New Jersey Court of Errors and Appeals

WILLIAM E. TUTTLE, JR., and ARTHUR D. TUTTLE, Partners, trading as TUTTLE BROTHERS, Claimants-Appellees, vs. GEORGE I. APGAR and THEODORE APGAR, Partners, doing business as APGAR BROTHERS, Builders, and BENJAMIN S. HARRIS, Owner.	ON MECHANIC'S LIEN ON APPEAL OF HEIRS OF OWNER.

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BRIEF FOR OWNERS-APPELLANTS

The meritorious question presented by this appeal is, In a mechanic's lien action by a materialman can the defendant-owner avail himself of the discharge in bankruptcy of the defendant-builder as a defense to the lien claim? 30

STATEMENT OF FACTS

On December 10, 1907, summons was issued in a mechanic's lien action.

(Case, pp. 1 and 2.)

The declaration is in the usual form for such an action.

Case, pp. 2-5.) 40

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Three pleas were originally filed by the owner, (1) general issue, (2) release, and (3) no lien.

(Case, pp. 2-5)

The builders did not plead, but judgment pro confesso as to them was not entered. A similiter to the first and third pleas was filed, and a replication alleging fraud was filed to the second plea.

(Case, pp. 8 and 9.)

A demurrer was filed to the replication to the ~~third~~ second plea.

(Case, pp. 10 and 11.)

Whereupon the claimant filed a bill in Chancery to set aside the release, and a decree was made setting it aside. An appeal was taken from that decree, and the decree was affirmed by this court at the November Term, 1914.

Prior to the beginning of this mechanic's lien action, an interpleader suit had been instituted in Chancery by the owner to which the claimant was a party defendant, and the balance due under the owner's contract with the builder had been, under order of the court, paid into Chancery, and an injunction was later issued against proceeding in this mechanic's lien suit for the time being. The suit to set aside the release having been determined, this mechanic's lien suit was again taken up and an order was entered by consent sustaining the demurrer.

(Case, p. 12.)

A new replication to the second plea was then filed.

(Case, p. 13)

The owner having died intestate, Jan. 5, 1915, an order reviving the suit in the names of his heirs was entered.

(Case, p. 14.)

During the pendency of the Chancery action on the release the builders were adjudicated bankrupts and were, after litigation, granted their discharge.

An application was made for an order to file a plea puis darrien continuance setting up the builders' discharge in bankruptcy, and the transcript of the sten-

ographer's notes of the proceedings taken in the case is made up of the three-sided colloquy between the Court and opposing counsel as to whether such a plea should be filed and, if filed, whether it would defeat the lien. No testimony was taken.

(Case pp. 19-38.)

Judge Lloyd, who heard the matter in the Middlesex Circuit, later filed his conclusion that the discharge in bankruptcy of the contractors did not operate to extinguish the lien. 10

(Case, p. 39.)

Judgment was entered on Judge Lloyd's opinion, and the order for judgment directed the entry of a general judgment against the builders for $1064.06 besides costs "and specially to be made of the lands and building in the declaration and lien claim described" and further ordered that "execution be perpetually stayed as against the defendant builders."

Later, in order to make the record complete, Judge Lloyd made an order allowing the filing of a plea puis 20 darrien continuance nunc pro tunc as of the date of the argument setting up the discharge in bankruptcy of the builders on condition that it was to be the only defense raised to the lien. This was done to carry out the understanding under which the case was argued and to allow of the question to be raised on appeal.

(Case, p. 15)

Such a plea was then filed.

(Case, p. 16)

It is from this judgment ordered by Judge Lloyd 30 that this appeal is taken.

GROUNDS OF APPEAL

There are nine grounds assigned for appeal.

(Case, pp. 42 and 43)

1.

The court decided that the discharge in bankruptcy 40

of the builders was not available to the owners as a defense or plea to the action.

In his Conclusions, Judge Lloyd said, "My conclusion in this case is that the discharge of the contractor Tuttle did not operate to extinguish the lien claim filed against the property of Harris, the owner." The name Tuttle in the quotation should have been Apgar. The judgment entered followed this conclusion.

10 **(Case, Conclusions, p. 39)**

In considering this case the peculiar wording of our mechanic's lien statute and of the federal bankruptcy act is of paramount importance.

The mechanic's lien statute says. ". . . all or any of said defendants may, jointly or severally, have any defense or plea to the same that might be had by the builder to any action on said contract without this act; and in addition thereto, the owner (or mortgagor) may plead that said building or land are not liable to said
20 debt."

P. L. 1898, p. 538, Sec. 24.

The statute thus gives the owner all the rights and remedies of the contractor together with the additional one specified.

The federal bankruptcy act says, " 'A discharge' shall mean the release of a bankrupt from all his debts which are provable in bankruptcy, except such as are excepted by this act."

Federal Bankruptcy Act, 1898, Sec. 1, Par. 1 (12)

30 The plea of a discharge in bankruptcy, both before and after suit brought, is a well-known plea, and the books have many precedents for such a plea. Chitty says in his "Treatise on Pleading," Vol. 1, 8th Am. Ed. from 6th London Ed., p. 658, "And if the defendant became bankrupt, and obtains his certificate after issue joined, he should plea this defence puis darrien continuance" and in Vol. 3 of the same work at p. 1242 he gives a form for a plea of defendant's bankruptcy and certificate puis carrien continuance; and in
40 his "Precedents in Pleading," Vol. 1, p. 248, 1st Am.

Ed. from 1st London Ed., he gives another form for the same kind of plea.

Can there be any question but that, if suit were brought without the mechanic's lien act by the claimants against the builders for the contract price of the materials furnished, a discharge in bankruptcy would ~~not~~ be an effectual defense or plea and prevent the claimants from recovering judgment?

That a plea of discharge in bankruptcy interposed by the builders to a suit by the claimants on their contract with the builders without the mechanic's lien act would be a bar to any recovery seems too elemental to require argument; in fact, the Court below practically concedes that such is the case by perpetually staying execution against the builders on the judgment rendered. Why then can not the owner make use of such defense or plea in this action? The statute says he may. And the statute, being in derogation of the common law, must be strictly construed, or, as Chief Justice Green puts it, in **Ayres vs. Revere, 25 N. J. L. (1 Dutch.) 474, 481 (Supreme Court, 1856)** "the statute is not of that purely remedial character which calls for a peculiarly liberal construction at the hands of the court."

2.

The Court decided that while the execution should be perpetually stayed as against the builders, the amount of the judgment was a lien against the building and lands mentioned and described in the lien claim and declaration.

The order for judgment recites that while the judgment should be perpetually stayed as against the builders the same is a lien upon the building and lands mentioned in the lien claim and declaration.

Case, Order for Judgment, pp. 40 and 41.

As the special judgment follows and is dependent upon the general judgment, it is difficult to see under what authority the builders can be relieved of the bur-

den of the general judgment and yet the owner be subjected to the penalty of the special judgment.

3.

The court decided that $1,064.06 besides costs of suit be specially made of the lands and building in the declaration and lien claim mentioned and described.

The order for judgment is to the effect noted.

Case, Order for Judgment, pp. 40 and 41.

10 By perpetually staying execution on the general judgment as against the real debtors, the builders, the court practically says in its order for judgment that the amount of the judgment be not merely **specially** but **exclusively** made of the owner's property. The provisions of the mechanic's lien law do not permit of the entry of any such judgment. The manner of the wording of the order is of no importance, when the effect of the order is to make a pronouncement which the statute does not authorize the court to make.

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4.

The court decided that the plaintiffs were entitled to a verdict for the full amount claimed in the lien claim and declaration with interest and that the same was a lien upon the building and lands mentioned and described in the lien claim and declaration.

What has been said under 1, 2 and 3 is applicable here.

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5.

The court decided that a claim not enforceable generally against the builders could be enforced specifically against the owners.

The court by perpetually staying execution on the general judgment as against the builders while not staying the enforcement specially as against the owner's property, practically said that a general judgment which could not be enforced generally could be en-

40 forced specially. Which conclusion is directly opposed

to the whole theory of the mechanic's lien law. That law predicates the liability of the owner's property for the payment of the builder's debt to the claimant on an enforceable claim against the builder by the claimant. If the claimant has not an enforceable claim, then under what theory can the owner's property be made to respond. If the claim when reduced to judgment is not enforceable, the claim itself is not enforceable. By saying to the claimant, we will let you reduce your claim to judgment, but we will not let you enforce your judgment, practically says your claim is not enforceable. By allowing the claim to be put in judgment, which is not enforceable, does not, and cannot, change the inherent character of the thing, claim or judgment, it matters not which it is called, held by the claimant. 10

6.

The court decided that while the discharge in bankruptcy of the builders was available to the builders to escape liability for the claim, such discharge was not available to the owners to escape a lien for the same claim. 20

By staying execution as against the builders the court recognized the efficacy of the discharge in bankruptcy as a release from debt and as an answer (plea or defense) to the claimants' demands against the builders. The mechanic's lien statute, as before pointed out, gives the owner the benefit of any plea or defense (answer) to the claimants' demands that the builders may have. Can the Court by merely changing the form of relief to the builders, destroy the relief itself to the owner? Can the Court say that a discharge in bankruptcy is no answer, defense, or plea to the claimants' demands, but it is an answer, defense, or plea to the claimants' judgment, and therefore the enforcement of such judgment will be stayed. Manifestly, the mechanics' lien statute by saying that the owner may avail himself of any defense or plea to the claim that the builder may have, did not mean that the builder could 30 40

go free but the owner could not, on the merits of the same defense or plea.

