against you from Apgar Brothers for a balance due on contract of \$525, which is the last payment of \$600 less \$75 payment you have testified to, and extras for \$23.-30, making total of \$548.30, and ask you if that is the bill which represents the sum as the balance due on this contract? A. That represents the sum that was
10 for extras \$23.30.

Q. The bill is dated 11-20-07. A. \$23.30 was for extras.

Q. That bill is marked "O.K, Apgar Brothers, 11-20-07;" was that put on in your presence or not? A. I think it was.

Q. Does this sum of \$548.30 represent all that is due from you to Apgar Brothers? A. Yes.

Q. This amount represented by this bill, \$548.30, represents all that is due under the contract and the
20 extras furnished under the contract from you to Apgar Brothers? A. It does.

Q. And is that the amount of money paid into court in this case? A. \$548.30 is the amount paid into court.

The Court: What was the date of the notice served on them, that the release had been obtained by fraudulent means?

Mr. Koestler: November 21.

30

The Court: This payment of \$75 was made before you claimed it was fraudulent.

Q. This \$75 which was paid on account of the last payment was paid by check dated November 18, 1907, and has an endorsement "Paid November 18-07, First National Bank, Plainfield, N. J." I ask you, at the time you gave that check was the release of lien furnished you? A. It was.

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Benjamin S. Harris—Direct

Q. At that time when this lien was furnished you, which I now show you—

The Court: What do you mean by “furnished you?”

Q. At the time you gave this check for \$75 Apgar Brothers handed you the release? A. I had the release 10 in my possession before I gave the check for \$75.

Q. At that time did the release have the contractor's affidavit to it? A. It did; so far as I could see it was filled in full.

Q. What did you do with the release after you received it? A. I took it to my counsel.

Q. What did he say about it? Objected to. Objection sustained.

Q. I ask you to look at that release of lien and the contractor's affidavit, and see if you want to modify 20 your answer any as to how the release appeared when it was first furnished to you. (Witness shown paper.) Was that all filled out when it was first handed to you? A. Was it filled out?

Q. Yes. A. In what way do you mean?

Q. Was the affidavit made at the time you gave the check?

The Court: There is a release. Do you recollect anything about that affidavit, that seems to be on the 30 third page of the release; have you any special recollection about that part of the paper?

Q. Had the affidavit been sworn to at that time? If you don't remember, say so. A. I don't remember; that part I cannot remember.

BY THE COURT:—

Q. They handed you a paper and you identify it as 40

Benjamin S. Harris—Direct

that paper which you call the release of lien, and was it at the same time, as part of the transaction, you paid the \$75, or did you have the paper in your possession for some time before? A. No, sir.

Q. It was part of the same transaction? A. It was the same time that I received the release that I paid the \$75.

10 Q. Then they brought the paper to you and produced that as the release, and then on receiving that, you looked at it, I suppose, and say what it was? A. Yes, sir.

Q. And you then made a payment to him of \$75 and kept the release? A. I kept the release, certainly.

Q. And then you subsequently took it to your counsel; who was your counsel? A. Mr. Crane.

Q. Do you recollect whether you took it on the same day or a little later; have you any recollection about
20 that? A. I don't think I took it until the next day.

BY MR. ANGLEMAN:—

Q. You delivered it to him just exactly as you had received it? A. Yes, sir.

Q. When they gave you this release and you gave the check for \$75, why did you not pay the entire amount? A. Mr. Apgar came to my house, it was the noon hour, my dinner was waiting, he said he had the
30 release for me; he gave it to me, I looked over it, and so far as I could see, it was all right.

Mr. Koestler: Objected to, Tuttle Brothers not being present.

The Court: I will admit it subject to its relevancy against Tuttle Bros.

Witness (Continuing): He asked me for \$75, as he
40 had a note to meet; he said he was in a great hurry

Benjamin S. Harris—Direct

to meet some parties, therefore he took his departure. I told him I would meet him at Mr. ^{Craig's} Koestler's office and settle the matter up in the course of a day or two.

Q. (By the Court): Did you then give him the \$75?

A. I gave him the check for \$75 after receiving the release.

Q. (By the Court): And you at once gave him your check while you were at home? A. I did. 10

Q. (By the Court): And told him you would meet him at your counsel's in a day or two to settle up the whole matter? A. Yes.

Q. Was that \$75 the amount he asked you to give him? A. Yes.

Q. After that did you receive certain notices and letters from Tuttle Bros., L. Lumber Company, Mr. Larrabee, in relation to the balance due Appgar Bros.?

A. I did. 20

Q. After that date? A. Yes.

Q. Do you recollect which notice was served first?

A. I do.

Q. Which one was it? A. There was a notice left at my house, although I didn't receive it personally.

Q. What notice was that? A. It was left at my house; a gentleman left it, who claimed to be Mr. Tuttle.

Q. Is this the notice which I asked you about? (Witness shown notice.) 30

BY THE COURT:—

Q. What do you mean by saying it was left at your house? Do you mean that when you came home to your house on a certain day, you found the notice there, and it had been left? A. When I came home in the evening, it had been left there previous to my coming.

Q. How do you know it had been left there; was it

Benjamin S. Harris—Direct

handed to you to look at? A. It was handed to me by one of my family.

Q. When you got home, did you get it? A. I received it from one of my family.

Q. You got it when you got home that evening? A. Yes.

Q. That was the first one that was received? A. 10 Yes.

Q. It was dated November 18. Have you any way of fixing the day on which you got it, either by reference to the date of the paper itself or anything else? Have you any memorandum as to the date it was left at your house? A. It was left on the 18th of November, on the same day it was dated.

BY MR. ANGLEMAN:—

Q. How long after you had received the release of 20 lien was it before you received this Tuttle notice? A. It was from the hours between 12 and 1 until the hours between 5 and 6.

BY THE COURT:—

Q. You had given the check between 12 and 1 o'clock on that day, and this notice was received when you arrived home that evening between 5 and 6? A. Yes, somewhere thereabouts. It was left at my house; 30 I didn't receive it at that time for the simple reason that I didn't come in until after 6.

Q. I want the time you received it after six. A. I didn't receive it until after six o'clock, but it was left between the hours between five and six by a gentleman claiming to be Mr. Tuttle.

Q. After six o'clock on that same day you received the notice? A. Yes.

Q. And before the payment of the check you had not had any information of any notice having been 40 left? A. No, sir.

Benjamin S. Harris—Direct

BY MR. ANGLEMAN:—

Q. Do you remember what paper you next received—what notice? Do you remember receiving a letter from Tuttle after receiving their notice—

The Court: You didn't read the notice.

Q. (Continuing): Headed, "Tuttle Bros., Westfield, N. J.," to Benjamin Harris. Do you remember after receiving this notice from Tuttle Bros., receiving a letter from them also? I show you the Tuttle letter. A. Yes.

Q. And ask you if that is the letter which you received from them? A. Yes, sir.

Q. The letter is dated November 21; how many days after you received the notice was it that you received the letter?

20

Q. (By the Court): That was received in the regular course of mail? A. I think it must have come through the mail.

Q. Do you remember how many days intervened? A. I cannot say definitely.

(Letter shown to Mr. Koestler.)

Mr. Koestler: That is all right.

30

Mr. Angelman: The letter is on their letterhead and dated November 21, 1907. Benjamin Harris, Plainfield, N. J. Dear Sir: (reading letter).

(Contract offered in evidence and marked Exhibit C 1.)

(Checks offered in evidence and marked Exhibit C 2.)

40

Benjamin S. Harris—Direct

(Statement—Benjamin Harris to Apgar Bros., \$548.30, offered in evidence and marked Exhibit C 3.)

(Release of Mechanic's Lien, Apgar Bros. to Benjamin S. Harris, offered in evidence and marked Exhibit C 4.)

- 10 (Paper—Benjamin Harris, dated November 18, signed "Tuttle Bros.", offered in evidence and marked Exhibit C 5.)

(Letter—Tuttle Bros. to Benjamin Harris, November 21, 1907, offered in evidence and marked Exhibit C 6.)

- Q. Do you remember what the next notice was you received? A. The Tuttle notice to retain money was
20 received on the 18th, the same day.

Q. After you paid the check what was the next notice given by any of the sub-contractors? A. I think I received the notice from Mr. Loizeaux.

Q. I show you the Loizeaux notice; is that the notice which you received? A. That is the notice, yes, sir.

The Court: Is it dated? Witness: It is not dated.

- Q. What time of the day did you receive this notice?
30 A. Between seven and eight o'clock in the morning.

Q. What did you do with the notice? A. I kept it.

Q. How long? A. Until I could take it to my counsel.

Q. When was that? A. That was in the course of a couple of hours.

Q. You took it to your counsel the same day? A. Yes, sir.

- Q. Do you remember what date that was? A. I can-
40 not remember the date, no, sir.

Benjamin S. Harris—Direct

Q. Was that notice received the same day that the Tuttle letter was received?

The Court: Or before?

Witness: I don't think it was.

Q. You don't think it was the same day? A. Still **10**
I can not be positive.

Q. On the day that you received the Loizeaux notice did you receive any other notices?

The Court: Ask the witness whether he can remember whether the Loizeaux notice was received before or after the Tuttle letter. He may have a recollection about that.

Q. Was it received after you received the letter **20**
from Tuttle Bros.? Did you receive this letter of Tuttle Bros. before you received the Loizeaux notice or afterward? Have you any recollection about that? A. No, sir. I wouldn't want to swear to it.

(The Loizeaux notice is offered in evidence and marked Exhibit C7.)

Q. When did you receive the Larabee notice; after the Loizeaux notice or before? A. I think it was after, **30**
yes, sir.

Q. Was it the same day? A. I cannot say in regard to that, but it was after.

Q. I show you the Larrabee notice dated November 21, 1907, and I ask if that was the notice served by Mr. Larrabee on you? A. That was the notice, yes, sir.

Q. What did you do with the notice after you received it? A. I gave it to my counsel.

Q. Did you give it to him the same day it was received? A. I did. **40**

Benjamin S. Harris—Direct

(The Larrabee notice is offered in evidence and marked Exhibit C8.)

Q. After the receipt of the Larrabee notice did Mr. Larrabee serve any other paper on you? A. Yes.

Q. I show you a paper purporting to be an assignment from Apgar Bros. to Larrabee, dated November 22, 1907, and ask if that was the paper you refer to as being served on you after the Larrabee notice? A. That was the paper; that was the bill of assignment.

Q. And how long after you received the Larrabee notice was it before you received the assignment; one day, two days, or no days? A. There was a certain time elapsed, but I cannot tell exactly how long; there was a short time elapsed.

Mr. Koestler: I object to the assignment going in evidence. I don't object to its going in to show the fact that it was served on Mr. Harris; but I object to its showing anything else until it is proved in the regular course.

(Paper offered in evidence and marked Exhibit C9.)

Q. Did you receive any other notices or letters or assignments? A. I don't think I did after the notice of assignment.

30

Mr. Angleman: We admit that it was not filed.

The Court: It is admitted that the contract was not filed.

Q. After receiving these several notices, did you in turn serve notices on Apgar Bros. that these several notices had been received by you? A. I did.

Q. I show you a notice to Apgar Bros., which incorporates in it the Tuttle notice, and ask if that is

40

Benjamin S. Harris—Direct

your signature to it? A. Yes, sir, that is my signature.

Q. And did you serve that on Apgar Bros.? A. I did personally.

Q. Can you tell the date by looking at it? A. 21st of November.

Q. And did you sign on it that you had so served it at the time you served it? A. I did; there is my signature.

10

(Paper offered in evidence and marked Exhibit C10.)

Q. I show you a notice given Apgar Bros., incorporating in it the notice received from Loizeaux Lumber Company, and ask if you served that notice? A. I did.

Q. And did you endorse upon it at that time? A. I did.

20

Q. And the signature on the back and the signature on the front are your signatures? A. Yes.

Q. It was served November 23? A. Yes.

(Notice offered in evidence and marked Exhibit C11.)

Q. I show you notice to Apgar Bros. incorporating in it the letter from Tuttle Bros., and ask if you served that notice on them and signed it? A. I did, and that is my signature.

30

Q. It is dated as having been served November 23, 1907; did you endorse on it the time of service? A. I did.

Q. Was that served with the other paper; did you serve it at the same time you served the Loizeaux notice? A. I did.

(Notice offered in evidence and marked Exhibit C13.)

40

Benjamin S. Harris—Direct

Q. I show you notice to Apgar Bros., which incorporates in it the notice received by you from Larrabee, and ask if you served that notice on Apgar Bros.? A. Yes, sir, I did.

Q. Is that your signature to it? A. That is my signature.

Q. And did you endorse the time of service with
10 your signature at the time you made the service? A. I did.

Q. That is endorsed as having been served the 23rd of November; that is correct? Was that the same time that you served the Tuttle notice and the Loizeaux notice?

Q. (By the Court.) Did you serve all three persons together? A. Yes.

20 (Paper offered in evidence and marked Exhibit C14.)

Q. In response to those notices did you receive any notice from the Apgar Bros., any written notice? A. No, I did not.

Q. Did you receive any verbal notice? A. No, I did not.

Q. In consequence of the various claims being made to this money, did you go with Mr. Loizeaux and Mr.
30 Dunn of the Loizeaux Company, the two Apgar Brothers, Mr. William E. Tuttle, Jr., and Mr. Larrabee and meet at the office of Mr. Crane, your solicitor? A. We did, yes, sir.

Q. Do you remember the date? A. Somewhere about the 26th or 27th of November.

Q. What took place at that meeting?

Objected to as immaterial.

Benjamin S. Harris—Direct

A. Do you wish me to state who was at the meeting?

Q. Yes. A. Mr. Loizeaux, Mr. Tuttle, Mr. Dunn, who claimed to be a foreman or secretary of Mr. Loizeaux, Mr. Larrabee, both of the Apgar Brothers, Mr. Crane and myself.

Q. Which Mr. Tuttle was there? A. Mr. W. E. Tuttle.

10

Q. What time of the evening did you meet? A. I think it was in the neighborhood of eight o'clock.

Q. How long did you stay there? A. Probably the best part of an hour.

Q. What was the object of the meeting? A. They claimed to come there—that was the understanding when they first came there, to see if they couldn't come to some agreement in regard to how they should receive the money, or who would receive it,—what was laying in my hands.

20

Q. Did they come to any agreement? A. No, they did not.

Q. Who claimed the money? A. They did not seem to any of them claim it after they found that Mr. Larrabee had a bill of assignment, they didn't seem to come to any agreement.

Q. What did they say as to who should receive the money from you? A. They didn't say.

Q. What did Mr. Loizeaux say as to whether or not he should receive the money?

30

Objected to. Objection sustained.

Q. (By the Court.) What was said, if anything, by either of these creditors, as to his or their right or claim to the money? Take the Tuttle claim; do you recollect what was said by Mr. W. E. Tuttle as to whether he made any claim that any part of it belonged to him first; do you recollect that? A. I do.

Q. (By the Court.) What was his claim? A. Mr. 40

Benjamin S. Harris—Direct

Tuttle claimed that he had taken advice from his counsel, and as he had the first stop notice, he should stand on that.

Q. (By the Court.) He was entitled to payment?

A. He didn't say that. He should stand on that, as he has the first stop notice.

10

Q. And he said he did that under legal advice? A. Yes, he said he had taken counsel from his lawyer, and on that ground he should stand.

Q. What did Mr. Loizeaux say? A. Mr. Loizeaux said he should have it on that ground also.

Q. (By the Court.) What did he claim? A. He didn't claim he has the first stop notice, because they couldn't both have the first stop notice.

20

Q. Do you recollect what Loizeaux claimed about it? A. He said he should have had it on the grounds, but not on the first stop notice, as I know of because he didn't have the first stop notice.

Q. He claimed the money, too? A. Yes.

Q. What did Mr. Larrabee say? A. Mr. Larrabee had his bill of assignment.

Q. Did he claim the money? A. He thought we ought to draw the money.

30

Q. Did they come to any conclusion as to who should receive the money? A. No, they did not; they agreed to disagree on it.

Q. Then after that meeting, do you remember what the next paper was that was served on you by any one? A. I don't remember what Mr. Larrabee served me with a summons; Mr. Larrabee served me with a summons.

Mr. Koestler: At the meeting?

40

Mr. Angleman: No, after.

Benjamin S. Harris—Direct

Q. I show you summons in Middlesex County Supreme Court in the case between Larrabee and Benjamin Harris, summons and declaration, summons dated November 27, 1907, and ask if that paper was served on you by the sheriff or deputy sheriff of Middlesex County? A. It was served by the sheriff and constable or deputy; it was served all right.

10

(Summons offered in evidence and marked Exhibit C15.)

Q. After that what did you do? A. I turned the money over, what was laying in hands, to the court.

Q. You gave it to your counsel to pay into court?

A. Yes.

Q. What was the next paper served on you after you turned the money into court; did the sheriff serve another paper on you? A. No, I don't think he did. 20

Q. You got a summons in a lien claim suit from the Tuttles? A. Yes.

Q. Is this the summons, issued December 10, 1907?

A. Yes, sir, but not served by the sheriff; that was served on me.

Q. Were there any more papers served on you that you can recall? A. I don't think so.

It is admitted that the lien claim was filed on the same date, December 10, 1907. 30

Q. In view of the various notices and suits brought against you, did you know to whom you should pay this money? A. I did not.

Q. Were you ready and willing to pay it to whomever—(interrupted). A. I was ready and willing to pay it to whomever it belonged, but still I didn't want to pay it and have to pay it more than once—to the rightful party, I was ready and willing to pay it.

40

Benjamin S. Harris—Cross

Cross Examination by Mr. Koestler:

Q. When was your house entirely completed? A. About the 15th or 16th of November.

Q. When did you first ask Apgar Bros. to get releases? A. I didn't ask them to get the releases.

Q. Didn't you refuse to pay the money until you had a release? A. I did not.

10 Q. You did not? A. No.

Q. How is it you only paid \$75 when they brought the release? A. He told me that he was in a hurry to meet a party, that he had to straighten out a note for them, and he wished the \$75 in order to meet them to take up this note.

Q. But you accepted the release when he gave it to you? A. I accepted the release before I paid \$75.

Q. And which of the Apgars gave you that release? A. Mr. George Apgar.

20 Q. You had no conversation at all with Apgar in regard to getting a release? A. I had not.

Q. You knew at that time your contract had not been filed, didn't you? A. I did.

Q. Hadn't your counsel advised you that your building was subject to liens if you didn't get releases? A. He had not.

Q. Did your counsel know your contract wasn't filed? A. I don't know as he did.

30 Q. Your counsel didn't attend to the drawing of the contract? A. He did not.

Q. That is, you didn't have any counsel until after you commenced to have trouble with notices, is that it? A. That is the idea.

Q. And you never told your counsel that the contract had not been filed? A. I did not. I did at the time.

Q. When did you first tell your counsel that the contract had not been filed? A. When the stop notices came, when Mr. Tuttle's stop notice came.

40 Q. You got that on the 18th? A. I did.

Benjamin S. Harris—Cross

Q. And probably gave it to your counsel the following day? A. Yes.

Q. And that is the time you fix when you told him the contract has not been filed? A. Yes.

Mr. Angleman: Objected to.

The Court: I will take the evidence.

10

Q. At this meeting on November 26th you have told us about the claims of the different people; was anything said in regard to the letters claiming fraud in the release? A. I think Mr. Loizeaux claimed the release was a fraud.

Q. What did Mr. Tuttle claim? A. I don't remember whether he put in any claim in regard to that or not; I cannot say as to that.

Q. He had before that served a letter on you stating it was a fraud? A. Yes. 20

Q. Were the Apgars present at this meeting? A. Yes.

Q. Did they say anything when the charge was made that the release was a fraud? A. I don't think they did; I don't remember that they did.

Q. If they had said anything, you would remember it now? A. I think so.

Q. Do you recall the date when you paid the \$548.30 to your lawyer? A. I do not, but my vouchers recall it. 30

Q. Did you pay it by check? A. I paid it by check.

Q. Have you got the check here? A. The check must be among my vouchers.

Q. Do you know when it was paid into court?

Mr. Angleman: We have the receipt of the Clerk, and produce it.

Mr. Koestler: The receipt shows that it was paid in December 7, 1907.

40

George R. Apgar—Direct

GEORGE R. APGAR sworn.

Direct Examination by Mr. Angleman:

Q. You are one of the members of the defunct firm of Apgar Bros.? A. I am.

Q. Who is the other member? A. Theodore Apgar,
10 my brother.

Q. You are now bankrupts? A. Yes, sir.

Q. I show you Exhibit C1, the contract in this case, and ask you if you signed it "Apgar Bros.?" A. I did, yes, sir.

Q. And was that contract between you and Mr. Harris for the building of his property? A. Yes, sir.

Q. I show you Exhibit C2, being six checks of Mr. Harris, to the order of Apgar Bros., and ask you if the endorsements on them of Apgar Bros., were made by
20 you? A. They were, yes sir.

Q. Did you receive or have credited up to your account the moneys represented by those checks? A. I did, yes, sir.

Q. I show you Exhibit C3, being the bill to Mr. Harris from Apgar Bros. for the balance due on the contract and the extras, amounting to \$548.30, and ask if the O. K. on that was made by you? A. Yes, sir.

Q. Does that amount \$548.30 represent all that was due your firm from Mr. Harris? A. It does, yes, sir.

30 Q. And that bill was handed by you to Mr. Harris? A. It was, yes, sir.

Q. I show you Exhibit C4, being release of lien, and ask if your name as witness was subscribed by you? A. It was, yes, sir.

Q. Did you actually see all of the persons sign their names there to which you have signed your name as witness? A. All except one.

Q. Which one was that? A. Tuttle Bros.

Q. Did you see him write that? A. No, sir.

George R. Apgar—Direct

Q. Are you familiar with the signature of Tuttle Bros.? A. I am.

Q. Is that the signature of Tuttle Bros? A. It is.

Q. How did you come to sign your name there as witness if you did not actually see him write it? A. I took them to Mr. Harris that day and I didn't have it; the next day he brought it in and asked me—I took the release to him with all the signers on it, but I didn't 10 sign as witness.

By the Court:

Q. You hadn't signed at all as witness? A. No, sir.

Q. You took the release to Mr. Harris with the signatures to the release on? A. Yes.

Q. But no signature of any witness? A. That is right.

Q. Witness to any of them? A. No. 20

Q. And Mr. Harris asked you— A. The next day I went up to his house to get some stuff and he brought this release back and asked me if I would sign as witness and I took and signed it, overlooking Mr. Tuttle's.

By Mr. Angleman:

Q. Overlooking the fact that you hadn't seen Tuttle sign it? A. Yes. 30

Q. Do you know who did see Mr. Tuttle sign? A. Yes, sir.

Q. Who? A. My brother.

Q. On the contractor's affidavit on the release I notice your name is signed; did you sign that? A. Yes, sir.

Q. Did you take that affidavit? A. I did.

The Court: What is the date?

George R. Apgar—Direct

Mr. Angleman: It is dated November 20, 1902, before Mr. Crane.

Q. And this release is the paper you gave Mr. Harris; when you gave it to him, what did you say about the payment which was due?

10 Objected to.

A. When I took it to him I had a note coming due, my brother told me I had a note coming due in the bank, and he wanted \$75 to meet it. Well, I am ahead of my story. I took it first to Mr. Loizeaux and he asked me if I was going to meet a note—Mr. Loizeaux did that.

Q. (By the Court.) A note he held against you?

20 A. I cannot say.

Q. What had he to do with your making a note?

A. He asked me that.

Q. What note? A. I cannot tell you what note it was. There are several of them. I told him I was, so I went to Mr. Harris and took this release to him and asked him for \$75 to meet that note.

Q. What did Harris say or do? A. He wrote me out a check for \$75 and I took it to the bank and deposited in the bank to meet the note.

30 Q. Was anything said about the balance? A. I told him I wanted the rest of the money to go to Mr. Larrabee.

Q. Did you say it at that time? A. I did, yes, sir.

Q. Were you to call and get the rest of the money later? A. I was, yes, sir.

Q. And you didn't call later on? A. No, sir.

Q. I show you Exhibit C9, being assignment by you to Larrabee, and ask if that is your signature there, "George R. Apgar?" A. It is.

