New Jersey Court of Errors and Appeals

Between JOSEPH P. DAY, *et al.*, Complainants-Respondents, and HARRY G. HENDRICKS, Receiver and Trustee of George E. Thomas, bankrupt, defendant-appellant, *et als.*, Defendants.	On Bill, etc. Appeal from Court of Chancery.

BRIEF ON BEHALF OF JOSEPH P. DAY AND PAULINE M. POPE DAY, HIS WIFE COMPLAINANTS-RESPONDENTS.

Preliminary Statement.

The statement of the Vice Chancellor in his Conclusions as to the Appellant' motion here sought to be reviewed, is fully justified by the record

> "The bankrupts claim against the complainants was on book account and it subsequently appeared, and in fact was admitted by all parties, that the charges on the book account represented exactly the same items comprising the four lien claims filed, and no others. A stipulation respecting the distribution of the *fund paid into court* was entered into by the solicitors of all parties in interest, including the solicitor of the trustee in bankruptcy. Following this, *a final decree carrying out the terms of the stipulation was entered by consent of the so-*

> *licitors of all the parties.* (Case, page 69). * * * * It having conclusively appeared that the claim of the trustee in bankruptcy, if any, is for exactly the same items covered by the various mechanics' lien claims which have been paid in full in this suit, as hereinbefore stated, I conceive *there is no equity in this application. It is plainly an attempt to compel the complainants to pay the same debt twice.* (Case, page 70). (italics ours.)

The appellant is asking this Court, sitting as a Court of Equity, to compel Day,—the party whose money has been received by and paid out of the Court of Chancery, pursuant to decree of interpleader, said decree having been consented to by the appellant herein—to pay a second time the sums so distributed by the Court, and that, too, when the bill of complaint was taken as confessed against this appellant, as well as against all the parties thereto, and the Order of Reference (Case, pages 40-41), Decree of Interpleader and Final Decree were made and entered on the written consent of the appellant herein, as well as by the written consent of all the remaining parties thereto. (Case, pages 45-52; pages 56-59).

In addition to the foregoing, the Order from which the appellant is now appealing was entered in open court in the presence of appellant and with his knowledge and consent. The Order or Decree complained of, was the product of the suggestion of the appellant. It is, therefore, respectfully submitted that the appellant cannot have a Decree moulded into a form suggested by him and then have it reversed because of the form so imparted to it. Appellant is, therefore, estopped from taking inconsistent positions with reference to the order entered April 10, 1928, by the Court of Chancery of New Jersey, and is bound by the said Order or

Decree. Furthermore, it is respectfully submitted that the injunction or restraint order issued out of the Court of Chancery and entered January 9, 1928, (Case, pages 42-44), *and unappealed from* in itself constitutes a bar to this appeal.

There was no dispute that the debt which the appellant seeks authority to sue for was represented by the fund that was distributed by the Court of Chancery in the interpleader suit. This fact was the basis of Judge Clark's order of the twelfth day of March, 1928, (Appendix A, this brief) forbidding the truetee to bring any action against Day. Said Order of the United States District Court has not in anywise been modified, rescinded or vacated, and is still in full force and effect, binding upon the appellant herein.

The decree of distribution, (State of Case, pages 49-52; also pages 58-59) expressly adjudges that the trustee in bankruptcy "is not entitled to any of the moneys on deposit with this Court." The solicitor of the trustee in bankruptcy signed the stipulation as to division of the moneys in Court (State of Case, page 38), and also signed the consent to the decree of distribution containing the adjudication that the trustee in bankruptcy was not entitled to any of the moneys on deposit in Court. The consents of the appellant must be construed as consents to a decree which declared that the trustee in bankruptcy was not entitled to any of the moneys paid into Court. This fund by consent of all parties covered the entire indebtedness from Day to the bankrupt. *No appeal has been taken from any of said Orders and Decrees, and all of these Orders and Decrees are still operative and in full force and effect.* The only appeal taken is from the Order made April 10, 1928, refusing to vacate the restraint of December 3, 1927, and confirming the restraint. No appeal is

taken from the restraint imposed January 9, 1928. No appeal was taken from any of the remaining Orders and Decrees entered by the said Court of Chancery.

If we understand the appellant's grounds of appeal, his insistment is that the Court of Chancery had no jurisdiction in the matter. Attention is at this time respectfully directed to the Order of the United States District Court for the District of New Jersey, (Case, pages 14-15), which specifically directs the appellant "to accept process of subpoena and such other process as said Court of Chancery may issue, also to accept service of such orders and decrees that the said Court of Chancery may make and also to fully comply with all orders and decrees that the said Court of Chancery of New Jersey may make or enter in said proceeding" (Case, page 15, line 30), and it is respectfully submitted that this Order of the United States District Court, also the fact that the Court of Chancery had possession of the fund and that the said Court of Chancery had cognizance of the class of cases to which the one here adjudged belongs, gave the Court of Chancery exclusive jurisdiction in the matter—it appearing that the proper parties (including this appellant) appeared before the Court of Chancery, consented *voluntarily* to the entry of all the Orders and Decrees in said Court of Chancery made and it appearing also that the points decided by the said Court of Chancery were, in substance and effect, within the issue, (Munday v. Vail, 34 N. J. Law 418; Commercial Trust Co. of N. J. v. Drayton, 90 N. J. Eq. 264). Appellant apparently concedes that the said Court of Chancery had jurisdiction to enter all Orders and Decrees made by it prior to the decree appealed from. Appellant cannot, therefore, now raise any ques-

tion of jurisdiction. Appellant is estopped from taking inconsistent positions with reference to the Order entered April 10, 1928, by the Court of Chancery of New Jersey, and appellant having consented to the entry of said Order of April 10, 1928, is bound by said Order and cannot now appeal therefrom.

"There is no equity in this application. It is plainly an attempt to compel complainants to pay the same debt twice. (Conclusions of Vice Chancellor Berry, Case, page 70).

The Final Decree entered in this matter was made on February 7, 1928. No appeal was taken from that Decree.

The Order from which the appellant is now appealing is one refusing to vacate a restraint entered prior to Final Decree. The Order being appealfrom was entered on April 10, 1928, The *Notice of Appeal* was filed by the present appellant on April 10, 1929—exactly one year after the entry of the Order appealed from. The delinquency here exhibited by the appellant is of such a character as to justify the intervention of this Honorable Court, and this Court, of its own motion, should dismiss the appeal. The appellant is barred by laches from making this appeal—aside from the fact that appellant consented to the entry of the Order appealed from.

The "facts" as submitted by the Appellant are neither accurate nor complete. Complainants-respondents accordingly set forth the correct and entire facts, as the same were presented by appellant and the remaining parties to the suit, before the Court of Chancery of New Jersey.

Statement of Facts.

On or about September 1, 1925, complainant Joseph P. Day entered into an agreement with one George E. Thomas, by which the latter agreed to make certain alterations to an existing building and also to build a house for complainants on premises owned by complainants, which Agreement was not filed. (Case, page 16, paragraph 2).

In erecting and constructing the building, the said Thomas entered into contracts and agreements with laborers and materialmen, (Case, page 19, paragraph 3) and also purchased materials from and had services performed by the following: Union County Coal & Lumber Co.; John D. McCollum and Aaron O. Smith, trading under the firm name of McCollum & Smith, Arthur E. James and Harvey J. Tiger.

Thomas failed to pay the said persons who furnished material and did the work for him under the contract.

On March 31, 1927, the Union County Coal & Lumber Co. filed a mechanics lien against the premises owned by the complainants and also instituted suit thereon, in the Essex County Circuit Court, to recover the sum of $5,449.54 for materials furnished in the erection and construction of the buildings upon the complainants lands. (Case, page 19, paragraph 11). This suit was instituted

prior to the adjudication in bankruptcy of George E. Thomas, the contractor.

On April 18, 1927 John D. McCollum and Aaron O. Smith, trading under the firm name of McCollum & Smith, filed a mechanics lien against complainants premises and also instituted suit thereon to recover the sum of $1,697.71 for materials furnished and labor performed in the erection and construction of the buildings upon the lands of complainants. (Case, page 19, paragraph 12).

On April 18, 1927, Arthur E. James filed a mechanics lien against complainants premises and also instituted suit thereon to recover the sum of $1,202.45 for materials furnished and labor performed in the erection and construction of the buildings upon complainant's lands. (Case, page 20, paragraph 13).

On April 18, 1927, Thomas was adjudicated a bankrupt in the United States District Court for the District of New Jersey, and one Harry G. Hendricks, (by Order of said Court) was appointed Receiver. Subsequently, by an Order of the said Court, the said Harry G. Hendricks was appointed trustee of the said George E. Thomas, bankrupt. (Case, page 18, paragraph 9).

On April 28, 1927, Harvey J. Tiger filed a mechanics lien against the premises owned by complainants, and also instituted suit thereon, to recover the sum of $546.50, for materials furnished and labor performed in the erection and construction of the buildings upon complainant's lands (Case, page 21, paragraph 14).

Harry G. Hendricks, Receiver and Trustee of George E. Thomas, bankrupt, was made a party defendant to each of the aforementioned four mechanics' liens claims and suits instituted thereon.

These lien claims were admittedly properly filed

in the Clerk's office of Essex County, and suits thereon instituted diligently in the Essex County Circuit Court.

None of the lien claimants filed any claim either with the Trustee or with the Referee in Bankruptcy. None of the lien claimants have received any dividends or other monies from the bankrupt estate.

The total amount of the lien claims filed against the complainants premises, upon which said claims suit was instituted by the said lien claimants, amounted to $8896.20. This sum the lien claimants demanded from these *complainants.* The Receiver and Trustee of George E. Thomas, bankrupt, also demanded this same sum of $8896.-20 less $558.48 making $8337.72, as due from the complainants on an open book account of the said bankrupt, as the balance due under the contract made with the bankrupt and complainants. (Case, page 19, paragraph 10; also Case, page 22, paragraphs numbered 18 to 20). This $8337.72, as it appears on the open book account of the bankrupt contractor Thomas—it is admitted by all the parties to this litigation—covers exactly the same items for materials furnished and labor performed as is represented in the four mechanics' liens filed and suits thereon instituted in the Essex County Circuit Court by the lien claimants. (See Conclusions of Vice Chancellor Berry, Case, page 69, line 10).