7.

The Court decided that the discharge in bankruptcy of the builders did not operate to extinguish the lien claim filed against the property of the owners.

Such is the language used by the Court in the Con-
10 clusions filed.

Case, Conclusions, p. 39.

By perpetually staying execution against the builders, the Court very effectually extinguished the contract demands of the claimants against the builders. If then the contract demands of the claimants against the builders are extinguished, on what foundation can the lien demands, which are predicated on the contract demands, of the claimants against the owner rest? Can the contract demands be wiped out and not the lien
20 demands? Can the general judgment, which represents the contract demands, be wiped out, and the special judgment, which represents the lien demands, not be wiped out also? In this connection, it must be remembered that the general judgment has not had one moment of real life, as the very order entering it stayed its enforcement.

8.

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The Court decided that property improved by building thereon is pledged by the law to those furnishing labor and material.

The Court said in the Conclusions filed, "The property improved by building thereon is pledged by the law to those furnishing labor and material."

Case, Conclusions, p. 39.

As a legal proposition not modified, but rather accentuated, by the context, this is a rather broad state-
40 ment to make of the effect of the mechanic's lien law.

9.

The Court decided that the bankruptcy law maintains intact all liens held by the creditors, even though the principal debtor be discharged.

In the Conclusions filed, the Court said, "The trend of all authority under the bankrupt law is to maintain intact all liens held by the creditors, even though the principal debtor be discharged. I see nothing exceptional in the lien held by mechanics and material men to take it out of this status." 10

Case, Conclusions, p. 39.

The cases of liens under the bankruptcy law relate to cases involving statutes unlike ours, or to cases involving liens on the bankrupt's estate, either real or personal, or to liens on funds coming to the bankrupt's estate. A most careful examination of many cases has failed to reveal any precedent for the Court's action in this case. It must be remembered that this case is one of an alleged lien of a non-bankrupt on property of a non-bankrupt, that neither the bankrupt builders nor 20 the bankrupt builders' estate have any interest in either the lien or in the property, and that the proceedings are purely under a state statute involving the title to real property. The bankruptcy statute as such has absolutely nothing to do with the case beyond the effect to be given to the discharge as to the liability of the builders for their debts.

In the case of **Boehm vs. Brion, 85 N. J. L. (56 Vr.) 330, 332 (Errors and Appeals, 1913, Minturn, J.)** this court said, "The proceeding against the owner is entirely statutory and is not based upon the theory of 30 any existing contractual relation between him and the claimant."

Under that statement of the law by this Court, how can the conclusion be escaped that a release of the builders' obligation, whether by operation of law or by act of the parties, is not also a release of the lien?

It is most respectfully submitted that the theory 40

on which the case was decided in the Court below was entirely wrong, and that judgment should have been rendered in favor of the owners.

J. HENRY CRANE,
Attorney and of Counsel with Appellants.

W. S. ANGLEMAN,
Of Counsel with Appellants.

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Plainfield, N. J., November 9, 1915.

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New Jersey Court of Errors and Appeals

WILLIAM E. TUTTLE, JR., *et al.*, Claimant-~~Appellees~~, Respondents. vs. BENJAMIN S. HARRIS, *et al.*, Owners-Appellants.	On Mechanic's Lien.

BRIEF FOR ~~APPELLEES~~ RESPONDENTS.

On May 17th, 1915, the above cause came on for trial before the Circuit Judge without a jury, the defendants waived proof of the claimants' case but applied to the court for leave to file a plea *puis darrein continuance.* The Court heard the argument of counsel as to whether this plea should be permitted, and, after considerable discussion as to whether leave to file the plea should be granted to defendants, the court said:

> This is the only question in the case, is it not?
>
> Mr. Angelman: Yes. I was going to suggest, we are perfectly willing that your Honor take the matter under advisement, and if we are entitled to file it then you can sign the order and we will take the judgment, or if not entitled to file it, then they will take judgment for what they claim.
>
> Mr. Koestler: I presume the record ought to show.

Mr. Angelman admits the proper filing of the lien claim.

Mr. Angelman: We make no other objection on any other ground.

The Court: I see. My impressions are two-fold with respect to this request for leave to file the plea. One is that it is technical in the sense of not being substantially meritorious, and the Court ought not to lend its aid to further a plea of that kind, particularly after a lapse of several years from the time when the plea might have been filed. The second is that the plea, even if filed, under my present impression, would not be available to the defendant. I realize that by refusing the plea the defendant may be deprived of the opportunity of having that latter question presented in a Court of Review, but I cannot determine it for that reason, if upon other grounds the plea should not be admitted. If it was simply a question of the efficacy of the plea, if filed, I would permit it to be filed; but where it is a question also of the laches and the technical nature of the plea, I must take that into consideration in determining what I would do about permitting the plea to be filed. (C., pg. 36.)

In pursuance to the direction of the Trial Judge counsel sent memorandum of authorities to him (C., pg. 38) and the learned Trial Judge concluded that the defendants were not entitled to file the plea and that the claimants were entitled to judgment (C., pg. 39). On July 14th the order for judgment was signed by Judge Lloyd and filed on July 17th, 1915 (C., pg. 40-41).

The notice of appeal in this case is dated August

30th, 1915, and was filed on September 2d, 1915. The record discloses an order for leave to file a plea *puis darrein continuance,* not dated, but filed October 25th, 1915 (C., pg. 15). There was also filed on the same day a plea *puis darrein continuance* setting up an alleged discharge in bankruptcy of the defendant builders (C., pg. 16).

Counsel for appellants in their brief on page 3, line 19, admit that this order, allowing the filing of a plea *puis darrein continuance* was not made until after the entry of judgment final.

Counsel for appellees has written to Judge Lloyd stating that he believed the order was signed a day or two before October 25th and has received Judge Lloyd's written response, saying:

> "I fear I cannot tell you the date if it is not in the order. It probably was sometime about the date you suggest.
>
> Yours truly,
>
> Frank T. Lloyd."

Mr. Angleman has admitted to me that the order was actually signed Oct. 25-1915.

Therefore before taking up the main question in the case we have two preliminary questions to determine and in order to determine those questions, notice of motion has been given objecting to the printed case and of motion to strike from the record the alleged order and the alleged plea on the ground of lack of jurisdiction.

The two preliminary questions are, First, the Circuit Judge had no authority or jurisdiction to make the order that was filed on October 25th, and, Second, there is no proof in the case sustaining the alleged plea.

1. The Circuit Court was without jurisdiction to make the Order.

An inspection of the record shows that two points were present to the mind of Judge Lloyd on May 17th and they were:

(a) That owing to laches the defendants were not entitled to ask for leave to file the plea;

(b) The plea was not a meritorious defense; and recurring to the concluding remarks of Judge Lloyd on page 36 "where it is a question also of the laches and the technical nature of the plea, I must take that into consideration in determining what I would do about permitting the plea to be filed," and when we take this statement in connection with the statement of Mr. Angleman "if not entitled to file it (the plea) then they will take judgment for what they claim" (C., pg. 36, line 15.)

Necessarily the conclusion of Judge Lloyd as filed on July 17th shows that he would not permit the plea to be filed and accordingly judgment was forthwith entered.

It is evident that the refusal of Judge Lloyd to permit this plea to be filed is a matter of discretion which is not reviewable by appeal.

> *Hall* v. *Lawrence,* 22 N. J. L., 72.
> *Crawford* v. *New Jersey Railway Co.,* 28 N. J. L., 479.
> *Bruch* v. *Carter,* 32 N. J. L., 554.

The case does not show that after judgment was entered there was any notice given to the claimant that an application would be made for leave to file a plea *nunc pro tunc* and the necessary con-

clusion is that this order for the plea was signed at a date considerably subsequent to the taking of the appeal and it is elementary that the taking of this appeal removed the cause from the Circuit Court so that the Circuit Court could not make any order and therefore the order to file the plea is a nullity, and should not be considered on this appeal.

II. The Plea of Discharge in Bankruptcy is not Sustained by Proof.

Although the plea of discharge in bankruptcy appears in the printed case, in the part of the record which shows the proceedings on trial, there is no evidence or stipulation that there was a discharge granted. Counsel for the lien claimants was not requested to admit on the record that there ever was a discharge in bankruptcy of the defendant builders, and I believe there is no such admission on the record. It might be considered that it was admitted that the defendant builders were thrown into bankruptcy but there certainly is no admission that they were discharged as bankrupts.

III. A Discharge in Bankruptcy of the Builders does not Annul a Lien Claim.

If your Honors determine that it is necessary in this case to consider the only question of law which would properly have been before the Circuit Court, had a plea of discharge in bankruptcy been filed and proven upon the trial of the cause, then it is respectfully insisted that there is no merit in the contention advanced by the appellant.

The section of the Bankruptcy Act which relates

to the annulling of liens is known as ~~70f~~ 67f and reads as follows:

> "That all levies, judgments, attachments, or others liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same."

In commenting upon this section Loveland on Bankruptcy, at page 884, says:

> "Section 67f, annulling liens obtained by legal proceedings, deals with liens on property which passes to the trustee for the benefit of the creditors of the bankrupt, but does not effect liens on property, which is not a part of the estate."