40 Q. You made it? A. Yes.

George R. Apgar—Direct

Q. Did your brother make his signature at the same time? A. Yes.

Q. Who is the witness here, George Penny? A. I don't know him.

Q. Where was it signed; do you remember? A. I cannot tell you that.

Q. And that was the assignment you gave Mr. Larrabee? A. It was, yes, sir. 10

Q. The date of the assignment is November 22nd? I show you four notices given to you by Mr. Harris, being Exhibits C10, 12, 13 and 14, relative to the notices served on Harris by Tuttle Brothers, Loizeaux Co. and Larrabee, and ask you if you recollect the notice being served on you? A. I do, yes, sir.

Q. Those notices were served? A. Yes.

Q. Has this money \$548.30 been paid you? A. No, sir.

Q. Were you present at the meeting in Mr. Crane's office, referred to by Mr. Harris in his testimony? A. I was, yes, sir. 20

Q. Do you remember who were there? A. I do.

Q. Who were they? A. Mr. Larrabee, Mr. Tuttle, Mr. Loizeaux and Mr. Dunn and Mr. Clauson, my brother and I.

Q. Who was Mr. Clauson? A. A mason.

Q. And what was said or done at that meeting?

Mr. Koestler: Same objection. 30

The Court: I will take the evidence.

A. The meeting was called to divide that money, the way I could understand it, between the creditors. wasn't it?—and, of course, Mr. Larrabee had this assignment and he got up and told them about the assignment, and Mr. Tuttle spoke up and asked my brother Theodore if he signed it—he didn't say a word to me—any brother told him he did, so then Mr. Loizeaux 40

George R. Apgar—Cross

said, "Now, they are going to start a fight," and I guess they did start a fight.

Q. Mr. Loizeaux said he was going to start a fight?

A. He said, "Mr. Tuttle, we have got to start a fight."

Q. What did Mr. Tuttle say? A. I don't remember what he did say.

Q. At that meeting what did Mr. Tuttle say as to
10 whether or not he claimed this balance of this money?

Objected to.

The Court: Did he make any claim on the money?

Witness: I cannot say, because we went out before the meeting was closed, they stayed in.

Q. While you were there, they were disputing as to who should get the money? A. Yes.

Q. Did Mr. Larrabee claim the money? A. He
20 claimed the money.

Q. Do you recollect anything that Mr. Tuttle said while you were there? A. No, sir, only that he turned and asked my brother if he signed it.

Q. Was there any promise made by you to Tuttle Brothers as to the payment to them by you or your firm of the balance of this money if they should sign this release? A. There was not by me.

Q. You were not at Tuttle Brothers' at the time the release was signed, were you? A. No, sir.

30 Q. Had Tuttle Bros. been in the habit of signing releases for you?

Objected to. Objection sustained.

Q. What was the custom obtaining between you as to obtaining releases?

Objected to. Objection sustained.

40 Cross Examination by Mr. Koestler:

George R. Apgar—Cross

Q. You were at that meeting at Mr. Crane's office?

A. I was, yes, sir.

Q. What did you say when at that meeting you were accused of obtaining that release from Tuttle Brothers and Loizeaux Lumber Co. fraudulently?

Mr. Angleman: Objected to; there is no evidence about that. 10

The Court: When Loizeaux—on his direct examination he didn't say anything about Tuttle; he said about the Loizeaux.

Q. What did you say when Loizeaux— A. I didn't say anything.

Q. You say you didn't see Tuttle Brothers' signature made to this release? A. I didn't, no, sir.

Q. Which of the Tuttle Brothers signed? A. Wil- 20
liam Tuttle.

Q. Are you sure? A. Yes, sir.

Q. Are you just as sure of that as the fact that you were not there when it was signed? A. Yes, sir, I am.

Q. William Tuttle is the one with the mustache, isn't he? A. It looks like him.

Q. And you are sure William Tuttle signed this release? A. I am.

Q. Who was there when William Tuttle signed it? A. My brother. 30

Q. Do you know on what day it was signed? A. No, I can not tell you the date.

Q. You claim you were not there at all? A. No, sir.

Q. Hadn't you prior to the date this release was signed asked one or the other of the Tuttle Brothers to sign a release? A. No, sir.

Q. Did you have any of the signatures made by the other people to this release? A. I did.

Q. Which one did you have sign? A. Clausen, Larabee, William Baker, E. Daniel Thorne and Loizeaux. 40

George R. Apgar—Cross

Q. When you had Clauson sign it, it had already been signed by Tuttle Brothers? A. Yes, sir, Tuttle Brothers were the first one to sign it.

Q. And when was the day that you first gave this release to Mr. Harris? A. On the 18th of November.

Q. Then when did you take it back again to have it signed by yourself as a witness? A. I didn't take it
10 back.

Q. When did you sign it as witness? A. I cannot say—two, or three days after.

Q. Was it the day after? A. Yes, sir.

Q. Did you sign it as witness the day you signed the affidavit before Mr. Crane, or before the affidavit was signed? A. I signed the affidavit after.

Q. After you signed as a witness? A. Yes.

Q. Was it on the same day or preceding day? A. No, the preceding day.

20 Q. Are you sure that on the 20th day of November you signed this affidavit at Plainfield to which your name is affixed? A. Yes, sir.

Q. That is your signature? A. Yes, sir.

Q. You are sure it happened on the 20th? A. Yes, sir.

Q. Do you know what day of the week the 20th was? A. Wednesday.

Q. Did you read this affidavit before you signed it? A. I did.

30 Q. All of it? A. Sure, yes.

Q. Didn't you know you were swearing to a lie when you signed it?

Objected to. Objection sustained.

Q. Didn't you know that this affidavit stated that the contract or duplicate was filed in the office of the County Clerk in which the building is situated; isn't that the statement in the affidavit? A. Yes.

George R. Apgar—Re-Direct—Re-Cross

Q. What have you to say about that? A. I haven't anything to say about it at all.

Q. You knew that was in the affidavit when you signed it? A. Yes.

Q. And you knew the contract wasn't filed? A. Yes.

Q. And yet you swore to it? A. Sure I did.

Q. You took a solemn oath that that contract was filed, isn't that so? A. (No answer.) 10

Q. You were present when your brother Theodore was present? A. Yes, sir.

Q. How long did you stay at the meeting at Crane's office? A. I judge about half an hour.

Q. Who called that meeting? A. I don't remember.

Q. Who asked you to go there? A. Mr. Crane did.

Re-Direct by Mr. Angleman:

20

Q. Counsel has called your attention to a statement in this affidavit about the contract being filed. At the time you signed this, did you or did you not think that Mr. Harris had filed the contract? A. I cannot say; I thought he did, because that was his place; it wasn't my place.

Q. When you signed this, did you intentionally take an affidavit of anything you didn't think was true? A. No, sir, I did not, I thought it was all right.

30

Re-Cross by Mr. Koestler:

Q. You knew the contract hadn't been filed? A. I cannot tell you; I don't know; I don't know whether it was filed or not. It wasn't my business to have it filed.

Q. Didn't you state a little while ago on cross examination that you knew it wasn't filed? A. No, I didn't.

40

Theodore Apgar—Direct.

THEODORE APGAR, sworn for complainant.

Direct Examination by Mr. Angleman:

Q. You are the other member of the firm of Apgar Brothers? A. I am.

Q. And your firm is now in bankruptcy? A. Yes,
10 sir.

Q. Do you remember building the house for Mr. Harris in the fall of 1907? A. Yes.

The Court: You need not go over that again. You can call him again.

Q. I show you the release of lien, Exhibit C4, and call your attention to Tuttle Bros.' signature on the release, and ask you if you saw one of the firm sign the
20 firm name to that release? A. I did.

Q. Which one did you see sign it? A. William E. Tuttle.

Q. And where did he sign it? A. In his office.

Q. And what was said by you when you asked him to sign it? A. I said when I got the money I would give him \$500.

Q. What did he say? A. He signed it, he didn't say any more.

Q. Did he make any objection to signing it? A. No,
30 sir, not at all.

Q. Did you ever get the money on that note? A. No, sir.

Q. Do you recollect when he signed it? A. No, it was four or five days before the list went in; I don't recall just the day.

Q. I show you Exhibits C10, 12, 13 and 14, being the notices served on Apgar Bros. by Harris, and ask if those notices were served on you as a member of the firm? A. They were.

40 Q. And on the date mentioned? A. I cannot re-

Theodore Apgar—Direct.

member the date. They were left at the house several times we were at home.

Q. But you received them all? A. Yes.

Q. I show you Exhibit C9, being the assignment by Apgar Bros. to Larrabee, and ask if that is your signature? A. Yes, sir, it is.

Q. And that paper was the assignment you gave Larrabee? A. Yes. 10

Q. Were you present at the meeting in Mr. Crane's office? A. I was.

Q. Who else was there? A. Mr. Loizeaux, Mr. Dunn, Mr. Tuttle—William E. Tuttle, Mr. Larrabee, Mr. Crane, Mr. Harris, my brother and myself.

Q. What was the object of the meeting? A. To try to settle up Mr. Harris' matter on this money that was left.

Q. Now, what was said in regard to how the money should go at that meeting? A. When the meeting was called they found out we made an assignment to Mr. Larrabee and they seemed to be surprised that I and my brother had made an assignment. There wasn't much said at that time, and Mr. Tuttle turned around and said, "Dore, did you do anything like that?" I said "Yes," and they talked a little while between themselves and we was there and heard what was going on, and that is about all I recollect. 20

Q. At that meeting did Mr. Tuttle make any claim on the fund in your presence? A. He said he had advice from his lawyer—if you want that—"I have advice of my lawyer and I am going ahead and take further steps for that money." 30

Q. What did Mr. Loizeaux say as to claiming any interest in it? A. I don't know the words he used, but I recollect he used some similar words, "that he was going ahead," and claimed the lien was a fraud. He claimed this release was a fraud and he was going ahead with his money. 40

Theodore Apgar—Cross

Q. Did Larrabee claim the money? A. Yes, because he had an assignment.

Q. Your firm never paid the balance remaining? A. No, sir, not yet.

Q. There was talk at this meeting in regard to the release? A. There was a little bit.

Q. And it was there claimed that the release was a fraud? A. Mr. Loizeaux claimed it was a fraud.

Cross Examination by Mr. Koestler:

Q. What did you do when he said that? A. I didn't say anything.

Q. Did your brother say anything? A. No.

Q. And after he claimed the release was a fraud he threatened to have you arrested, didn't he? A. No, not exactly.

Q. Didn't he afterwards have you arrested on the ground of fraud? A. No, sir.

Q. You were not arrested by Mr. Loizeaux on account of this? A. I was arrested; I wasn't taken over to Brunswick—not on this.

Q. Something else? A. Perhaps, yes.

Q. Tell me what the first thing was that was said when this meeting got together? A. I couldn't remember that all.

Q. What was the next thing you remember? A. Mr. Tuttle asked when this meeting come together—
30 they went there to attend to this matter with Mr. Harris, and it come up that we made an assignment to Mr. Larrabee, Mr. Tuttle turned around and said to me, "Did you do anything like that?" I said, "Yes, I did."

Q. He said that because you promised to give him \$500 out of this money? A. Yes, I suppose so, lots of other promises I made him and he got his money, but this money he didn't get.

Q. What was said before this release was signed
40 by Mr. Tuttle? A. Nothing.

Theodore Apgar—Cross

Q. You didn't say anything to Tuttle at all to have him sign this release?

The Court: He has given his direct testimony. He told what took place.

Witness: You said before this release was signed.

10

Q. Was anything said before you had the release signed, by you to the Tuttle's or Tuttle's to you? A. At the same time I had that release signed by Mr. Tuttle I promised him \$500 out of that release.

Q. You said that before anything was said; is that the first thing you said to him? A. I asked him to sign that release.

Q. What did he say? A. He asked how much money he was to get out of it. I told him \$500.

Q. And your conversation was with Mr. William E. Tuttle? A. Yes. 20

Q. You didn't have anything to do with Arthur Tuttle at all about this release? A. No.

Q. Sure of that? A. Positive.

Q. You are sure William E. Tuttle signed the release? A. Yes.

Q. You are sure that is William E. Tuttle's release? A. Yes, I saw him sign it.

Q. You had some talk with Arthur Tuttle about this release? A. Not that release, no. 30

Q. And didn't you say to Tuttle Brothers, or to one of them, that there was a certain amount of money coming to you from Harris? A. Probably, yes.

Q. Didn't you? A. Probably, yes.

Q. Didn't you tell Tuttle Brothers or one of them that there was about \$550 still coming to you from Harris? A. No, more than that, \$600.

Q. And didn't you say that as soon as they signed the release you could get the money? A. No.

40

Theodore Apgar—Re-Direct

Q. You didn't? A. No, "as soon as I would get it," I said.

Q. You didn't say to one of the Tuttle Brothers that as soon as they signed the release you would go around and get the money from Harris and pay them? A. No, we couldn't promise that way, because we had our money.

10 Q. Did you? A. We didn't, no.

Q. Who was there with you? A. Apgar Brothers.

Q. Who was there with you? A. Alone.

Q. And your brother wasn't there at all? A. No, sir.

Q. You didn't sign as witness opposite Tuttle's signature? A. No.

Q. You also signed the affidavit on this? A. Yes.

Q. Did you read it before you signed it? A. I don't know whether I read it; I have signed a good many re-
20 leases.

Q. You knew what was in it? A. Probably.

Q. When did you first find out that the contract had not been filed? A. The day we made the contract.

Q. And you swore in this affidavit that the contract was filed? A. I suppose so, yes, that is my signature there.

Q. You knew that was in the affidavit? A. My signature is there.

Q. You knew it was in there? A. Yes, sir.

30 Q. You knew at the time you signed the affidavit that the contract had not been filed, didn't you? A. Yes.

Q. You are sure of that? A. Yes.

Re-Direct by Mr. Angleman:

Q. Do you know what is meant by filing a contract?

A. I do.

Q. You said that you knew the day the affidavit was signed that it had not been filed; of course it
40 wasn't filed until after you signed it? A. Yes.

Theodore Apgar—Re-Cross
J. Henry Crane—Direct

Q. Did you have any positive knowledge at the time you signed this affidavit as to whether or not Mr. Harris had filed the contract? A. I didn't know it until after the trouble come up—until he had it delivered in his hands.

Q. You mean you hadn't filed your contract? A. Yes.

Q. You didn't know what Harris had done? A. 10
No, sir.

Q. When you made this affidavit, did you purposely make that misstatement in the affidavit? A. I did not.

Q. These arrest proceedings for fraud on the Loizeaux account, did they hold? A. No.

The Court: Don't go into that; he said it wasn't in reference to that.

Re-Cross by Mr. Koestler:

20

Q. You have identified these four notices, Exhibits 10, 12, 13 and 14, as having been served upon you by Mr. Harris; is that so? A. Yes.

Q. What did you do in reference to these notices after they were served on you? A. I didn't do anything.

Q. Did you serve any notice on Tuttle Brothers? A. I did not.

Q. Did you go to them and deny the allegation of 30
fraud set up in that notice? A. I did not.

Q. Did you go to them and deny in writing that their claim of \$727 was due? A. I did not.

Q. You didn't deny the claim of Mr. Loizeaux that he set up the release was a fraud against him either, did you? A. I did not.

Q. Your brother didn't either, did he? A. I don't think so.

J. HENRY CRANE, sworn for complainants.

40

J. Henry Crane—Direct

Direct Examination by Mr. Angleman:

Q. You are an attorney and counsellor at law of this State? A. Yes, practicing in Plainfield.

Q. And you are ~~receiver~~^{solicitor} for Mr. Harris in this cause? A. I am.

Q. You took charge of the matter prior to its coming into court? A. Yes.

Q. I show you the release of lien Exhibit C4, and call your attention to the affidavit, and ask you if you took the affidavit of the Apgars to that? A. Yes, the affidavit was taken before me on the date stated therein.

Q. The date therein stated is November 20; was that the right date? A. That was the date.

Q. And put in by you at the time it was taken? A. It was.

Q. Will you state the circumstances of your taking the affidavit? A. Mr. Harris brought the release down to me on the 19th, and he said that Apgar Brothers or George Apgar had been there and wanted the money and he had given him \$75 and told him he would bring the release down to his counsel before he paid the rest over, and I looked it over. I said, "Mr. Harris, it is not complete."

Mr. Koestler: Objected to.

30 The Court: I will take it subject to your objection.

Witness: (Continuing) I told him, "You had better take it right back to the Apgars to have them witness the signatures and then tell them they must both come to my house and take the affidavit, because we don't know whether these are all the persons who have done work or furnished material," and I sent him out to have the Apgar Brothers fill in their signatures to —whoever witnessed the signatures of the material men
40 or contractors.

J. Henry Crane—Direct

Q. You delivered it to him; did he the next day deliver it back to you? A. Yes, he brought it back and both the Apgars came in on the 20th and swore to the affidavit

Q. That is after the delivery to you by Mr. Harris? A. He delivered it to me on the 19th.

Q. He brought it back on the same day? A. Yes, he went right out and brought it back late in the afternoon. 10

Q. I show you Exhibit C5, being the Tuttle notice, and ask you if you made the endorsement on the back, reading: "Received November 20, 1907?" A. Yes, that is my writing, "Received November 20, 1907."

Q. Was that the date on which it was brought to your office by Mr. Harris? A. Yes, sir, I believe it to be.

Q. You endorsed it at the time? A. As far as I know, or I believe that to be correct. 20

Q. I show you Exhibit C7, being the Loizeaux notice, and ask you if you made the endorsement, "Received November 22, 1907" on it? A. That is my endorsement and that is the date I received it. I asked him which date he received it and I endorsed it on that date.

Q. It is endorsed the date Harris received it? A. I said "When did you get this, last night or this morning?" and the date he gave me I endorsed.

Q. But the other date is the date on which you received it—the endorsement on the Tuttle notice? A. I asked him when he received it and marked it as received on that day. 30

Q. You put the notices down as of the date he told you at the time? A. Yes, that he received them.

Q. I show you the Larrabee notice, Exhibit C8, and ask if the endorsement "Received November 22, 1907," was made in a similar manner? A. In the same way.

Q. I show you Exhibit C9, being the assignment to Larrabee. There is an endorsement on that in lead 40

J. Henry Crane—Direct

pencil "11/26/07;" was that made by you? A. Yes, that is my notation.

Q. And that was similar to the other one? A. Yes, I think I got that the morning of the date that is on that.

Q. I show you receipt from the Clerk in Chancery, dated December 7, 1907, for \$548.30 in the case of Harris vs. Larrabee, and ask you if that is the receipt which
10 you received from the Clerk for the deposit of the moneys in this case? A. Yes, sir, from the Clerk in Chancery.

Q. What was the amount of moneys which you have deposited in this cause? A. \$548.30.

Q. You were present at the meeting in your office between the claimant to this fund and the Apgar Brothers? A. Yes, I had them come to the office.

Q. Was the meeting called at your office on your
20 suggestion? A. I wrote them all to call there.

Q. What was the object of the meeting? A. The object of the meeting was to see if we couldn't straighten the matter out, and William E. Tuttle, Jr., was there, Mr. Loizeaux, the vice-president of the J. D. Loizeaux Lumber Co., and Mr. Dunn the secretary of the company, and Mr. Larrabee, both of the Mr. Apgars and Mr. Harris, and I simply stated I had got them there to see if the thing couldn't be fixed up, as Mr. Harris was a poor man and he paid his money
30 on his contracts and there was just this amount due and he was willing to pay it to whoever it belonged, and to see if the matter couldn't be fixed up. I showed them the different notices that had been put in and also stated—

Q. Those being the notices shown here today? A. Yes, sir, and also the assignment. When I mentioned the assignment from Mr. Larrabee, the others didn't seem to like it at all and were surprised that Mr. Larrabee had put in the assignment, and they accused Mr.
40 Larrabee of breaking faith with them—they accused

J. Henry Crane—Direct

Mr. Larrabee of breaking faith; he said, "We have had a meeting of the creditors and we agreed to get this thing together and fix this up and carry the boys through."

Q. Was that a meeting before this meeting? A. They referred to a meeting of all the creditors they had had, in which they had an agreement to get together and fix the thing up, and they said Mr. Larrabee hadn't been fair in taking this assignment and he has broken his agreement, and they asked Theodore and George—they said "George and Theodore, did you give that assignment?" He said, "We did." He said, "Did you think it was fair to do that?" and they answered that Mr. Larrabee hadn't had a cent out of any of the moneys that were due him and they felt that he ought to get something, and to be fair, they made the assignment of the balance that was coming to them to him, and they spoke to Mr. Larrabee then and asked him if he was going to keep his agreement or if he was going to insist on his assignment, and Mr. Larrabee said he was; he said, "Gentlemen, I haven't had a cent out of this and my bill is nearly \$700, and my counsel says the assignment is good and that I am entitled to the money first out of it, and Mr. Loizeaux and Mr. Tuttle said, "Well, it is no use of talking any more, we cannot settle this thing if this assignment is going to stand," and the meeting broke up over that, and Apgar Brothers began to go out and I called them together and said, "Can't you fix this up in some way?" I asked Mr. Larrabee if he was still going to insist on his assignment or whether he would get together with the rest of them so as to save the trouble for Mr. Harris, and he said no, he would stand on his counsel, who advised him that the assignment was good and that he had the first claim to the money under it, and Mr. Tuttle said he was advised by counsel that his stop notice was good; the stop notice having been put in before the assignment, he was first entitled to the money, and Mr.

J. Henry Crane—Direct

Loizeaux said, "I don't see how this assignment is of any validity or any good, the stop notice is in first," and he claimed the money, too,—“If it is coming up in court—you go in a court, we will fight it through,” and they all claimed the money,—Larrabee, first, on his assignment, on Mr. Stillwell's advice, and Mr. Tuttle on the advice of his counsel that his stop notice was first in, and Mr. Larrabee said his counsel advised him they were entitled to the money and they wanted to get it. Then Mr. Larrabee went out, and Mr. Loizeaux and Mr. Dunn and Mr. Tuttle sat in the back room and got talking over the affair, and they said they liked the Apgar boys and were “Sorry the thing broke up in this way. We agreed to get together to see the boys through, we all like them.” Mr. Loizeaux said, “I don't like the way that release was obtained.” Mr. Tuttle said, “You know it is done right along; it is business. We couldn't insist upon a release before the man gets the money,” and he said, “Theodore came in and asked me to sign the release and I said, ‘How much is there in it for us?’ he said, ‘There will be \$500,’ and I signed it. The boys are honest, I trust them for any amount,” and he said, “Two or three days after when Theodore came in, they told me they were in a failing condition. I was never more surprised in my life;” and we talked along and went out. They couldn't come to no agreement and the three insisted that they claimed the money.

Q. Did Mr. Tuttle at that meeting claim any particular misrepresentation in the securing of his signature? A. No, Mr. Tuttle didn't claim fraud in the Apgars' presence. After they had gone and Mr. Larrabee had gone, this conversation took place about the release.

Q. Did he use the word “fraud” at that time? A. Not to the best of my memory.

Q. Simply told you what you related here? A. Yes, I told it just as I remember it. My wording is

J. Henry Crane—Cross

not exact. I tried to take down everything, because I knew it was important, and I was interested in behalf of Mr. Harris.

Q. Have you had any other conversation with Mr. Tuttle about it—not about the release, but the case in general? A. I have had conversation with counsel for the J. D. Loizeaux Company.

10

Cross Examination by Mr. Koestler:

Q. When did you first act as counsel for Mr. Harris in this matter? A. About the 9th of November he came to me and said his house was about completed and the Apgar boys told him to get a release ready and they would sign it, and for me to draw up a release and have it ready by Monday, that he would have it signed on that day, and I filled out a general form of release and mailed it to him.

20

Q. That release was prepared by you at the request of your client, Mr. Harris? A. Yes.

Q. He told you before that time the Apgar Brothers had come to him and told him if he would get the release they would have it signed? A. Yes, they mentioned the release, and they would sign the release.

Q. Does this date, the 11th day of November, represent the day you drew it, or was that filled in afterwards? A. This is Monday, the 11th day of November, and he came to me on Saturday and said he wanted it on Monday, and it would be signed Monday.