Thereupon, application on behalf of Complainants was made to the United States District Court for the District of New Jersey, for leave to make the Receiver and Trustee of George E. Thomas, Bankrupt, a party to an interpleader suit then about to be instituted by Complainants in the Court of Chancery of New Jersey. On November 22, 1927, the United States District Court entered

an Order (Case, pages 14-15) of which the following excerpt only is here relevant (Case, page 15):

> "ORDERED, that permission is hereby given to Joseph P. Day and Pauline M. Pope Day, his wife, to make Harry G. Hendricks, Receiver and Trustee of George E. Thomas, bankrupt, a party defendant to said proceedings to be instituted by them in the Court of Chancery of New Jersey; and it is further
>
> ORDERED, that said Harry G. Hendricks, Receiver and Trustee of George E. Thomas, bankrupt, be and he is hereby ordered, directed and authorized to accept process of subpoena and such other process as said Court of Chancery may issue, also to accept service of such orders and decrees that the said Court of Chancery may make and also to fully comply with all orders and decrees that the said Court of Chancery of New Jersey may make or enter in said proceedings; and it is further
>
> ORDERED, that said Harry G. Hendricks, Receiver and Trustee, do interplead in said Court of Chancery proceedings and determine his rights thereunder."

In this situation, complainants, on November 25, 1927, filed their Bill in Nature of Bill of Interpleader in the Court of Chancery of New Jersey, making parties thereto Union County Coal & Lumber Co., John D. McCollum and Aaron O. Smith, trading under the firm name of McCollum & Smith, Arthur E. James, Harvey J. Tiger (lien claimants), and Harry G. Hendricks, Receiver and Trustee of George E. Thomas, Bankrupt, (this appellant).

On November 26, 1927, service of process of subpoena and Bill of Complaint was acknowledged in behalf of appellant and by the solicitors of all of

the hereinabove named defendants. (Case, page 31, Case, page 45).

By Order of the Court of Chancery, complainants deposited with the Clerk thereof $8896.20 representing the total amount demanded from Complainants and claimed to be due *either* to the lien claimants *or* to the bankrupt contractor.

On December 3, 1927, a Restraining Order and Order to Show Cause was issued out of the Court of Chancery and served upon all of the defendants, including appellant, restraining the lien claimants from proceeding further with their respective suits and restraining the Receiver and Trustee from instituting any suit against Complainants on the book account claim, which Order was made returnable for December 20, 1927 (Case, page 31). The appellant thereupon served complainants with Notice to Dismiss the Bill of Complaint, (Case, page 34) the hearing on said Notice to be had on December 13, 1927.

On December 10, 1927, appellant and the lien claimant defendants and complainants agreed that said Order to Show Cause be returnable and argued on December 13, 1927 (instead of December 20, 1927). An Order—*consented to by the appellant* and by all of the defendants—was then entered and approved by the Court, carrying out this agreement. The restraint was continued—by consent. (Case, pages 35-37).

At this hearing before the Honorable Vice Chancellor Berry, held on December 13, 1927, no affidavits or answer was either presented or filed by any of the defendants in opposition to Complainant's affidavit and to the relief prayed for by the complainants. No affidavits were ever filed by the defendants in opposition to Complainant's application for restraint and injunction. The appel

lant did not contest Complainant's right to relief, except that at this hearing appellant contended the Court of Chancery had no jurisdiction over interpleader proceedings. (Case, page 34).

On December 31, 1927, the lien claim defendant Union County Coal & Lumber Co., filed an Answer to the Bill in Nature of Bill of Interpleader. This Answer was on January 3, 1928, *withdrawn* by said Union County Coal & Lumber Co., and no other Answer filed by it. In fact none of the defendants filed any Answer. The appellant did not file any answer, either.

On December 27, 1927, Vice Chancellor Berry, by letter bearing that date, informed all counsel that he would advise an order directing that the defendants interplead in this cause, and that he would also advise an order denying the motions to strike out the bill of Complaint. Said letter is on file with the Clerk of this Court.

Thereupon, on January 3, 1928, the appellant herein, and all the lien claimants' defendants (Case, page 38) agreed amongst themselves as to the distribution of the fund, and all the parties defendants—including the appellant—entered into a written Stipulation to this effect. (State of Case, pages 38-39).

On January 9, 1928, counsel for appellant, also all counsel for respective lien claimants, as well as counsel representing the complainant herein, appeared before the Court of Chancery (Honorable Vice Chancellor Berry) in open Court, and informed said Court of the facts as stated in the preceding paragraph of this Brief, and that the defendants had amongst themselves agreed to the distribution of the fund and that with the approval of the Court, it was desired that the said Stipulation be filed (Case, pages 38-39), and that the follow-

ing Orders and Decrees be entered, approved and filed by the Court

(A) Restraining Order and Order Denying Motion to Dismiss. (Case, page 40).

(B) Order of Reference. (Case, page 41).

(C) Interlocutory Decree directing defendants to interplead amongst themselves. (Case, page 45).

(D) Final Decree. (Case, page 49).

The Court examined the orders and decrees presented, and approved these orders and forms of decrees and ordered them filed in the cause. Thereupon, *on January 9, 1928*—in the presence of and with the consent of all counsel—*all* of the aforementioned orders and decrees were approved, entered and filed in the Court of Chancery in this cause.

The attention of this Honorable Court is hereby now particularly directed to the fact that the present appellant at this time—January 9, 1928—entered a general appearance before the Court of Chancery. The appellant acquiesced in and in writing consented to the matter being referred to the Honorable Vice Chancellor Berry for adjudication (Case, pages 40-41); the appellant stipulated and consented to the distribution of the fund deposited with the Court of Chancery (Case, pages 38-39); pages 49-52; pages 56-59), and also consented to the making and entry of the remaining Orders and Decrees filed on this same date of January 9, 1928. These consents, also the genereal appearance entered by the appellant, must be construed as either an abandonment or waiver of any question which this appellant may raise challenging the jurisdiction of the Court of Chancery over

the subject matter or parties to the suit. This aside from the fact that the appellant had heretofore been directed by the United States District Court to subject himself and his rights to the jurisdiction of the Court of Chancery. (Case, page 14).

It should be noted that the appellant is not appealing from any of the Orders and Decrees entered on January 9, 1928. This in itself bars the appellant from prosecuting this appeal. It is also evident that the appellant is not seriously challenging the jurisdiction of the Court of Chancery. The appellant is appealing from an Order entered April 10, 1928, refusing to vacate the previous restraint of December 3, 1927. (Case, page 63). It should also be noted that that motion is not made by a party to this suit, and is also adressed to the discretion of the Court. The Court of Chancery, therefore, properly dismissed that motion (Linn vs. Wheeler, 21 N. J. Equity, 231; Collins vs. Kiederling, 87 N. J. Eq. 12; N. J. Photo Engraving Co. vs. Schonert, 95 N. J. Eq. 12; Kaufman vs. Jurczak, 139 Atl. 716—not officially reported). The appellant, however, requested that the Court of Chancery confirm the restraint. This was done—and this Order—the one entered April 10, 1928, (Case, page 65, at the request of the appellant—is the Order that the appellant is now appealing from.

The Final Decree makes reference to the Interlocutory Decree directing the defendants to interplead. Said Interlocutory Decree declares that the Bill of Complaint was taken as confessed as against all the defendants for that the defendants and each of them have wholly failed and neglected to answer the Bill of Complaint within the time limited by law (Case, pages 45-48).

Among other provisions contained in the Final Decree (entered by consent of this appellant and by the consent of the lienors) will be found the following: "and it appearing further that all of the defendants herein were heretofore ordered to interplead as to the fund so deposited with the Clerk of this Court in this cause". (Case, page 45, Case, page 49).

No provision having inadvertently been made regarding the payment of counsel fee, taxed costs and commission due Clerk in Chancery, in that these mounts had not been deducted pro rata from the amounts to be paid the lien claimants, in accordance with Stipulation consented to by appellant (Case, page 38) an Amended Final Decree and Order of Distribution, also consented to by the appellant and by all of the defendants, was thereafter presented to and on February 7, 1928, approved by the Court. (State of Case, page 56). This is in accordance with the Stipulation heretofore entered into between the defendants (State of Case, page 38). This Amended Final Decree is the same as the Final Decree of January 9, 1928, (except for the change made regarding the payment of counsel fee and taxed costs as allowed, and commissions due to Clerk in Chancery) and also refers thereto. (Case, page 49, Case, page 56).

Checks in the amounts as set forth in the Amended Final Decree and Order of Distribution of February 7, 1928, were thereupon sent by the Clerk in Chancery to all of the persons entitled thereto under this Order, and accepted and retained by said defendants. The fund—or subject matter of this controversy—is therefor now no longer in existence. The Order of distribution (Case, pages 56-59) has been executed and its object attained, and there is nothing upon which a judgment of re-

versal, if any, could operate. These monies were disbursed by order of the Court of Chancery, and *with the knowledge and consent of this appellant.* Coreyell vs. Holcombe, 9 N. J. Eq. 650, cited with approval in Machlin vs. Essex Park Realty Co., 139 Atlantic Rep. 32 (not officially reported), Ewald vs. Ortynsky, 76 N. J. Eq. 291. The appellant acquiesced in the order or decree of distribution, and thereby waived his right to have it reviewed by this Honorable Court. Ewald vs. Ortynsky, 76 N. J. Eq. 291; Pemberton's Case, 40 N. J. Eq. 520, affirmed 41 N. J. Eq. 349.

On January 25, 1928, lien claimants' defendants discharged their lien claims and discontinued their respective lien claims suits, as well as delivered releases of their claims to complainants. The appellant herein, in writing, consented to the discharge of these lien claims and discontinuance of the lien claim suits. The Receiver and Trustee also delivered release to complainants. The Trustee executed a Release not in proper form. (Case, page 53). The Trustee thereafter executed correct form of Release. The release of the said Trustee was, however, first approved by the Court. (State of Case, page 60). Appellant had heretofore voluntarily consented to execute and deliver said Release. (Case, pages 58-59).

On March 7, 1928, the Union County Coal & Lumber Co., as a creditor of the bankrupt, (without notice to these complainants) applied for permission to the United States District Court for the District of New Jersey for leave to institute suit against the complainants' herein, upon the claim of the Trustee, as said claim appears in Bill of Complaint (Case, page 19, paragraph 10). By Judge Clark's Order (Appendix A of this Brief) it conclusively appears that counsel for said Union

County Coal & Lumber Co. *omitted* to inform the United States District Court for the District of New Jersey (Honorable Judge William Clark) of the Order theretofore made by said United States District Court directing the Trustee to interplead (Case, p. 14) and also omitted to inform the Court of these Court of Chancery of New Jersey interpleader proceedings. No noitce was ever served upon complainants or complainants counsel of this intention to apply to the United States District Court for permission to institute suit against complainants. Counsel for complainants learned that the Union County Coal & Lumber Co. contemplated instituting suit against complainants on this book account claim of the bankrupt, under this permission so improperly obtained.