Again on page 946 the same writer says:

> "Where by statute a lien of an artisan or other person who furnishes labor or materials to improve realty is imposed in certain circumstances on the land from the commencement of the improvement this is not a lien created by legal proceedings, and is not affected by the discharge of the debtor, although the lien was only perfected within four months of the bankruptcy."

In *Henderson* v. *Mayer*, 225 U. S., 700, Mr. Justice Lamar, in writing an opinion for the Supreme

Court, in speaking of the Bankruptcy Act, said that those provisions

> "were not intended to lessen rights which already existed, nor to defeat those inchoate liens given by statute, of which all creditors were bound to take notice, and subject to which they are presumed to have contracted when they dealt with the insolvent.
>
> Liens in favor of laborers, mechanics, and contractors are of this character, and although they may be perfected by record or foreclosure within four months of the bankruptcy, they are not created by judgments, nor are they treated as having been 'obtained through legal proceedings,' even when it is necessary to enforce them by some form of legal proceeding. The statutes of the various states differ as to the time when such liens attach, and also as to the property they cover. They may bind only what the plaintiff has improved or constructed; or they may extend to all the chattels of the debtor, or 'all the property involved in the business.' Re Bennett, 82 C. C. A., 531, 153 Fed., 673.
>
> In some cases the lien dates from commencement of the work, or from the completion of the contract. In others, prior to levy they are referred to as being dormant or inchoate liens, or as 'a right to a lien.' Re Bennett, 82 C. C. A., 531, 153 Fed., 677; Re Laird, 48 C. C. A., 538, 109 Fed., 554. But the courts, dealing specially with bankruptcy matters, have almost uniformly held that these statutory preferences are not obtained through legal proceedings, and therefore are not defeated by Section 67f, even where the registration, foreclosure, or levy

necessary to their completion or enforcement was within four months of the filing of the petition in bankruptcy."

Adjudications in our own courts hold that the bankruptcy act does not affect the statutory lien acquired under a stop notice:

Fehlings v. *Goings,* 67 N. J. Eq., 375.
National Fire Proofing Co. v. *Daly,* 74 N. J. Eq., 48; affd. 75 N. J. Eq., 583.

In *King* v. *Bloch,* 111 N. Y. Supp., 102, an attachment was issued on April 5th, 1907. The defendant gave a bond and obtained an order discharging the attachment; the condition of the bond given was to pay the judgment recovered not exceeding $8,400 and interest. The defendant received back the property levied upon and used the same until bankruptcy, on July 22d, 1907, when he was adjudicated a bankrupt on a petition filed July 11th, 1907, the Surety Company holds no collateral. From an order vacating the attachment the plaintiff appeals.

Counsel for the respondent relied on Section 67f of the Bankruptcy Act. The appellant contended that the Act merely discharged the lien of attachment and did not vacate the writ; that his client should proceed to judgment with a stay of execution against the bankrupt. The court held: that the defendant was not entitled to have the writ vacated and ordered a reversal. The court also said that in the same case it had previously refused leave to amend an answer by setting up defendants discharge in bankruptcy which would prevent plaintiff from obtaining judgment upon which the liability of the surety might be enforced.

In *re Mercedes* Import Co., 166 Fed. Rep., 427,

the Federal Court referred to *King* v. *Bloch* and adopted the practice there followed.

In *re Grissler,* 136 Fed. Rep., 754, the Federal Court vacated the stay of a mechanic's lien suit on the ground that the bankruptcy did not discharge the lien.

In *United States Wind Engine and Pump Co.* v. *The North Pennsylvania Iron Company,* 75 Atl., 1094, the Supreme Court of Pennsylvania said:

> "When the equities of a case call for it, our courts have from the earliest times, permitted the entries of special judgments, with proper control over the execution.
>
> This was practically the same thing as granting a special judgment with a perpetual stay of execution. The appellee has secured its discharge in bankruptcy and its personal liability is gone; but that does not constitute any reason why a judgment against it should not be entered for the special purpose of fixing and enforcing the liability of the surety."

In *Hill* v. *Hardy,* 130 U. S., 699, a judgment was entered with a perpetual stay of execution.

In *Cornell* v. *Matthews,* 27 N. J. L., 522, judgment was merely entered especially against the land, and it was held:

> "The plaintiff was entitled to a general and special judgment and that he might waive either."

In *Linn* v. *Hamilton*, 34 N. J. L., 305, a judg-

ment was recovered as against two joint debtors and one of them was subsequently discharged in bankruptcy. Upon an execution thereafter issued, a levy was made on after acquired property of the bankrupt, and on summary application the levy was vacated and execution stayed so far as it may be attempted to be levied upon the property of the bankrupt. The court held that the execution was regular.

Section 16 of the Bankruptcy Act provides:

> "The liability of a person who is a co-debtor with, or guarantor, or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt."

From the foregoing it must be apparent that even were Apgar Brothers the actual owners of the property upon which the lien is claimed, their discharge in bankruptcy would not by reason of any provision of the Bankruptcy Act discharge the lien. I have never heard it contended that the Bankruptcy Act was ever intended in any manner to disturb liens upon the property of a person whose estate was not being administered in bankruptcy.

Inasmuch as there is nothing in the Bankruptcy Act itself which would disturb the lien, we must see whether there is anything in the Mechanic Lien Act which does so.

Appellant contends that the language contained in Section 24 does so and the pertinent language of that section is:

> "And all or any of said defendants may, jointly or severally, have any defence or plea to the same that might be had by the builder to any action on said contract without this act."

This section relates to a defense to the declaration and its very object was to prevent collusion between the claimant and the builder to the detriment of the owner, or, in other words, that the owner is not to be precluded from setting up an actual affirmative defense if the builder fails to do so.

The title of the statute is "An Act to secure to mechanics and others, payment for their labor and material in erecting any building." The first section of the Mechanic Lien Act is "Every building hereafter erected or built within this state shall be liable for the payment of any debt contracted and owing to any person for labor performed or materials furnished for the erection and construction thereof——." Section 31 provides five methods by which the lien may be discharged.

The very object of the Mechanic Lien Act is to secure payment to the material-man and gives the material-man as a security for that payment, a lien on the property. The time when a material-man needs that lien is when the builder has not sufficient resources to pay, and as our statute does not, in any of its parts, require or contemplate a judgment against the builder as a condition precedent to the lien against the land, it would be ridiculous to say that the bankruptcy of a builder and his discharge in bankruptcy discharges the lien.

I have only been able to find one case which is precisely in point and that is

> *Eberle* v. *Drennan*, 40 Okla., 59; 51 L. R. A., New Series, 68 at page 75.

It is insisted that the language of Section 24 of the Mechanics Lien Act must be read in the light of the other sections of the act and of the title of the act. We also know that the Legislature knows

of the existence of the Bankruptcy Act and that they have never by express language made, or intended to make, a discharge in bankruptcy of a builder a discharge of the lien against lands.

Conclusion.

In this case it is an admitted fact that Tuttle Bros. supplied materials with which the building of the owner was improved; it is also admitted that they did not receive payment for the materials.

It is therefore respectfully insisted that the statute intended to secure to Tuttle Brothers the payment in money, or its equivalent, for the materials they furnished and that the statute never contemplated any other means of payment or discharge of the lien than is expressly set forth in it.

The Mechanic Lien is a statutory proceeding and as the statute must be followed in perfecting and enforcing the lien, so must the statute be followed in discharging the lien.

I reiterate that the sole object of the provision contained in Section 24 of the Mechanic Lien Act is to prevent frauds being perpetrated upon owners.

It is therefore respectfully submitted that the judgment below should be affirmed with costs.

Respectfully submitted,

SAMUEL KOESTLER.

Paul Q. Oliver,
Of Counsel for Tuttle Bros.

[6859]

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SUMMONS

MIDDLESEX COUNTY, SS: THE STATE OF NEW JERSEY, to the Sheriff of the County of Middlesex, GREETING:

(SEAL)

You are hereby commanded to summon George I. Apgar and Theodore Apgar, partners doing business as Apgar Brothers, 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 Middlesex, on the twenty-seventh day of December, instant, 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.

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-five 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-seven feet in a southeasterly direction from the center line of West Seventh Street, running thence in a southwesterly direction and at right angles to Clinton Avenue 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 Avenue aforesaid; thence along said center line of Clinton Avenue in a northwesterly direction a distance of sixty feet to the plaec of beginning.

10 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.

JOHN H. CONGER,
Clerk.

PAUL Q. OLIVER, Attorney.

Filed
Jan. 14, 1908

20 **DECLARATION.**

MIDDLESEX COUNTY CIRCUIT COURT.