30

Q. That was your conversation with Mr. Harris? A. Yes, in my office.

Q. Up to that time you hadn't seen the Apgar Brothers in regard to this transaction? A. No.

Q. When did you first learn that the contract had not been filed? A. After the release had been sworn to. I asked Mr. Harris if the contract had been filed, and he said "Yes, I think the Apgar Brothers filed it."

Q. And you asked the Apgar Brothers and found

40

J. Henry Crane—Cross

out they had not? A. I asked them if they had filed it, and they said "no, we supposed Mr. Harris had filed it," so I came to the conclusion it wasn't filed, and I asked Mr. Harris to bring to me his contract.

Q. What did you want the contract for?

Q. (By the Court) Can you fix the date when you
10 first definitely ascertained that the contract had not been filed? A. No, I cannot fix the date, except it was after the 20th of November.

Q. How long after, a day or two or more? A. It was probably a day or two after, because I remember Mr. Loizeaux calling me up and asking me if it hadn't been filed. I said, "I just learned it hadn't been."

Q. Did you learn that before the meeting on the 26th or after? A. Yes, before the meeting on the 26th,
20 because the gentleman asked me and I told him, and we asked them both there at the time.

Q. That was stated at the meeting? A. Yes.

Q. You are sure of that? A. Absolutely sure of it.

Q. Didn't you know at that meeting that the claimants under the stop notices had no claim?

Objected to.

Q. Larrabee claimed under the stop notice, an answering defendant? A. He had a stop notice and assignment in.
30

Q. At the meeting Larrabee, did he set up any claim under the stop notice as well as assignment? A. He spoke particularly about his assignment.

Q. And Tuttle and Loizeaux expressed surprise that there was an assignment? A. Yes.

Q. Did they seem to indicate from their actions that they thought the assignment made Larrabee's claim first? A. They didn't. Mr. Loizeaux argued that the
40 assignment was in and he come in ahead of Larrabee.

J. Henry Crane—Cross

Mr. Tuttle agreed that he having the first stop notice, he was entitled to that money and he would stand on it on the advice of counsel.

Q. Tuttle's claim at that time was only under the stop notice? A. They had notice in of fraud, too, warning us not to turn over the money.

Q. At the time you had this meeting, you had all these papers that had been served on Mr. Harris up to 10 that date? A. Yes.

Q. You had Tuttle's stop notice and you had Tuttle's letter claiming fraud in the release, and at that meeting did you read any of the papers? A. I didn't read them to them.

Q. You showed them to the people there? A. The papers were there and we discussed on them in general.

Q. Was anything said in regard to the claim of fraud? A. Not in the presence of the Apgar Brothers.

Q. You are sure that was not said in the presence 20 of the Apgar Brothers? A. Yes, I am sure of that. They tried to get together and settle, and they would have got together if Mr. Larrabee hadn't broken his agreement with these people and taken that assignment and stood on it and claimed the money.

Q. In regard to these papers—notice on which you have written dates, isn't it likely that on the Tuttle stop notice, the date you wrote was the date it was handed to you and not the date it was served on Mr. Harris? A. In that date there may possibly be a mistake. I 30 wouldn't say that it is absolutely correct.

Q. What did this \$548.30 that you sent to the Clerk in Chancery include? A. It included the balance of the last payment and some \$23.30 for extras.

Q. It didn't include any interest on it? A. No.

Q. You didn't include interest in that check from the date the building was completed until the date you filed your deposit, did you? A. Not at all.

Q. You say Tuttle didn't claim fraud? A. Not in the presence of Apgar Brothers. 40

William E. Tuttle—Direct

Q. Did he claim it in the presence of you? A. No.

Q. His letter was in? A. Yes, he spoke about it after the Apgar Brothers went out, and then there was a general discussion about the release. Mr. Loizeaux thought it was fraudulent; Mr. Tuttle thought it was a little more reasonable.

Q. He felt sorry that they had done this thing? A. No, it was the custom; "We do it every day, we have to do it."

Q. Did he say releases are obtained from him under fraud every day? A. He didn't use the word "fraud" at all; he said, "We do it right along; we couldn't do business if we didn't do it."

Q. Didn't do what? A. When a man we are dealing with, we sign this release. "How much is there in it for me?" Theodore said, "When I get it, there will be \$500."

20 Q. Do you mean to say that after a lapse of almost a year and a half you can state exactly what took place at that meeting? A. I don't pretend to state exactly; I pretend to state in substance.

Q. You don't mean to say that Tuttle at that meeting was making excuses for the Apgar Brothers and claiming they did the proper thing in getting that release? A. No, sir.

COMPLAINANT RESTS

30

WILLIAM E. TUTTLE, sworn for defendant.

Direct Examination by Mr. Koestler:

Q. Mr. Tuttle, you are a member of the firm of Tuttle Bros? A. Yes, sir.

Q. And the other member is your brother, Arthur Tuttle? A. Yes, sir.

Q. Your place of business is at Westfield? A. Westfield.

40 Q. Did you make a contract or agreement with Ap-

William E. Tuttle—Direct

gar Bros. in regard to furnishing this material to the Harris house? A. I think that was made during my absence, by my brother.

Q. Do you know whether the material was furnished to that house? A. From our records in the office, it was.

Q. I show you stop notice dated November 18, 1907, to Benjamin Harris, which was offered as Exhibit C5, 10 and ask you to look at the signature? A. That is my signature.

Q. That is written "Tuttle Bros.?" A. "Tuttle Bros., Westfield, N. J."

Q. Who wrote that? A. By me.

Q. I show you letter of November 21, 1907, and ask if you wrote the signature "Tuttle Bros." to that letter? A. That was also signed by me.

Q. I show you release of lien dated November 11, 1907, and call your attention to the signature "Tuttle Bros.;" did you write that signature? A. I did not, no, sir. 20

Q. Whose writing is that? A. I should say that was my brother's, Mr. Arthur Tuttle.

Q. Were you present at the time the release of lien was signed? A. Yes.

Q. Who got that signed, George Apgar or Theodore? A. Theodore Apgar.

Q. Tell us what took place just prior and at the time of signing this release? A. I came in the office and found my brother and Theodore Apgar there; my brother said that he wanted to get this release signed and I told him that we shouldn't sign that unless we were absolutely sure of our money. We were then promised by Theodore Apgar — 30

Q. Tell us what Theodore said, if you can? A. He said that this money was ready; we had been asking them for the money on this job for some time; it had been held up for one reason or another—delay in delivery of material and that sort of thing, and he said 40

William E. Tuttle—Direct

that the money was now ready and upon our signing a release he could get it.

Q. Did he say what he would do with it? A. He was to bring us the \$500.

Q. Did he tell you how much he was to get from Harris? A. My recollection is about \$600, I know there was some difference, that is, he wasn't to bring it all
10 to us.

Q. When Theodore Apgar said that who was there, you alone, or was your brother? A. My brother and I were both in the office. My brother had kept him there until I came.

Q. And how long was Mr. Apgar there altogether before the release was finally signed? A. Well, we had quite a little conversation; I would say there was quite a little talk about it.

Your brother didn't sign it until he conferred with
20 you? A. No.

Q. Would you have signed this release if the representation had not been made by Theodore Apgar?

Objected to.

Q. Would you have signed the release if Theodore Apgar had not made this statement to you? A. No.

Q. Would you have your brother sign it? A. No, my brother and I conferred.

30 Q. In having this release signed by your brother, did you rely on the statement made by Theodore Apgar? A. Yes, we did.

Q. How was the credit of Apgar Brothers about the time this release was signed? A. We had already declined them any further credit on any new jobs; we were delivering them at that time some stuff on contracts which were under way, in order to get them finished and get money, but they had lost their credit; they owed us a very large amount of money and we
40 had declined to sell them on any new jobs.

William E. Tuttle—Direct

Q. This Harris job was a job on which you had made a contract? A. Yes, but our money was due; we would have completed the contract.

Q. Did you know from anything that Theodore Apgar said at the time this release was signed by your brother, that it was to be signed by other claimants?

Objected to.

10

Q. Was the subject mentioned, that he was to get—
A. I don't recall that it was.

Q. Do you recollect when you first saw this release, whether there were any signatures on it? A. It was a blank release.

Q. Blank as to signatures? A. Yes.

Q. The typewriting was filled in? A. Oh, yes, because we would not have signed a release that wasn't.

Q. This building is not in Plainfield, it is in Piscataway Township, right outside of Plainfield? A. It is on the outside of Plainfield—we supposed it was. 20

Q. At the time this release was signed, did you know whether or not the contract for the work between Harris and Apgar Brothers was filed?? A. We did not; we assumed that it was.

Q. Did you have any knowledge as to whether or not the contract was filed at the time you served the stop notice dated November 18? A. When the stop notice was served, of course we believed that the contract had been filed. 30

Q. Were you under the same belief when you wrote the letter of November 21, 1907? A. I am not exactly sure of that.

Q. From what source did you first find out that the contract was not filed? A. Through our attorney, Mr. Oliver.

Q. Do you recall whether you found that out prior or after the meeting you had in Mr. Crane's office on November 26? A. I really don't remember. Just at 40

William E. Tuttle—Direct

that time Mr. Oliver was our attorney and had the matter in hand; I don't remember just when that information came.

Q. Do you know whether you had knowledge at the time you wrote the letter of November 21?

Mr. Angleman: He said he did not.

10

A. I am not sure.

Q. You attended a meeting at Mr. Crane's office on November 26, did you? A. Yes.

Q. At whose request did you attend that meeting?

A. Mr. Crane's request.

Q. What was the object of that meeting? A. My recollection is that Mr. Crane invited the creditors there to see if some amicable arrangement couldn't be made with this money which he held in his hands from

20 Harris.

Q. Tell us what took place at that meeting. A. I remember that very shortly after the people assembled it developed that this man Larrabee had received an assignment from the Apgar Brothers of their claim; that practically broke up the meeting. I was astonished, and I remember that Mr. Loizeaux spoke up and he was astonished and very angry; he felt very much hurt; he was a very heavy creditor, and my recollection is that Mr. Loizeaux made a lot of remarks which of-

30 fended the Apgar Brothers, who left the room.

Q. Remarks in reference to what? A. To this fraudulent release which had been signed.

Q. How long were you there? A. I cannot tell exactly; we were there for a little while when this first part was going on; then the Apgar Brothers withdrew and I think there were three or four of us that remained for a little while and had a little conversation about the whole affair.

Q. After the Apgar Brothers left did you have any

40

William E. Tuttle—Cross

conversation with Mr. Crane? A. Mr. Crane was in the conversation, it was general.

Q. One of the witnesses has said that you remarked that by advice of counsel you would stand on your stop notice; do you recollect what was said about that? A. I may have said that.

Q. Did you advance any claim to this money at that meeting? A. No, I don't recall advancing any claim, 10 because I was disgusted with the whole proceeding and I think we simply threw up our hands and said things would have to take their course.

Q. Mr. Crane says that you said, in speaking in regard to procuring the release, "You know it is done all along." What have you to say in regard to that remark? A. Well, I think that Mr. Crane is mistaken, if I ever passed a remark of that kind; of course, there are some releases that are signed and some that are not. It would be ridiculous for us to sign releases indiscrim- 20 inately, and it also would be ridiculous for us to refuse to sign releases for responsible parties, and we didn't consider Apgar Brothers responsible at that time.

Q. At that time you had your letter in before Mr. Crane claiming fraud? A. Yes, we had just heard of some money being promised to two other people, and upon getting that information we sent this letter to Mr. Harris, believing that the transaction was not straight.

Q. When Mr. Crane says you said "the boys are honest, I trust them for any amount," what is your 30 recollection? A. That is a mistake, because at that time they owed us a great amount of money and we had, as I say, declined to give them further credit on other jobs.

Q. You didn't have anything to do with the arrangement of selling this lumber to Apgar Brothers? A. No, I was out of town.

Cross Examination by Mr. Angleman:

William E. Tuttle—Cross

Q. When did you first decline to give further credit to Apgar Brothers? A. Some time—for several weeks previous to this arrangement.

Q. What specific instance? A. I don't recall specific instances, except we told them that they must not make that account larger.

Q. Do you call that declining to give credit? A.
10 Yes.

Q. That is the only thing? A. Yes.

Q. You continued to sell to them after you signed this release, did you not? A. Nothing, except to finish up those jobs which were under way.

Q. Can you tell us when the last materials were furnished him prior to his bankruptcy? A. I cannot.

Q. How long before his bankruptcy? A. I cannot tell that.

Q. A very short time? A. Yes, I assume so.

20 Q. And the bankruptcy was about the 26th of February? A. I had forgotten about that; we didn't sell them anything, I don't think, after early in November.

Q. Nothing after early in November? A. I don't think so.

Q. When did you finish this Harris contract? A. In October or the first of November.

Q. You didn't furnish him anything after the first part of November? A. On the Harris contract?

Q. I mean on any contract. A. I don't think so,
30 not after this business developed.

Q. This was signed on the 11th of November and you had that meeting in Mr. Crane's office along about the 26th of November, which is the last of November? A. Yes.

Q. Do you mean to say after the meeting in Crane's office or after the signing of this release? A. I am not sure; we would have to refer to our books on that, but if we were furnishing them anything at that time, it was on the contracts which we had taken and which

William E. Tuttle—Cross

we were anxious to have finished so the money would be due.

Q. This stop notice which you served shows your contract was finished on October 31? A. Yes, it was charged on October 31.

Q. When was it finished? A. I am inclined to think there were a few small items which were yet to be delivered to complete the contract—some little 10 changes or something which hadn't been furnished. The bulk of the contract had been furnished and it is possible a few small pieces may have been delivered after.

Q. The object of giving this stop notice Exhibit C 5 and sending this fraud letter Exhibit C 6 was that your firm might get possession of this money still due on the Harris contract, was it not?

Objected to.

20

A. They were served to get the money for ourselves.

Q. Yourselves? A. Yes.

Q. And that was the object of both of those papers? A. I should take it so.

Q. You have been in business how long? A. About twelve years.

Q. And you are reasonably familiar with the mechanics lien law? A. No, sir.

30

Q. You know, do you not, that under the law, if a contract is filed, a builder does not have to obtain a release? A. I admit I know nothing about it.

Objected to. Objection sustained.

Q. Who were present at the time this release was signed? A. Theodore Apgar, my brother and myself.

Q. Any one else? A. I don't remember that there was.

40

William E. Tuttle—Cross

Q. Was George Apgar there? A. I don't think so.

Q. What time of the day was it? A. I don't know.

Q. Do you know what day of the week it was? A. Simply from referring to the date.

Q. Do you know what day of the week it was? A. No.

Q. Do you know what time of the day? A. No, sir.

10 Q. Do you know how many releases you signed that week? A. No, sir.

Q. Do you know how many you signed that day? A. I do not.

Q. You signed quite a number, did you? A. No, sir, very rarely.

Q. What was the exact language which Theodore used when he asked your brother to sign? A. That is a pretty hard question to answer at this distance from that interview that morning; the conversation was in
20 substance that.

Q. Can't you remember the language? A. Oh, no.

Q. You cannot? A. No.

Q. Were you present when Theodore came in? A. No, sir, Theodore and my brother were in the office when I came in.

Q. You recall now as well as you can what was said to you when you came in, in Apgar's presence, after he had been there with your brother; what was the first news you got about it? A. My brother said that he
30 was—this is in substance—that he had asked us to sign a release for that money; he had objected and said he wouldn't sign it until it was referred to me. When I came in we said we couldn't sign it unless some money was forthcoming; we asked what he would bring us, what we would get; he said \$500. He even promised that upon the signing of this release he could get the money from Mr. Harris and bring it directly to us, and it was on that absolute understanding that we signed the release, and only upon that agreement.

40 Q. Upon his promise to give you \$500 when he got

Arthur Tuttle—Direct

it? A. Upon his promise to get it, that the job was finished; he was to get it and bring it to us.

Q. Why didn't you take an order from him on the owner? A. I have been advised never to take orders.

Q. By a lawyer? A. By lawyers, yes.

Q. You cannot recall now when you first learned that the contract was not filed? A. I don't know, I am not sure; it must have been about this time, because 10
our attorney had the matter in hand, and that would probably be the first thing he would give his attention to.

Q. At this meeting in Mr. Crane's office, you still held to the notices which you had served, did you not? A. I don't think that there was anything said about these notices very much; that sort of talk was all ended, and if I had been instructed to by my lawyer at that time, I probably did.

Q. You don't know whether you said what Mr. 20
Crane said or not? A. I may have said that.

Q. That meeting was called, as I understand it, for the purpose of seeing if the three claimants of this fund could not get together and make an amicable adjustment? A. I don't remember that that was the cause, because I don't think that anybody went there with that feeling that that would be brought about.

Q. You think all three went there with the idea that they wanted the whole money? A. I know we expected of course we would get it on these representations 30
which had been made to us. I don't think there was any discussion about dividing the money on any amicable arrangement that evening.

ARTHUR TUTTLE, sworn for defendants.

Direct Examination by Mr. Koestler:

Q. You are a member of the firm of Tuttle Bros.?

A. I am.

Arthur Tuttle—Direct

Q. Did you make the arrangement with Apgar Bros. by which the material was furnished for the Harris house? A. Yes.

Q. Will you state how that was done? A. We had a contract with Mr. Saxton's house and they told us to duplicate that contract.

10 Q. At what price did you furnish the material for the Saxton house? A. The same as the Harris house, \$582.77.

Q. Have you any paper with you from which you can refresh your recollection? Did you make the contract with Apgar Brothers on the Harris house in writing? A. Yes, \$582.77.

Q. Where is your written contract with Apgar Bros. on this Harris house? A. I haven't it with me, I think it is in a book.

20 Q. Isn't it a fact that you merely made an estimate?

The Court: Was the estimate in writing?

Mr. Angleman: Your stop notice shows the amount.

Q. Have you the Saxton estimate? A. No.

30 Q. I show you stop notice dated November 18, 1907, and that account annexed to the same; can you tell us about that account? Do you know about a copy of the account being annexed to the stop notice? A. That is correct, as per the estimate of the Saxton house, which was duplicated.

Q. What was the estimate on the Saxton house? A. \$582.77.

Q. Was that duplicated in this case? A. Yes.

Q. Was there any extra material furnished outside of the Saxton job? A. Yes, these extras here—shingles and columns, which brings the total up to \$727.65.

40 Q. That is the amount for which you served stop notice? A. Yes.

Arthur Tuttle—Direct

Q. By whom is the stop notice signed? A. By my brother, W. E. Tuttle, Jr.

Q. Who served the stop notice? A. I did.

Q. On whom? A. On Mrs. Benjamin Harris.

Q. Where? A. At his residence.

Q. Do you recall on what day you served that, with reference to the date? A. The same day the stop notice was made out, I served it late in the afternoon, the 10 18th of November.

Q. Had you before serving this notice made any demand for payment on Apgar Bros.? A. Yes, some time during the week following after they had signed the release, I went up to their house.

Q. You went to the house and whom did you see? A. I saw Mr. Theodore Apgar and Mr. George Apgar.

Q. What did you say to them then? A. I asked them about the Harris money.

Q. Did you get any of it? A. No.

20

Q. I show you a letter of November 21 and ask you who signed the signature, "Tuttle Bros." to that letter? A. That is my brother's signature, W. E. Tuttle, Jr.

Q. I show you release of lien dated November 11, 1907, and ask you who signed the signature "Tuttle Bros." to that release? A. That is my release.

Q. Was George R. Apgar present when you signed it? A. No.

Q. Who was present? A. Theodore Apgar.

30

Q. Will you tell us the circumstances under which this release of lien was signed "Tuttle Bros." in your handwriting? A. Mr. Theodore Apgar came there to the office.

Q. Who was there when Theodore came? A. I don't know that any one was there.

Q. You were there? A. I was there.

Q. Was your brother W. E. there? A. No, my brother wasn't there.

Q. What talk did you have? A. He asked me to 40

Arthur Tuttle—Direct

sign this release. I told him I could not do it without consulting my brother.

Q. How long was it before your brother came in?
A. I don't remember—a very short time.

Q. What did Apgar say in regard to procuring your signature to the release? A. He said that if we would sign that release he would get the money from Mr.
10 Harris and bring it to us, the money was due and ready. He would bring us \$500.

Q. Did he say how much he was to get from Harris? A. I don't recall that he did. I was under the impression about \$600. Yes, he told me several times he had \$600 coming up there as soon as he would get that job finished.

Q. Did he say how much he would bring to you?
A. \$500.

Q. Did he say what he was going to do with the release if you would sign it? A. He would take that to
20 Mr. Harris and get the money.

Q. And then your brother came in? A. I cannot say when he came in. He came in—I think most of this conversation was after my brother was there.

Q. Was the release signed? A. Yes, I signed the release.

Q. Did you and your brother have a conference before you signed it? A. Yes—no, I wouldn't say it was a conference; we talked right there before Mr. Apgar.

Q. Would you have signed the release if Apgar
30 hadn't made the statement he did make? A. No, I would not.

Q. Did you ever go to Apgar to see him in regard to getting that money for which you signed the release?
A. Yes.

Q. How long after signing the release? A. I cannot say—three or four days—two or three days—some time during that week.

Q. Where did you go? A. To Theodore Apgar's
40 house, Dunellen.

Arthur Tuttle—Cross

Q. Whom did you see? A. I saw Theodore and George.

Q. Did you ask for the money? A. Yes.

Q. What did they say? A. They said they didn't have it.

Q. What did they say they were going to do with the money when they got it?

10

Objected to.

Q. (By the Court.) What was said? A. I don't remember the conversation; it was rather unsatisfactory, they didn't seem to talk as though they were going to get the money.

Q. What did they say that led you to believe that?
A. I don't just recall.

Q. Did he mention anything about Mr. Larrabee? 20

A. I think George said something about Mr. Larrabee having a claim.

Cross Examination by Mr. Angleman:

Q. How long after you went to the Apgars at Duncellen to get the money which Theodore had promised you on this release was it before you sent the stop notice? A. I cannot just say.

Q. A day or a week? A. Probably two or three 30 days.

Q. Why didn't you send it right away? A. I don't know. I don't remember why we didn't send it right away; I had to have a conference with my brother.

Q. You signed the release on the day before that but didn't give the stop notice until the 18th; you say that when you signed the release Theodore Apgar told you that he would immediately take it to Harris and immediately get the money and immediately bring the

30

Arthur Tuttle—Re-Direct

money to you, is that right? A. It wasn't in so many words, but that was the substance of it.

Q. But yet you waited a whole week before you notified Harris that Apgar had not kept his agreement?

A. Yes, sir.

Q. In fact, you waited longer than a week. How long after? You waited ten days, a week and a half?

10 A. No.

Q. The stop notice didn't say anything about the fraud in the lien; the first mention of fraud was eleven days after what you claim was when the fraud was perpetrated? A. I don't know that I signed that release on the 11th.

Q. Do you remember when you did sign it, looking at the date? A. No.

Q. You don't know what date it was signed? A. No, I have no record of it.

20 Q. Was it signed the same week as the fraud letter? A. It had been signed some little time before that letter was written.

Q. If there was fraud in the getting of this release, why did you not immediately notify Harris of the fraud as soon as you discovered it? A. (No answer).

Q. Isn't this cry of fraud or misrepresentation on your part an afterthought entirely? A. Yes.

Re-Direct by Mr. Koestler:

30 Q. What do you mean by that, Mr. Tuttle? A. I didn't think there was any fraud when I signed the release.

Q. You didn't think there was any fraud when you signed the release? A. No.

Q. When did you find out that there was fraud? A. I cannot exactly say; it seemed like fraud to me the night I was up there.

Q. Who had charge of this matter outside of your signing the release, you or your brother? A. My
40 brother.

William E. Tuttle, Recalled—Direct—Cross

Q. He signed the stop notice and he signed the fraud letter, didn't he? A. Yes.

WILLIAM E. TUTTLE, recalled.

Direct Examination by Mr. Koestler:

Q. Did you receive any information in regard to 10 this release from other sources between the time you served the stop notice and the time of writing the letter claiming fraud? A. Yes, I found that he had promised that some money to J. D. Loizeaux Lumber Co., and also to this man Larrabee. He had made us promise for this release in the meantime, before he got this money. That was why we put up the cry of fraud; we found he had lied to the three of us.

Cross Examination by Mr. Angleman:

20

Q. That was the reason you put up the cry of fraud? A. Yes, when we ascertained that we at once consulted with our lawyer.