At the request of the Honorable Judge Clark, counsel for the Union County Coal & Lumber Co. and present counsel for complainants appeared before Judge Clark on March 12, 1928, and after listening to the arguments of each of said counsel and examining the evidence submitted before him, Judge Clark, on March 12, 1928, vacated his former order permitting suit to be instituted against complainants and thereupon entered an Order directing that no suit whatsoever be instituted against complainants. (Appendix A of this Brief). This Order still remains operative and has not been modified, rescinded or vacated. It is still in effect.

A copy of this Order was on March 15, 1928, served upon the Receiver and Trustee (the appellant herein) and legal service thereof acknowledged. A certified copy of this Order and acknowledgment of service thereof is on file in the office of the Clerk in Chancery, filed by direction of Vice Chancellor Berry.

On March 29, 1928, the Union County Coal &

Lumber Co., *as an alleged general creditor of George E. Thomas, bankrupt,* served complainants, and also served the appellant herein with notice that said Union County Coal & Lumber Co., creditor as aforesaid, would appear before the Honorable Vice Chancellor Berry "for the purpose of requesting the court to make an order dissolving the restraint imposed, or intending to be imposed, upon Honorable Harry G. Hendricks, receiver and trustee of George E. Thomas, bankrupt, dated December 3, 1927, *if in the opinion of the court it shall seem necessary or desirable to make such order.*" (State of Case, pages 63-64; Case, pages 65-66). The question of "jurisdiction" was not raised by the parties appearing on this motion. The appellant argued against said motion, and the appellant as well as complainants both requested the Court to confirm previous restraints and to deny the motion of the said Union County Coal & Lumber Co., creditor of the bankrupt. (Appendix ~~E~~D this Brief). It should be noted that this motion is not made on behalf of the trustee in bankruptcy, but by the Union County Coal & Lumber Co. *as a general creditor of George E. Thomas, Bankrupt.* The said Union County Coal & Lumber Co. *as a general creditor of George E. Thomas, bankrupt,* was not a party to the suit. It was represented in this capacity by the Receiver and Trustee, and therefore, as a general creditor of the Bankrupt, the said Union County Coal & Lumber Co. could not—in law—make any motion in the cause (Linn vs. Wheeler, 21 N. J. Eq. 231). This same Union County Coal & Lumber Company *as a lien claimant* participated in the distribution of the fund on deposit with the Court of Chancery and has received out of said fund the full amount of its claim. (Conclusions of Vice Chancellor, Case, page 70).

On April 3, 1928, at the hearing on the motion of the said Union County Coal & Lumber Co. *as a general creditor of George E. Thomas, Bankrupt* (Case, page 63) the appellant herein—who had also been served with Notice of said Motion—resisted the application of the said Union County Coal & Lumber Co. (creditor as aforesaid) and requested the Court to deny the said motion on the ground that the Union County Coal & Lumber Co. *as a general creditor of the bonkrupt* was not a party to the suit, being represented by said appellant as Receiver and Trustee. The appellant requested that the previous restraints of the Court of Chancery of New Jersey be continued. At this hearing, the Order of Judge Clark of the United States District Court (Appendix A, this Brief) was presented in evidence before the Vice Chancellor, and his Honor, Vice Chancellor Berry directed that said Order be filed with the Clerk in Chancery. The Order was accordingly filed with the Clerk in Chancery. (Appendix B, this Brief).

As a result of the hearing had before the Court of Chancery on April 3, 1928 as aforesaid, the said Court did on April 10, 1928 enter an Order denying the motion of the Union County Coal & Lumber Co. *as a general creditor of George E. Thomas, bankrupt,* to vacate the restraint imposed upon the Receiver and Trustee, and again made the injunction permanent. (Case, pages 65-67). Said Order of April 10, 1928 was entered in the presence of the appellant, and with his knowledge and consent. Appellant assisted in the moulding of said form of decree. It is from this same Order that the appellant is appealing, despite the fact that this Order was the product of the suggestion of the appellant and was acquiesced in by him.

The attention of this Honorable Court is at this time respectfully directed to the fact that when the

Union County Coal & Lumber Company presented this motion to the Court of Chancery, (Case, page 63), the said Appellant did not raise any question of jurisdiction. The said motion was directed only to the restraint "imposed or intended to be imposed upon Honorable Harry G. Hendricks, Receiver and Trustee of George E. Thomas dated December 3, 1927. The motion was addressed to the discretion of the Court. It should also be noted at this time that this motion is not directed to the restraint imposed upon the Receiver and Trustee on January 9, 1928. (Case, pages 42 to 44). The Restraining Order of January 9, 1928, is still in effect and operative so as to enjoin the Receiver and Trustee from instituting any suit against Complainants. It has not been vacated or modified. The Restraining Order of January 9, 1928, it is evident, supersedes the one of December 3, 1927.

The Union County Coal & Lumber Co. *as a general creditor of the bankrupt* appealed to the New Jersey Court of Errors and Appeals from the said Order of April 10, 1928 entered by the Court of Chancery. One of the respondents at said Appeal was the present appellant, who resisted the appeal of the said Union County Coal & Lumber Co. by the filing of his answer to Petition of Appeal in those proceedings. At the February, 1929 Term of the New Jersey Court of Errors and Appeals, the said Honorable Court dismissed said Appeal.

Now, the Receiver and Trustee is appealing from the same Order of April 10, 1928 entered by the Court as aforesaid. The *Notice of Appeal* was filed by the present appellant on April 10, 1929—exactly one year after the entry of the Order appealed from. The delinquency here exhibited by the appellant is of such a character as to justify the intervention of this Honorable Court, and this

Court, of its own motion, should dismiss this appeal. The appellant is barred by laches from making this appeal—aside from the fact that appellant consented to the entry of the Order appealed from.

The appellant is not appealing from any of the Orders and Decrees entered in this cause, (except the one of April 10, 1928, refusing to vacate the restraint imposed in the Order of December 3, 1927). Appellant is not appealing from the restraint imposed on December 3, 1927. All of the unappealed from Orders and Decrees are still in force and effect, operative and binding upon the appellant and all other defendants in this cause. These remaining Orders and Decrees—of themselves—constitute a bar to appellants appeal.

Law and Argument.

Counsel for appellant having in his Brief cited cases which are not applicable to the case at bar and said Brief being based on a state of facts not before the Court of Chancery, it is impossible to satisfactorily reply to Appellant's Brief point by point, as said points appear numbered in Appellant's Brief. It is elementary that this matter must be decided by the case as it was before the Court of Chancery. *No new facts can be introduced in the Court of Errors and Appeals.* Black vs. Delaware &c. Co., 24 N. J. Eq. 455; Ashley vs. Yetter, 78 N. J. Eq. 173, 187; Miller vs. Miller, 81 N. J. Eq. 218.

Counsel for complainants-respondents respectfully submits their Brief as follows:

POINT I.

Did Complainants have the right to file bill in nature of Bill of Interpleader in the Court of Chancery?

Complainants were entitled to file their Bill in Nature of Interpleader in the Court of Chancery where complainants (who were owners of lands and buildings encumbered by the lien claims of the lien claimants) are parties interested in the subject matter and where there are conflicting claims of third persons and there is doubt as to who is lawfully entitled to the fund. Thus in the case of Illingsworth vs. Rowe, 52 New Jersey Equity 360 it was held:

> "The owner of a house may file a bill in the nature of an interpleader against the builder and person who has furnished material, to have it determined who is entitled to the balance due under the contract; and for a decree that upon paying the same all right of lien against the house and land shall become extinct."

By reason of the conflicting claims of the lien claimants and receiver and trustee in bankruptcy, the property of complainants was in danger of being sacrificed and complainants would thereby suffer an irreparable injury and under these circumstances, complainants had an equitable right to relief from *either* the liens of the four lien claimants *or* the claim of the receiver and trustee in bankruptcy.

Republic Casualty Co. vs. Fischman, 99 N. J. Equity 758. 33 Corpus Juris 423.

Another case in point on this subject is that of Ireland vs. Kelly, reported in 60 N. J. Equity, Pg. 308, which said case on Pg. 312 thereof recites the law to be as follows:

> "This condition of disputing claims upon the same fund may arise from so many causes that it is difficult to define any limitation which must deprive the holder of the fund of his right to be protected. The fact that one party claims because of an admitted contract with the holder of the fund, and the other by some claimed arrangement with the admitted contractor, will not exclude the holder of the fund from his right to be protected. All claims arising under equitable assignments are within this class. Those arising under building contracts are quite familiar. In these cases the owner (the holder of the fund) only contracts to pay the builder who claims payment. But perhaps half a dozen other persons assert claims on the same fund upon what they contend are equitable assignments from the builder, or other rights against him, in the creation of which the holder of the fund has no part. It is common practice in such cases for the owner to pay the money into court and file a bill for interpleader to compel those who make these conflicting claims on the fund to settle their disputes between themselves. Those cases, many of them, do not set up any contractual relation between the disputants and the holder of the fund, except as may have arisen by operation of law because of some act of the builder or of the claimants themselves."

In the present case of Day vs. Hendricks, *et als*, the controversy is not a controversy as to the amount for which the complainant is liable but is a controversy touching the rights of the several defendants as against each other. There is no dis-

pute touching the amount for which complainant is liable. Complainants are under no duty to decide as to the contentions of rival claimants from whom they are entitled to be protected, and may in good faith bring them and the fund into Court and compel them to interplead.

> Pennsylvania Railroad Company vs. Stevenson, 63 N. J. Equity 634.

It is no objection to the remedy of interpleader that each of the claimants claims only part of the fund where all together claim an amount in excess of the whole fund. The claims of a contractor and others who made claims against the funds by reason of contracts with the Contractor justify the owner in instituting an interpleader proceeding to determine their claims.

> Lepente vs. Letteri, 44 Atl. Rep. 730;
> Brunetti vs. Grandi, 89 N. J. Eq. 116;
> Aleck vs. Johnson, 49 N. J. Equity, 507;
> South End Improvement Co. vs. Harden, 52 Atl. Rep. 1127;
> Mt. Holly etc. vs. Ferree, 17 N. J. Equity 117.