Of the Twenty-seventh day of December, in the year of Our Lord One Thousand Nine Hundred and Seven.
MIDDLESEX COUNTY, SS.:

George I. Apgar and Theodore Apgar, partners doing business as Apgar Brothers, builders, and Benjamin S. Harris, Owner, the defendants to this suit, were
30 duly summoned, George I. Apgar and Benjamin S. Harris personally, on December 12th, 1907, and Theodore Apgar on December 13th, 1907, by leaving a copy at his usual place of abode with a member of his family above the age of fourteen years, to answer unto William E. Tuttle, Jr., and Arthur D. Tuttle, partners trading as Tuttle Brothers, the plaintiffs therein in an action upon contract, and thereupon the plaintiffs by Paul Q. Oliver, their attorney, complain; For that whereas the defendants, George I. Apgar and Theodore
40 Apgar, partners as aforesaid, heretofore, to wit, on the

ninth day of December, in the year of Our Lord One Thousand Nine Hundred and Seven, at Westfield, to wit, at New Brunswick, in the County of Middlesex, were indebted to the plaintiffs in Fifteen Hundred Dollars, for goods sold and delivered by the plaintiffs to the said defendants at their request; And in the like sum for work done and materials furnished by the plaintiffs for the said defendants at their request; And 10 in the like sum for money lent by the plaintiffs to the said defendants at their request; And in the like sum for money paid by the plaintiffs for the use of the said defendants at their request; and in the like sum for money received by the said defendants for the use of the plaintiffs; and in the like sum for interest for the forbearance by the plaintiffs at the said defendants' request of money due and owing from the said defendants to the plaintiffs; and in the like sum for money due from the said defendants to the plain- 20 tiffs on an account stated between them and being so indebted, the said defendants in consideration thereof, then and there promised the plaintiffs to pay them the said several sums of money on request. Yet the said defendants have disregarded their said several promises, and have not paid the said several sums of money, nor any of them, or any part thereof, although often requested so to do, but to do so have hitherto wholly refused, and still do refuse, to the damage of the plaintiffs Fifteen Hundred Dollars, and therefore 30 they bring their suit, &c. And the said plaintiffs aver and in fact say that the said debt is by virtue of the provisions of an act of the Legislature entitled: "An Act to secure to mechanics and others payment for their labor and materials in erecting any building," (Revision of 1898) approved June 14, 1898, and the several supplements thereto and amendment thereof a lien upon a certain building and the curtilage, lands and messuage on which the same is erected, described as follows: 40

Declaration

The said building is a two and one-half story frame dwelling house about twenty-eight feet wide and about thirty-five feet deep, and the same is erected upon that lot of land or messuage situate, lying and being in the Township of Piscataway, in the County of Middlesex, and State of New Jersey, and described as follows:

BEGINNING at a point in the centre line of Clinton
10 Avenue, said point being distant five hundred and fifty-seven feet in a southeasterly direction from the centre line of West Seventh Stret; running thence in a southwesterly direction and at right angles to Clinton Avenue 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 centre of
20 Clinton Avenue aforesaid; thence along said centre line of Clinton Avenue in a northwesterly direction a distance of sixty feet to the place of BEGINNING.

PAUL Q. OLIVER,
Attorney for Plaintiffs.

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Declaration

Notice is hereby given that this action is brought to recover the amount due on a book account for materials sold and delivered of which the following is a true copy:

1907.	Order No.	Items.		
Oct. 31	No. 51	Sash, Doors, and 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	42.35	
		8000 16" C. B. W. C. Shingles	40.00	82.35
" 12,	1858	3 Cols. 8x8' Staved	3.50	10.50
" 16,	2008	1 8x8 Col. C. & B.		2.50
				$727.65

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PLEAS.

Filed Feb. 15, 1908

MIDDLESEX COUNTY CIRCUIT COURT.

WILLIAM E. TUTTLE, JR., et als., partners, etc., Plaintiffs. vs. GEORGE I. APGAR, et als., Defendants.	On Contract. PLEAS of Benjamin S. Harris, Defendant.

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And the said defendant, Benjamin S. Harris, by J. Henry Crane, his attorney, comes and defends the wrong and injury, when, etc., and says, that the said Benjamin S. Harris, owner, did not undertake or promise, in manner and form, as the said plaintiffs hath above thereof complained against him, and of this he puts himself upon the country:

20 And for a further plea in his behalf, by leave of the court for that purpose first had and obtained, according to the statute in such case made and provided, the said defendant, Benjamin S. Harris, says, that before the commencement of this suit, to wit, on the Eleventh day of November, Nineteen Hundred and Seven, the plaintiffs by their certain deed of release, sealed with their seals, and now shown to the court here, the date whereof is a certain day and year therein mentioned, to wit, the day and year last aforesaid, did jointly and 30 severally release and discharge the said building and lot or curtilage whereon the same is erected, of and from any and all liens held by them thereon, by virtue of the Mechanic's lien law of New Jersey for the payment of any debt contracted and owing said plaintiffs for labor theretofore performed and materials furnished by the said plaintiffs for the erection and construction of said building as by the said deed of release reference being thereto had, will fully appear. And this the said defendant is ready to verify. Where-40 fore the said defendant prays judgment, if the said

plaintiffs ought to have or maintain their aforesaid action.

And for a further plea in this behalf, by leave of the court here for that purpose first had and obtained, according to the form of the statute in such case made and provided, the said defendant, Benjamin S. Harris, says, that the plaintiffs ought not further to have or maintain their aforesaid action against him and against the said building and lands in the said declaration mentioned; because he says, that said building and lands are not liable to the said supposed debt in manner and form as the said planitiffs hath above thereof complained against him, and of this he puts himself upon the country.

J. HENRY CRANE,
Attorney for the Defendant, Benjamin S. Harris.

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

Benjamin S. Harris, of full age, being duly sworn according to law, on his oath says, that he is the above named defendant and that the foregoing pleas are not intended for the purpose of delay, and that affiant verily believes that, the said defendant, hath a just and legal defense to said action on the merits of the case.

BENJAMIN S. HARRIS.

Subscribed and sworn to before me this 14th day of February, A. D. 1908.

WILLIAM G. DeMEZA,
M. C. C. of N. J.

10 20 30 40

Filed Mar. 2, 1908

SIMILITER AND REPLICATION

MIDDLESEX COUNTY CIRCUIT COURT

WILLIAM E. TUTTLE, JR., et al, Partners, &c., Plaintiffs, vs. GEORGE I. APGAR, et als., Defendants.	ON CONTRACT. MECHANIC'S LIEN. SIMILITER and REPLICATION.

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And the said plaintiff as to the plea of the said defendant, Benjamin S. Harris, by him first above pleaded, and whereof he hath put himself upon the country, do the like.

And the said plaintiffs as to the plea of the said defendant, Benjamin S. Harris, by him thirdly above pleaded, and whereof he hath put himself upon the country, do the like.

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And the said plaintiffs as to the said plea of the said defendant, Benjamin S. Harris, by him secondly above pleaded, say that the said plaintiffs, by reason of anything the said defendant, in that plea alleged, ought not to be barred from having or maintaining their aforesaid action thereof, against the said defendant, because they say that the said deed of release, mentioned in said plea, was obtained from them by George I. Apgar and Theodore Apgar, Partners, doing business as Apgar Brothers, by the fraudulent representations that the sum of Five Hundred Dollars would be paid to these plaintiffs, and that the time said representation was made, it was false and fraudulent, and known to be false, and fraudulent by said Apgar Brothers; that notice of the fraudulent manner in which said release was obtained, was given to the defendant, Benjamin S. Harris, before he acted upon said release, and that he has not parted with any money, or other thing, of value by reason of said deed of release; and that as against said Benjamin S. Harris there is fraud in the considera-

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tion of said release; and the same is without consideration, and not a bar to claimants' suit.

And this they, the said plaintiffs, pray may be inquired by the country, &c.

PAUL Q. OLIVER,
Attorney of Plaintiffs.

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DEMURRER TO REPLICATION

Filed Apl. 16, 1908

MIDDLESEX COUNTY CIRCUIT COURT

WILLIAM E. TUTTLE, JR., et al., Partners, etc., vs. GEORGE I. APGAR, et als.	ON CONTRACT. ON MECHANIC'S LIEN. DEMURRER TO REPLICATION.

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The defendant Benjamin S. Harris demurs to the said replication of the plaintiff to the said second plea of the defendant Benjamin S. Harris upon the following grounds:

1. Because the matters therein contained in manner and form as the same are in the said replication stated and set forth are not sufficient in law for the said plaintiff to have or maintain his aforesaid action
20 against the defendant Benjamin S. Harris.

2. Because the matters therein set forth do not invalidate the said release.

3. Because the said replication is not legally an answer to the said second plea.

4. Because a conclusion of law is pleaded while the facts upon which that conclusion is based are not set forth.

5. Because a failure of consideration can not be shown at law in the giving of the release pleaded in
30 bar.

6. Because fraud in the consideration of the release pleaded in bar can not be shown at law.

7. Because a general allegation that a sealed instrument such as the release pleaded in bar was obtained by fraud is not sufficient.

8. Because of duplicity.

9. Because of improperly concluding to the country, when the conclusion should have been with a verification.

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Demurrer to Replication

Wherefore, the said defendant Benjamin S. Harris prays judgment.

J. HENRY CRANE,
Attorney for Defendant

[Usual affidavit annexed.]

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Filed Dec. 7, 1914

ORDER SUSTAINING DEMURRER.

MIDDLESEX COUNTY CIRCUIT COURT.

WILLIAM E. TUTTLE, JR., et al., Plaintiffs, vs. GEORGE I. APGAR, et als., Defendants.	On Contract. Mechanics Lien. ORDER SUSTAINING DEMURRER, &c.

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Upon the consent hereunder written:

It is on this day of November, Nineteen Hundred and Fourteen, ordered that the demurrer filed by the defendant, Benjamin S. Harris, to the replication of the plaintiffs to the plea of the defendant, Benjamin S. Harris, by him secondly pleaded, be and the same is hereby sustained with costs.