The assignment from Apgar Bros. to Larrabee and from Larrabee to the Trustees is offered in evidence. That is the assignment to the Trustees in Bankruptcy.

The Court: It is admitted that the Apgar Bros. 30 have been adjudicated bankrupts by the United States District Court on March 16, 1908, and that an assignment under the bankruptcy act has been made to the defendants Trustees in Bankruptcy?

Mr. Koestler: I don't admit the assignment to Larrabee, because I don't think it is properly proven. The assignment to the trustees in bankruptcy is dated the 13th day of July, 1908. The bankrupts assigned to

40

Theodore Apgar, Recalled—Direct

Larrabee and Larrabee assigned to the Trustees. I waive proof on the Trustees, dated July 13, 1908.

(Marked Exhibit D 1 for Trustees in Bankruptcy.)

As to the other assignment from Apgar Bros., the bankrupts, to Larrabee, I cannot produce the subscribing witness, but we can produce the parties who signed
 10 it—the two Apgar Brothers who signed it. They have already sworn to it; they said they didn't know who the subscribing witness was.

THEODORE APGAR, recalled for Bankrupts.

Direct Examination by Mr. Blatz:

Q. That is your signature on Exhibit C 9? A. Yes.

20 Q. Where did you sign that paper for Larrabee? You signed some paper for Larrabee, signing over your right to the money, that is, the one the creditors talked about. A. In my house, at the dining-room table, in the presence of my wife.

Q. Where do you live? A. Dunellen, Front Street.

Q. At what time in the day did you sign it? A. About eight o'clock at night, after I got home from work.

Q. Who lives in your house? A. My wife, two
 30 children and myself.

Q. Anybody else in the house? A. No.

Q. That night, was there any other man there? A. Not that night, no.

Q. Then when you signed it, there was nobody present to see your signature? You signed it in your house; where did your brother sign? A. I don't know; he must have signed it over at his house.

Q. When it was brought to you had it been signed by your brother, or did you sign first? A. I signed
 40 first.

Theodore Apgar, Recalled—Cross

Q. Where did you get the paper? A. Mr. Larrabee brought it to us.

Q. He brought it to you at your house? A. Yes.

Q. Then when you signed it, Larrabee was there, was he? A. Yes—I mean outside of Mr. Larrabee.

Q. Larrabee was there and saw you sign it? A. Yes.

Q. Nobody else, no other man saw you sign it? A. 10
Yes, that is right.

Q. After you signed it you took it to Larrabee?
A. He took it over with him.

Q. That is all you know about it? A. Yes.

Q. You don't know who put that name there? A.
No.

Q. And there wasn't anybody there as a subscribing witness? A. No, outside of Mr. Larrabee.

Cross Examination by Mr. Koestler:

20

Q. When did you sign this assignment? A. I don't know what day it was.

Q. Do you recall the fact of the first notice being served on you by Mr. Harris that he had been served with a stop notice? A. No, if I recollect right, it was about the night after Arthur Tuttle was to my brother's house—a night after, maybe two nights after.

Q. Sure of that? A. Yes, sir, positive.

Q. Do you know whether you signed this paper on 30
the day on which it is dated? A. No.

Q. Did you have any negotiations with Mr. Larrabee toward the signing of this paper before he came that day? A. No.

Q. You didn't have this paper prepared? A. I did not.

Q. You don't know who George Penny is? A. I do not.

Q. And George Penny didn't see you sign this paper? A. No.

40

George Apgar, Recalled—Direct—Cross

GEORGE APGAR, recalled for Bankrupts.

Direct Examination by Mr. Blatz:

Q. That is the paper shown you this morning, Exhibit C 9? A. Yes.

Q. Can you tell us where that was signed? Where
10 did you sign it? A. In my house, on Front Street, Dunellen.

Q. Who was present at the time? A. Mr. Larrabee.

Q. Who else? A. That is all.

Q. What time in the evening? A. I judge about quarter to eight, between half past seven and eight o'clock.

Q. How far do you live from your brother? A. Right alongside of each other.

Q. Had your brother signed before you did? A.
20 Yes.

Q. Then Larrabee brought it to you? A. Yes.

Q. No other man was there when you signed it?
A. Not at that time, no.

Q. Do you know George Penny? A. No, I do not.

Q. Never heard of him? A. No.

Q. That is your signature? A. Yes.

Q. And that is the paper you signed? A. Yes.

Cross Examination by Mr. Koestler:

30 Q. Do you know who George Penny is? A. No, I do not.

Q. Do you know whether you signed that paper the same day your brother did? A. Yes, sir.

Q. When did you sign it, the day time or night time? A. About quarter to eight—between half past seven and eight o'clock.

Q. And your brother signed it before you did? A. Yes.

40

George Apgar, Recalled—Cross

Q. Do you know what day of the week it was? A. No, sir.

Q. Do you know what day of the month it was? A. No.

Q. Do you know whether at the time you signed this you had already been served with notice advising you that stop notices had been served on Harris by Tuttle? A. Yes. 10

Q. You had been served with that notice already? A. Yes.

Q. Didn't you sign this in order to defeat Tuttle right under the notice?

Objected to.

Q. Do you know whether the name "George Penny" was written on this paper at the time you signed it? A. I don't recollect. 20

Q. Can you swear one way or the other? A. No, I wouldn't.

Q. Penny didn't come along with Larrabee? A. No.

(Exhibit C 9 offered in evidence by Trustees in Bankruptcy.)

Objected to.

The Court: I will overrule the objection. The paper is proved. It is proved that there wasn't any witness on this when it was signed, and this signature was written afterwards. 30

ALL REST.

Exhibit C 1

EXHIBIT C 1.

CONTRACT.

Dunellen, N. J., June 26th, 1907.

This is an agreement between Apgar Bros. and
 10 Benj. S. Harris for a house to be built on Clinton Ave.,
 Plainfield, N. J., near Eight St.

The house is to be a duplicate of Mr. Saxon's, accord-
 ing to his plans and Specifications, also to be a Barn
 20x24; contract price Four Thousand and One Hun-
 dred Dollars (\$4100) pay payments to be made as fol-
 lows: first payment when the barn is completed and the
 foundation for the house is up \$600.00

Second payment when the house is sheathed
 to the plate 800.00

20 Third payment when the house is inclosed
 ready for the mason 800.00

Fourth payment when all plastered and all the
 standing trim is on 900.00

Fifth payment when all windows and doors are
 in 400.00

Balance when the house is all completed..... 600.00

This does not include painting. The house will be
 compleated about middle of 15 October.

BENJ. S. HARRIS,
 APGAR BROS.

30

Exhibit C 2

EXHIBIT C 2.

Six CHECKS as follows:

No. Plainfield, N. J., July 24, 1907.

THE FIRST NATIONAL BANK

of Plainfield.

Pay to the order of Apgar Bros. for building, 10

Six hundred Dollars

\$600.00.

Benjamin S. Harris.

Endorsed

Apgar Bros.

Paid Jul. 24, 1907, First National Bank,

Plainfield, N. J.

No. Plainfield, N. J., Aug. 1st, 1907.

THE FIRST NATIONAL BANK

Of Plainfield.

20

Pay to the order of Apgar Bros., for building,

Eight hundred Dollars

\$800.00.

Benjamin S. Harris.

Endorsed

Apgar Bros.

Paid Aug. 2, 1907, First National Bank,

Plainfield, N. J.

No. Plainfield, N. J., Aug. 22nd, 1907.

THE FIRST NATIONAL BANK

30

Of Plainfield.

Pay to the order of Apgar Bros. for building

Eight hundred Dollars

\$800.

Benjamin S. Harris.

Endorsed

Apgar Bros.

Paid Aug. 22, 1907, First National Bank,

Plainfield, N. J.

Exhibit C 2

No. Plainfield, N. J., Oct. 10, 1907.
THE FIRST NATIONAL BANK
 Of Plainfield.

Pay to the order of Apgar Bros. for building
 Nine HundredDollars
 \$900. Benjamin S. Harris.

Endorsed

10 Apgar Bros.

Paid Oct. 10, 1907, First National Bank,
 Plainfield, N. J.

No. Plainfield, N. J., Nov. 7th, 1907.
THE FIRST NATIONAL BANK
 Of Plainfield

Pay to the order of Apgar Bros. for building
 Four HundredDollars
 \$400.00. Benjamin S. Harris.

Endorsed

20

Apgar Bros.

Paid Nov. 8, 1907, First National Bank,
 Plainfield, N. J.

No. Plainfield, N. J., Nov. 18th, 1907.
THE FIRST NATIONAL BANK
 Of Plainfield.

Pay to the order of Apgar Bros. for building,
 Seventy-five Dollars

30 \$75.00.

Benjamin S. Harris.

Endorsed

Apgar Bros.

Paid No .18, 1907, First National Bank,
 Plainfield, N. J.

Exhibits C 3 and C 4**EXHIBIT C 3.****BILL FOR EXTRA WORK. BALANCE DUE ON
CONTRACT, \$548.30.**

Benj. S. Harris, Dr.,		
To Apgar Bros. for Extras.		
Aug. 24th	One extra door	\$ 5.00 10
" "	Back stoop	3.00
" "	2 shelves	2.00
" "	Double action door	2.50
Sept. 10	Handle for door	.30
" "	Railing for back stoop	1.00
Oct. 16	Screen door frame	2.50
Nov. 7	Grill work	5.50
" "	Small steps	1.50
		23.30 20
Due on contract		525.00
Total		\$548.30
O. K. Apgar Bros.		
11-20-'07.		

EXHIBIT C 4.**RELEASE OF MECHANICS LIENS, APGAR BROS.
TO BENJ. HARRIS.**

30

WHEREAS, George Apgar & Theodore Apgar, partners doing business under the name and firm of Apgar Bros., Contractors, have by a contract in writing, agreed to erect for

Benjamin S. Harris, the owner, a building situate on Clinton Ave. opp. W. 8th St., in the Twp. of Piscataway, County of Middlesex and State of New Jersey, known as No. ? Clinton Ave., in said Township and we the undersigned, have done work and furnished materials for the erection and construction thereof. 40

Exhibit C 4

NOW THEREFORE, in order to enable the said contractors to collect and receive the contract moneys due them therefor, and in consideration of one dollar to each of us paid, we hereby jointly and severally release and discharge the said building, and the lot or curtilage whereon the same is erected, of and from any and all liens held by us thereon, by virtue of the

10 Mechanics' Lien Law of New Jersey, for the payment of any debt contracted and owing to us for labor heretofore performed and materials furnished by us for the erection and construction of such building.

WITNESS our hands and seals this Eleventh day of November, One Thousand Nine Hundred and Seven,

**Signatures of Materialmen,
Journeymen and Laborers.**

Witnesses.

	George I. Apgar	Tuttle Bros.	(L.S.)
20	George I. Apgar	W. G. Clawson	(L.S.)
	George I. Apgar	W. L. Larrabee	(L.S.)
	George I. Apgar	William Baker	(L.S.)
	George I. Apgar	Timothy S. Thorn	(L.S.)
	George I. Apgar	E. Daniel	(L.S.)
	George I. Apgar	Charles C. Graves	(L.S.)
	George I. Apgar	J. D. Loizeaux Lumber Co.	(L.S.)
	Benjamin S. Harris	Apgar Bros.	(L.S.)
	J. H. Crane	Henry H. Apgar	(L.S.)

30

CONTRACTOR'S AFFIDAVIT.

STATE OF NEW JERSEY }
COUNTY OF UNION } ss.

George Apgar & Theodore Apgar, partners, doing business under the name of Apgar Bros., each being duly sworn on his oath, says that they are the persons who are erecting the building described in the foregoing release; that the same is being erected under a contract in writing made by and between the above

40 mentioned owner and deponents as contractors, which

Exhibits C 4 and C 5

contract or a duplicate thereof has been duly filed in the office of the Clerk of the County in which said building is situate; And deponent further says that no person or persons other than those named in and who have executed said release have any lien upon said building or the lands whereon the same is situated, by reason of work done or materials furnished for the erection or construction of said building.

10

George I. Apgar.

Theodore Apgar.

Subscribed and sworn to before me this
20th day of November, A. D. 1907, Plain-
field, N. J.

(SEAL)

J. Henry Crane,
Notary Public of N. J.

EXHIBIT C 5.

STOP NOTICE, TUTTLE BROS. TO BENJ. HARRIS. 20

TUTTLE BROS., WESTFIELD, N. J.

To Benjamin Harris:

Take notice there is due us from George Apgar and Theodore Apgar, partners trading as Apgar Brothers, contractors, the sum of seven hundred twenty-seven dollars and sixty-five cents (\$727.65) for materials by us furnished and by them used in the erection of your dwelling house on the West side of Clinton Avenue near Eighth Street, in the City of Plainfield, Union County, New Jersey; that we have demanded of them 30
payment of the same and they have refused to pay the same, and we therefore notify you to retain the amount so due out of the amount owing by you to said contractors, and to pay the same to us.

A bill of the items of the said materials is hereto annexed.

Dated, Nov. 18th, 1907.

Tuttle Bros.,
Westfield, N. J.

1907

40

Exhibits C 5 and C 6

		Oct. 31, No. 51 Sash, Doors & Mill Work		
		per contract, estimate No. 2277	\$582.77	
		Extras.		
10	Aug. 9,	1789 1415 ft. R. C. Siding,	49.53	
		1756 1210 sq. ft. R. C. Siding	42.35	
		8000 16" C. B. W. C.		
		Shingles,	40.00	
			—	82.35
	" 12,	1859 3 Cols 8x8' Staved	3.50	10.50
	" 16,	2008 1 8x8' Col. C. & B.		2.50
				—
				\$727.65

Endorsed,
Recvd Nov. 20th, 1907.

EXHIBIT C 6.**20****LETTER FROM TUTTLE BROS. TO MR. HARRIS.**

Westfield, N. J., November 21, 1907.

Mr. Benjamin Harris,
Plainfield,
New Jersey.

Dear Sir:

A week or so ago at the request of Messrs. Apgar
30 Brothers, we signed a release of lien affecting your new
house on Clinton Avenue, in Plainfield, upon the under-
standing that the sum of money amounting to about
\$500.00 which he expect to receive from you on the
strength of the release was to be paid at once to us.

We find that Mr. Apgar also obtained signatures to
this from other parties, making the same representa-
tion.

As the release was obtained from us by fraud and
has never been delivered to you by us and as no money
40 has been paid to us on it, we hereby notify you to pay

Exhibit C 7

no money to Apgar Apgar Brothers, or to any person for them on account of the construction of this house.

Very respectfully yours,

Tuttle Bros.

EXHIBIT C 7.

**NOTICE J. D. LOIZEAUX LUMBER COMPANY TO 10
MR. HARRIS.**

Mr. Benjamin Harris,
Plainfield, N. J.

Dear Sir:

I hereby notify you that a paper purporting to be a release of the building and curtilage owned by you on Clinton Avenue near Eighth Street and signed by the J. D. Loizeaux Lumber Company, and delivered to George Apgar, one of the firm of Apgar Brothers, was 20
procured from said J. D. Loizeaux Lumber Company by false and fraudulent representations made to J. D. Loizeaux, the Vice President thereof, and upon the strength of which said false and fraudulent representations said paper purporting to be said Release was signed, it, therefore, notifies you not to give any force and effect to the said Release and we hereby demand that if same is in your possession that you deliver same to us that we may cancel our signature therefrom.

Very truly yours,

30

J. D. Loizeaux Lumber Co.

Isaac P. Runyon, Atty.

Endorsed

Recv'd Nov. 22nd, 1907.

Benj. S. Harris.

Exhibit C 8**EXHIBIT C 8.****STOP NOTICE. W. L. LARRABEE TO BENJAMIN HARRIS.**

To Benjamin Harris:

- 10 You are hereby notified that Theodore Apgar and George Apgar, partners as Apgar Bros., are justly indebted to me in the sum of five hundred and forty-three dollars for material and labor furnished by me to them, and used by them, in the erection of a two story and a half frame dwelling house, erected or being erected on the land owned by you, and situated on Clinton Avenue in the township of Piscataway, county of Middlesex and State of New Jersey, nearly opposite Eighth Street, pursuant to the contract made between you and them, and you are further notified that I have
- 20 demanded payment from the said firm of Apgar Bros. of the said sum of money, so due and owing me as aforesaid, and that they have refused to pay same or any part of same, and you are therefore required to retain the amount so due and claimed by me out of the amount owing by you on said contract, or that may hereafter become due and owing from you on said contract and on being satisfied of the correctness of my demand, to pay the same to me. Said sum being balance due on sub-contract made by me as sub-contractor
- 30 with said firm of Apgar Bros. for plumbing and tinning work and heating.

Dated November 21, 1907.

W. L. Larrabee.

Endorsed

Recvd Nov. 22nd, 1907.

Exhibits C 9 and C 10**EXHIBIT C 9.****ASSIGNMENT, APGAR BROS. TO WILLARD L. LARRABEE.**

KNOW ALL MEN BY THESE PRESENTS, that we, Theodore Apgar and George Apgar, partners as Apgar Bros., in consideration of the sum of one dollar to us in hand paid the receipt whereof is hereby acknowledged, do hereby assign, transfer and set over to Willard L. Larrabee, and his assigns, all our right, title and interest in and to a certain contract made with us with Benjamin Harris for constructoin of house on Clinton Avenue, opposite West Eighth Street, near the city line of Plainfield, New Jersey, together with all moneys now due or to become due thereon and we hereby authorize and empower said Benjamin Harris to pay to said Willard L. Larrabee or his assigns all moneys now due to us or that may become due by virtue of said contract and this shall be a sufficient warrant and discharge for him in the premises.

In witness whereof we have hereunto set our hands and seals this twenty-second day of November, 1907.

Theodore Apgar (L.S.)

George I. Apgar (L.S.)

Signed, sealed & delivered
in the presence of,

George Peney.

Endorsed

11/26/07

30

EXHIBIT C 10.**NOTICE OF STOP NOTICE RECEIVED FROM TUTTLE BRS. BENJAMIN HARRIS TO APGAR BROS.**

To Apgar Bros., contractors:

You are hereby notified that I have been served with a notice, a copy whereof is as follows:

"To Benjamin Harris:

31

Exhibit C 10

Take notice there is due us from George Apgar and Theodore Apgar, partners, trading as Apgar Brothers, contractors, the sum of seven hundred twenty-seven dollars and sixty-five cents (\$727.65) for materials, by us furnished and by them used in the erection of your dwelling house on the west side of Clinton Avenue near Eighth Street, in the City of Plainfield, Union County, New Jersey; that we have demanded of them payment of the same and they have refused to pay the same, and we therefore notify you to retain the amount so due out of the amount owing by you to said contractors, and to pay the same to us.

A bill of the said items is hereto annexed.

Dated Nov. 18th, 1907. Sgd. Tuttle Bros.,
Westfield, N. J.
1907.

20	Oct. 31st.	No. 51 Sash, Doors & Mill Work per contract, estimate No. 2277	\$582.77
		Extras.	
	Aug. 9th, 1789	1415 ft. R. C. Siding	49.53
	1756	1210 Sq. ft. R. C. Siding	42.35
		8000 16" C. B. W. C.	
		Shingles	\$40.00
			82.35
	" 12th, 1859	3 Cols. 8x8' Staved	3.50 10.50
	" 16th, 2008	1 8x8' Col. C. & B.	2.50
30			\$727.65

Respectfully,
Benjamin S. Harris,
Owner.

Endorsed.

Copy. Notice.

Served a copy of the within notice on Theodore Apgar this 21st day of Nov., A. D. 1907.

Benjamin S. Harris.

Exhibit C 12**EXHIBIT C 12.**

**NOTICE OF STOP NOTICE RECEIVED FROM J. D.
LOIZEAUX LUMBER CO. BENJAMIN HAR-
RIS TO APGAR BROS.**

To Apgar Bros., Contractors:

You are hereby notified that I have been served 10
with a notice, a copy whereof is as follows:

"Mr. Benjamin Harris,
Plainfield, N. J.

Dear Sir:—

I hereby notify you that a paper purporting to be
a release of the building and curtilage owned by you on
Clinton Avenue near Eighth Street and signed by the
J. D. Loizeaux Lumber Company, and delivered to
George Apgar, one of the firm of Apgar Brothers, was
procured by false and fraudulent representations made 20
to J. D. Loizeaux, the Vice President thereof, and upon
the strength of which said false and fraudulent repre-
sentations said paper purporting to be said Release
was signed; it therefore, notifies you not to give any
force and effect to the said Release and we hereby de-
mand that if same is in your possession that you de-
liver same to us that we may cancel our signature
therefrom.

Very truly yours,

J. D. Loizeaux Lumber Co.,” 30

Isaac P. Runyon, Atty.

Respectfully,

Benjamin S. Harris,
Owner.

Endorsed.

Copy—

Served a notice of which this is a true copy on Theo-
dore Apgar this 23rd day of Nov., 1907.

Benjamin S. Harris. 40

Exhibit C 13**EXHIBIT C 13.****BENJAMIN HARRIS TO APGAR BROS. NOTICE
OF LETTER RECEIVED FROM TUTTLE BROS.**

To Apgar Bros., Contractors:

10 You are hereby notified that I have been served
with a notice, a copy whereof is as follows:

"Mr. Benjamin Harris,
Plainfield,
New Jersey.

Dear Sir:

A week or so ago at the request of Messrs. Apgar
Brothers, we signed a release of lien affecting your new
house on Clinton Avenue, in Plainfield, upon the un-
derstanding that the sum of money amounting to about
\$500 which he expected to receive from you on the
20 strength of the release was to be paid at once to us.

We find that Mr. Apgar also obtained signatures to
this from other parties, making the same representa-
tions.

As the release was obtained from us by fraud and
has never been delivered to you by us and as no money
has been paid to us on it, we hereby notify you to pay
no money to Apgar Brothers, or to any person for them
on account of the construction of this house.

Very respectfully yours,

30 Tuttle Bros."

Respectfully,

Benjamin S. Harris,
Owner.

Endorsed

Copy of Notice

Served notice of which this is a true copy on Theo-
dore Apgar this 23rd day of Nov., 1907.

Benj. S. Harris.

Exhibit C14**EXHIBIT C 14.**

**BENJAMIN HARRIS TO APGAR BROS. NOTICE
OF STOP NOTICE RECEIVED FROM
W. L. LARRABEE.**

To Apgar Bros., Contractors:

You are hereby notified that I have been served with 10
a notice, a copy whereof is as follows:

“To Benjamin Harris:

You are hereby notified that Theodore Apgar and
George Apgar, partners as Apgar Bros., are justly in-
debted to me in the sum of five hundred and forty-
three dollars, for material and labor furnished by me
to them, and used by them in the erection of a two and
a half story frame dwelling house erected or being
erected on the land owned by you, and situated on Clin-
ton Avenue in the Township of Piscataway, County of 20
Middlesex, and State of New Jersey, nearly opposite
Eighth Street, pursuant to the contract made between
you and them, and you are further notified that I have
demanded payment from the said firm of Apgar Bros.
of the said sum of money, so due and owing me as
aforesaid, and that they have refused to pay same or
any part of same, and you are therefore required to
retain the amount so due and claimed by me out of the
amount owing by you on said contract or that may
hereafter become due and owing from you on said 30
contract and on being satisfied of the correctness
of my demand to pay the same to me. Said sum being
due on a sub-contract made by me as sub-contractor
with said firm of Apgar Bros. for plumbing and tin-
ning work and heating.

Dated November 21st, 1907.

Sgd. W. L. Larrabee.”

Respectfully,

Benjamin S. Harris,

Owner. 40

Exhibit C15

Endorsed
Copy Stop Notice

Served notice of which this is a true copy on Theodore Apgar this 23rd day of Nov., 1907.

Benj. S. Harris.

EXHIBIT C 15.

10

SUMMONS AND DECLARATION IN SUIT ON CONTRACT, NEW JERSEY SUPREME COURT, LARRABEE VS. APGAR BROS.

New Jersey S. S. The State of New Jersey to the sheriff of the county of Middlesex
Greeting: You are hereby commanded to summon Benjamin Harris, defendant, to appear before the Supreme Court of New Jersey, on the seventh day of December,

(seal)

20

1907, to answer unto Willard L. Larrabee, assignee of Theodore Apgar and George Apgar, partners as Apgar Bros., plaintiff, in an action on contract wherein the plaintiff claims from the defendant one thousand dollars and have you there this writ.