Under a bill in the nature of a bill of interpleader the complainant has a right to ask for active affirmative relief; as for example, where there is a dispute between two or more persons as to which is entitled to a mortgage debt, and that, on its payment, the mortgage shall be surrendered to him for cancellation.

> Illingworth v. Rowe, 52 N. J. Equity 360.

The Bill of Complaint (Case, page 16) states an equitable cause of action, in that it alleges facts such that when the rights or liabilities of complain-

ant have been determined, there only remains to be determined the rights of the defendants as between themselves, and the Bill contains a prayer for injunction (Case page 23, paragraph 3) in accordance with the settled practice.

Complainants proved that there were adverse and conflicting claims by defendants—the lien claimants collectively demanding payment of lien claims, and the receiver and trustee demanding payment on book account *for the same items contained in the claims of the lien claimants.* A state of facts such as these entitles complainants to file their bill in Nature of Bill of Interpleader. Complainants are entitled to relief through the Court of Chancery. The very nature of a bill of interpleader presupposes that the party by whom it is exhibited (Complainants) would be liable a second time, if he should either voluntarily or otherwise pay the money which he owes to a wrong claimant.

The State Court (the Court of Chancery of New Jersey) had jurisdiction so as to bind those who were parties to the suit and those whom the parties in law represented. In the case at bar, the Receiver and Trustee represented creditors of the Bankrupt. The Court of Chancery having cognizance of the class of cases to which the one to be adjudged belongs, is empowered to determine claims the title to which was involved on question of interpleader and this question being submitted to this judicial action, the Trustee (and the creditors whom he represents) is bound by that decision.

Commercial Trust Company of N. J. vs. Drayton, 90 N. J. Equity 264.

Suitor seeking to protect some right recognized in court of equity, but not protected in court of

law, comes into equity as of right, and court has no discretion to refuse to entertain his bill.

> Pine Bldg. Co. vs. Grossman, 140 Atlantic Reporter 251 (not officially reported).

In Pennsylvania Railroad Co. vs. Stevenson, 63 N. J. Equity 634 it was held:

> "The holder of a fund has no duty to decide as to the contentions of rival claimants therefor, from whom he is entitled to be protected, and may in good faith bring them and the fund into court, and compel them to interplead."

The Bill of Complaint, as filed by the complainants-respondents in the Court of Chancery, does state an equitable cause of action, in that it presents facts entitling the Court of Chancery to protect complainants against the embarrassment of conflicting claims and double vexation in respect to one liability. Complainants had no clear and unembarrassed adequate legal remedy at law.

In determining what is an adequate legal remedy the courts will take into consideration the question of the multiplicity of suits.

> People's Brewing Co. v. Levin, 78 N. J. Equity 583; Christian Fiegenspan v. Nizolek, 72 N. J. Equity 949, affirmed. Christian Feigenspan v. Nizolek, 71 N. J. Equity, 382.

The Interlocutory Decree entered January 9, 1928, by consent of all parties, and in open court, (State of Case, pages 45-48) decrees that "the Court being further of the opinion that said Bill in Nature of Bill of Interpleader is properly brought by the complainants in this cause and that said complainants are entitled to relief in their

said Bill of Complaint prayed." This decree was entered only after the Court had "examined the pleadings and having heard and considered the arguments of counsel in connection therewith, and having also read and considered the briefs submitted by respective counsel in connection therewith." (Interlocutory Decree, State of Case, pages 45 and 46). It should also be borne in mind, that this Interlocutory Decree was entered with the knowledge and consent of appellant and all the defendants in this cause, in open Court, and simultaneously therewith a Final Decree was entered by consent of all parties relating to the distribution of the fund. It appearing that the Bill of Complaint does state an equitable cause of action, the Court of Chancery had jurisdiction to direct the lien claimants to interplead, and to the entry of this Interlocutory Decree, all the lien claimants and this appellant Receiver and Trustee in Bankruptcy consented. From an Order or Decree entered by consent, there can be no appeal.

Pembertons Case, 40 N. J. Equity 520.

The policy of the law favors and the peace and good order of society are best promoted by the termination of such litigation by a single suit—interpleader proceedings. The remedy by "interpleader" is an equitable one, and is based upon the theory that conflicting claimants should litigate their claims amongst themselves, without involving the holder of the fund (Day) in their dispute. Its office is to protect one against the embarrassment of conflicting claims and double vexation in respect to one liability. Lord Rosedale once said that it was more important that an end should be put to litigation, than that justice should be done in every case. (Cited with approval by the Court of Errors and Appeals in re Walsh Estate, 80 N. J. Equity 565.

POINT II.

Did Court of Chancery have jurisdiction?

If we understand the appellant's brief, his insistment is that the Court of Chancery had no jurisdiction under the facts set forth in the complainant's bill to entertain that bill or to grant any relief thereunder; that the sole jurisdiction was vested in the United States District Court.

Assuming that that question could be raised on this *appeal* from the order refusing to set aside the restraint and confirming the restraint, the law, both Federal and State, is settled otherwise where as here, the lien claims and the suits thereon were brought *prior to* the adjudication of bankruptcy.

Under such circumstances, the Federal decisions hold that the State Court can entertain jurisdiction and dispose of the subject matter making the Trustee in Bankruptcy a party.

> Gordon Jones Const. Co. re Welder, 201 S. W. 681; Doolittle vs. Mutual Life Ins. Co. of N. Y., 249 Federal Reporter 491; Davis vs. Planters Trust Co., 196 Fed. Rep. 970; Metcalf vs. Barker, 187 U. S. 173; In re Blake, 150 Fed. 279; 4 Remington on Bankruptcy, pages 152-153; in re Cotton, 209 Fed. 124; Remington on Bankruptcy, Section 2189; Friedman vs. Zweifler, 132 N. Y. Supp. 320; Nelson vs. Leary, 164 Pacific Rep. 1050; Heidritter vs. Elizabeth Oil Co., 112 U. S. 294; Smith vs. McIver, 9 Wheat. 532; In re Farrell, 201 Fed.

Rep. 338; In re Blake, 150 Fed. Rep. 279.

The same doctrine is the settled law in this State.

Birdsell vs. Cashin, 60 N. J. Equity 116; Occumpaugh vs. Linde & Griffith Co., 95 N. J. Equity 228; Commercial Trust Co. vs. Drayton, 90 N. J. Equity 264 268 and cases therin cited.

Where there is a conflict of jurisdiction between Courts and one Court cannot enjoin proceedings in the other, either Court may waive its jurisdiction in favor of the other. (Bank of Andrews vs. Gudger, 212 Fed. Rep. 49; Brumby vs. Jones, 141 Fed. Rep. 318; Plant vs. Gorham, 174 Fed. Rep. 852).

Whatever question there might be in the case on this point is settled by the order of the United States District Court (Case, page 14), directing this appellant, the Trustee in Bankruptcy to appear in the interpleader suit and abide by the decisions of the Court of Chancery made therein and by the order of Judge Clark dated March 12, 1928, (Appendix A, this Brief) restraining the Trustee in Bankruptcy from bringing any action upon the book account of Thomas, the bankrupt, against Day.

The appellant goes so far as to attempt to raise the question on this appeal, that the bill in the nature of an interpleader did not state an equitable cause of action. The Court of Chancery decreed that it did. That decree is not appealed from.

All the decrees in the case were made upon the consent of the Trustee in Bankruptcy, this appellant—and the Final Decree (Case, page 56) has

been fully executed, all parties claimants to the fund owed by Day having discharged their mechanics liens and discontinued the suits thereon and a release having been given by the Trustee in Bankruptcy releasing Day from all claims in favor of the bankrupt's estate. Appellant is not appealing from this Final Decree.

All parties are estopped from attacking the validity of the orders and decrees pursuant to which the subject matter of the litigation has been disposed of as to all parties having an interest in the same.

These decrees were entered by consent of the appellant.

The bill of complaint prayed for an injunction against all the parties defendant. (The appellant's brief asserts that there was no prayer for injunction.) The injunction was granted by the order of January 9, 1928, which it is to be remembered is *unappealed* from, and this injunction is recognized by the United States District Court by its order of March 12, 1928 prohibiting the Trustee in Bankruptcy from bringing any suit on any claim of the bankrupt against Day. (Appendix A, of this Brief).

We submit further in this brief, matters showing that this appeal is without legal or equitable merit.

The late Chief Justice Beasley has defined "jurisdiction" in the case of Munday vs. Vail, 34 N. J. Law, 418 at page 422 in the following manner:

> "Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. To constitute this, there are three essentials: First, The court must have cognizance of the class of cases to which the one to be adjudged belongs. Second. The proper parties must be

> present. And, Third. The point decided must be, in substance and effect, within the issue."

Applying these directions to the case at bar, it seems unescapable that (1) the Court of Chancery of New Jersey has cognizance of interpleader proceedings of the class of cases to which the one at bar belongs; (2) that the proper parties, to wit, all the lien claimants and the Receiver and Trustee of the Bankrupt builder—being all the claimants to the fund, deposited with the Court of Chancery—were before and appeared in the Court of Chancery; and (3) the points decided by the Court of Chancery in the case at bar were all within the issue.

The case of Munday vs. Vail, *supra,* has been repeatedly cited with approval by the Court of Errors and Appeals.

In the case at bar the Court of Chancery had possession of the fund. This cannot be denied by the appellant. The Court of Chancery having actual possession of the fund, it has exclusive jurisdiction of the entire controversy relating thereto. The Bankruptcy Court did not have possession of the fund and, therefore, the Bankruptcy Court had no jurisdiction.

> "The actual possession of the Bankruptcy Court is the indispensable condition of its exclusive jurisdiction. First Nat. Bank v. Chicago Title & T. Co., 198 U. S. 280, 49 L. ed. 1051, 25 Sup. Ct. Rep. 693; Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. Rep. 293; Murphy v. John Hofman Co., 211 U. S. 562, 53 L. ed. 327, 29 Sup. Ct. Rep. 154. In the last case cited the court said: "The jurisdiction in such cases arises out of the possession of the property and is exclusive * * * of all

other courts, although otherwise the controversy would be cognizable in them."

In the case of Eyster v. Gaff, 91 U. S. 521, Mr. Justice Miller expresses the opinion of the Supreme Court of the United States in this emphatic language:

> "It is a mistake to suppose that the bankrupt law avoids of its own force all judicial proceedings in the state or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition. The court in the case before us had acquired jurisdiction of the parties and of the subject-matter of the suit. It was competent to administer full justice, and was proceeding, according to the law which governed such a suit, to do so * * * Having such jurisdiction, and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void * * * The opinion seems to have been quite prevalent in many quarters at one time that the moment a man is declared bankrupt the district court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the circuit courts have concurrent jurisdiction, and that no other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts into the bankrupt court by the service of a Rule to Show Cause, and to dispose of their rights in a summary way. This court has steadily set its fact against this view. The debtor of a bankrupt, or the man who contests the

> right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute had not devested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee in the Circuit and District Courts of the United States, it is concurrent with, and does not devest, that of the State Courts."