20 And it is further ordered that the plaintiffs shall have leave within ten days from the date of this order to file anew their replication to the said second plea of the defendant, Benjamin S. Harris.

FRANK T. LLOYD,
Circuit Judge.

We consent to the making of the foregoing order.

PAUL Q. OLIVER,
Atorney of Plaintiff.

J. H. CRANE,
30 Attorney of Defendant, Benjamin S. Harris.

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Filed Dec. 7, 1914

REPLICATION TO SECOND PLEA.

MIDDLESEX COUNTY CIRCUIT COURT.

WILLIAM E. TUTTLE, JR., et al., Plaintiffs, vs. GEORGE I. APGAR, et als., Defendants.	On Contract. Mechanics Lien. REPLICATION TO SECOND PLEA OF DEFENDANT, BENJAMIN S. HARRIS.

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And the plaintiffs as to the said plea of the said defendant, Benjamin S. Harris, by him secondly above pleaded, say that the said plaintiffs by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against the said defendants because they say that the said supposed writing of release in the said last plea mentioned was not nor is the deed of them the said plaintiffs. And this the said plaintiffs pray may be inquired of by the country, &c.

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PAUL Q. OLIVER,
Attorney of Plaintiffs.

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Filed Jan. 20, 1915

ORDER REVIVING SUIT

MIDDLESEX COUNTY CIRCUIT COURT

WILLIAM E. TUTTLE, JR., et al., Partners, &c., Claimants, vs. GEORGE I. APGAR, et al., Builders, and BENJAMIN S. HARRIS, Owner	ON LIEN CLAIM

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It appearing that Benjamin S. Harris, the defendant, named as owner in the above stated cause, died January fifth, 1915, after the filing of the lien claim and the issuance of the summons herein, leaving him surviving Delia Harris, Albert S. Harris, Benjamin M. Harris, James R. Harris and Lillian F. Harris, his widow and heirs at law.

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It is on this twentieth day of January, 1915, ordered that this cause proceed against said Delia Harris, Albert S. Harris, Benjamin M. Harris, James R. Harris and Lillian F. Harris.

On motion of

PAUL Q. OLIVER,
Attorney for Claimants.

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Filed Oct. 25, 1915

ORDER TO FILE PLEA OF PUIS DARREIN CONTINUANCE

MIDDLESEX COUNTY CIRCUIT COURT

WILLIAM E. TUTTLE, JR., and ARTHUR D. TUTTLE, Partners, trading as TUTTLE BROTHERS, Claimants, vs. GEORGE I. APGAR, et als., Defendants.	ON CONTRACT ON MECHANIC'S LIEN ORDER TO FILE PLEA OF PUIS DARREIN CONTINUANCE.

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It appearing to the Court that since the above stated cause was last continued, to wit, on the Twenty-first day of March, Nineteen Hundred and Ten, the said George I. Apgar and Theodore Apgar, builders, defendants, were severally granted a discharge in bankruptcy, both from individual debts and from partnership debts, by the District Court of the United States for the District of New Jersey, which said discharge is claimed by the defendants owners to be a defense to the plaintiffs' claims.

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It is hereby ordered that the defendants owners may file a plea of puis darrien continuance nunc pro tunc as of May 17, 1915, and aver the above-stated defense, on condition that the said discharge in bankruptcy is the only defense to be raised to said lien claim of the plaintiffs-claimants.

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FRANK T. LLOYD,
Judge.

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Filed
Oct. 25, 1915

PLEA PUIS DARREIN CONTINUANCE.

MIDDLESEX COUNTY CIRCUIT COURT.

WILLIAM E. TUTTLE, JR., and ARTHUR D. TUTTLE, Partners, trading as Tuttle Brothers, vs. GEORGE I. APGAR, et als.	ON CONTRACT ON MECHANICS LIEN. PLEA PUIS DARREIN CONTINUANCE.

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And now, at this day, to wit, the Seventeenth day of May, Nineteen Hundred and Fifteen, until which day the plea aforesaid was last continued, comes the defendants owners, by leave of the Court first had and obtained, and without waiving any former plea, according to the form of the statute in such case made and provided, by J. Henry Crane, attorney, and says that the plaintiffs ought not further to maintain his aforesaid action against the said defendants owners, because they say that after the furnishing of the said materials in the said declaration mentioned and after the last continuance of the plea aforesaid, and before this day, to wit, on the Twenty-first day of March, Nineteen Hundred and Ten, the said George I. Apgar and Theodore Apgar, builders, defendants, were severally granted a discharge in bankruptcy, both from individual debts and from partnership debts, by the District Court of the United States for the District of New Jersey, which said discharge as to George I. Apgar is in the words following, to wit:

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District Court of the United States.

District of New Jersey.

Whereas, George I. Apgar, of Dunellen, Middlesex County, in said District, has been duly adjudged a bankrupt, individually and as a member of the firm of Apgar Brothers, under the acts of Congress relating to

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bankruptcy, and appears to have conformed to all the requirements of law in that behalf:

It is therefore ordered by this Court that said George I. Apgar be discharged from all debts and claims, individual and copartnership, which are made provable by said acts against his estate, and which existed on the Fourteenth day of February, A. D. Nineteen hundred and eight, on which day the petition 10 for adjudication was filed against said firm, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

(SEAL) Witness the Honorable Joseph Cross, Judge of said District Court and the seal thereof, this Twenty-first day of March, A. D. Nineteen hundred and ten.

GEORGE T. CRANMER,
Clerk. 20

Per BENJAMIN F. HAVENS, Deputy.

and which said discharge as to Theodore Apgar is in the words following, to wit:

District Court of the United States.
District of New Jersey.

Whereas, Theodore Apgar, of Dunellen, Middlesex County, in said District, has been duly adjudged a bankrupt, individually and as a member of the firm of Apgar Brothers, under the acts of Congress relating to bankruptcy, and appears to have conformed to all 30 the requirements of law in that behalf:

It is therefore ordered by this Court that said Theodore Apgar, be discharged from all debts and claims, individual and copartnership, which are made provable by said acts against his estate, and which existed on the Fourteenth day of February, A. D. Nineteen hundred and eight, on which day the petition for adjudication was filed against said firm, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy. 40

Plea Puis Darrein Continuance

(SEAL) Witness the Honorable Joseph Cross, Judge of said District Court, and the seal thereof, this Twenty-first day of March, A. D. Nineteen Hundred and Ten.

GEORGE T. CRANMER,
Clerk.

10 Per BENJAMIN F. HAVENS, Deputy.

And the defendants owners aver that the cause of action set forth in the plaintiffs' said declaration is not excepted from the operation of the discharge in bankruptcy; and this the said defendant is ready to verify by the said record, wherefore he prays judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against them, etc.

J. HENRY CRANE,
Attorney for Defendant Owners.

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TRANSCRIPT OF PROCEEDINGS.

MIDDLESEX COUNTY CIRCUIT COURT.

April Term, 1915.

WILLIAM E. TUTTLE, et al., vs. BENJAMIN S. HARRIS, et al.	Action at Law. No. 9 in the List.

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Transcript of stenographer's notes of proceedings taken in the above entitled cause, before HON. FRANK T. LLOYD, Circuit Court Judge, at the Court House in the City of New Brunswick, N. J., on the seventeenth day of May, A. D., 1915, at 11.45 a. m.

APPEARANCES:

Samuel Koestler, Esq., for the Plaintiff.

Winfield S. Angleman, Esq., for the Defendant. 20

Mr. Koestler: This is a mechanic's lien case, instituted on December seventh, 1907. The reason it has not come to trial is that there was a plea of release, which necessitated the action of the Court of Chancery, and that action in the Court of Chancery was to set aside the release on the ground of fraud and consideration, and there were several trials and finally a judgment. There was then an appeal taken to the Court of Errors and Appeals, which was determined at the November term. The case was noticed for the last 30 term of this Court and by consent of counsel it was continued. Now, as I understand from Mr. Angleman, who is appearing for the defendant, both of the issues in the case are strictly questions of law. I understand that there is no question raised as to the delay in the case. I understand that there is no claim made that we are not entitled to a lien. The only question I understand from him that he desires to raise is this: That after we filed our lien against Apgar Brothers, as builders, and Harris, as owner, Apgar Brothers were 40

adjudicated bankrupt, and probably subsequently discharged from bankruptcy. There is no such pleading in the case. Apgar Brothers have never answered in this Mechanic's Lien suit, the only defendant appearing is the owner Harris. And I understand from Mr. Angleman that this morning he desires to apply to your Honor to file a plea puis darrein continuance of
10 the bankrupt, the builder. Of course, I object to that, under certain decisions. This is a matter within the discretion of Your Honor. I object to it for two reasons. In the first place, it should have been made at the time of the bankruptcy. In the second place, it is a matter of discretion. Ours is a claim not to be enforced especially against the builders. They have nothing; they are bankrupt, and we would not want to enforce it against them. And secondly that even the bankruptcy of the builder would not be a defense to
20 the lien. I have made quite an investigation of the law on that, and I think I am justified in stating to Your Honor that it does not discharge a lien in this State.

The Court: When did the bankruptcy arise, Mr. Angleman?