Witness, William S. Gummere, Esquire, Chief Justice of said court, at Trenton, the twenty-seventh day of November, in the year Nineteen hundred and seven.

30 Wm. M. Stillman, attorney, Wm. Riker, Jr., clerk.

New Jersey Supreme Court of the seventh day of December, Nineteen hundred and seven.

Middlesex County S. S. Benjamin Harris, the defendant in this suit was summoned to answer unto Willard L. Larrabee, the plaintiff therein, in an action upon contract, as assignee of Theodore Apgar and George Apgar, partners, as Apgar Bros., and thereupon the plaintiff by William M. Stillman, his attorney, complains for that whereas heretofore to wit on the twenty-
40 second day of May, nineteen hundred and seven, the

Exhibit C15

said Theodore Apgar and George Apgar, partners, as Apgar Bros., by a certain agreement then and there made between the said firm of Apgar Bros., and the said defendant, agreed that said firm of Apgar Bros. should supply the labor and furnish the material to finish a certain house or messuage of the defendant, situate on Clinton Avenue opposite West Eighth Street in the township of Piscataway, county of Middlesex 10
aforesaid, agreeably to certain plans thereof then in the possession of the defendant, viz., that when said house should be fully completed according to said plans and according to the specifications then in the possession of said defendant that said defendant would pay the balance of five hundred and twenty-five dollars then due and owing from said defendant to said Apgar Bros. for the construction and building of said dwelling house or messuage.

And the agreement being so made afterwards to wit, 20
on November twenty-second, nineteen hundred and seven, at New Brunswick, to wit, in the township of Piscataway, county and State aforesaid, the said firm of Apgar Bros. did finish and complete said dwelling house or messuage of the defendant according to said plans and specifications and to the satisfaction of said defendant and did fully and faithfully perform their said agreement, wherefore and whereby the said defendant then and there undertook and agreed to pay said firm of Apgar Bros. said sum of five hundred and 30
twenty-five dollars for their labor and material used in and about the finishing and completion of said house according to said plan and specifications as aforesaid, and although the said firm of Apgar Bros. hath performed and fulfilled all things on their part and behalf in said agreement mentioned, yet the said plaintiff in fact saith that the said defendant contriving and wrongfully intending to injure the said plaintiff as assignee of all the right, title and interest of said firm of Apgar Bros. in and to said contract and the moneys to 40

Exhibit C15

be paid thereunder did not and would not perform the said agreement and would not pay to him the said sum of five hundred and twenty-five dollars so due by virtue of his promise and undertaking, whereby the plaintiff hath requested but disregarded said several promises and did not pay said sum of money or any part thereof, although often requested so to do, but hath
10 hitherto wholly refused and still doth refuse to the damage of the plaintiff one thousand dollars and therefore he brings his suit.

And whereas also heretofore to wit on the day and year aforesaid, to wit, the 22nd day of November, 1907, at, to wit, New Brunswick aforesaid, the said Theodore Apgar and George Apgar, partners as Apgar Bros., did assign, transfer and set over to plaintiff all their right, title and interest in and to a certain contract or agreement made with the defendant to finish a certain
20 house owned by the defendant on Clinton Avenue, opposite West Eighth Street, in the township of Piscataway, county and State aforesaid, whereby there was due to them, the said firm of Apgar Bros., from said defendant, the sum of five hundred and twenty-five dollars, and by virtue of said assignment and as assignee and full owner of said moneys so due thereunder the said plaintiff did demand of the said defendant the said sum of five hundred and twenty-five dollars, yet the defendant hath disregarded his said promise
30 and has not paid said sum of money to said firm of Apgar Bros., nor to plaintiff as their assignee, nor any part thereof, although often requested so to do, but hath wholly refused and still doth refuse to the damage of plaintiff one thousand dollars, and therefore he brings his suit, &c.

And whereas, also heretofore to wit, on the day and year aforesaid, at to wit, New Brunswick aforesaid, the plaintiff by William M. Stillman, his attorney, complains, for that the defendant heretofore to wit on
40 the twenty-sixth day of November, Nineteen hundred

Exhibit C15

and seven, at to wit, New Brunswick aforesaid, was indebted to the plaintiff in the sum of one thousand dollars for goods sold and delivered by Theodore Apgar and George Apgar, partners as Apgar Bros., to the defendant at his request and in the like sum for work done and materials furnished by the said firm of Apgar Bros. to the defendant at his request; and in the like sum for money lent by said firm of Apgar Bros. 10 to the defendant at his request, and the like sum or money paid by said firm of Apgar Bros. to the defendant at his request, and in the like sum for money received for the use of said firm of Apgar Bros. by said defendant, and in like sum for the forbearance by said firm of Apgar Bros. at the defendant's request of moneys due and owing from the defendant to the said firm of Apgar Bros., and in the like sum for money due from the defendant to said firm of Apgar Bros. on an account stated between them and being so indebted to 20 the defendant in consideration thereof then and there promised the said Theodore Apgar and George Apgar, partners as Apgar Bros., to pay said several sums of money on request, all of which promises and agreements the said Theodore Apgar and George Apgar, partners as Apgar Bros., did on the to wit day and year aforesaid, at to wit, New Brunswick, duly assign and set over and sell to the plaintiff for full value received. Yet the said said defendant hath disregarded his said several promises and hath not paid the said 30 several sums of money nor any of them or any part thereof, although often requested so to do, either to said plaintiff or to said firm of Apgar Bros., but hath hitherto wholly refused and still doth refuse to the damage of the plaintiff one thousand dollars, and therefore he brings his suit, &c.

Wm. M. Stillman,
Attorney for Plaintiff.

Notice is hereby given that this action is brought to recover the amount due on an agreement made by de- 40

Exhibit C 15

fendant as owner with said firm of Apgar Bros. as builders to build and to finish construction of a dwelling house on Clinton Avenue opposite West Eighth Street in the township of Piscataway, county of Middlesex and State of New Jersey, being the sum of five hundred and twenty-five dollars, all the right, title and interest of said firm of Apgar Bros. in said contract and
 10 all moneys due or to become due thereunder being assigned to the plaintiff by assignment duly executed on November 22, 1907.

Schedule.

Amount due on said contract	\$525.00
Interest from November 27, 1907, until paid, besides costs of this suit.	

WM. M. STILLMAN,
 Attorney for Pl'tnt'ff.

Dated November 27, 1907.

20

30

40

Exhibit C 15

NEW JERSEY SUPREME COURT.
MIDDLESEX COUNTY.

WILLARD L. LARRABEE,	}	On Contract. Summons and Declaration.	10
Plntff.,			
v.			
BENJAMIN HARRIS,	Def't.		

Summons ret'ble Dec. 7, 1907.

WM. M. STILLMAN, Atty.,
212 W. Front St., Plainfield, N. J.

To the within named defendant:

In case the within summons and declaration are served upon you personally then take notice, that if you intend to make a defence to this action you must file an affidavit of merits within ten days from the date of the service hereof upon you, and that unless you file such affidavit, judgment by default will be entered against you at the end of said ten days and that in case you file such affidavit, unless you file a plea or demurrer within 20 days from the date of service hereof upon you, judgment by default will in such case be entered against you at the end of said 20 days. In case the within summons and declaration are served upon you by leaving a copy at your dwelling house or place of abode, then take notice that unless you appear and file a plea or demurrer within 20 days after the date of service hereof upon you judgment will be entered against you.

Judgment will be claimed for \$525 with interest thereon from November 27, 1907, besides costs.

WM. M. STILLMAN,
Attorney for Plaintiff,
212 W. Front St.,
Plainfield, New Jersey.

Served Nov. 29th, 1907.

Exhibit C 16**EXHIBIT C 16.**

**LIEN CLAIM SUMMONS, MIDDLESEX CIRCUIT
COURT. TUTTLE BROS. VS. BENJAMIN
HARRIS.**

MIDDLESEX COUNTY, SS.: THE STATE OF NEW
 10 JERSEY, to the Sher-
 (SEAL) iff of the County of
 Middlesex, GREET-
 ING:

You are hereby commanded to summon George I.
 Apgar and Theodore Apgar, partners, doing business
 as Apgar Bros., builders, and Benjamin S. Harris,
 owner, if in your county they may be found, so that
 they be and appear before our Circuit Court, to be
 holden at New Brunswick, in and for the County of
 20 Middlesex, on the twenty-seventh day of December, in-
 stant, that the said George I. Apgar and Theodore Apgar,
 partners as aforesaid, builders as aforesaid, may
 answer unto William E. Tuttle, Jr., and Arthur D.
 Tuttle, partners trading as Tuttle Brothers, claimants,
 in an action upon contract to their damage, fifteen
 hundred dollars, for which said William E. Tuttle, Jr.,
 and Arthur D. Tuttle, partners as aforesaid, claim a
 building lien on a certain building and lands of said
 Benjamin S. Harris.

30 The description of the building and of the lot or
 curtilage upon which the lien is claimed is as follows:

The building is a two and one-half story frame
 dwelling house about twenty-eight feet wide and about
 thirty feet deep, and the same is erected upon a lot of
 land situate in the Township of Piscataway, in the
 County of Middlesex and State of New Jersey, near
 the line of the City of Plainfield, described as follows:

Beginning at a point in the center line of Clinton
 Avenue, said point being distant five hundred and fifty-
 40 seven feet in a southeasterly direction from the center

Exhibit C 16

line of West Seventh Street, running thence in a south-
 westerly direction and at right angles to Clinton Ave-
 nue, a distance of two hundred and twenty-five feet to
 a point; thence in a southeasterly direction and parallel
 with Clinton Avenue a distance of sixty feet to a point;
 thence in a northeasterly direction and at right angles
 to Clinton Avenue, a distance of two hundred and
 twenty-five feet to a point in the center line of Clinton 10
 Avenue aforesaid; thence along said center line of Clin-
 ton Avenue in a northwesterly direction a distance of
 sixty feet to the place of beginning.

And in what manner you shall have executed this
 writ make appear at the time and place aforesaid; and
 have you then and there this writ.

Witness, Francis J. Swayze, Esquire, Judge of our
 said court, at New Brunswick aforesaid, the tenth day
 of December, nineteen hundred and seven.

JNO. H. CONGER,

20

Clerk.

PAUL Q. OLIVER, Attorney.

Middlesex Circuit Court. William E. Tuttle, Jr.,
 et al., partners, claimants, vs. George I. Apgar, et al.,
 partners, &c., builders, and Benjamin S. Harris, owner.
 Lien Claim Summons. Ret'ble December 27, 1907.
 Paul Q. Oliver, Westfield, N. J., attorney for claimants.

The issuing of this summons was endorsed on the
 lien claim on which it is founded this 10th day of De- 30
 cember, 1907. Jno. H. Conger, clerk. Served Dec.
 10th, 1907. Benjamin S. Harris.

Exhibit C 16 (a.)

EXHIBIT C 16 (A.)

**RECEIPT FROM CLERK IN CHANCERY FOR
\$548.30.**

Office of the Clerk in Chancery, New Jersey.
Trenton, N. J., Dec. 7, 1907.

10 Received from J. Henry Crane

Five hundred forty-eight 30/100 Dollars.

Harris v. Larrabee.

\$548 30/100.

VIVIAN M. LEWIS,

Ck. per S.

20

30

40

Interpleader—Memorandum

(Sent to Counsel, but not filed.)
IN CHANCERY OF NEW JERSEY

Between

BENJAMIN S. HARRIS,

Complainant,

and

WILLARD L. LARRABEE,

et als,

Defendants.

ON BILL
OF INTERPLEADER 10

On bill, supplemental bill, answer, amended answer
and proofs.

Mr. Crane and Mr. W. S. Angleman for complainant.

Mr. Oliver and Mr. Koestler for Tuttle Bros.

Mr. Crane for defendant Larrabee.

20

(MEMORANDUM)

Emery, V. C. The contract between complainant and the Apgars not having been filed, it is settled beyond question, that Tuttle Bros, as lien claimants cannot be required to look to the contract price in the hands of the owner or paid into court on an interpleader. **Schmidt vs. Eitel**, 4 Robbins 8 (Ch. Magie, 1905); **Summerman vs. Knowles**, 4 Vroom 203 (Sup. Ct. 1868); **30 Beckhard vs. Rudolph**, 2 Robbins 740 (Err. & App. 1905), cases referred to at p. 744. The serving of the stop notice did not, of itself, operate to release the lien claim, if it existed, or estop Tuttle Bros, from afterwards bringing suit to establish it. The fact that such suit was not brought until after the filing of the original bill, may affect the question of costs, but such delay in setting up the claim to a lien does not destroy the claim if it exists, or entitle complainant to insist on any estoppel beyond the costs incurred while the 40

Interpleader—Memorandum

- claimants were still apparently relying on the stop notice. By the original answer filed Tuttle Bros, renounced any right to the fund paid into Court, but in the amended answer they ask that any right they may have to the fund on the facts proved (including the service of the notice) be protected by the court. In similar cases, where the contract has not been filed, but
- 10 stop notices have been given (supposing, as this case, that the contract had been filed), and have been relied on in the interpleader suit, as the basis of claim, this court has decreed an interpleader and proceeded to adjudicate on the validity of the claim under the notice as against other claimants. **Weaver vs. Atlantic Roofing Co.**, 12 Dick. 547 (Grey V. C. 1898); **English vs. Warren**, 20 Dick. Ch. 30 (Pitney, V. C., 1903). In addition to their claim under the notice by the amended answer, another circumstance entitles complainant as
- 20 against Tuttle Bros. to hold the interpleader bill at least for the present. Any claim on the part of Tuttle Bros. to the fund in court, depends or may depend, on the result of the suit brought by them against Apgar Bros. and Harris the complainant, to set aside a release of their lien, given to the Apgar Bros. before the serving of their stop notice on the owner. They claim that this release was procured by fraud and that Harris was notified of the fraud claimed three days after receiving the notice. In the lien suit, Harris, who is de-
- 30 fendant owner, has set up the release as a bar to the lien, and the suit of Tuttle Bros. in this court is to have the release declared fraudulent and the owner enjoined from setting it up or proving it in defence in the lien claim suit. If not successful in this suit and until claim under the notice is formally renounced, the question may still remain as to their rights under the notice, as between themselves and the other claimants, under the prayer in the amended answer. Tuttle Bros. cannot be enjoined from prosecuting their suit on the lien
- 40 claim to its final determination, and pending this suit

Interpleader—Memorandum

should not be required by decree of interpleader to be remitted to their claim on the money paid into court. The owner, on the other hand, if the lien be not established, should not be deprived of his right to require the parties claiming, by stop notice not renounced, the money due on the contract, to interplead. And he is also entitled, pending the settlement of the lien suit, to enjoin any suit by Larrabee claiming title as assignee 10 of the Apgar Bros.' rights under the contract. For under the contract between Harris and the Apgar Bros., the latter were to pay for the materials furnished for the building, which are the basis of the lien claim of Tuttle Bros., and as between themselves, Harris is the surety and Apgar Bros. the principal debtor for this debt. The assignment from Apgar Bros. is subject therefore to deduction for any payment by Harris under this lien claim and pending the lien claim suit, action by Larrabee should be enjoined. 20

The rights of all parties will be protected in this case by a decree that this cause stand over for further hearing, pending the suit on the lien claim, and I will advise such decree. Form to be settled if not agreed on at Chancery Chambers, Newark, July 27th. inst., at 10.30 A. M.

IN CHANCERY OF NEW JERSEY.

Between
BENJAMIN S. HARRIS,
Complainant,
and
10 WILLARD L. LARRABEE,
et als.,
Defendants.

On Bill of
Interpleader.
Order for Further
Hearing.

The above-entitled cause coming on for final hearing on bill, supplemental bill, answer, amended answer and proofs, in the presence of J. Henry Crane and W. S. Angleman, of counsel with complainants, Paul Q. Oliver and Samuel Koestler, of counsel with defendants Tuttle Brothers, and Francis J. Blatz, of counsel with trustees in bankruptcy of Apgar Brothers, assignees of the interest of defendant Willard L. Larabee, and the court having heard the testimony and the arguments of the respective counsel thereon, and it appearing that the defendants Tuttle Brothers have a suit on a lien claim pending, and the court being of the opinion that this cause should stand over for further hearing pending the said suit on the lien claim:

It is, on this twenty-seventh day of July, nineteen
30 hundred and nine, on motion of J. Henry Crane, solicitor for the complainant herein, ordered that this cause stand over for further hearing to a date to be fixed by the court on application.

Respectfully advised,
MAHLON PITNEY, C.

JOHN R. EMERY,
Vice Chancellor.

On Injunction—Conclusions

(Filed Oct. 1, 1913)

IN CHANCERY OF NEW JERSEY.

Between

WILLIAM E. TUTTLE, JR.,
et al.,

Complainants,

and

BENJAMIN S. HARRIS,
et als.,

Defendants.

On Bill of
Injunction.

10

Heard on bill, answers, replication and proofs.

Mr. Paul Q. Oliver and Mr. Koestler for complainants.

20

Mr. J. Henry Crane and Mr. W. S. Angleman for defendant Harris.

(CONCLUSIONS)

Emery, V. C.

The complainants in this case have brought suit at law on a mechanics' lien claim against the defendants Apgar Brothers, as builders, and defendant Harris as owner. In this action defendant Harris pleads (among other defences) a release of the lien by complainants. This bill was thereupon filed by complainants charging that the release was obtained from them by fraud of Apgar Brothers, praying its cancellation and that the defendant Harris may be enjoined from setting it up as a defence in the suit at law. The fraud claimed is that the release was signed by complainants on the application of Apgar Brothers, who at the time represented to them that on presenting the release signed by com- 40

On Injunction—Conclusions

- plainants to Harris, the owner, Apgar Brothers would receive from Harris about \$550, the balance due them on their contract with Harris, and would pay \$500 of this to the complainants. It is claimed by the bill that at the time of making these representations Apgar Brothers had no intention of paying to complainants the money promised, that immediately after obtaining
- 10 complainants' signatures to the release Apgar Brothers procured the signature of other lien creditors to the release, upon the same representations and promises to them respectively. The bill further charges that the release, which was executed by complainants on the 11th of November, was not delivered to the defendant Harris until the 20th of November following. At the time the complainants signed the release they supposed that the contract between Apgar Brothers and Harris had been filed, and on November 18th, 1907, they
- 20 served a stop notice on Harris, but on the 21st of November notified defendant Harris by letter that the release was signed by them on the understanding that the sum of money amounting to about \$500, which the Apgars expected to receive from him (Harris) on the strength of the release, was to be paid at once to them, that they found Apgar obtained signatures from other parties on the same representation, and that as the release was obtained from them by fraud and had never been delivered to Harris by them, and as no
- 30 money had been paid to them on it, they notified Harris to pay no money to Apgar Brothers, or to any person for them on account of the construction of the defendant's house. Defendants Apgar Brothers deny specifically any false or fraudulent representations to complaints in order to secure the release, and deny representations or promises of any kind to complainants or any other lien creditor to secure it, alleging that it was signed by complainants and the others on presentation and in the ordinary course of business—that on deliver-
- 40 ing the release to defendant Harris, the latter, rely-

On Injunction—Conclusions

ing on its validity, gave them a check for a portion of the amount due and promised to pay the balance in a short time. Defendant Harris, denying any knowledge or information of the transaction between complainants and the Apgar Brothers relating to the execution of the release, says he received the release and paid out money thereon relying on its validity before he received any notice from complainants that its execution was claimed to be fraudulent. The amount of money paid by Harris to the Apgar Brothers on receiving the release is not set out in the answer of either defendant, but on the proofs it appears to have been a payment of \$75 only to one of the Apgar Brothers. The balance due on the contract was paid into this court by Harris on December 3rd, 1907, upon his filing a bill of interpleader, the proceedings in which have been introduced into this suit by the pleadings and proofs. This interpleader bill was filed against Apgar Brothers and against the complainants and the Loizeaux Lumber Company and W. L. Larrabee, other creditors who had served stop notices, and also against Larrabee as claiming to be an assignee of the contract under an assignment from Apgar Brothers to him, dated November 22, 1907, and upon which he commenced an action at law on November 27th. On filing this bill and upon paying into court the amount admitted to be due under the contract (\$548.50), an ex parte interlocutory injunction was obtained against Larrabee's prosecution of his suit. The interpleader bill prayed decree discharging Harris from all liability to any of the defendants, upon this payment into court. The interpleader bill prayed no injunction against Tuttle Brothers, the complainants, but subpoenas on the bill were served upon them on December 7th. On December 10th, complainants commenced their suit on the lien claim, and on the filing of a supplemental bill December 17, an interlocutory injunction against the prosecution of this suit was issued, but at the hearing of the interpleader suit

On Injunction—Conclusions

this injunction was dissolved for the purpose of allowing the suit on the lien claim to be pursued. This was upon the ground that the contract not having been filed, the lien claimants could not be required to look to the contract price in the hands of the owner or paid into court on an interpleader. **Schmidt vs. Eitel**, 4 Robbins 8 (Ch. Magie 1905); **Summerman vs. Knowles**, 10 4 Vroom 203 (Sup. Ct. 1868); **Beckard vs. Rudolph**, 2 Robbins 740 (Err. & App. 1905) cases referred to on p 744. The stop notice given by complainants, it was also held, did not release the lien or stop complainants from afterwards bringing suit on the lien claim. And at the hearing of the interpleader suit, it was directed that for the purpose of protecting the equities of all parties the further hearing of that cause stand over to await the final determination of the lien suit. The issue now therefore is upon the validity of complainants' 20 claim to set aside, as against them, the release of lien pleaded in the suit. There is contradictory evidence upon some of the issues, but as to what seem to me the controlling facts, there is little controversy.

The firm of Apgar Brothers was composed of two members, George I. and Theodore Apgar. Complainants, William E. Tuttle, Jr., and Arthur D. Tuttle, partners as Tuttle Brothers, had furnished materials to Apgar Brothers for the erection of defendant Harris' house and on November 11th, 1907, the amount of their 30 claim was about \$727.65. On or about that date Theodore Apgar applied to Tuttle Brothers to sign a release of lien in order that he might get from the owner Harris the balance which was coming to him on the contract, which was stated to be about \$550. Theodore Apgar, as I find, conversed with both of the complainants about signing the release, for, although he says that he had no conversation with Arthur Tuttle, Arthur's testimony is positive on the point that he refused to sign without waiting to speak to his brother about 40 it, and that when his brother came in, the conversation

On Injunction—Conclusions

of Theodore Apgar was with his brother and in his presence, and his brother William then signed the release. William E. Tuttle corroborates this statement. All three agree that in the conversation before the release, Theodore Apgar promised William E. Tuttle to give him \$500 as the consideration Tuttle was to get for the release. The Tuttle Brothers say that Apgar told them the money was ready and he could get it on their signing a release, and that he would get the money and bring it directly to them. I think there is no question that the release was signed upon the statement and promise of Theodore Apgar that the money due from Harris, about \$550 or \$600 was ready to be paid over, and that \$500 of this money would be paid to Tuttle Brothers. William E. Tuttle then signed the release in the firm name of "Tuttle Bros." and delivered the release to Theodore Apgar. There does not appear to have been any conversation at that time about procuring any other signatures to the release and there were no other signatures on the paper at the time the Tuttle Brothers signed it. The release, however, was on a regular form of Release of Lien prepared by the attorney of Harris, or delivered by Harris to Apgar Brothers, for the signatures of several lien claimants, and the releasors became formal parties only by the signatures, their names not appearing in the release itself. The release recited the contract between Apgar Brothers and Harris for the building, and that "we the undersigned have done work and furnished materials for the erection and construction thereof," and that in order to enable the contractors to collect and receive the contract moneys due them, and in consideration of one dollar, the subscribers jointly and severally released and discharged the building, etc., from any and all liens under the Mechanics' Lien Law, for the payment of any debt contracted and owing to them for labor performed or materials furnished for the erection and construction of such building. On November 14th, three days after

On Injunction—Conclusions

- the delivery of this release to Theodore Apgar, and as the money had not been received, Arthur Tuttle applied to both Theodore and George Apgar, who were then together, and asked them about the Harris money, but did not then get any money. The important feature of this evidence is that George, the other partner, then and before the procuring by him of the Loizeaux
- 10 Company release, knew of the Tuttle Brothers release and of their expectation of receiving money. Between November 14th and 18th signatures of labor men whose claims seem to have been paid, were obtained, and on November 18th, George Apgar took the release to the Loizeaux Company, material men to whom Apgar Brothers then owed about \$500 on the Harris contract, and procured the signature of this company to the release, upon the promise to pay the company the money due them. This is the statement of Mr. Loizeaux and
- 20 his evidence impressed me as reliable. George Apgar's statement is that he did not promise Loizeaux to pay him all the money due the company on the job, but that he promised, if the release was signed, to pay off a note previously given to the company, which came due on that day. What the amount of this note was or whether any note was paid that day by the Apgar Brothers, does not satisfactorily appear, and George's statement is not corroborated. Between the time of getting the signatures of the Tuttle Brothers and the Loizeaux
- 30 Company to the release, the signature of Larrabee, a material man whose claim of \$543 had not been paid, had also been obtained. On procuring the Loizeaux Company release, George Apgar delivered the release to Harris, the owner, on the same day, November 18, and received from him \$75. George further swears that at the time of delivering the release and receiving this payment on account he told Harris that he wanted the rest of the money to go to Mr. Larrabee, and on November 22nd, Apgar Brothers assigned the money due
- 40 on the contract to Larrabee.