On the question of jurisdiction of the Court of Chancery of New Jersey, the United States Supreme Court, speaking through Mr. Justice Taft, as recently as November 10, 1928, decided that the Court of Chancery of New Jersey has power and duty of relieving against all wrong for which law gives no adequate remedy. (Lehigh Valley R. Co. v. Board of Public Utility Com'rs., 49 Sup. Ct. Rep. 69.) Mr. Justice Taft, in his opinion, cites with approval the case of Allen v. Distilling Co., 87 N. J. Eq. 531, using this language:

> "So long as courts of equity are to serve the purpose of the creation of the Court of Chancery of England—and in this State the Court of Chancery is the successor, in all that such term implies, of that court—jurisdiction must depend only upon the existence of, or a threatened, wrong, and the absence of an adequate remedy at law * * * * Due to our habit of endeavoring to find decided cases to fit each situation, we too often overlook the fundamental reasons for the creation or evolution of the court. It received no grant of express powers, nor were express duties imposed upon it. The law courts were left to deal with the violation of all rights for which they could give an adequate remedy. The duty of relieving against any remaining wrongs was imposed upon the Court of Chancery."

In the case at bar, the Court of Chancery of New Jersey had jurisdiction over the parties and the subject matter. The Court of Chancery of New Jersey also had actual possession of the property—the "fund". It is well settled that where property is in the actual possession of the State Court, that Court draws to it the right to decide upon conflicting claims to its ultimate possession and control. The fact that a trustee in bankruptcy may be interested in the result of litigation which is pending between parties in a State Court does not entitled the Trustee to have the proceedings in such action stayed, as between such parties, and to have the controversy transferred for adjudication to the bankruptcy court. The jurisdiction of the State Court is not ousted merely because one of the defendants in an action pending therein has been adjudicated bankrupt.

> Metcalf vs. Barker, 197 U. S. 173; Greater Amer. Exp., 102 Fed. 986; Friedman vs. Zwifler, 132 N. Y. Supp. 320; Dobbins vs. Coles, 59 N. J. Eq. 80; Manufacturing Co. vs. Ahern, 30 N. J. Eq. 569.

The contractor in the case at bar, was George E. Thomas. This contractor was the party that was adjudicated bankrupt. Any suit which the said contractor—prior to his bankruptcy—could have instituted against the complainants, would have to be brought in the State Courts. The action could not have been maintained by the Bankrupt himself in a Federal Court, if bankruptcy had not intervened. His Receiver and/or Trustee is in no better position. A State Court upon the bankruptcy of a contractor, has jurisdic-

tion to distribute money in the possession of the owner. Neither the lien claimants nor the owner consented to be sued in the Federal Courts. No suit was ever instituted by or in behalf of the Receiver and Trustee in the Federal Courts against the lien claimants and/or the complainant. None of the lien claimants filed their claims either with the Trustee or with the Referee. On the contrary, lien claims were filed and suits thereon instituted in the State Courts. The appellant was a party to said suits by Order of his Court. The State Court had jurisdiction over the parties and the subject matter and possession of the res; and it is well settled that where property is in the actual possession of the State Court, the State Court draws to it the right to decide upon conflicting claims to its ultimate possession and control. Metcalf vs. Barker, *supra*. Gordon Jones Const. Co. vs. Welder, 201 S. W. 681. See also Section 23 (b) of the Bankruptcy Laws of the United States.

The bankruptcy court did not have the property or the subject matter of the litigation (the fund) in its custody or possession. Clearly the Federal Court did not have the possession of the fund and has not had it. The State court first had jurisdiction of the controversy and the fund, and State Court was competent therefor to decide every question within the sphere of the pending cause and rightfully proceeded to adjudicate the rights of the parties in and to that fund. It is claimed that as questions arise under the bankruptcy law, the Federal Court should assume jurisdiction; but the State court is competent and has power to determine those questions.

Frank vs. Vollkomer, 205 U. S. 521; Doolittle vs. Mutual Life Ins. Co. of N. Y. et. al., 249 Federal Reporter 491; Davis vs. Planters Trust Co., 196 Federal Reporter 970.

"A court of equity which has acquired jurisdiction of the subject matter and of the parties to a controversy may, and it should, grant complete relief, to the end that litigation over it may cease and a multiplicity of suits may be avoided."

In re Blake, 17 A. B. R. 668, 150 Fed. 279.

"Where all parties in lien cases consent that the owner may pay the fund into the bankruptcy court the litigation may be there carried on. Without consent of the parties, the State court is the proper forum, where it is not the owner but the contractor or sub-contractor who is the bankrupt and where third parties claim interests."

4 Remington on Bankruptcy, pages 152-153, in re Cotton, 209 Fed. 124;; Nelson Supply Co. vs. Leary, 49 Utah 493, 164 Pac. 1047.

The parties in the case at bar *did not* consent that the owner (Day) pay the fund into the bankruptcy Court, neither did either the Complainants or the lienors consent to carry on the litigation in the bankruptcy Court. There is nothing in the State of Case to the contrary. Hence, it follows that the proper forum where this litigation could be carried on is in the State Courts. As hereinbefore indicated, the action could not have been maintained by the Bankrupt himself in a Federal Court, if bankruptcy had not intervened, and

the Receiver and Trustee of the bankrupt is in the same position—the Receiver and Trustee, too, cannot maintain this action in a Federal Court.

Brumby vs. Jones, 141 Fed. 318
Plaut vs. Gorham Mfg. Co., 174 Fed. 852

The owner of property holding a fund or owing money on a building contract, subject to mechanics' or subcontractors' liens, may not be sued in the bankruptcy court.

Remington on Bankruptcy, Section 2189.

The bankrupt law has not deprived the State courts of jurisdiction over suits brought to decide the rights of property between the bankrupt and third person.

Barbank vs. Bigelow, 92 U. S. 179.

As counsel for complainants-respondents has indicated in this Brief, mechanics liens created by State Law are within Bankruptcy Act, Sec. 67d (Comp. St. Sec. 9651) providing that liens therein described shall not be affected by Bankruptcy Act.

In re Caswell Const. Co. Inc., 13 Federal Reporter (2nd Series) 667.

Mechanics liens filed after adjudication in bankruptcy within time required by State law take precedence over interest of trustee in bankruptcy.

In re Caswell Const. Co. Inc. *supra.*

The fact that one of the defendants has been adjudicated a bankrupt does not oust the State court of jurisdiction.

Friedman vs. Zweifler, 132 N. Y. Supp. 320.

"A court of equity which has acquired jurisdiction of the subject matter and of the parties to a controversy may, and it should, grant complete relief, to the end that litigation over it may cease and a multiplicity of suits may be avoided."

In re Blake, 17 A. B. R. 668, 150 Fed. 279 (C. C. A. Mo.)

The case of Orinoco Iron Co. vs. Metzel, 230 Fed. 40, cited in Appellant's Brief, is not applicable to the facts in the case at bar. In this Orinoco case the fund was deposited with the United States Authorities and in this Orinoco case the fund was, therefore, in the jurisdiction of the Federal Courts. *This is not the situation in the case at bar.* In the case at bar the Bankruptcy Court never had possession of the fund. The only court that had possession of the fund was the Court in Chancery of New Jersey. The Court of Chancery of New Jersey, therefore, had jurisdiction and possession of the fund and could adjudicate and determine the distribution of said fund. In re Blake, 150 Fed. 279; Heidritter vs. Elizabeth Oil Cloth Co., 112 U. S. 294; Smith vs. McIver, 9 Wheat. 532; Bindsell vs. Cashion, 60 N. J. Equity, 116.

In the case at bar, the Court of Chancery of New Jersey—a state Court—had jurisdiction over the parties and the subject matter and parties and possession of the fund. It is generally held that where a Court takes possession of property, it has jurisdiction to determine all claims affecting it.

Metcalf vs. Barker, 187 U. S. 173; 7 C. J. 102; 7 C. J. 34; Wabash R. R. Co. vs. Adelberg, 208 U. S. 38; Lyon Bonding & Surety Co. vs. Karatz, 262 U. S. 77.

However, whatever question there might be in the case on this point, is settled by the Order of the United States District Court—the Court which appointed the appellant as Receiver and Trustee. That Order (Case, page 14) expressly directs the Receiver and Trustee (the appellant herein) to submit himself and his rights to the jurisdiction of the Court of Chancery "and determine his rights thereunder." (Case, page 15, last paragraph). This Order entered by the United States District Court, cannot be questioned by the appellant in any State Court. This Order is not reviewable by any State Court and cannot be attacked by the appellant in these proceedings.

In addition to this, it may well be said, that the appellant entered a general appearance in the proceedings before the Court of Chancery and thereby waived any possible question of jurisdiction. It conclusively appears from the State of Case, that this appellant participated in the proceedings had before the Court of Chancery, by acquiescing in the Orders and Decrees entered in that Court, in manner following: (1) The appellant consented to the Order continuing restraint (Case, pages 35-37); thereafter (2) the appellant, through Alan Bruce Conlin, his counsel, stipulated as to the distribution of the fund deposited with the Court of Chancery (Case, pages 38-39); the appellant (3) also consented to Order referring this matter for adjudication to the Honorable Vice Chancellor Berry (Case, pages 40-41), and also appeared and consented to the entry of the Restraining Order and Order Denying Motion to Dismiss (Case, pages 42-44), also to the Interlocutory Decree (Case, page 45) filed simultaneously therewith. The appellant further participated in the proceedings before the Court of Chancery and did not then ques-

tion its jurisdiction, by the appellant consenting to the entry of the Final Decree (Case pages 49-52) and to the making and entering of the Amended Final Decree and Order of Distribution (Case, pages 56-59), both of which carried into effect the terms of the Stipulation heretofore entered into by the appellant (Case, pages 38-39. Mr. Alan Bruce Conlin, as the then counsel of the present appellant, signed said Stipulation, Orders and Decrees aforementioned). Furthermore, in order to dispose of the claim of the Bankrupt Trustee against the Complainants herein, the appellant voluntarily agreed to execute and deliver release to complainants. (Case, page 58, line 24).