Mr. Angleman: It was filed in December, 1907. The bankruptcy took place, the discharge was granted,
30 or the petition was an involuntary petition filed against the builders partnership in February, 1908, and the discharge was granted in March, 1910. There has been no judgment in this suit against the builders. Now, my motion is to allow the owner to file a plea of puis darrein continuance, setting forth the discharge in bankruptcy, and I do that under the Mechanic's Lien law, of section twenty four, which says: "and all or any of said defendants may jointly or severally have any defense or plea to the same that might be had by
40 the builder to any action on said contract without this

act." Now, that is exceedingly broad; whatever any other decision of any other States may be as to mechanic's lien or bankruptcy proceedings, would have no effect on the wording of this statute.

The Court: Is that a defense? That is a discharge, isn't it?

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Mr. Angleman: It is a defense.

The Court: I say it is a discharge from the debt.

Mr. Angleman: Yes.

The Court: Does not the statute contemplate any defense on the merits?

Mr. Angleman: No, it says: "defense or plea." 20

The Court: Yes, I know, but does not that mean any defense on the merits?

Mr. Angleman: No, I take it not, because the situation is this: the lien is predicated on an enforcable claim by the material men as against the builder. Now, if there is no enforcable claim, then there is no lien, because you must first prove an enforcable claim before you have your lien. 30

The Court: Why wasn't this plea filed before?

Mr. Angleman: All the facts were not set forth.

The Court: This is five years old.

Mr. Angleman: In the spring of 1907 the owner made a contract; Harris, the owner, made a contract with the builders, Apgar Brothers, to build a house. 40

Tuttle Brothers furnished some of the material. They are the lien claimants. All the payments were made up to the last payment, but there were certain of the material men and certain of the people who did work there that were not paid, and they got into a dispute as to who were entitled to payment, and one of them brought a suit. The owner, Harris, thereby filed a plea
10 of interpleader, and paid the balance due into court, and obtained an injunction restraining the prosecution of the suit. Thereupon Tuttle Brothers, the lien claimant, filed a lien and started a suit upon the lien in this Court. We then filed a supplemental pleading restraining them from proceeding with that suit, pending the hearing on the interpleader suit. That suit was subsequently modified so as to allow us to file our regular pleading, and go to issue. We came to issue when we filed a plea of release, and they filed a repli-
20 cation setting forth fraud in the release, and we demurred to that replication. Then they filed a plea in chancery to set aside the release, and for an injunction preventing us presenting that in this case. That case was heard, in conjunction with the interpleader case, and the interpleader case, the final decision in the interpleader case stayed until the decision in the other and the decision in this suit, and was finally decided by Vice-Chancellor Emery, that the release should be set aside; and from that an appeal was taken, and the
30 Court of Errors heard it, and set it aside. Since that was done I suggested to Mr. Koestler that I would make this application, and it is simply to the convenience of the——

The Court: Was there any reason why that could not have been made at the time you filed your other pleadings, or very shortly after it? The bankruptcy followed immediately.

Mr. Angleman: Yes. For the simple reason the
40 discharge did not come until 1910.

The Court: You know the rule is against permitting pleadings to be amended for the purpose of setting up technical defense.

Mr. Angleman: I understand that. If the thing hadn't been tied up by the Chancery proceedings, but the discharge wasn't until 1910. The discharge was opposed, and if the opposition had been successful, of course, we would not have had any plea. And if the decision in the Chancery suit was favorable to the release, that would have ended this case. 10

The Court: I know, but you could put in all your defenses at any time.

Mr. Angleman: I could not have put in this defense until after 1910, when the question of the release was pending, and we were at issue on that, and that was the point then. We really were not in any position to make any application under our restraint. We had gone the limit under the restraint, both sides. 20

The Court: Well, you were not restrained in filing additional pleas, were you?

Mr. Angleman: Yes, after we had come to the issue. That was the understanding, that we should not do anything more with it pending the hearing on that. That was the positive understanding in the Chancery Court, as well as the understanding with Mr. Koestler, but as soon as that was discharged, then I notified him I would make this application. 30

The Court: Don't you think, coming back to the fundamental question, when you read the law, it must be read in conjunction with the case itself, and with the facts of the contract, and its performance? Don't you think that the meaning of the statute must be that any 40

defense which the builder would have against payment of the bill, the owner would have?

Mr. Angleman: Yes, I think that is undoubtedly so.

The Court: And that deals with the merits of the thing.

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Mr. Angleman: No.

The Court: For instance, if there had been payments, if there had been release, the release can be shown, if the work has not been properly done, the contractor being under obligation to perform, to the owner, and the owner being entitled to the service, and there is a default, such a defense.

20 Mr. Angleman: But this discharge in bankruptcy is legal payment, because all his assets is put in the pot to pay all his creditors. It might be one hundred per cent., might be ten per cent., might be one per cent.; but any way it pays them, and that is the theory upon which the discharge is given. But the statute goes still further.

The Court: Yes, but it is his debt that is paid, not the debt of somebody else.

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Mr. Angleman: The lien only follows the debt of the builder or contractor. Now, if the contractor has no debts, which the discharge in bankruptcy says he has none, if the contractor has no debts, then there is no lien, and that as I take it——

The Court: Isn't that question at rest in this country pretty well?

40 Mr. Angleman: Not under this statute.

The Court: It is as between principal and surety, isn't it ?

Mr. Angleman: That is a different proposition. You have to take the exact wording—I am basing it upon this wording. This gives new rights and the new rights must be interpreted by just what the statute says. It says they may have any defense or plea. 10

The Court: I should certainly construe that to apply to the meritorious defenses in performance, or in pertaining to the contract.

Mr. Angleman: We must go a step further. The judgment is merely that the general judgment against the builders shall be made special against the land. Now, if there is no claim against the builder, there can be no claim against the land. And it subrogates the 20 owner to position of the material men as against the contractor. Now, if there can be no subrogation, then there is no liability for a lien, and the debt, being wiped away by the bankruptcy, the discharge in bankruptcy, therefore there can be no subrogation, and the owner is without any remedy as against the contractor. The whole three are——

The Court: Is that absolutely sure?

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Mr. Angleman: Yes, that is the whole theory of the law.

The Court: Is that absolutely that the owner is without remedy?

Mr. Angleman: Oh, yes, because the discharge in bankruptcy discharges the debt absolutely.

The Court: What debt? 40

Mr. Angleman: The debt of the contractor.

The Court: Yes, but it is a thing that he is obliged to pay, a debt after the bankruptcy proceedings.

Mr. Angleman: Oh, no, he is not obliged to pay it at all.

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The Court: The owner?

Mr. Angleman: No.

The Court: I say the owner is obliged to pay a debt of his contractor, and it is a debt which did not exist at all at the time of the bankruptcy.

Mr. Angleman: The original debt did. He has only subrogated it. It did not make a new debt. He is only subrogated as to the rights of the material men as 20 against the contractor. The material man has no right against the contractor, and therefore there could be no subrogation. That takes away the right which the owner would have to go back on the contractor.

The Court: I will hear what authorities you have on it.

Mr. Angleman: I only take the statute just as it is. There are some cases in some of the states, but they are on different statutes entirely. It is the wording of the statute, and allows this subrogation, which makes 30 a special plea.

The Court: Would not such defense be available to the owner, as the statute contemplates?

Mr. Angleman: I think not, not unless it said so.

The Court: You do not mean to say that if a contractor paid his bills, that the owner could be held for them?

Mr. Angleman: Without this——

The Court: No, no. I say that would not the legal effect of the relation of the parties—the owner is simp- 40 ly a surety, in a sense, pledging his property to the

performance of the contract, so far as the material and labor are concerned. Now, any defense that the contractor has, would be a defense, in any event, wouldn't it, in the hands of the owner? What defense could you imagine?

Mr. Angleman: Not unless it was set forth.

The Court: What defense could you imagine that the owner would be deprived of setting up, that the contractor could make? 10

Mr. Angleman: From the wording of the rest of the statute I do not think he could have any at all, provided——

The Court: Irrespective of the statute, the mere fact that he becomes a surety, pledging his goods to the contractor's debt,——

Mr. Angleman: I think it is a little different relation than that of securety.

The Court: It is a different relation, because he only insures to the extent, of his goods, to the extent of his property. But he does do that. He does say to the contractor, through the law, and through the people who are working on the building, giving supplies to it, that he would guarantee their payments to the extent of the value of his property. That is what a specific judgment against the property means. 20

Mr. Angleman: It is a modified——

The Court: It is a limited one, undoubtedly.

Mr. Angleman: Any right—— 30

The Court: Is there any defenes that the contractor could have that would not be available to the owner, regardless of any statute?

Mr. Angleman: I think payment would be the only defense he would have. Absolute payment, I think, would be the defense.

The Court: You do not think an owner, for instance, could set up against a sub-contractor, that he had not done his work right?

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Mr. Angleman: No.

The Court: You do not?

Mr. Angleman: No, I do not think so.

The Court: That would be novel to me.

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Mr. Angleman: The reason I say that is the wording of the first section of the statute (reading the statute).

The Court: Yes, but it means it is a real debt. It does not mean a claim based on inefficient work or unfulfilled contracts.

Mr. Angleman: Well, it would not have been a
20 debt if the contractor had not furnished——

The Court: That is just what I am trying to say to you. Therefore, it would be a defense, wouldn't it? Irrespective of whether this statute said he might have the defense or not.