On Injunction—Conclusions

It seems to me clear that the release signed by Tuttle Brothers and delivered to Harris, the owner, under these circumstances, cannot be set up by Harris as a discharge of the lien. To the extent that Harris has acted on the faith of the release—that is, to the extent of the payment of \$75, he is a bona fide purchaser without notice, and he is entitled to be indemnified or reimbursed, as a condition of delivering up or cancelling Tuttle Brothers release, but the release was without any consideration so far as the Tuttle Brothers were concerned, except the promise of Theodore Apgar, one of the partners, acting for the firm, to pay \$500 on account of their claim, out of the money to be paid to them by Harris. The release when delivered to this partner Theodore was held by him on the faith of this promise and of the intention to carry it out, and when George, the other partner, received the release from his brother, he was bound by his partner's acts and assurances in obtaining the release, and was also bound not to deliver the release unless at the time of delivery he had the intention of carrying out the promise. The Apgar Brothers held the release not as agents of the owner, I think, but as acting for the Tuttle Brothers, in its delivery to the owner, and as to the conditions and objects of the delivery each of the partners was bound by the acts and promises of the other up to the time of the delivery to the owner. Joint action and representation by both partners, either to the Tuttle Brothers or the Loizeaux Company was not necessary in order to make the delivery of the release (which became effective only by delivery to Harris) fraudulent against Tuttle Brothers.

If at the time of the delivery of the release by George, one of the partners, to the owner, it is apparent from the evidence that the partners did not then intend that any of the money should be paid to Tuttle Brothers, then the delivery of the release was fraudulent against them, because it was not then intended by

On Injunction—Conclusions

the partners to carry out the promises on which it had been procured for delivery. The main contention for the defendants has been that there was no proof of anything but a breach of promise by Theodore, which was admitted, but if I am correct in my view of the real nature of the transaction, and that the real question is whether at the time of the delivery of the release to the owner the partners had no intention of carrying out the promises to Tuttle Brothers, made to induce their signature to the release, then the actual participation or knowledge of George as to the promises made by the other partner is immaterial. The fraud of the partners consisted in the delivery of the release by one of them on behalf of the firm, with an intention at the time of delivery, of not doing the thing, the performance of which was the inducement to complainants to sign the paper for delivery to the owner, and without which inducement the paper would never have been in the hands of the partners as the agents of complainants for delivery to the owner.

As I have before stated, I think the contractors in delivering the release to the owner were to be considered as agents of and acting for the releasors, but if it be considered that under the facts of the case the contractors were the agents of the owner to procure the release for him, as a condition of payment, the equities of the case in reference to the cancellation of the release are not changed, but are rather strengthened. For if the owner's agent has procured the release by fraud, the owner upon being informed of the agent's fraud, cannot in equity insist upon taking advantage of it and hold the benefit of it. If he does, it becomes his own fraud. 2 Pom. Eq. Jur. §909.

It was also contended for the defendants that by reason of the stop notice served by complainants on the owner on November 18th, 1907, the complainants are estopped from setting up the lien. Subsequent to this notice, however, and before the owner had made any

On Injunction—Conclusions

further payments to the contractors on the faith of the release, the complainants by their letter of November 21st, notified the owner that the release had been fraudulently procured. The bill of interpleader was filed shortly after receiving this notice (December 3). The ex parte payment into court of the balance of the money after the receipt of the letter was at complainants' risk and cannot be considered as a payment to the contractors made in good faith relying on the validity of the release. When the point was raised in the interpleader suit that the stop notice was a bar to the action on the lien, I held that fact that the suit on the lien was not brought until after filing the original bill of interpleader might affect the question of costs, but did not destroy the lien claim if it existed or entitle complainants to insist on any estoppel beyond the costs incurred while they were apparently relying on the stop notice. I still adhere to this view. 10 20

I will advise a decree directing the cancellation of the release so far as complainants are concerned and that the defendants be enjoined from proving the paper in question under the plea of release. At the time of settling the decree counsel may also apply in the interpleader suit for such further order or decree as may be proper in view of the decree here advised.

On Injunction—Order for Re-Argument

(Filed Sept. 28, 1911.)

IN CHANCERY OF NEW JERSEY

10	Between WILLIAM E. TUTTLE, Jr., et al., Complainants, and BENJAMIN S. HARRIS, et als., Defendants.	} ON BILL FOR INJUNCTION. ORDER FOR RE-ARGUMENT.
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Application having been made on behalf of the defendant, Benjamin S. Harris, for a re-argument in the above-stated cause, and the same coming on to be heard, and the Court having heard W. S. Angleman, of counsel with the defendant, Benjamin S. Harris, in support of said application, and Samuel Koestler, of counsel with complainants, in opposition thereto, and the Court having duly considered the said application, and being of the opinion that the said application should be granted,

It is ordered, on this Twenty-sixth day of September, Nineteen Hundred and Eleven, on motion of W. S. Angleman, of counsel with the defendant, Benjamin S. Harris, that the above-stated cause be re-argued on the point of Apgar Brothers agency and on the point of the effect of the payment of money into Court as to the subsequent right thereto of Harris and others, and that said re-argument take place at the Chancery Chambers, Prudential Building, in the City of Newark, on Tuesday, the Twenty-fourth day of October, Nineteen Hundred and Eleven.

Mahlon Pitney,
C.

Respectfully advised,
John R. Every,
Vice Chancellor.

On Rehearing—Memorandum

(Filed Oct. 1, 1913.)

IN CHANCERY OF NEW JERSEY

Between

WILLIAM E. TUTTLE, Jr.,
et als., Partners &c.,
Complainants.

and

BENJAMIN S. HARRIS,
et als.,
Defendants.

ON BILL, &c.

10

On Rehearing.

Mr. W. S. Angleman for defendant Harris.

Mr. Samuel Koestler for complainants.

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(MEMORANDUM)

EMERY, V. C.

On the rehearing in this cause two questions were argued.

(1) The agency of Apgar Brothers in the delivery of the release of complainants to Harris, the owner,—and

(2) The effect of complainants' payment of money into Court in the interpleader suit.

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On consideration of the arguments and briefs of counsel on the rehearing, I still adhere to the view taken in the conclusions upon both these points. On the **first** point, it is now insisted on the rehearing that Apgar Brothers were the agents of Harris, the owner, and that Harris, the owner, at the time of receiving the release, not being informed as to any conditions attached to its delivery by the agreement between complainants and Apgar Brothers, is entitled to hold the release as operative according to its terms. On the as-

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On Rehearing—Memorandum

sumption that Apgar Brothers in delivering the release were complainants' agents and not agents of the owner, it is not a question of the effect of special conditions to the agent uncommunicated to the third person who is about entering into obligations on his part or changing his status at the time of the delivery of the release by reason thereof, but it is a question of
 10 now giving the owner without consideration the benefit of the agent's fraud on his principal. To the extent that the owner has acted on the faith of the release of the complainants, he is a bona fide purchaser for value, entitled to protection, but beyond this, he is claiming for his own benefit without consideration and against the principal, the protection of the agents' fraud on the principal. The principle of special agency or instruction is not involved.

As to the effect of payment into Court by complainant in the interpleader suit, the mere payment into Court on an ex parte application, did not extinguish complainants' right to the money. This may be effected by the decree of interpleader, made after hearing parties on the right to interplead and settle their rights to the fund and discharging complainant from liability. **Chosen Friends vs. Bennett**, 2 Dick. 39-41. (Van Fleet, V. C., 1890). **Williston vs. Salmon**, 18 Stew. Eq., 257-264. (Err. & App. 1889). But such effect cannot be given to the ex parte preliminary order
 20 for payment.

In the interpleader suit no decree for interpleader has yet been made, and the hearing of that suit (until further order) stands over to await the judgment in the lien suit. If the bill of interpleader be dismissed on the hearing, then Harris, the complainant, will be entitled to the repayment of the money paid into Court by him to procure the injunction. **Blennerhasset vs. Scanlon**, 1 Hogan (Ir. Ch.) 363; cited 4 **Chitty Eq. Dig.**, 313-1 **Haggart vs. Cutts**, 10 L. J. Ch. (N. S.) 314
 30 (1841).

On Rehearing—Memorandum

Decree in accordance with the conclusion sent to counsel will be advised, and will be settled on motion day, Sept. 9th, unless agreed to by counsel before that date.

(Not signed.)

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Final Decree

(Filed Oct. 4, 1913.)

IN CHANCERY OF NEW JERSEY

Between

WILLIAM E. TUTTLE, Jr., and
 ARTHUR D. TUTTLE, Part-
 10 ners, trading as Tuttle Brothers,
 ers,

Complainants,

and

BENJAMIN S. HARRIS, et als.,
 Defendants.

ON BILL, &c.
 FINAL DECREE.

This cause coming on to be heard before the Hon-
 orable John R. Emery, one of the Vice Chancellors of
 20 this Court, pursuant to the reference made to him, and
 in the presence of Paul Q. Oliver and Samuel Koestler,
 of counsel with the complainants, and of Winfield S.
 Angleman and J. Henry Crane, of counsel with the de-
 fendants, Benjamin S. Harris and Theodore Apgar and
 George I. Apgar, Partners, trading as Apgar Brothers;
 whereupon, and upon considering the bill of complaint
 of said complainants, and the answers of said defend-
 ants, and the evidence offered to sustain the allegations
 thereof, and the arguments and re-arguments of the
 30 respective counsel thereon; and it satisfactorily appear-
 ing to the Court that on or about the eleventh day of
 November, nineteen hundred and seven, the complain-
 ants executed a release of lien against the premises of
 said Benjamin S. Harris, set forth in the bill of com-
 plaint in this cause, and delivered the same to the de-
 fendant, Theodore Apgar, upon his promise to deliver
 the same to the defendant, Benjamin S. Harris, and
 procure moneys from him out of which the defendant,
 Theodore Apgar, agreed to pay to the complainants
 40 the sum of five hundred dollars, and that said release

Final Decree

was delivered by the defendants, Apgar Brothers, to the defendant, Benjamin S. Harris, contrary to the promise of said Theodore Apgar to the complainants; and with an intention at the time of such delivery of not paying to the complainants the sum of five hundred dollars as promised as the inducing cause of procuring their signature to said release; and that the delivery of such release of the complainants, by said Apgar Brothers to the defendant, Benjamin S. Harris, was fraudulent as against the complainants. 10

And it further appearing that at the time of the delivery of said release to the said Benjamin S. Harris, he did pay to the said Apgar Brothers, the sum of seventy-five dollars in good faith and without notice, and that he is entitled to be re-imbursed to the extent of seventy-five dollars as a condition for delivering up or cancelling the release of the complainants.

And it further appearing that the defendants should be restrained and enjoined from proving the aforementioned release under their plea of release filed in the mechanic's lien suit, instituted by the complainants against the building of said Benjamin S. Harris, now pending in the Middlesex County Circuit Court; and said case having been opened for re-argument and having been re-argued by the counsel of the respective parties, and the Court having set this day for the settling of this decree, and in the presence of counsel of the respective parties; 20 30

It is thereupon on this thirtieth day of September, nineteen hundred and thirteen, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed, that a certain paper writing executed by the complainants on or about the eleventh day of November, nineteen hundred and seven, purporting to be a release of lien against the premises of the defendant, Benjamin S. Harris, set forth in the bill of complaint, in this cause, was fraudulently procured from the complainants by 40

Final Decree

the defendants, Apgar Brothers, and by them fraudulently delivered to the defendant, Benjamin S. Harris, and without any consideration therefore being paid to the complainants by the said defendants, Harris or Apgar Brothers.

And it is further ordered, adjudged and decreed, that as a condition for delivering up or cancelling the
10 said release of complainants hereinbefore particularly set forth, the complainants repay to said Benjamin S. Harris, the sum of seventy-five dollars, and interest thereon from the eighteenth day of November, nineteen hundred and seven, until paid; the said sum of seventy-five dollars being the amount of money paid by said Benjamin S. Harris to Apgar Brothers, upon the delivery of said Benjamin S. Harris of the release of lien signed by the complainants and others prior to receiving notice of the complainants' claim of fraud, and that
20 upon the complainants' making such payment to the defendant, Benjamin S. Harris, or offering to make such payment, and the same being refused by the said defendant, Benjamin S. Harris, that said release so signed by complainants as aforesaid, in-so-far as it effects the rights of the claimants be cancelled and set aside as having been fraudulently procured from the complainants by the defendants, Apgar Brothers, and fraudulently delivered by them the said Apgar Brothers, to the defendant, Benjamin S. Harris.

30 And it is further ordered, adjudged and decreed, that upon payment by said complainants of said sum of seventy-five dollars and interest aforesaid, to the defendant, Benjamin S. Harris, or the offer of such payment and refusal thereof by the said Benjamin S. Harris, coupled with the payment thereof into Court, together with Clerk's fees thereon, that an injunction do issue out of this Court restraining and perpetually enjoining the said defendant, Benjamin S. Harris, and any person or persons claiming by, from or under him,
40 from proving under the plea of release filed by said de-

Final Decree

fendant, Benjamin S. Harris, in the mechanic's lien suit, instituted by the complainants against the premises of said Benjamin S. Harris, mentioned and described in the bill of complaint herein, now pending in the Middlesex County Circuit Court, a certain paper release signed by the complainants on or about the eleventh day of November, 1907, and purporting to release the claim and demand of said complainants 10 against the building and lands of said defendant, Benjamin S. Harris.

And it is further ordered, that the complainants do recover from the said defendants, Apgar Brothers, their costs of suit to be taxed, including the counsel fee of One Hundred and Fifty Dollars, but that neither complainants nor defendant Harris recover any costs against each other.

E. R. Walker,

Respectfully advised,

C. 20

John R. Emery,

Vice Chancellor.

Notice of Appeal

(Filed Dec. 27, 1913.)

IN CHANCERY OF NEW JERSEY

Between

WILLIAM E. TUTTLE, Jr.,
and ARTHUR D. TUT-
TLE, Partners, trading
as Tuttle Brothers,

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Complainants,

and

BENJAMIN S. HARRIS,
et als.,

Defendants.

ON BILL ETC.

NOTICE OF APPEAL.

The defendant, Benjamin S. Harris, hereby appeals
from the final decree made in the above-entitled cause,
and from the whole and every part of said final decree.

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J. H. CRANE,

Solicitor for Complainant.

Dated, December 27, 1913.

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

W. S. ANGLEMAN,
Of Counsel with Complainant.

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Petition of Appeal—Benj. S. Harris

(Filed Jan. 17, 1914.)

COURT OF ERRORS AND APPEALS

Between	
WILLIAM E. TUTTLE, Jr.,	
and ARTHUR D. TUTTLE, Partners, trading as Tuttle Brothers,	ON BILL, ETC.
Complainants and	ON APPEAL OF
Respondents,	BENJAMIN S. HARRIS. 10
and	RIS.
BENJAMIN S. HARRIS,	PETITION OF AP-
et als.,	PEAL.
Defendants.	

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

The petition of Benjamin S. Harris, the appellant 20
in the above-stated cause, respectfully shows that
your petitioner finds himself aggrieved by a final decree made in the Court of Chancery by His Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the thirtieth day of September, Nineteen hundred and thirteen, wherein the said William E. Tuttle, Jr., and Arthur D. Tuttle, partners, trading as Tuttle Brothers, were complainants, and the said Benjamin S. Harris and Theodore Apgar and George I. Apgar, partners, trading as Apgar Brothers, were defendants, in this respect, to wit: that the said decree adjudges that a certain paper writing executed by the complainants on or about the eleventh day of November, nineteen hundred and seven, purporting to be a release of lien against the premises of the defendant, Benjamin S. Harris, set forth in the bill of complaint in this cause was fraudulently procured from the complainants by the defendants, Apgar Brothers, and by them fraudulently delivered to the defendant, Benjamin S. Harris, and without any consideration therefor being paid to 40

Petition of Appeal—Benj. S. Harris

the complainants by the said defendants, Harris or Apgar Brothers, and that the said decree adjudges that as a condition for delivering up or cancelling the said release of complainants the complainants repay to the said Benjamin S. Harris the sum of seventy-five dollars and interest thereon from the eighteenth day of November, nineteen hundred and seven, until paid, the said

10 sum of seventy-five dollars being the amount of money paid by said Benjamin S. Harris to Apgar Brothers upon the delivery to said Benjamin S. Harris of the release of lien signed by the complainants and others prior to receiving notice of the complainants' claim of fraud, and that upon the complainants making such payment to the defendant, Benjamin S. Harris, or offering to make such payment, and the same being refused by the said defendant, Benjamin S. Harris, that said release so signed by the complainants, in so far

20 as it affects the rights of the complainants be cancelled and set aside as having been fraudulently procured from the complainants by the defendants, Apgar Brothers, and fraudulently delivered by them, the said Apgar Brothers, to the defendant, Benjamin S. Harris, and that the said decree adjudges that upon payment by said complainants of said sum of seventy-five dollars and interest aforesaid to the defendant, Benjamin S. Harris, or the offer of such payment and refusal thereof by the said Benjamin S. Harris, coupled with the

30 payment thereof into Court, together with Clerk's fees thereon that an injunction do issue out of this Court restraining and perpetually enjoining the said defendant, Benjamin S. Harris, and any person or persons claiming by, from or under him from proving under the plea of release filed by said defendant, Benjamin S. Harris, in the mechanics lien suit instituted by the complainants against the promises of said Benjamin S. Harris mentioned and described in the bill of complaint here in now pending in the Middlesex County Circuit

40 Court a certain paper release signed by the complain-

Petition of Appeal—Benj. S. Harris

ants on or about the eleventh day of November, 1907, and purporting to release the claim and demand of said complainants against the building and lands of said defendant, Benjamin S. Harris, as described in the complainants' bill of complaint, and that the said decree adjudges that neither the complainants nor the defendant, Benjamin S. Harris, recover any costs or counsel fees as against each other.

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And your petitioner appeals from the decree of the Chancellor, which decrees adversely to the said appellant, Benjamin S. Harris, as aforesaid, upon the ground that the same is erroneous, for that the answer filed in this cause by the defendant, Benjamin S. Harris, should have been sustained, and for that the bill of complaint filed herein should have been dismissed as against the defendant, Benjamin S. Harris, and for that the relief prayed therein by the complainants should have been denied the complainants as against the defendant, Benjamin S. Harris, and for that there should have been no relief given the complainants as against the defendant, Benjamin S. Harris, and for that the defendant, Benjamin S. Harris, should have been allowed costs and counsel fees as against the complainants, and for that the decree in this cause should have been made accordingly.

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Your petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this honorable court shall seem meet.

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J. HENRY CRANE,
Solicitor for Benjamin S. Harris, Appellant.
W. S. ANGLEMAN,
Of Counsel.

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Petition of Appeal—Answer of Tuttle Bros.

(Filed Feb. 27, 1914)

COURT OF ERRORS AND APPEALS

Between WILLIAM E. TUTTLE, Jr., and ARTHUR D. TUT- TLE, Partners, trading as 10 Tuttle Brothers, and Complainants, BENJAMIN S. HARRIS, et als., Defendants.	On Bill, &c. ON APPEAL OF BENJAMIN S. HAR- RIS. PETITION OF AP- PEAL.
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20 The answer of the respondents, William E. Tuttle, Jr., and Arthur D. Tuttle, to the petition of appeal of the above-named appellant.

These respondents, William E. Tuttle, Jr., and Arthur D. Tuttle, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless say and admit, that a final decree was on the thirtieth day of September, nineteen hundred and thirteen, made in the Court of Chancery in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, these respondents
30 pray to refer thereto when the same shall be produced. And these respondents, William E. Tuttle, Jr., and Arthur D. Tuttle, are advised and believe that the said decree is agreeable to equity, and they pray that the same may be affirmed with costs to be adjudged to these respondents.

PAUL Q. OLIVER,
Solicitor and of counsel with Respondents.

New Jersey Court of Errors and Appeals

WILLIAM E. TUTTLE and
ARTHUR D. TUTTLE, partners
trading as TUTTLE BROTHERS,
Complainants-Respondents,
and
BENJAMIN S. HARRIS, *et als.*,
Defendant-Appellant.

On Appeal
from Chancery.

BRIEF FOR RESPONDENTS.

The appellant, Benjamin S. Harris, on June 26, 1907, entered into a contract with Apgar Brothers to erect a house for Harris upon his land at Plainfield, for Forty-one hundred dollars (\$4,100), the final payment to be Six hundred dollars (\$600) (C. p. 176). Apgar Brothers ordered from the respondents, Tuttle Brothers, the finished trim for the house, which amounted to the sum of Seven hundred and twenty-six dollars and sixty-five cents (\$726.65) (C. p. 181).

The house was completed early in November and about the 9th of November Mr. Harris requested his attorney to prepare a release, which release was prepared on Monday, November 11th, and mailed to Mr. Harris (C. p. 153). This release came into the possession of the Apgar Brothers and was taken by Theodore Apgar to Tuttle Brothers for their signature. Theodore Apgar saw Arthur Tuttle and requested him to sign the release, but he would not do so without first consulting his brother, Wil-

liam E. Tuttle, Jr., who was called into the office, and in the presence of the two complainants, Theodore Apgar stated that there was between Five hundred (\$500) or Six hundred dollars (\$600) due on the contract with Harris, that the money was ready, and that if they, Tuttle Brothers, would sign the release, he would take it to Harris, get the money and bring Five hundred dollars (\$500) thereof to Tuttle Brothers (C. pp. 157, 158, 164, 168). Theodore Apgar says that at the time he had the release signed, by Mr. Tuttle, he promised him Five hundred dollars (\$500) out of that release (C. pp. 145, l. 12).

A few days later Tuttle called upon the Apgar Brothers at Dunellen, asked for the money, and they said they did not have it, but they said something then about Mr. Larrabee's claim (C. p. 169). Other signatures were obtained to the release, and finally George Apgar procures the signature of Mr. Loizeaux to the release, under suspicious and fraudulent circumstances (C. pp. 44, 50, 51, bottom of 52, 52, l. 22, and top of p. 54). George Apgar denies Mr. Loizeaux's testimony, and states that he only promised to pay a note, and the Seventy-five dollars (\$75), he got from Harris at the time of the delivery of the release was used to pay a note held by Mr. Loizeaux (C. p. 54). He further says that he believes that his brother made some promise at the time of obtaining Tuttle's signature (C. p. 57, l. 27). On cross examination he further says that he could not swear that the Loizeaux Lumber Company held any note on the Harris job (C. p. 58, l. 25). That he could not tell which note Mr. Loizeaux wanted paid off (C. p. 59). That he gave the release to Mr. Harris about one-half hour after it was signed by Mr. Loizeaux (C. p. 61). The release was then afterwards re-delivered to him in order to get two more signatures (C. p. 61). That

they, Apgar Brothers, signed the release after they had the check of Seventy-five dollars (\$75) (C. p. 62, l. 30).