Under the Order aforesaid (Case, pages 14-15) the Trustee had full authority to submit himself and his rights to the jurisdiction of the Court of Chancery. By his acts as set forth in the preceding paragraph, the Trustee also voluntarily submitted himself and his rights to the jurisdiction of the Court of Chancery. As the Court of Chancery has jurisdiction of the subject matter of the controversy, the Trustee (the present appellant) becomes bound by the adjudication, whether or not the decision of the state court is favorable or unfavorable to him. Furthermore, it is apparent that the appellant further appeared and consented to the entry of the Order now being appealed from. The Trustee is therefore in no position to lawfully avoid the enforcement of the decree.

> Commercial Trust Company vs. Drayton, 90 N. J. Eq. 264; and cases therein cited.

We are at a loss to understand how any serious consideration can be given by this Honorable Court to such inconsistent positions of the Appel-

lant. While a defendant may take alternative positions as to certain matters or things, he cannot take inconsistent ones with reference to the very same identical matter or thing.

Cleaves vs. Yeskel, 141 Atlantic Reporter 814 (not officially reported).

The matters contained in the Petition of Appeal of the Appellant were not questions raised by this Appellant in the Court of Chancery below in connection with Order now being appealed from.

Appellant never raised any question of jurisdiction in the Court of Chancery.

In this Appeal, appellant now raises question of jurisdiction directed to an Order made December 3, 1927. This question of jurisdiction *was not* raised by appellant in the Court of Chancery. This appellant cannot raise on appeal any point not taken at trial. Questions not presented in the trial court cannot be considered on appeal. Questions not raised in the lower court will not be considered on appeal.

Wittke vs. Wittke, 102 N. J. Law 176; Ruggles vs. Ocean etc., 89 N. J. Law 180; Shaw vs. Bender, 90 N. J. Law 147; Bell vs. Mecum, 75 N. J. Law 547; Hubatka vs. Maierhoffer, 81 N. J. Law 410, reversing judgment; Same vs. Meyerhoffer, 79 N. J. Law 264; Osborn vs. Gurtner, 75 N. J. Law 224; Streuli vs. Wolowitz, 80 N. J. Law 180.

The judgment of a Court of general jurisdiction will not be reversed on a point not raised below. 81 N. J. Law 427, affirming judgment Fay vs. Thornton, 80 N. J. Law 104.

Questions argued in the brief, but not raised at

the trial, cannot be considered. Corcia vs. Guliano (N. J. Court of Errors and Appeals) 84 N. J. Law 404-8.

The Bill of Complaint does state an equitable cause of action and it being elementary that the Court of Chancery of New Jersey has exclusive jurisdiction to hear and determine controversies of the class of cases to which the one at bar belongs, any argument of appellant's counsel to the contrary is without merit.

Illingworth vs. Rowe, 52 N. J. Eq. 360.

POINT III.

No appeal will lie from order entered in this cause denying motion to dissolve restraint.

The attention of this Honorable Court is at this time respectfully directed to the Motion upon which the Order appealed from was entered. (Case pages 63-64). It should be noted that this motion is not made on behalf of the trustee, but is made in behalf of "Union County Coal & Lumber Co., a general creditor of George E. Thomas, bankrupt." The said Union County Coal & Lumber Co. *as a general creditor of George E. Thomas, bankrupt,* was not a party to the suit, and therefor could not be permitted to make any motion in it. Furthermore, the said Union County Coal & Lumber Co. *as a general creditor of George E. Thomas, bankrupt,* also gave notice of this motion to the Receiver and Trustee—the appellant herein. The appellant has inadvertently or otherwise omitted to include this Notice in the State of Case, although requested by counsel for Complainants so to do.

This Notice is therefore included in this Brief of Complainants-Respondents (Appendix D, this Brief).

The law is settled in New Jersey that no one but a party to a suit can make any motion in it, except for the purpose of being made a party. The Receiver and Trustee was enjoined. The Receiver and Trustee *did not* ask to be relieved from the injunction and did not make any motion before the Court of Chancery to vacate the injunction. A creditor of the bankrupt cannot ask it for the Receiver and Trustee. No permission was granted by the United States District Court to the said creditor to ask it in behalf of the Receiver and Trustee. No one but a party to a suit can make any motion in it. Linn vs. Wheeler, 21 N. J. Eq. 231. A motion made by a stranger to the suit must be dismissed. Collins vs. Kiederling, 87 N. J. Eq. 12; Photo Engraving Co. vs. Schonert, 95 N. J. Eq. 12; City of Passaic vs. Gross, 99 N. J. Law 409. The conduct of the suits belong to the parties to the suits and they only have the right to apply for order or direction. Collins vs. Kiederling, *supra*. In the case at bar, the only one who had the right to apply for the Order was the Trustee. The Trustee alone has the right to maintain an action of this kind. Bingaman vs. Commonwealth etc. 15 F (2nd) 119; Kobrin vs. Drazin, 97 N. J. Eq. 400; Muller vs. Schram, 100 N. J. Eq. 143; Dean vs. Shingle, 46 A. L. R. 1156. In the case at bar, the Trustee did not move to vacate the restraint imposed upon him. On the contrary, when the motion to vacate the restraint was before the Court, the Trustee requested the Court *not* to vacate its previous restraint. The Trustee—this appellant—requested the Court of Chancery to continue its previous restraint and again make

them permanent. The Trustee has also further expressed approval of the proceedings had before the Court of Chancery. (Appendix C, this Brief).

"Where the trustee refused to act or violates his duty, the United States District Court alone has jurisdiction to authorize a creditor to intervene or to institute and prosecute a suit and then only in the name of the trustee."

Babbit vs. Read, 240 Fed. 694.

An examination of the order of Judge Clark of the United States District Court (Appendix A of this brief) will show not only that the creditor has no authority of the court to bring an action against complainants in the name of the trustee, but that the appellant trustee was and is expressly prohibited from doing so.

Appellant is appealing from the decree of the Court of Chancery made on April 10, 1928, (Case, pages 65-67), The *motion* made by a creditor of the bankrupt (and which resulted in the making of this Order or Decree) was for an Order dissolving the restraint imposed on December 3, 1927, upon the Receiver and Trustee (Case, pages 63-64), *"if in the opinion of the Court it shall seem necessary or desirable to make such Order."* (Case, pages 63-64). The motion was not directed to the Restraining Order entered January 9, 1928. (Case, pages 42-44). This Restraining Order has not been modified or vacated and has not been appealed from. It is still in effect and operative. This Restraining Order does not contain the phrase "until the further order of the Court."

The motion of the creditor of the bankrupt in the Court below, was, therefore, a motion addressed to the discretion of the Court, as is apparent from the particular phrase therein contained, viz: "if in

the opinion of the Court it shall seem necessary or desirable to make such order." (Case, pages 63 and 64). Appellant in its Brief on page 6, states this motion was argued to obtain a ruling by the Court thereon."

> "The application to open the decree was addressed to the discretion of the Court. There is nothing which indicates that the discretion of the Court was abused or that the order as made was the result of mistake or of any imposition practiced on the court. This Court (Court of Errors and Appeals of New Jersey) will not undertake in such a case to review the Order for the purpose of determining whether it shall substitute its discretion for that of the Court of Chancery. Such an Order is not appealable."
>
> Williams vs. Lowe, 79 N. J. Equity 173; Masionis vs. Rommel, 138 Atlantic Reporter 892, (not officially reported) dismissing appeal (Chancery) 100 N. J. Equity 138; Reed vs. Patterson, 44 N. J. Equity 211.

Appellant does not contend that the discretion of the Court was abused, or that the order was made as result of mistake or imposition practiced on the court.

The attention of the Court is respectfully directed to the Final Decree entered January 9, 1928, and the Amended Final Decree and Order of Distribution entered February 7, 1928, (pages 49 and 56 of Case). Both of these final decrees were entered by consent of this appellant, and by parties defendants in the Court below, and is a judgment, conclusive and binding upon the parties thereto and their privies. After the entry of these mentioned decrees, this motion was presented by the

creditor of the bankrupt—not by the trustee—to dissolve a restraint imposed or intended to be imposed upon the said Receiver and Trustee. The motion was not one to open or vacate the restraint imposed on January 9, 1928, or these Final Decrees entered January 9, 1928, and February 7, 1928. The appellant is not appealing from the entry of either of these restraining orders and decrees of January 9, 1928, or February 7, 1928. The appellant is appealing from the refusal of the Vice Chancellor to grant a motion to a general creditor of the bankrupt to dissolve a restraint imposed or intended to be imposed on December 3, 1927, upon the Receiver and Trustee, so as to permit the Receiver and Trustee to sue on the Trustee's claim against the Complainants, which claim has already been adjudicated and passed upon in these proceedings, and has been disposed of by the entry of the January 9, 1928 restraining order and January 9, 1928, and February 7, 1928, final decrees. Such questions, under the laws of our State, are *res judicata,* and the appellant is precluded from making this appeal.

> Paterson vs. Baker, 51 N. J. Equity 49; In re Walsh's Estate, 80 N. J. Equity 565; Cleaves vs. Yeskel *et al,* decided May 14, 1928 and reported in 141 Atlantic Reporter 814. (Not officially reported).

The claims of the trustee was admittedly for the same items and for the same materials and labor as is included in the mechanic lien claims. The subject matter of the lien claims and the claim of the trustee are identical. (Case, page 69, Conclusions).

Where an Order refusing to open a decree of the

Court of Chancery is not shown to be an abuse of discretion or the result of mistake or imposition practiced upon the Court, it is not reviewable in the Court of Errors and Appeals, as the question as to whether or not a decree shall be reopened rests within the discretion of the court making the decree. This Court will not substitute its discretion for the discretion of the Court of Chancery. An appeal taken to review such an Order will be dismissed.

Hudson Trust Co. vs. Boyd, 80 N. J. Equity 267;
Masionis vs. Rommel, 138 Atlantic Reporter, 892 (not officially reported).

This appeal should be dismissed, it appearing that the law in this State is well settled that an appeal will not lie from an Order that was entirely within the discretion of the Court of Chancery.

The Orders and Decrees heretofore entered in the Court of Chancery should not be reversed at the instance of the appellant, since they were the product of his own suggestion, and were entered in open Court in his presence and with his knowledge and consent. A defendant cannot have a decree moulded into a form suggested by him and then have it reversed because of the form so imparted to it.

Williams vs. Lowe, 79 N. J. Equity 173.