Mr. Angleman: Coming back, that is just what I say——

30 The Court: You are giving probably greater significance than the law would attach perhaps to the relation of the parties, where a lien were given on the property. Now, my question is whether it was really intended to go any further.

Mr. Angleman: It is coming back to my idea, only in a different way. The owner, to be liable for a lien, the lien claimant must first show he has an enforceable claim against the contractor. That is the point. He
40 must have an enforcable claim against the contractor.

Now, if he has not an enforcable claim against the contractor, for any cause, under the statute, he cannot claim the lien against the owner. Because the lien against the owner is predicated upon an enforcable cause of action against the contractor.

The Court: Have you got the mechanic's lien book there? 10

Mr. Angleman: Yes. Here is the section.

The Court: What is the form of the judgment in this kind of a case?

Mr. Angleman: There are a number of decisions which go the length of saying that the statute must be strictly construed. Take, for instance, the case of making a mortgage holder a defendant. "It is not 20 enough that the lien claimant knew there was a mortgage, and knew that Jones held the mortgage, if the mortgage, in the language of the statute, had not been filed or recorded." The mere fact that actual knowledge of the fact will not help the mortgage holder any, if he has not filed it and it is not on record.

The Court: Does not the section of 143, section thirty-one, throw some light upon it in determining how a lien shall be discharged by payment. By pay- 30 ing to the County Clerk before the expiration of the time limit for suing a summons on such claim by filing an affidavit with a notice to the owner of payment. (Reading.)

Mr. Angleman: That is satisfaction of the lien claim without suit.

The Court: No. Your claim is that the effect of bankruptcy proceedings successfully carried through operated to discharge the lien. 40

Mr. Angleman: Is a defense to the lien.

The Court: Operated to discharge the lien. If the law had contemplated that, wouldn't it have said so, would not it have enumerated that among the things?

Mr. Angleman: I do not think so.

10 The Court: Why not?

Mr. Angleman: Because that is merely the way you get a lien off the record, where you do not go to trial. If a person files a lien suit, and perhaps issues a summons, but don't file a declaration, and does not proceed with it for a year, then if you want to get it off the record without a formal trial——

20 The Court: I know, but it is dealing with matters as you say, after the commencement of the action.

Mr. Angleman: Yes, but not such as this.

The Court: Why not such as that, when everything else is mentioned, every other means of discharge? Why wouldn't it have said as well, if in case of discharge in bankruptcy of the principal debtor?

30 Mr. Angleman: Because that would have taken it out of the record, as I take it.

The Court: Very true, but why shouldn't it take it out of the record? Other things would have to be pleaded. Payment would have to be pleaded.

Mr. Angleman: That is where you want to get rid of it without trial, or coming to an issue. I could pay to the County Clerk and discharge it.

40 The Court: Yes.

Mr. Angleman: And if he does not proceed within a year, I can get an order to discharge him.

The Court: Yes this is dealing with a matter——

Mr. Angleman: That is a matter "in pais."

The Court: Yes, matters arising subsequent to the lien. 10

Mr. Angleman: Because there has to be a judgment of the Court to get it off, and it is an order of the Court. I could not come into Court, and ask the Court to discharge, because they would have a right to controvert the discharge.

The Court: Very well, that is admitted, just as they could have a right to controvert payments. 20

Mr. Angleman: This is something that must be pleaded. It is not given as conclusive. It says it may be.

The Court: But isn't it rather persuasive that the legislature did not intend that bankruptcy should be in effect a discharge of the property from the debt?

Mr. Angleman: I think the whole intent of the Statute is that the lien cannot be enforcable unless there is an enforceable right against the contractor. 30

The Court: I was trying to look at the question of judgment here, when I asked for the book. The statute does seem to contemplate that the proceedings shall go on to judgment; and that the judgment shall be generally against the builder, and especially against the building.

Mr. Angleman: Now, there would not be any right 40

to a judgment, there would not be any special judgment. It predicates the right of lien on the right of a general judgment.

The Court: Don't you think, Mr. Angleman, that it would require pretty plain language of a legislature to show that where contractors, having contracts with 10 owners of property, commence the erection of a building, and the persons who deal with the contractor, on the face of the building, proceed and expend large sums of money, either in material or services, that that credit has to be absolutely destroyed at the mere insolvency of the contractor, when, in point of fact, a large percentage of them may be insolvent to start with?

Mr. Angleman: That might be so, Your Honor, if a 20 lien was given without any regard for any other circumstances. Now, a lien is only given in certain cases; that is, where the contract has been filed. It is only given under certain conditions and circumstances. In this bankruptcy matter, theoretically, the material men have been paid, theoretically they have been paid.

The Court: Yes, but actually they have not. Is not the theory of the law that they do not place their risk on the builder at all, but that they place their risk on 30 the building, and the improvements? Now, if every insolvency is to defeat that, don't you think that the legislature ought to say so in much plainer terms than they have?

Mr. Angleman This is required on the building when the contract is not filed, where the contractor has no claim which will defeat a judgment against him. It says so in so many words. The relation of the owner to the lien claimant, is within the case of Boehm vs. Brion 40 85 N.J.L. 330-2 June term, 1913, Errors and Appeals;

it says there: "the proceeding against the owner is entirely statutory, and is not based upon the theory of any existing contractual relation between him and the plaintiff." Just the point I make. It is not based on any theory upon a contractual relation between the claimant and the owner. It is based entirely upon the theory of the contractual relationship between the claimant and the contractor, and if there is no con- 10 tract, if the contract is destroyed for any reason whatever, then, under the statute, the owner can come in and say, you have no contract, you have no enforceable contract with the builders in this case, they are not liable to you, you can't collect from them, ou can't get any judgment from them, and therefore you can't have any lien, because the lien is predicated upon an enforceable claim against the builder, against the contractor, following out the theory of the Court of Errors in this case. Now, here is another case which follows that 20 out exactly and shows how strictly they adhere to the language; it is the case of the Grantwood Lumber Company, Eighty New Jersey Law, Supreme Court, 1910. "A written contract by the owner with the builder whereby the builder contracted to furnish materials for repairs and otherwise, is not a consent that the builder should contract for material." There is where the owner made a contract with the builder to make some repairs, and the builder contracted with the sub-contractor to do certain things, and did not pay him, and he 30 comes back upon the owner. The Supreme Court says "no, the consent with the builder is not the consent with the sub-contractor." So you see they limit it. And evidently do so strictly predicating the whole thing upon the theory, as I have said, that there must be this enforceable claim against the contractor, before there can be an enforceable lien against the owner. And that general judgment, or a right to a general judgment, must precede the right to the special judgment, because the wording is that the general judg- 40

ment, or what would be the general judgment if the bill had been served properly, must be made special, out of the land. That is the form of the judgment. And therefore I say, when the law says theoretically that the material men have been paid by the contractor, because they have the right to come in and take their percentage of the money that was put into the pot in
10 the bankruptcy proceedings, then that statute which says that the owner may have any defense or plea which the contractor could have, without this act, to suit on the contract, then the owner can have his plea of a discharge in bankruptcy, which undoubtedly the contractors could have, on a suit on the contract by the material men against them, without this act. There cannot be any question of it. Now, the statute says that the owner can have the same plea that the contractors could have against the material men, on a suit by the
20 material men against the contractor, without this act. Now, this plea of discharge in bankruptcy was undoubtedly admissible there, and the language is clear, and all the cases hold it to a strict interpretation of the language, because it is in derogation of the common law and supplies a liability where none was before. Therefore I submit that we have a right to file this plea.

Mr. Koestler: That title of the act under which our action is brought is "An act to secure Mechanic's
30 (reading). In the construction of the act we must look at its title and the object of it. The object of this title is to secure actual payment, not a fictitious payment. Now, when we come to section twenty-four, which contains the language in question, in my opinion that means that the owner shall have the defense which the law of this State gives, and not which the statutes of the United States or other States give. The defense which is now attempted to be interposed is the defense which is given by the statute of the United States
40 contained in the Bankruptcy Act, and that really was

not contemplated in this Mechanic's Lien act, and one of the reasons was, as stated by Your Honor, the method of discharge provided by section twenty-eight, I think it is twenty-eight.

The Court: Thirty-one.

Mr. Koestler: Thirty-one. Then, again, if you turn to section twenty-six, twenty-six provides for the substitution of parties in case of death of the builder, mortgagee, or owner. Now, surely the Legislature know of such a thing as bankruptcy when they enacted that section, giving the right to substitute parties, but they never said a word about substituting—merely the owner, builder or mortgagee. And that really shows that the Legislature never intended that bankruptcy should defeat the lien. Further than that, there is an analogy that can be drawn. It is true there is no contractual relation, but our decisions have long held that there need not be a contractual relation in order to enforce a lien against the land of the owner. I think we can go away back as far as Five Dutcher in Ayers against Revies, and as we come down in the line of decisions we find by analogy that the bankruptcy courts have refused to stop actions where judgment went necessarily against a bankrupt, in order to enforce the liability of sureties. There is a whole line of decisions. That is absolutely indisputed, and I have some of those decisions here. Now, by analogy, the land stands in place of the surety.

The Court: Well, I would rather describe it as a limited suretyship pledging the land.