Tuttle Brothers stop notice was served on Harris on November 18th (C. p. 181). On November 21st Tuttle Brothers wrote a letter to Benjamin S. Harris, showing the understanding upon which the release was signed by them and alleging fraud (C. p. 182). On the 22d Harris also received a letter from the Loizeaux Lumber Company, claiming fraud (C. p. 183), and on November 23d, Mr. Harris served upon Theodore Apgar copies of both the Tuttle and Loizeaux letters aforesaid (C. pp. 187, 188). There was a meeting of the claimants in the office of the attorney of Mr. Harris on November 26th, in which for the first time it became known that the funds had been assigned by Apgar Brothers to Mr. Larrabee (C. p. 154). On November 29th Larrabee instituted suit at law against Harris to recover the moneys due on the contract (C. p. 195), and thereupon Harris filed his bill of interpleader and offered to pay his money into Court (C. p. 67, l. 10), and prayed for restraint against Larrabee's suit. On December 3d an order was made that injunction issue as prayed upon the complainant depositing in the Court of Chancery, Five hundred and forty-eight dollars and thirty cents (\$548.30) (C. p. 73). The money was so deposited on December 7th, and injunction issued against Larrabee (C. pp. 150, 198). Tuttle Brothers in the meantime finding out that the contract of June 26th had never been filed as required by law, instituted a mechanic's lien suit on December 10th (C. pp. 131, l. 30, 196). To the mechanic's lien suit Mr. Harris pleaded as a defense among other things, the release procured from Tuttle Brothers by Apgar Brothers and fraudulently delivered by them to Harris on November 18th, and

again on November 20th; thereupon Tuttle Brothers filed their bill of complaint in this cause to set aside the release and to restrain Harris from offering it as a defense in the mechanic's lien suit (C. pp. 1-17). There is nothing in the bill of complaint which charges Harris with fraudulently inducing Tuttle Brothers to *sign* the release, but on the contrary, the allegation in paragraph five charges the fraud against Apgar Brothers, and in paragraph ten of the bill of complaint a fraudulent delivery of the release is alleged, and it is claimed that the execution was induced by the false and fraudulent representations of Apgar Brothers. I emphasize this point as an answer to what was said by Mr. Justice Garrison on the oral argument that the complaint alleged that the release was procured by Harris.

After the filing of the bill of complaint in this cause Harris filed a demurrer (C. p. 18), and the learned Vice-Chancellor overruled the demurrer (C. p. 21). In the answer of Apgar Brothers, they deny any fraudulent representations and say that no promises were made to secure signatures (C. p. 29, l. 16).

Tuttle Brothers were defendants to Harris's interpleader suit, and among other things contended that they were not required to look to the fund paid into Court for the reason that the contract was not filed. See the opinion of the Vice-Chancellor (C. p. 199, etc.). The complainant's case then went to final hearing and the testimony in the interpleader suit was used together with additional testimony adduced and the Vice-Chancellor decided in favor of the complainant (C. p. 203, etc.). A re-argument was granted upon two questions, and thereafter the learned Vice-Chancellor again decided in favor of the complainant (C. p. 213), and the final decree from which this appeal is taken was entered.

The appellant claims that the decree should be reversed because the other signers to the release were not parties, that Harris paid out the money, that the complainants were guilty of *laches*, that there was no fraud against them and that the payment into Court was an estoppel and that Harris should have been awarded costs and counsel fees. In answering these points, it is contended:

1. That there was no *F R A U D*.
2. That there was no *L A C H E S*.
3. That there is no *E S T O P P E L*, either by the payment of the Seventy-five dollars (\$75) or by the payment of money into Court.
4. That all necessary *P A R T I E S* were brought into the suit.
5. That Harris is not entitled to costs or counsel fees.

I. Fraud.

The fraud in this case was not the failure of the Apgar Brothers to carry out a promise for the future payment of moneys, the fraud in this case is that the Apgar Brothers were given a release to deliver upon a certain condition, namely, that money was ready to be paid and would be paid upon their delivery to Mr. Harris of the release signed by Tuttle Brothers, and that they would then bring Five hundred dollars (\$500) of such money to be by them received, to Tuttle Brothers. That this is the situation is amply demonstrated by the testimony above recited, and it was so found as a question of fact by the learned Vice-Chancellor who saw the witnesses. The principal point is that when

the Apgar Brothers delivered that release they had absolutely no intention that Tuttle Brothers should receive any of the money; they had previously made a similar promise to Mr. Loizeaux and at the time of the delivery of the release to Mr. Harris, they told him that they wanted the money paid to Larrabee (C. p.), and then subsequently executed a formal assignment to Larrabee. Under this question we may properly consider whether the Apgars were the agents of Tuttle Brothers, or of Mr. Harris. Assuming that Apgars did not want for themselves the balance of the money in the hands of Mr. Harris, it must be necessarily admitted that the release was for the absolute protection and benefit of Mr. Harris, as against liens which might have been filed against his house, because he had failed to file his contract in the office of the County Clerk, as required by the mechanic's lien law. These claims amounted to many times the paltry Five hundred dollars (\$500) or Six hundred dollars (\$600) in his hands, and he had his attorney prepare the release and he delivered it to the Apgar Brothers for the very purpose of procuring the signatures which now appear upon it. The Apgars were his representatives and the devices which they used in procuring the signatures must necessarily be the means which Harris adopted, together with the benefits, if any, of that release.

2 *Pomeroy Eq. Juris* 416.

Huguemin v. Baseley, 14 Vesey, p. 273.

Bridgeman v. Green, 14 Vesey Sr. 267.

Wilmot's notes 58.

Van v. Van L. R. 8 Ch. 383, 397.

1 *Perry on Trusts*, Sec. 211.

If as above contended, the Apgars were the agents of Harris, then there is absolutely no question that

he cannot profit by the release event to the extent of the money which he advanced upon it.

Reitman v. Florillo, 47 Vr. 815.

If, on the other hand, it is held that the Apgars were not the agents of Harris, they were the agents of Tuttle Brothers for the purpose of delivering the release pursuant to the understanding upon which it was signed.

Black v. Shreve, 2 Beas. 456.

The National Iron Armor Company v.

Bruner, 4 C. E. Gr. 331.

Milne v. Kleb, 17 Stew. 379.

Dowden v. Cryder, 26 Vr. 330.

This is the most favorable construction for the appellant, and if it is the correct one, the decree of the Court of Chancery protects him to the extent that he acted upon the release and having acquired a paper through a fraudulent delivery, he is only a *bona fide* holder to the extent to which he parted with money.

Holcolm v. Wyckoff, 6 Vr. 35.

II. Laches.

The appellant claims that Tuttle Brothers did nothing to show their intention of repudiating their signature to the release until their filing of the bill of complaint in the Court of Chancery on March 18, 1908; and even advances the absurd proposition that the letter written by Tuttle on November 21, 1907, was an affirmance of the signature to the release. The release in question reached Harris on November 18, 1907, he re-delivered it to

Apgar Brothers and finally received it in the form in which it is now presented to the Court on November 20, 1907. He undoubtedly received Tuttle's letter on November 21st, not later than the 22d, because on the 23d he served a notice together with a copy of the letter above specifically mentioned. This is followed by service of lien claim papers on Harris, on December 10th, and when the necessity arose, by reason of the plea of release, the bill of complaint was filed.

The appellant insists that it was Tuttle's duty to do two things immediately:

(a) To demand from the owner a cancellation of the release.

(b) To notify all co-signers.

So far as Tuttle Brothers were concerned there were no co-signers, they signed upon the understanding that their release was to be taken to Mr. Harris and there is not a scintilla of evidence in the case to hold or imply that the complainants in any way understood that other people were to sign the release. The action of Tuttle in writing the letter certainly advised Mr. Harris of the authority or understanding upon which the release was to be delivered to him and of the fact that their confidence had been violated. The letter likewise absolutely refutes the statement of counsel for the appellant that the claim of fraud was an after thought. If Harris chose to act on the release thereafter, he did it with full notice and at his peril.

III. Estoppel.

a. By payment of seventy five (\$75) dollars.

The appellant insists that inasmuch as Mr. Harris acted in some way upon the release by paying seventy-five (\$75) dollars on November 18th, to Apgar Brothers, Tuttle Brothers are absolutely debarred from any relief whether the release was fraudulently delivered or not. It is true that the bill of complaint alleged that no money had been paid on the strength of this release to the complainants. It is likewise true that in Harris's bill of interpleader in paragraph four, he says that the release was furnished and duly verified on the 20th of November (C., p. 64, l. 17). It is likewise true that the final delivery of the release was not made until the 20th of November, and it certainly appears that there was some secret arrangement or understanding between Mr. Harris on the one part and the Apgars on the other, because Mr. Harris then under the protection of counsel, was probably advised of the dilemma in which he had placed himself by not filing his contract, but assuming that after the release with Tuttle's signature on it, was either shown or handed to Mr. Harris on November 18th, all that he paid was seventy-five (\$75) dollars, the most that he can ask of a Court of Equity, is to be placed in *statu quo*. The decree does that for him.

b. By the payment of money into Court, under the Interpleader.

Harris says that because he paid money into Court and with the release set aside will have to pay Tuttle's claim on lien claim judgment, that he is subject to a double payment, through the sole

fraud of the Tuttle Brothers. His bill shows that when Mr. Harris filed the interpleader, that he did not allege that his contract was filed, but he did allege the letter of Tuttle Brothers, claiming fraud in the release (C., p. 65). Counsel for appellant admits that while the stop notice in itself did not give a lien, the non-filing of the contract, together with the release of lien, created to the stop notice claimant, a lien upon the fund in the same manner as a stop notice alone would have done, had the contract been filed. The fallacy of this argument is at once apparent when we consider the claim that the release being fraudulent, is no release and in order to be in a position to advance that argument it must first be established that the release is valid; Harris at the time of filing his interpleader, knew of Tuttle's claim regarding that release and when he filed his bill of interpleader, he did not pay the money into Court; he paid the money into Court when he enjoined the Larrabee suit. The whole gist of the appellant's argument under this point, practically is, that Harris has forfeited any and all rights to the funds of which he has made the Court of Chancery, trustee, by payment of money into that Court. This is not so, his rights are not forfeited in that fund until a decree of interpleader and there is no decree of interpleader and probably never will be, so at the present time, Harris still has rights to the funds in court.

2 Daniels Ch. Pl. & Pr. 1650 et seq.
Willsion & Salmon, 18 Stew. 264.
Chosen Friends & Bennett, 2 Dick. 41.
Bedell v. Hoffman, 2 Paige 199.
City Bank v. Bangs, 2 Paige 570.
2 Story Eq. Juris 155.
Chancery Rule No. 221.

IV. Parties.

Under the first point of the appellant's argument, it is insisted that everybody that signed the release should have been before the Court of Chancery as a party to the Tuttle's suit. It must be remembered that Tuttles' did not know anything about other parties to the release and in fact the distinct understanding was that immediately upon their signing the release it was to be delivered to Harris and the money obtained. The other parties to the release cannot be effected in any way by the Tuttle success or failure. In his suit to have his name stricken from the release, the only parties who are interested and who will be effected by the decree, are the people who are actually charged with fraud and those who received the benefit of the fraud. Apgar Brothers are not made defendants to this suit because they themselves signed the release, they are made defendants because they fraudulently procured the signing of the release by Tuttle Brothers and fraudulently delivered it to Harris without intending to meet the obligation made at the time of inducing the signature to the release. This release in itself carried no indication to Tuttle Brothers that it was to be signed by others. The objection for want of parties was not raised by demurrer or by the answer to the suit nor through the trial of the case until final argument and even then it was not suggested in the way it is now brought before this Court. The only argument made before the Court of Chancery was the question that the release had been acted upon and therefore could not be set aside as to one party without being set aside as to everybody. See

Wood v. Stover, 1 Stew. 248.

Swallow v. Swallow, 12 C. E. Gr. 278.

Van Doren v. Robinson, 1 C. E. Gr. 256.

Cutler v. Tuttle, 4 C. E. Gr. 549.

V. Harris is not Entitled to Costs or Counsel Fees.

Mr. Harris was advised of the claim of the Tuttle Brothers that their signature upon the release was null by reason of the fraud. He had in his hands about six hundred (\$600) dollars to pay claims many times that amount and the release was evidently for his sole benefit and when the complainants instituted their lien claim suit, Harris unscrupulously and inequitably interposed it as an absolute defense and the only relief which the complainants could possibly obtain, was by this suit in Chancery to restrain this defense. Unknown to them, Harris had paid seventy-five (\$75) dollars to the Apgar Brothers. If he had paid nothing there seems to be no question but that he could not have relied in any measure upon the release; having paid seventy-five (\$75) dollars to the Apgar Brothers, he is entitled to rely on it to the extent of seventy-five (\$75) dollars and that money having been repaid to him, he is placed in *statu quo*; the complainants prevailing in getting the release set aside. Under the Section 84 of the Chancery Act, the award of costs is discretionary.

1 Comp. Stat. 442.

Under Section 91 the Court may make allowance of counsel fees to the party obtaining the decree.

1 Comp. Stat. 445.

This Section has been held to be constitutional although it makes no allowance to successful defendants.

MacMullin v. Doughty, 68 Eq. 776.

Conclusion.

In conclusion the respondents insist that the entire responsibility for their mass of litigation over a small claim should be placed at the door of Mr. Harris, because he neglected to protect himself by filing his contract, as required by law. He, in filing a bill of interpleader fraudulently intimated to every claimant that he had done what was necessary in order to entitle him to do so, to wit, filed his contract. The mechanics lien law gives to all material men four months within to file their lien claims. Harris did not want to give that time, but wanted to force them into Court to have their rights attach to a fund of less than five hundred and fifty (\$550) dollars, when in fact there was several thousand dollars owing. He knew according to law that the stop notices were ineffective.

Schmidt v. Eitel, 4 Rob. 8.

Beckhard v. Rudolph, 4 Rob. 740.

Summerman v. Knowles, 4 Vr. 203.

He furnished Apgar Brothers with the release to be signed and he attempted to take the benefits of that release and repudiate the means by which it was procured. Tuttle Brothers were the only ones who have at any stage been diligent enough to ascertain the trick that was endeavored to be played upon them by the filing of the interpleader bill. Within the time limited by law, they ascertained that there was no contract filed and placed a lien on Mr. Harris's building, which was liable for the payment of the lumber furnished by Tuttle Brothers, and which went in to that building. If Mr. Harris wanted to protect himself so that he would be liable merely for the contract price, the only way he could do it was to file his contract.

The only witness on behalf of Harris, who could controvert or in any way contradict the case made by the complainants, is Theodore Apgar, and the evidence shows that the Apgars' had at that time lost their credit and subsequently became bankrupts, owing large sums of money. The learned Vice-Chancellor placed no reliance on the statements of the Apgar Brothers, but choose to place faith in the sworn statements of reputable business men.

Since the decree in this case places Mr. Harris in *statu quo*, he certainly has no right to complain. Viewed from every phase of the case, the decree does equity by the parties and it is respectfully insisted that it should be affirmed with costs.

Respectfully submitted,

SAMUEL KOESTLER,

PAUL Q. OLIVER,

Of counsel with Respondents.

[4030]

Court of Errors and Appeals

Between
WILLIAM E. TUTTLE, JR.,
and **ARTHUR D. TUT-**
TLE, Partners, trading as
TUTTLE BROTHERS,
Complainants and
Respondents,
and
BENJAMIN S. HARRIS,
et als.,
Defendants.

ON BILL, ETC.
ON APPEAL OF
BENJAMIN S. HARRIS.

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Brief for Appellant

The prayer for relief in the bill of complaint is that a certain mechanics' lien release executed by the complainants, material-men, and by them delivered to Theodore Apgar and George I. Apgar, builders, and by them delivered to Benjamin S. Harris, owner, the defendants, may be declared to have been obtained through the false and fraudulent representations of the builders and without any consideration from the owner, and that the same may be surrendered and cancelled, and that an injunction may issue restraining the owner from offering the release in evidence in a certain lien claim suit pending in the Middlesex Circuit Court.

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The final decree, advised by Vice Chancellor Emery, adjudges that the release was fraudulently procured from the complainants by the builders and by them fraudulently delivered to the owner without any consideration being paid therefor to the complainants by the builder or owner, and that the release be delivered up and cancelled on the complainants repaying to the owner \$75 and interest from November 18, 1907, being the amount of money with interest paid by the owner to the builders upon the delivery of the release by

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the builders to the owner prior to the owner receiving notice of the complainants' claim of fraud, and that an injunction issue restraining the owner from proving the release under the plea of release filed by him in the mechanics' lien suit.

This appeal from this decree is taken by the owner.

FACTS

- 10 Harris, owner and defendant-appellant, made a contract on June 26, 1907, with Apgar Brothers, builders, two of the defendants, to build a house for \$4100.

Case, p. 116, lines 33-37; p. 123, lines 36, 37.

Case, Contract, Exhibit C1, p. 176.

The contract was not filed.

Case, p. 126, lines 30-33.

The first five payments under the contract, being all the payments but the final payment of \$600, were duly paid by check.

- 20 Case, p. 116, line 38, to p. 117, line 26; p. 123, lines 39, 40.

Case, Checks (First Five) Exhibit C2. pp. 177, 178.

- When the final payment of \$600 and a bill of extras of \$23.30 became due, Apgar Brothers, builders, on November 18, 1907, brought a release of lien, dated November 11, 1907, to Harris, owner, and Harris gave them a check for \$75, being the amount the builder then asked, and told them he would meet them at his lawyer's office in a day or two and settle up the matter. This release was a joint and several release, and was signed by eight creditors of the builders, besides the builders themselves. The complainants were the first signers.

Case, p. 117, line 27, to p. 121, line 15; p. 123, lines 39, 40; p. 136, lines 4-35;

Case, Extras, Exhibit C3, p. 179.

Case, Release, Exhibit C4, p. 179;

Case, Check (Last One) Exhibit C2, p. 178.

Before that time arrived, however, the complainants and others served various stop notices and papers on Harris, the first being served on November 10, 1907, and the last on November 26, 1907.

Case, p. 121, line 17 to p. 126, line 29.

Case, Tuttle Brothers Stop Notice, Exhibit C5, p. 181;

Case, Tuttle Brothers Letter, Exhibit C6, p. 182;

Case, Loizeaux Co. Stop Notice, Exhibit C7, p. 183; 10

Case, Larrabee Stop Notice, Exhibit C8, p. 184;

Case, Apgar Brothers Assignment, Exhibit C9, p. 185;

This suit is based, as to the notice to Harris of the alleged fraud of Apgar Brothers in obtaining the release, on the Tuttle Brothers' letter (Case, Exhibit C6, p. 182), served on Harris after the Tuttle Brothers' stop notice was served.

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Case, Bill of Complaint, p. 5, paragraph 7.

After the receipt of these various notices, Harris and the stop notice claimants met at the office of Harris' lawyer in an endeavor to settle as to whom the balance due on the contract and for extras, \$548.30, should be paid, but without success.

Case, p. 128, line 28, to p. 130, line 33.

Case, p. 150, line 16, to p. 153, line 3.

Following this, Larrabee, a stop notice claimant, to whom the builders had assigned their rights under the contract, brought suit on November 27, 1907, in the Supreme Court, against Harris for the balance due under the contract and the extras.

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Case, p. 130, line 34, to p. 131, line 12;

Case, Summons and Declaration in Larrabee suit, Exhibit C15, p. 190.

Thereupon, Harris filed, on December 3d, 1907, a bill of interpleader in ~~this~~ court, making Larrabee, the assignee of the interest of Apgar Brothers, builders, and a stop notice claimant, Tuttle Brothers and J. D. Loi- 40

zeaux Lumber Company, the other stop notice claimants, parties defendants, and an order was made that an injunction issue restraining Larrabee from proceeding in his suit upon Harris depositing in Court \$548.30, the balance due under the contract and the extras. Subsequently, the trustees in bankruptcy of Apgar Brothers, builders, to whom Larrabee assigned his interest, were admitted as parties defendant.

Case, Bill of Interpleader, p. 63.

10 **Case, Order for Injunction, p. 73.**

Case, Order to Admit, p. 109.

The money was duly deposited with the Clerk of this Court, on December 7, 1907, and the injunction was issued.

Case, Receipt from Clerk, Exhibit C. 16 (A)

p. 198.

A week after the bill of interpleader was filed, Tuttle Brothers filed, in the Middlesex County Clerk's office, a mechanics' lien against the Harris building and
20 brought suit to enforce it, making Apgar Brothers, builders, and Harris, owner, defendants.

Case, p. 131, lines 29, 30.

Case, Lien Claim Summons in Tuttle Brothers' suit, Exhibit C. 16, p. 196.

Harris then applied for, and was granted, on December 17, 1907, leave to file a supplemental bill in his interpleader suit, setting forth the instituting of the lien suit by Tuttle Brothers. He filed such supplemental bill and prayed that the lien suit be enjoined.
30 An injunction was thereupon issued pursuant to the prayer of the supplemental bill.

Case, Leave to File Supplemental Bill, p. 74;

Case, Supplemental Bill, p. 75;

Case, Order for Injunction, p. 79;

This Injunction was later, on December 31, 1907, modified so as to allow the filing of pleadings in the lien suit and was still later, on September 8, 1908, modified so as to allow for application to the Middlesex Circuit Court to extend the time to prosecute the suit.

Case, Order Denying Motion, p. 80, lines 34-37.

Case, Order Modifying, p. 82.

Harris having pleaded the release in the lien suit, Tuttle Brothers then, on March 18, 1908, filed their bill of complaint in this suit to set aside the release and to enjoin Harris from offering it in the lien suit.

Case, Bill of Complaint, p. 1.

To this bill of complaint, Harris demurred.

Case, Demurrer, p. 18.

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This demurrer was overruled, on July 27, 1909.

Case, Vice Chancellor Emery's Memorandum, p. 20.

Case, Order overruling Demurrer, p. 22.

The testimony in the interpleader suit having been taken pending decision on the demurrer in this suit, Vice Chancellor Emery, at the time of deciding the demurrer, also sent counsel his memorandum in the interpleader suit, deciding that the interpleader suit should stand over pending the lien claim suit, and an order 20 was made, on July 27, 1909, that the interpleader suit stand over for further hearing.

Case, Order for Further Hearing, p. 202.

The proceedings in the interpleader suit were introduced into this suit by the pleadings and proofs.

Case, Conclusions, p. 205, lines 17-19.

Case, Interpleader Pleadings and Proofs, pp. 63-202.

In August, 1911, Vice Chancellor Emery gave his Conclusions in this suit (which, however, were not filed 30 until October 1, 1913), and on September 28, 1911, he allowed an order for re-argument on two points, first, the agency of Apgar Brothers, builders, in delivering the release executed by the complainants and others to Harris, owner, and, second, the effect of the payment by Harris, owner, of the balance of the money into Court in the interpleader suit. The decision on the re-argument was made by Vice Chancellor Emery in August, 1913, in a Memorandum filed on October 1,

1913, and the final decree, made on September 30, 1913, and filed on October 4, 1913, followed.

Case, Conclusions, p. 203.

Case, Order for Re-Argument, p. 212.

Case, Memorandum, p. 213.

Case, Final Decree, p. 216.

THE QUESTIONS INVOLVED

- 10 The questions raised by this appeal are:
1. Can a suit for the cancellation of a release which does not make parties to the suit other and later releasors in such release be maintained?
 2. Can a release of lien be cancelled by the court after delivery to an innocent owner who has paid out money on the strength of it?
 3. Should not a suit for cancellation on the ground of fraudulent representation be instituted as soon as the alleged fraud is discovered?
 - 20 4. Can the breach of a promise to pay money be deemed a fraud?
 5. Can the creditor of a builder claim payment under a stop notice in an interpleader suit of moneys paid into court and at the same time invoke the aid of the court to restrain the complainant in the interpleader suit from offering in evidence a release of lien in a lien suit instituted by the creditor to collect the same debt as that claimed under the stop notice?

GROUND OF APPEAL

- 30 The decree is alleged to be erroneous because it adjudges:
1. Release fraudulently procured and delivered.
 2. Condition for cancelling release the re-payment of \$75 and interest.
 3. Release to be cancelled on payment of \$75 and interest.
 4. Injunction restraining proving release in lien suit.
 - 40 5. No costs or counsel fees allowed Harris.

THE ARGUMENT

I. Should Not All Signers to the Release Have Been Made Parties to This Suit?

It will be noticed that the release is joint and several, that the complainants were the first to sign it, and that of the other nine signers the only one to be made parties defendant are Apgar Brothers, the builders.