The decree and orders entered on January 9, 1928, as heretofore indicated, were entered by consent and in the presence of counsel for all the parties. Having been entered by consent, they can not be reversed and are not appealable. These de-

crees and orders are equivalent to a judgment and must be respected and treated as such.

Pemberton's Case, 40 N. J. Equity 520.

If after a decree in equity a party shall proceed at law for the same matter, equity will restrain him by injunction; such suit at law is treated as a contempt of court.

Sarson vs. Mascia, 90 N. J. Equity 433.

It is respectfully submitted by this respondent, that it would neither be just nor equitable to set aside the order of April 10, 1928.

Appellant's appeal is from a motion addressed to the discretion of the Court. It is well settled under the many decisions heretofore rendered by this Honorable Court, that under such circumstances, the Court of Errors and Appeals will not substitute its discretion for that of the Court of Chancery, and that in such cases presented to this Honorable Court, the appeal will be dismissed. The motion was made after Final Decree in this cause and was addressed to the discretion of the Court. The motion was denied. There can be no appeal by appellant.

Williams vs. Lowe, 79 N. J. Equity 173; Paterson vs. Baker, 51 N. J. Equity 49; In re Walsh's Estate, 80 N. J. Equity 565; Cleaves vs. Yeskel, 141 Atlantic Reporter, 814 (not officially reported); Masionis vs. Rommell, 138 Atlantic Reporter 892 (not officially reported); Reed vs. Paterson, 44 N. J. Equity 211; In re Lutz, 99 N. J. Equity 409, Passaic &c. vs. Consolidated, 100 N. J. Equity 186.

The Order appealed from was entered April 10,

1928. The Notice of Appeal was filed April 10, 1929—exactly one year after entry of Order appealed from.

Aside from the law that the appellant has no right of appeal from the order or decree referred to and aside from the fact that the grounds of appeal set forth in Appellant's Petition of Appeal are not grounds which would sustain this appeal the delinquency here exhibited by the appellant is of such character as to justify the intervention by this Honorable Court, and this Court, of its own motion, should dismiss this appeal upon such terms as may be just.

> Williams vs. White, 98 N. J. Law 140;
> Bahler vs. Robert Treat Baths, 140 Atlantic Reporter 323. (not officially reported).
> Vanderbilt vs. Chioscinski, 98 N. J. Equity 393.

Appellant is barred by laches from prosecuting this appeal. The decree or order appealed from is an interlocutory decree or order, and the appeal was not taken in due time. This is aside from the fact that this appeal is made on behalf of a party who consented to the entry of a final decree herein and therefore has no standing to press this appeal.

The object of the interpleader proceedings have been attained, under decrees of the Court of Chancery which are unappealed from.

The monies paid by complainants into the Court of Chancery by order of that Court and due to *either* the lien claimants *or* to the Trustee have been paid out by the Court of Chancery under its Orders not appealed from. The defendants, *amongst themselves,* agreed to the distribution thereof to the lien claimants. The lien claimants have executed and filed discharges and discontin-

uances of mechanics lien claims and suits and the Trustee has executed release of his book account claim. There is nothing upon which judgment of reversal, if any, could operate, and therefore no appeal will lie. 98 N. J. Eq. 692.

All of the lien claims and suits instituted thereon were admitted and conceded by the appellant to be valid and correct. Vice Chancellor Berry's Conclusions affirms this contention of these Complainants-Respondents. Serious consideration cannot then be given to any suggestion by appellant (Appellant's Brief, Page 11, last paragraph) that some or any of the lien claims might fail for want of proof. That "argument" on the part of appellant was not made to the Vice Chancellor. This appellant, on the contrary, conceded the validity and correctness of the lien claims (State of Case, page 70, first sentence) and these facts appear in the Conclusions of the Vice Chancellor and cannot be now questioned or argued by the appellant before this Honorable Court. The issue here is not of facts. Neither can appellant question the contents of the several releases executed by the lienors and the trustee in bankruptcy. This is a matter that complainants alone can present if they be dissatisfied with the form of release presented. When Complainants did not receive proper form of release, they obtained corrected releases, which were filed, (Case page 60, replacing Release, Case, page 53). The final decree (Case, page 56) refers to the claim of the Receiver and Trustee in the following phraseology: "And it is further ORDERED, ADJUDGED and DECREED that the defendant, Harry G. Hendricks, receiver and trustee of George E. Thomas, bankrupt, is not entitled to any of the moneys on deposit with this court, and that the said Harry G. Hendricks, receiver and trustee of George E. Thomas, do execute a valid and effec-

tual release, releasing the complainants herein from all claims up to and including the amount of moneys paid under this order." The Release executed by the Receiver and Trustee (Case, page 60) also makes mention of the book account claim of the Receiver and Trustee and particularly refers thereto.

A finding of fact not contended to be without support in the evidence is not reviewable in the Court of Errors and Appeals; review in that court being confined to questions of law only.

> Defiance Fruit Co. vs. Fox, 76 N. J. Law 482.

Judgment of lower court will be sustained, if there is any evidence to support findings on which it is based. Findings in equity will not be disturbed when sustained by the evidence.

> Pittis vs. Pittis, 84 N. J. Equity 506; Kavanaugh vs. Berman, 135 Atlantic Reporter 471; Kroop vs. Scala, 135 Atlantic Reporter 501, (official state reports not available).

While *res adjudicata* by a decree in equity is pleadable in an action at law, the party holding the decree is not driven to that defense, but may proceed in equity to restrain the action at law.

> Sarson vs. Maecia, 90 N. J. Equity, 435.

The restraining power of a court of equity is exercised for the protection of rights, the existence of which are clearly established, and so far only as may be essential for the protection of those rights.

> Millville Gas Light Co. vs. Vineland Light, etc., Co., 72 N. J. Equity 305.

POINT IV.

Pleadings and orders entered by Court of Chancery refer to claim of Appellant with sufficient particularity.

Appellant in its Brief has suggested that the interlocutory decree entered January 9, 1928, (Case, page 45 referred to in Appellant's Brief on page 5) as well as the Final Decree entered also on January 9, 1928, and Amended Final Decree entered February 7, 1928, (Case, page 49 and page 56 referred to in Appellants Brief page 6) do not make reference to the claim of Thomas against Day on open account. This contention is without merit.

An examination of the Bill of Complaint (Case, page 18, paragraph numbered 10; also Case, page 22, paragraphs numbered 17 to 19; Case, pages 23 and 24, paragraphs numbered 3 and 5) discloses beyond any doubt that the claim of Thomas against Day is set forth with sufficient particularity.

The Bill of Complaint also prays restraint not only against the lien suits, but also against suit of the appellant on the book account. (Case, pages 23-24, paragraphs numbered 3 and 5). The argument of appellants counsel (Appellant's Brief, page 6) to the contrary is therefore without merit.

The interlocutory decree (Case, pages 45 to 48) briefly summarized—insofar as it pertains to the claim of Thomas against Day—decrees that all of the defendants having failed to answer the aforementioned Bill of Complaint the same is hereby taken as confessed against all the said defendants and each of them; that the said bill in nature of bill of interpleader is properly brought by the

complainants in this cause, and that the said complainants are entitled to the relief in their said bill of complaint prayed. This decree further provides (Case, pages 47-48) "that the said defendants Union County Coal & Lumber Co., John D. McCollum and Aaron O. Smith, trading under the firm name of McCullum & Smith, Harvey J. Tiger and Arthur E. James, and Harry G. Hendricks, receiver and trustee of George E. Thomas, bankrupt, be and each of them are hereby directed to severally execute and deliver to these complainants *valid, proper and effectual general releases*, releasing said complainants (jointly and severally) from any and all liabilities arising out of their said respective claims and demands submitted by them and each of them and as in said bill of complaint more particularly set forth." This decree is in proper form and contains all essentials requisite to interpleader decree, as an examination thereof in its entirety will disclose.

It is respectfully submitted that the entry—by consent and with the knowledge of the appellant and in his presence in open Court of the Interlocutory Decree on January 9, 1928, simultaneously with the entry by consent of the Final Decree filed on January 9, 1928, terminated the liability of these Complainants to the appellant and remaining defendants, and each of them, and their privies and parties in interest, and that these Complainants-Respondents were thereupon "released, acquitted and discharged from all claims by or liability to all of the defendants in this cause and each of them", as well as their privies.

Willison vs. Salmon, 45 N. J. Equity 257.

A decree of interpleader will conclude a defendant thereto as to the fund in controversy, even

though his right to sue at law on his claim is not enjoined.

McMurray vs. Sisters of Charity, 68 N. J. L. 312.

On January 9, 1928, and simultaneously with the entry of this decree of interpleader, a restraining order was entered (Case, page 42) which, insofar as it related to the book account claim of Thomas against Day, provides that (Case, page 43, line 20) it is "ORDERED that the defendants Harry G. Hendricks, Receiver and Trustee of George E. Thomas, bankrupt, Union County Coal & Lumber Co., John D. McCollum and Aaron O. Smith trading under the firm name of McCollum & Smith, Arthur E. James and Harvey J. Tiger, and each of them be and they are hereby enjoined and restrained from commencing or instituting any action or actions, suit or suits, or other proceedings against these complainants to recover the said sum of eight thousand eight hundred and ninety-six dollars and twenty cents ($8,896.20), or any part thereof."

This Restraint of January 9, 1928, is significant in several aspects. In the first place it supersedes the restraint obtained December 3, 1927. (Case, page 31). The restraint of December 3, 1927 contains the phrase "until the further order of this Court." An examination of the restraint of January 9, 1928, will disclose that no such phrase is contained therein. In the second place, this restraint of January 9, 1928, was entered on the Order to Show Cause of December 3, 1927, which directed "that the defendants and each of them show cause—why the restraint prayed for in the bill of complaint shall not be granted." The bill of complaint con-

tains a special prayer for injunction in addition to prayer for general relief, and under these prayers, injunction can be granted. (Case, page 23, paragraph numbered 3; Case, page 25, paragraph numbered 9).

City of Newark vs. Erie R. Co. 76 N. J. Equity 317.

The general rule is that a preliminary injunction will not issue where the material facts in the bill on which the complainants equity depends, are met by a full, explicit and circumstantial denial under oath.

Meyer vs. Somerville, 79 Equity 613; Citizens Coach Co. vs. Camden Horse Railroad Co. 29 N. J. Equity 299; Schleman vs. Whittle, 99 Atl. 206; Brunetto vs. Town of Montclair, 87 N. J. Equity 338; D'Elia vs. Warren, 142 Atl. Rep. 553 (not officially reported).