Mr. Koestler: Yes. Therefore this technical defense should not be permitted to be interposed to defeat the very object of the statute. Of course, a good many builders are not financially responsible, and it is in the case where they are not financially responsible the law throws this protection around the material men. There is absolutely no doubt but the most irresponsible builder is the one that has been adjudicated bankrupt,

and just because he was adjudicated bankrupt is no reason why the law intends to take away that protection. That is the time they need it most. And I think the language I have just quoted to Your Honor is taken from a case in Oklahoma, which I have cited here, in which this very question——

The Court: This is the only question in the case,
10 is it not?

Mr. Angleman: Yes. I was going to suggest, we are perfectly willing that Your Honor take the matter under advisement, and if we are entitled to file it then you can sign the order and we will take the judgment, or if not entitled to file it, then they will take judgment for what they claim.

Mr. Koestler: I presume the record ought to show. Mr. Angleman admits the proper filing of the lien claim.

20 Mr. Angleman: We make no other objection on any other ground.

The Court: I see. My impressions are two-fold with respect to this request for leave to file the plea. One is that it is technical in the sense of not being substantially meritorious, and the Court ought not to lend its aid to further a plea of that kind, particularly after a lapse of several years from the time when the plea might have been filed. The second is that the plea, even if filed, under my present impression, would
30 not be available to the defendant. I realize that by refusing the plea the defendant may be deprived of the opportunity of having that latter question presented in a Court of Review, but I cannot determine it for that reason, if upon other grounds the plea should not be admitted. If it was simply a question of the efficacy of the plea, if filed, I would permit it to be filed; but where it is a question also of the laches and the technical nature of the plea, I must take that into consideration in determining what I would do about per-
40 mitting the plea to be filed.

Transcript

Mr. Angleman: There is no laches in the case. I can send you a memorandum of the case as it was, and that is the reason it has been held up all this time. We have paid over into the Chancery Court all the money in the contract.

The Court: There has been a delay since 1910.

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Mr. Angleman: We could not have done it then.

The Court: You could have filed a plea .There was no restraint upon you.

Mr. Angleman: I should say I would be in contempt of Court if I get an order against any man for doing a thing, and then I go and do the same thing myself. It is hardly equitable, if you are dealing with an equitable Court on an injunction. 20

The Court: If there should have been any question of that sort, it has rather the appearance of an election, to depend upon the effect of the release, and abandonment of the other claim. Otherwise you could have gone into the Court of Chancery, if there was any doubt about its restraint, and obtained leave to file that additional plea.

Mr. Angleman: The testimony was all taken in the Court of Chancery at that time. 30

The Court: Yes, but this was 1910, this bankruptcy occurred, and you could have gone into the Court of Chancery at that time, and asked them to relieve you of any possible restraining situation that might exist.

Mr. Angleman: None of us considered the question of laches at that time, because we all understood nothing further was to be done with this case.

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The Court: I know, but where a new defense is arising that is of the importance this is, and it arises pending the litigation, I think it is a question of laches, where the other side is deprived of any information that you intend to rely upon it until four or five years afterward.

10 Mr. Angleman: They knew right away. For the simple reaosn that the release was the main protection in the Chancery suit, because Vice-Chancellor Emery had held up the decision in the interpleader suit, pending the decision in that suit, and pending the Court's decision in this suit, and his money is all paid in there. If they don't get their money here, they go in there and share.

The Court: The real question is not so much one 20 of laches, as it is a question of meritoriousness. The Courts will not lend their aid to permit a plea to be filed out of time, where it is not thoroughly meritorious. I will be glad to have counsel send me a memorandum of any authorities they want to.

Mr. Koestler: I will hand my memorandum to you now.

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Filed July 17, 1915

CONCLUSIONS

TUTTLE, JR., et al.,
vs.
APGAR and HARRIS

Lloyd J.

My conclusion in this case is that the discharge of the contractor Tuttle did not operate to extinguish the lien claim filed against the property of Harris, the owner. The property improved by building thereon is pledged by the law to those furnishing labor and material.

10

The trend of all authority under the bankrupt law is to maintain intact all liens held by the creditors, even though the principle debtor be discharged. I see nothing exceptional in the lien held by mechanics and material men to take it out of this status.

The claimant will be awarded a verdict for his claim and counsel may send to me an order for judgment covering the same.

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Filed July 17, 1915

ORDER FOR JUDGMENT

William E. Tuttle, Jr., and Arthur Tuttle, Partners, trading as Tuttle Brothers, Claimants, vs. George I. Apgar and Theodore Apgar, Partners, trading as Apgar Brothers, Builders, and Delia Harris, Albert S. Harris, Benjamin M. Harris, James R. Harris and Lillian F. Harris, heirs at law of Benjamin S. Harris, Owners.	On Mechanic's Lien. Order for Judgment.

The summons in the above cause having been duly served upon the builders, George I. Apgar and Theodore Apgar, partners, trading as Apgar Brothers, and upon the owner, Benjamin S. Harris, in his lifetime, the declaration having been duly filed and the owner having pleaded thereto and after issue joined between the claimants and the owner, the said Benjamin S. Harris having departed this life and upon his death the names of his heirs having been entered upon the record and said cause having been duly noticed for trial at the April term, 1915, of the Middlesex County Circuit the parties plaintiff and defendant having waived a trial by jury and consenting to the trial of this cause before the court without a jury and the said cause coming on for trial and the attorneys of the defendant owners applying in open court for leave to file a plea pries darien continuance setting up the bankruptcy of the defendant builders and their discharge in bankruptcy subsequent to the filing of the lien claim and the issuance of the summons herein, and said attorneys

of said defendants admitting in open court that said defendant owners offer no further or other defense to the lien claim of the plaintiffs and further admitting that the plaintiffs would be entitled to judgment as claimed in their claim and declaration, if said motion to file such plea of discharge in bankruptcy of the builders should be refused; and the court having considered the argument of the respective attorneys of the parties and the court determining that the said defendant owners 10 are not entitled to avail themselves of the bankruptcy and discharge in bankruptcy of the defendant builders and that the plaintiffs are entitled to a verdict for the full amount claimed in the lien claim and declaration with interest being the sum of ten hundred and sixty-four dollars and six cents ($1,064.06) and that the same is a lien upon the building and lands mentioned and described in said lien claim and declaration in this cause and that execution should be stayed as against the defendant builders. 20

It is thereupon on this fourteenth day of July, nineteen hundred and fifteen, ordered that judgment final be entered generally in favor of the plaintiffs and against the defendant builders, George I. Apgar and Theodore Apgar, partners, trading as Apgar Brothers, for the sum of Ten hundred and sixty-four dollars and six cents ($1,064.06) besides costs of suit to be taxed and specially to be made of the lands and building in the declaration and lien claim mentioned and described, and 30

It is further Ordered, that execution be perpetually stayed as against the defendant builders, George I. Apgar and Theodore Apgar, partners, trading as Apgar brothers.

Let the foregoing order be entered

FRANK T. LLOYD,
Circuit Judge.

On motion of
SAMUEL KOESTER,
of Counsel with Plaintiff

Damages, $1,064.06; Costs, $34.76—$1,098.82. 40

Filed Sept. 2, 1915

NOTICE OF APPEAL

MIDDLESEX COUNTY CIRCUIT COURT.

WILLIAM E. TUTTLE, JR., and ARTHUR TUTTLE, Partners, etc., Claimants, vs. GEORGE I. APGAR and THEODORE APGAR, Partners, etc., Builders, and BENJAMIN S. HARRIS, Owner.	ON MECHANICS LIEN. NOTICE OF APPEAL.

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20 Take notice that Delia Harris, Albert S. Harris, Benjamin M. Harris, James H. Harris and Lillian F. Harris, the heirs at law of Benjamin S. Harris, deceased, defendant owner, appeal to the Court of Errors and Appeals from so much of the judgment entered in this cause as adjudges that the sum of $1064.06, besides costs of suit be specially made of the lands and building in the declaration and lien claim mentioned and described, on the following grounds:

1: The court decided that the discharge in bank-
30 ruptcy of the builders was not available to the owners as a defense or plea to the action.

2: The court decided that, while the execution should be perpetually stayed as against the builders, the amount of the judgment was a lien against the building and lands mentioned and described in the lien claim and declaration.

3: The court decided that $1064.06 besides costs of suit be specially made of the lands and building in the declaration and lien claim mentioned and described.

40 4: The court decided that the plaintiffs were en-

titled to a verdict for the full amount claimed in the lien claim and declaration with interest and that the same was a lien upon the building and lands mentioned and described in the lien claim and declaration.

5: The court decided that a claim not enforceable generally against the builders could be enforced specifically against the owners.

6: The court decided that while the discharge in bankruptcy of the builders was available to the builders to escape liability for the claim, such discharge was not available to the owners to escape a lien for the same claim.

7: The court decided that the discharge in bankruptcy of the builders did not operate to extinguish the lien claim filed against the property of the owners.

8: The court decided that property improved by building thereon is pledged by the law to those furnishing labor and material.

9: The court decided that the bankruptcy law maintains intact all liens held by the creditors, even though the principal debtor be discharged.

Dated August 30th, 1915.

J. HENRY CRANE,
Attorney for Defendant Owners.

To:

PAUL Q. OLIVER,
Attorney for Plaintiffs.
SAMUEL KOESTLER,
Of Counsel with Plaintiff.
Or to Whom it may concern.

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