This situation gives rise to the first point raised, 10 namely, that a joint mechanics' lien release can not be declared void as to the first signer in a suit to which the other later signers are not made parties. This is on the grounds,

1. The document being joint, as well as several, all the signers are equally interested in the question as to its validity.

2. The release having been delivered to, and acted on, by the owner, the owner, as to the several signers, stands on the same basis as a single covenantee to two 20 or more covenantors in a joint and several bond.

3. It would allow the first signer to perpetrate a fraud on, and obtain an undue advantage over, the remaining signers, to have a release declared void as to the first signer for matter not appearing on the face of the paper nor communicated to the other signers and the allegations concerning which the other signers have had no opportunity to meet.

In this connection, the testimony of J. D. Loizeaux, a witness for the complainants, is important. He testified that he presumed the complainants, having signed 30 the release, had been paid.

(Case p. 48, lines 22-30.)

If he or any of the other signers, had known, or even thought, that the complainants had not been paid but had made the agreement now claimed by the complainants to have been made by them with the builders and would subsequently, in order to make their own claim good, bring suit to have the release declared void as to them, would he, or any of the others, have signed 40

the release? Would any one sign a release in order that another releasor might get the money?

Every signer gave up something by signing, namely, his right to a mechanics' lien claim. Every signer, after the first, knew that the preceding signer or signers had so given up a right. Did not that knowledge enter into his decision to release his own right and was not that in reality part of the moving consideration for his signature? The complainants, being the first signers, by their act in so signing, have led others to sign. Can they now, in justice to those others, be allowed to take their names from the release and be put in the advantageous position from which their act took the others? Are they not estopped from so doing?

In other words, is not the joint understanding, i. e., the actual words contained in the release, those words being the only statements in the matter actually communicated to all the signers, the controlling understanding in a suit to set aside the joint undertaking?

20 Would not any other ruling open the door for the perpetration of fraud on innocent signers?

II. Can a Release Be Cancelled After Having Been Acted on By an Innocent Owner?

The undisputed testimony is that on the delivery of the release to the owner, Harris, by the builders, Apgar Brothers, the owner, Harris, paid \$75 to the builders, the sum requested at that time. The balance of the amount due, \$548.30, was paid into court in the interpleader suit, in which the complainants are parties defendants, and before any action was started by the complainants to enforce their alleged mechanics' lien claim and before this suit was instituted to set aside the release.

The interpleader suit was based, among other things, on the claim then made by the complainants, not to a mechanics' lien, but to the money due the builders, a stop notice to that effect having been served by them on the owner, Harris, followed later by a letter notify-

ing the owner not to pay any money to the builders, Apgar Brothers, and followed still later by a conference of the creditors, builders, and owner, in which the complainants participated and claimed first right to the money.

The first move made by the complainants which can be called an actual disaffirmance of the right of the owner to rely on the release is the filing of the bill of complaint in this case, several months after the institution of the interpleader suit, and the first move 10 which can be called a constructive disaffirmance is the filing of the mechanics' lien in the Middlesex County Clerk's office, which was also after the institution of the interpleader suit. The statement then in the last part of complainant's bill (**Case, p. 9, lines 1-5**) that "he, the said Benjamin S. Harris, has not paid out any money, or parted with anything of value since he received, from said Apgar Brothers, said release of lien, so executed by your orators" is false and must have been so known to be false by the complainants when 20 they filed their bill. A similar false statement is contained in the affidavit of Arthur D. Tuttle, one of the complainants, annexed to the complainants' bill (**Case, p. 16, lines 10-13**), and states, not on information and belief, but as a fact "that said Benjamin S. Harris has not parted with any money, or other thing of value by reason of the execution of said release."

This was one of two statements in the bill which made it good, under the Court's decision, against demurrer.

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Case, Memorandum, p. 21, lines 26-31.

It is significant that Arthur D. Tuttle was not called to substantiate specifically the affidavit which he had taken to this alleged fact, important as that statement was held to be in the case, nor was any one else called to substantiate the allegations in the bill. But he was asked whether he knew that at the time the bill of complaint was filed if Harris had paid any money on account of the release, and he answered no. (**Case, p. 35, lines 25-27.**) It goes to show the animus back of 40

the bill and the length the complainants were willing to go to substantiate their cry of fraud, which, as Arthur D. Tuttle admitted in his testimony in the interpleader suit, was an afterthought entirely, as witness the concluding questions on his cross-examination:

Q. If there was fraud in the getting of this release, why did you not immediately notify Harris of the fraud as soon as you discovered it? A. (No answer.)

10 Q. Isn't this cry of fraud or misrepresentation on your part an afterthought entirely? A. Yes.

Case, p. 170, lines 23-27.

And that this cry was an afterthought entirely does not depend on Arthur D. Tuttle's testimony to it, important as that is. The written documents signed in the firm's name by his brother, William E. Tuttle, and served on Harris show it. First, there is a stop notice (Case, Exhibit C. 5, p. 181), in which there is no claim,
 20 mention, or even intimation of fraud in the release which Tuttle Brothers knew was then in the hands of Harris. In fact, a careful analysis of this notice would lead to an opposite conclusion, for it does not say that the builders promised to pay them the moneys, or any part of the moneys, due from the owner, but it does say that they, Tuttle Brothers, had demanded of them, Apgar Brothers, payment of the moneys due, and that the Apgar Brothers had refused to pay them. The cry of fraud is based on a **promise** to pay on demand being
 30 ing made as a condition to signing the release. The stop notice is based on a **refusal** to pay on a simple demand being made for the payment of the debt, not on a **refusal** to keep a promise to pay, made for a consideration. If there were any fraud, the fraud was certainly complete when Apgar Brothers absolutely refused to pay them any money. It was not necessary for Tuttle Brothers to wait longer to find out that fact, unless, as Arthur D. Tuttle testified, it was an afterthought entirely. Second, there is the letter claiming
 40 fraud (Case, Exhibit C. 6 p. 182), dated three days af-

ter the date of the stop notice, which does not seek to disavow the actual effect of the release in relinquishing their mechanics' lien, but seeks further to hold up the payment of the money to Apgar Brothers or to any person for them. The "afterthought" had not yet reached the point of affecting Harris personally, and did not so reach him until the filing of the mechanics' lien claim on December 10, about three weeks later. Furthermore, there is the testimony of William E. Tuttle which practically admits it. A part of his cross-examination in the interpleader suit was as follows: 10

Q. At this meeting in Mr. Crane's office, you still held to the notices which you had served, did you not?

A. I don't think that there was anything said about these notices very much; that sort of talk was all ended, and if I had been instructed to by my lawyer at that time, I probably did.

Q. You don't know whether you said what Mr. Crane said or not? 20

A. I may have said that.

Case, p. 165, lines 14-21.

Mr. Crane in his testimony in the interpleader suit said that Mr. Tuttle said he was advised by counsel that his stop notice was good; and the stop notice having been put in before the assignment, he was first entitled to the money.

Case, p. 152, lines 8-11.

And further in the same answer Mr. Crane testified: 30

Mr. Loizeaux said, "I don't like the way that release was obtained." Mr. Tuttle said, "You know it is done right along; it is business. We couldn't insist upon a release before the man gets the money," and he said, "Theodore came in and asked me to sign the release and I said, 'How much is there in it for us?' He said, 'There will be 500.,' and I signed it. The boys are honest, I trust them for any amount," and he said, "Two or three days after when Theodore came 40

in, they told me they was in a failing condition. I was never more surprised in my life," and we talked along and went out. They couldn't come to an agreement and the three insisted that they claimed the money.

Case, p. 152, lines 17-30.

Then came the following questions and answers:

Q. Did Mr. Tuttle at that meeting claim any particular misrepresentation in the securing of his signature?

10

A. No, Mr. Tuttle didn't claim fraud in the Apgars' presence. After they had gone, this conversation took place about the release.

Q. Did he use the word "fraud" at that time?

A. Not to the best of my memory.

Q. Simply told you what you related here?

A. Yes, I told it just as I remember it. My wording is not exact. I tried to take down everything, because I know it was important, and I was interested in behalf of Mr. Harris.

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Case, p. 152, line 31, to p. 153, line 3.

The complainants' action in signing the release led Harris to pay the \$75 mentioned to the builders, and the complainants' subsequent acts in serving stop notice and a letter later followed, at the conference noted, by their claim to first right to the money remaining due led, with similar action of other creditors, Harris to pay the balance of the money into Court in the interpleader suit. The present situation, therefore, in which Harris finds himself, is due to the actions of the complainant, one of those actions taking place **before** the discovery of the alleged fraud and three of those actions taking place **after** such discovery. Under such circumstances, are the complainants equitably entitled to any relief as against the innocent victim? They have not only led him into the trouble, but they have imprisoned him after getting him there, and the imprisonment has been done with full knowledge of all

30

40 the facts.

Harris, relying on the release, had actually parted with the control of the entire amount due the builders prior to any demand, actual or constructive, being made by the complainants for the cancellation of their firm name to the release, and he now stands in the position of having given up control of this money on the faith of the release. The expressed reason for giving the release was that the owner might settle up his contract made with the builders. The payment into Court under the order of the Court was constructively a settling of the contract. And this payment into Court must be considered, not as having been made on an ex parte order, but as having been made on notice, because the Court subsequently refused to strike out the interpleader bill and the supplemental bill thereto on the application of Tuttle Brothers.

Case, Order Denying Motion, p. 80.

But, even should this not be held to be the case there was an actual payment of \$75 made to the builders by the owner. A mechanics' lien is purely statutory, and there is no statutory authority by which the lien claimed in this case can be held to be partly good and partly bad, nor is there any authority by which the release can be held to be both good and bad at the same time. The claim made is that the release is absolutely void on account of fraud, and the Court is asked to restrain the owner from offering the release in evidence in the lien claim suit in the law Court. If the contention of the complainants is correct and the release is void, then the owner, an innocent third party, must suffer, even if the Court does order the money actually paid out to the builders on the faith of the release given by the complainants returned to him by the complainants. What may become of the money paid into Court in the interpleader suit has not yet been determined. Are not the complainants, under such circumstances, clearly estopped from the relief they seek, even if their contention be correct?

III. Laches.

The complainants were guilty of laches, which is the third point made. The question of laches is always a relative one. There are cases in which a delay of years might not be held to be laches, and there are others in which a matter of minutes would be fatal. In this case, the complainants owed to the owner a duty to demand **immediately** a cancellation of their name from the release if they ever intended to ask for such cancellation, and they also owed a duty to all their
 10 co-signers to notify them **immediately** that they had made such demand. The reason why such duty should be held to be an immediate one is that the release might be acted on any minute by the owner and probably would be acted on by him without much appreciable time intervening. Instead of such notification, they practically affirmed the release by serving a stop notice demanding the money. If they had any option in the matter, they exercised it then and there and can
 20 not now rescind.

IV. The Breach of Promise Not Fraudulent.

On the facts, the complainants have failed to substantiate their claims as to false representations in securing the release, and this is the fourth point. The two sets of allegations in the bill which were held to be of controlling importance in the decision on the demurrer were the ones alleging false and fraudulent representations to complainants and others for the purpose of securing their signatures to the release and the one
 30 alleging that Harris had not paid out any money or parted with anything of value since receiving the release. It has already been pointed out that the uncontradicted testimony is against the last allegation, and that Harris did actually pay out money after receiving, and on the faith of, the release.

As to the first allegations, none of the three witnesses, William E. Tuttle and Arthur E. Tuttle, the complainants, testifying as to the representations made to them by Theodore Apgar, and J. D. Loizeaux, testi-
 40 fying as to the representations made to him by George

I. Apgar, gives the language used in making these alleged false representations, but they severally say that the conversation was "in substance" or "the purport" of the conversation was. It can quite readily be seen that the exact language used is of great importance in this case, especially as neither of the builders denies making a promise. Making a promise and making a false representation are, however, two entirely distinct propositions.

But, even admitting that the witnesses have cor- 10
rectly given the actual substance and actual purport of the representations made, does that prove the allegations of the bill on which the complainants must and do rely? These allegations are that the representations made to them "were false and fraudulent, and made for the sole purpose of obtaining from your orators their signatures to said release, without, ever intending to pay to them the sum of Five Hundred dollars," and "that in fact immediately upon obtaining the signature of your orator, the said Arthur D. Tuttle, to said 20
release of lien, the said Apgar Brothers did proceed to interview one or more of their other creditors, who had furnished materials used in the erection and construction of said building, of the said Benjamin S. Harris, and did then and there make the same representation to each of the said persons, so interviewed by them."

Case, Bill of Complaint, p. 4, lines 17-29.

The proof is that Theodore Apgar obtained the signature of Tuttle Brothers the latter part of one week, and that George I. Apgar obtained the signature of the 30
Loizeaux Company the early part of the week following. No concert of action to deceive is shown to have existed between the two partners; and, in fact, if everything had taken place exactly as claimed, it is, by the most liberal interpretation of the testimony for complainants, not at all inconsistent with non-fraudulent dealing on behalf of Apgar Brothers. In other words, there is a link missing in the claim by which the complainants seek to bind. There is lacking, moreover, any attempt even remotely to connect 40

any signer other than Loizeaux with these alleged false representations, although the allegation in the bill is in the plural. Do not these several acknowledged failures to substantiate allegations in the bill look as though the testimony was being played up to a wished-for condition evolved prior to the obtaining of the testimony, rather than that the allegations in the bill were derived from a knowledge of the facts?

The other facts in the case bear out the statements 10 of the Apgars as to what took place when the signatures were obtained and do not in any way substantiate the complainants' claims.

1. Theodore Apgar testified on direct examination in the interpleader suit as to Tuttle Brothers' signature to the release:

Q. And what was said by you when you asked him to sign it?

A. I said when I got the money I would give him \$500.

20 Q. What did he say?

A. He signed it, he didn't say any more.

Q. Did he make any objection to signing it?

A. No, sir, not at all.

Case, p. 142, lines 24-30.

This statement of what took place is substantiated by Mr. Crane's testimony, of what William E. Tuttle said took place. In relating what was said at the creditors' meeting at his office, Mr. Crane testified that Mr. Tuttle said:

30 "Theodore came in and asked me to sign the release and I said 'How much is there in it for us?' he said 'There will be \$500', and I signed it."

Case, p. 152, lines 21-24.

Loizeaux and William E. Tuttle were both present at this meeting, but neither one has denied that William E. Tuttle made this statement at that meeting.

2. George Apgar testified on direct examination in the interpleader suit as to the Loizeaux signature to 40 the release:

I took it first to Mr. Loizeaux and he asked me if I was going to meet a note—Mr. Loizeaux did that.

Case, p. 136, lines 15-17.

I told him I was, so I went to Mr. Harris and took this release to him and asked him for \$75 to meet that note.

Q. What did Harris say or do?

A. He wrote me out a check for \$75 and I took it to the bank and deposited it in the bank to meet the note. 10

Case, p. 136, lines 24-29.

This check was proven and marked (with five other checks) as Exhibit C 2.

Case, Exhibit C 2, p. 177, 178.

Mr. Loizeaux was asked on cross-examination about this note, but would not deny that an Apgar Brothers' note to the Loizeaux Company was taken up later on the very day he signed the release. (**Case, p. 47, lines 17-27.**) George Apgar's testimony, therefore, stands 20 undenied. If his testimony as to this note were not true, testimony from Mr. Loizeaux's books or from the bank's books could easily have been obtained to the contrary. Ample time had elapsed from the time Mr. Apgar gave his testimony in the interpleader suit on March 24, 1909, and May 3, 1910, when this case was heard, and July 12, 1910, when Mr. Loizeaux gave his testimony, to have found this record evidence had it existed. The fact that such a note was paid later on the very day Loizeaux signed the release and partly 30 with money obtained from Harris on delivering the release, must go a long way toward substantiating the testimony of George Apgar as to what took place when the release was signed by Loizeaux. In fact, Loizeaux' own testimony is not entirely irreconcilable with this. When Loizeaux testified that "the purport" (**Case, p. 43, lines 35, 36**) of the conversation was that he was to get \$500 out of it, he may have taken into account the full face value of the note which the balance of \$75 helped to take up, and then, on learning that all but 40

\$75 of the note was paid from other sources, consider that he was entitled to the balance from the Harris job. And, in this connection it must be remembered that Loizeaux testified that Justice Swayze of the Supreme Court had decided in the action brought by Loizeaux against the Apgars that in this very transaction there had been no fraud committed by the Apgars.

Case, p. 50, lines 3-14; p. 52, lines 17-20.

31 The giving of an assignment of the balance of
 10 the Harris money to Larrabee was quite evidently an
 afterthought and was apparently based on the Apgars' desire, when they realized they would have to go to the wall, to divide up equitably the Harris money among their creditors on the Harris account. The Tut-
 tles already had received \$600, being the proceeds of one of the early checks received by the Apgars from Harris, as testified to in this case by George Apgar,
 (Case, p. 36, line 10, to p. 37, line 14). The Loizeaux Company had received payment for their note, as
 20 shown above. Larrabee, the other large creditor, had received nothing from the moneys coming from the Harris job. (Case, p. 151, lines 15-20.)

In relating what took place at the creditors' meeting when the Larrabee assignment was brought up, Mr. Crane testified in the interpleader suit:

30 "They referred to a meeting of all the cred-
 itors they had had, in which they had an agree-
 ment to get together and fix the thing up, and
 they said Mr. Larrabee hadn't been fair in
 taking this assignment and he has broken his
 agreement, and they asked Theodore and
 George—they said 'George and Theodore, did
 you give that assignment?'" He said, "We did."
 He said, "Did you think it was fair to do that,"
 and they answered that Mr. Larrabee hadn't had
 a cent out of any of the moneys that were due
 him and they felt that he ought to get some-
 thing, and to be fair, they made the assignment
 40 of the balance that was coming to them to him,
 and they spoke to Mr. Larrabee then and asked

him if he was going to keep his agreement or if he was going to insist on his assignment, and Mr. Larrabee said he was; he said, "Gentlemen, I haven't had a cent out of this and my bill is nearly \$700, and my counsel says the assignment is good and that I am entitled to the money first out of it," and Mr. Loizeaux and Mr. Tuttle said, "Well, it is no use of talking any more, we cannot settle this thing if this assignment is going to stand," and the meeting broke up over that. 10

Case, p. 151, lines 7-29.

4. No benefit or advantage has been shown to have accrued to Apgar Brothers from the transaction, nor has there been shown any attempt on the part of Apgar brothers to derive any benefit or advantage from the transaction. In fact, they deliberately pushed aside the opportunity of collecting in full the amount due and putting it in their own pockets, which opportunity, if they were acting fraudulently toward their creditors, 20 they certainly would have taken advantage of. Their whole attitude throughout has rather been one of concern for the payment of their creditors than otherwise. That they may not have used the best judgment in carrying out their ideas is no reason for saying that they have acted fraudulently.

5. The burden of proof has not been sustained by the complainants. It must be remembered that the complainants are seeking to set aside a paper executed by them with all the solemnity known to the law (i. e., 30 with a seal), that they were under no disability when so doing, that they were the stronger rather than the weaker party, and that the only testimony they offer in support of their contention and as a basis for setting aside their own solemn act is their own testimony as to their reasons for signing, which is in direct contradiction to the statements in the paper so signed. The testimony of Loizeaux as to his signing can not be evidential as to what took place when the complainants

signed, and further the burden of proof as to the Loizeaux signature has clearly not been met.

V. Can a Creditor Claim in Good Faith Double Payment?

The peculiar position in which the complainants are shown to be by this record must not be overlooked. This gives rise to the fifth point raised. They are claim-
 10 ing payment under a stop notice not renounced to a fund deposited by Harris in Court in the interpleader suit, and they are, by this action, seeking the aid of the Court to restrain Harris, the complainant in the interpleader suit, from putting a release of lien in evidence in a mechanics' lien suit which they have instituted against Harris, as owner, and in which they seek to make the very debt set forth in their stop notice a lien on Harris' property. In other words, they are insisting on payment from both funds. Both claims
 20 can not be good, and by insisting on both they show a lack of good faith in the claims they advance. They are merely speculators in the Court's decision.

The claimed position of the defendants as to the money in Court is most important. The answering defendants in the interpleader suit are Larrabee, to whose interest the bankruptcy trustees of Apgar Brothers have succeeded, and who have answered saying "the said sum of money due and owing to the said Apgar Brothers under the contract should have been paid
 30 over to the said Willard L. Larrabee, assignee of the said Apgar Brothers, which said money now belongs to these defendants," and the Tuttle Brothers, who, by their amended answer, set forth that the suit at bar has been instituted and say that they "insist that the issue to be raised, under their said bill of complaint, should be first determined before final hearing upon" the interpleader suit, and who further say that they are advised by counsel "that the question" as to whether they have "any lien or claim against the fund of money in Court"
 40 "is one of doubt and difficulty," and pray that the

Court may decree whether they are entitled "to any claim against the funds in Court," in other words, while prosecuting the present suit, they ask the Court to hold possession of the other suit with the funds paid in Court, so that, should they be unsuccessful in this suit, they may press their claim against the funds in Court in the other suit. The other defendant, the J. D. Loizeaux Company, did not file an answer. The two answers filed effectually tied up the money, and removed it from Harris' control, if there could have been any question as to that previously. 10

A case in this State, which shows what Harris' position is as to this money is **Supreme Council of the Order of Chosen Friends vs. Bennett et al.**, 2 Dick. 39. (Chancery, 1890, Van Fleet, V. C.) Reversed on the question as to the defendant to whom the money should be paid. **Bennet vs. Van Riper**, 2 Dick. 563. The Court in that case said:

"By becoming the complainant in an interpleader suit, and prosecuting such suit to a decree, requiring the defendants to interplead and settle among themselves the conflicting claims which they make to the fund in controversy, the complainant corporation has effectually extinguished any right which it might otherwise have asserted to the fund in litigation," and, also, 20

"The complainant having effectually cast itself off from all right to assert a claim to the fund in dispute, by the position which it has voluntarily assumed in this litigation, the only duty now devolving on the Court—indeed the only thing the Court can do in the present posture of the case—is to decide whether the fund belongs to Mrs. Bennett or to the other three claimants. The fund must be awarded to the one or the other." 30

In the Illinois case of **Cogswell vs. Armstrong**, 77 Ill. 139 (1875), the Court said:

"In this case, one of the defendants did not contest the right to the money. The other defendants appeared and insisted upon the payment of the money to them. The complainant, however, who could only file 40

his bill and have it determined which of the defendants claiming the fund was entitled to it, is urging that a portion of the fund should go to him. We are aware of no authority which would sanction the right of appellant to enter into the contest for a portion of the fund."

The syllabus to the case of **Anderson vs. Wilkinson, 10 Smedes and Marshall (Mississippi, 1848, Errors and Appeals, Clayton, J.)** says:

- 10 "The complainant, in a bill of interpleader, cannot, after the filing of the bill, set up a right in himself to the fund in controversy; by his bill he admits he has no interest in the fund, and leaves it to the defendants to adjust their conflicting claims."

The opinion in the last case does not use the specific language of the syllabus, which seems to be a deduction from the language which is used.

VI. Repayment of Moneys

- 20 The decree, while adjudging that the release should be cancelled, imposes the condition that the complainants should repay to Harris \$75 with interest, being the amount paid by him to the builders at the time of the delivery of the release. If the entire amount due the builders had been paid at that time could it have been decreed that the release should be cancelled on the repayment of the amount paid? If not, then why in the present instance? If so, what does a release amount to if it can be set aside after having been acted on by an innocent third party? The doctrine enunciated by this
30 decree is a most dangerous one.

VII. No Costs or Counsel Fees

- The decree, while directing the re-payment to Harris of certain moneys, there having been no offer to repay prior to the institution of the suit, refuses costs and counsel fees to him. While saying that he was right in refusing to surrender the release because he was entitled prior to doing so to re-payment of moneys
40 paid, the decree nevertheless punishes him for his first

refusal by refusing him payment of costs and counsel fees incurred in refusing an unjust demand.

It is respectfully submitted that the decree is erroneous and should be reversed.

J. HENRY CRANE,

Solicitor for and of Counsel with Appellant.

W. S. ANGLEMAN,

Of Counsel.

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