No denial under oath was filed by any of the defendants. The cause was therefore, one in which no denying affidavits was filed, neither was any answer filed by any defendants in this cause. Under these circumstances, it must be conceded that the complainants became entitled to the relief prayed for by them in their Bill of Complaint.

Whenever preliminary relief is granted on a bill or petition with affidavits annexed, and the defendant does not answer, but defaults in pleading a decree *pro confesso* against him may include a decree for the relief prayed in the bill or petition, or a final decree may be made thereafter, without the taking of further proofs.

Perrine vs. Perrine, 100 N. J. Equity 33.

The restraint imposed upon the Trustee on Jan-

uary 9, 1928, as aforesaid, is still in effect and has neither been modified nor vacated. The appellant is not appealing from that restraint and this must be conceded even by appellant.

The stipulation signed by all the parties (Case, page 38) disposes of the fund deposited with the Court of Chancery by distributing this fund to the lienors, thus indicating that the lienors are entitled thereto and not the Trustee.

Final Decree (Case, page 56) insofar as it relates to the claim of Thomas against Day decrees "That the defendant, Harry G. Hendricks, receiver and trustee of George E. Thomas, bankrupt, is not entitled to any of the moneys on deposit with this Court, and that the said Harry G. Hendricks, receiver and trustee of George E. Thomas, do execute a valid and effectual release, releasing the complainants herein from all claims up to and including the amount of moneys paid under this order." The amount of moneys "paid under this order" is $8896.20. The order is consented to by all parties, including the appellant Receiver and Trustee. (Case, page 59).

The claim of Thomas against Day is further disposed of in the Release executed and filed by the Receiver and Trustee of Day (Case, pages 60 to 62), and approved as to form by Vice Chancellor Berry.

The first release executed by the Trustee (Case, page 53) was not in proper form and was not approved as to form by the Vice Chancellor. An examination of the original second release executed by the Trustee (Case, pages 60-62) will disclose that this second release was approved by the Vice Chancellor.

It therefor is apparent that the claim of Thomas (represented by the appellant), against Day is

effectually and finally eliminated as a claim against Day by the entry of all of the foregoing orders, decrees and release, and that Thomas and the Trustee no longer have any claim against Day whatsoever.

The attention of the Court is by these complainants-respondents respectfully directed to the consent Final Decree wherein all defendants—including appellant did admit and acknowledge that:

> "all of the defendants herein were heretofore ordered to interplead as to the said fund so deposited with the Clerk of this Court in this cause by the complainants." (Case, page 57 also Case, page 49)

This Order to interplead (Interlocutory Decree filed January 9, 1928, page 45, State of Case) was filed simultaneously with the Final Decree—both being filed on January 9, 1928. The attention of the Court is again respectfully directed to the fact that all these pleadings were simultaneously filed —all on January 9, 1928—with the consent of appellant.

In order to make provision for counsel fees, costs and clerks commissions, an Amended Final Decree was drawn, consented to and filed. (See paragraph 5, Stipulation, Case, page 39; Amended Final Decree, Case, page 57).

In spite of the facts set forth in the Conclusions of Vice Chancellor Berry (Case, page 69), appellant in its Brief (Page 6, Appellant's Brief) makes mention from time to time, that there was no hearing, no evidence introduced or offered, before the Court of Chancery. Vice Chancellor Berry in his said Conclusions (Case, pages 68-69) states that "prior to the bankruptcy adjudication the Union County Coal & Lumber Company filed a mechanics' lien claim against the

premises in the sum of $5,449.54. On the day of such adjudication two other mechanics' lien claims were filed, and on April 28th another lien claim was filed, all of said claims aggregating more than that the amount due from complainants to the contractor. The trustee in bankruptcy claimed the full amount of the balance due the bankrupt less certain credits, whereupon this bill was filed, and the sum due paid into court. By order of the United States District Court for the District of New Jersey the trustee in bankruptcy was directed to interplead in this suit. The appellant moved to strike out the bill of complaint, which motion was denied. The bankrupt's claim against the complainants was on book account and it subsequently appeared, and in fact was admitted by all parties, that the charges on the book account represented exactly the same items comprising the four lien claims filed, and no others."

The appellant in its Brief makes no mention to this evidence introduced before the Vice Chancellor, and appellant does not mention the Order of the United States District Court directing the Trustee to interplead. Appellant also forgets to mention the Order of the United States District Court denying permission to institute suit against Complainants. (See this Brief, Appendix A). Appellant also forgets that the fund was distributed by the Court of Chancery, under agreement between the litigants and with the consent of this appellant. (See Consent Decree, Case, pages 56-59). Day did not pay any money to the lien claimants.

In Kirtland vs. Moore, 40 N. J. Equity Reports 106, at page 108, the Court said:

> "This court, in disposing of the questions in dispute among the defendants to a bill of interpleader, is at liberty to adopt any

> recognized method of trial which will best accomplish justice in the particular case. If, at the hearing on the bill, the questions in which the defendants are alone interested * * * are ripe for decision, the court may, at the same time that it decides the question whether the bill was properly filed or not, also decide the questions at issue among the defendants, and dispose of the case finally. If, however, the case, as among the defendants, is not, at that time, in condition to be properly disposed of, the court may then adopt such course as may seem best under the circumstances, as by directing that issues shall be raised by appropriate pleadings, or that an action at law shall be brought, or that such other course shall be taken as may seem best suited to the nature of the case.
>
> Condict vs. King, 2 Beas. 375; 2 Dan. Ch. Pr. (5th Am. ed.) 1569."

In the recent case of Bayonne vs. Hill, 100 N. J. Equity 479, at page 481 (affirmed by Court of Errors and Appeals, 138 Atlantic Reporter 927 but not yet officially reported), Vice Chancellor Bentley said:

> "Parties agreed completely upon the division of the fund to the last cent, and upon their agreement and stipulation a decree was made. If any proofs are to be required in a decree which embraces the expressed wishes of all the parties to the suit with any interest therein at the time of final hearing, I shall have to revise my notion of the practice of this court in that regard. It is done in hundreds of cases, and I have never known of the validity of such a decree being questioned. It is not similar to granting a decree without any proofs after answer filed and upon the failure of the defendant to ap-

pear at the time and place designated for the final hearing. In case such as the *sub judice,* the parties first appeal to the Court, but later say "We have settled our differences but require a decree", in this instance, to release the grasp of the Clerk upon the fund."

POINT V.

Court of Chancery did not interfere with administration of bankrupt estate.

The bankrupt contractor before he was adjudged a bankrupt took no steps which he could have done to secure a lien upon the funds in the hands of the owner, nor did the trustee in bankruptcy, who after his appointment was clothed with all the rights of the bankrupt and of its general creditors, take any steps in that direction. The bankruptcy of Thomas (the bankrupt contractor) wrought no change in the situation of the complainant and conferred no greater right on the trustee than the bankrupt himself possessed; and since neither the bankrupt nor the trustee at any time acquired a lien upon the fund in the hands of Day (the owner) which could only be properly secured under the statute, by a compliance with its provisions, and since this was not done, the bankruptcy became, in the course of affairs, only an immaterial incident. The funds in the hands of the Owner (Day), could not in any aspect have become part of the assets of the bankrupt contractor until he or his trustee had impressed upon such fund a statutory lien in the bankrupts favor, and even such statutory lien would be subservient to the statutory liens upon the fund of the parties

who furnished the materials and did the work for the bankrupt contractor. The Mechanics Lien Law is the outgrowth of a settled and well defined state policy, one of the principal objects of which is to secure to the merchant or trader who furnishes materials and to the mechanic or workmen who performs labor, payment for the materials furnished and labor performed. The obligation resting upon the owner is to pay the principal contractor unless mechanics lien claims of subcontractors, materialmen or workmen have been filed, and when such claims are filed, the owner may pay to the principal contractor, all sums *in excess* of what is required to meet the claims of lienors. A proceeding to enforce a lien claim on funds withheld from the principal contractor, will not be dismissed at the instance of a trustee in bankruptcy of the contractor on the theory that the funds sought to be recovered are assets of the contractor and that the materialmen and sub-contractors are required to come in under the bankruptcy proceedings and share with general creditors.

> Ocumpaugh vs. Linde & Griffith Co. *et al.*
> 94 N. J. Equity 602 reversed in 95 N. J. Equity 228.

The trustee in bankruptcy in the case at bar was entitled only to such sums in excess of what is required to meet the claims of the lienors. The trustee admitted and conceded the correctness and validity of the lien claims and the respective amounts claimed by them. Nothing remained in excess of amount due lienors. Consequently, there was nothing for the bankrupt estate to administer.

The contention of the appellant that Day purchased the lien claims (Appellant's Brief, page 12) is without foundation and is incorrect. The lien-

ors were paid by the Clerk in Chancery under Final Decree consented to by the appellant. (Case, pages 56-59)

The complainants *did not* pay any of the lienors. There was no payment by complainants to any one, except to the Chancellor of New Jersey. The Complainants deposited the fund $8896.20) in the Court of Chancery (by order of said Court) to be paid by and under direction of the Court to the persons entitled thereto. The Clerk in Chancery is not and was not the agent of Day.

The Clerk in Chancery is an officer of the Court of Chancery and his duties are prescribed by law and by the Chancellor through rules promulgated from time to time, as the Chancellor may deem necessary and advisable. The Clerk in Chancery is the "agent" of the Chancellor. Moneys paid into the Court of Chancery are payable to the order of "Chancellor of New Jersey" and delivered or sent to "Clerk in Chancery, Trenton, N. J." and deposited by said Clerk to the credit of the "Court of Chancery of New Jersey". No moneys against this account can be drawn, except by check of the Clerk *countersigned* by the Chancellor or a Vice Chancellor. Chancery Rule 167. The Clerk in Chancery—as an officer of said Court—could not himself pay any of the moneys deposited with him under this Rule, unless so ordered by the Chancellor. "All proceedings under an order not actually signed shall be null and void". Chancery Rule 175. The lienor defendants and the Trustee in Bankruptcy having between themselves settled their differences, required a decree "to release the grasp of the Clerk upon the fund".

Bayonne vs. Hill, 100 N. J. Equity 479 (affirmed 138 Atlantic Reporter 927, but not yet officially reported).

If, as between the lienors and trustee in bankruptcy, these defendants agreed that the four mechanic lien claimants were entitled to the fund and not the receiver and trustee in bankruptcy, and the fund was thereafter by the Court accordingly distributed, and this is the "error" which appellant complains of, this "error" cannot be charged against complainants. Surely under these circumstances, it would neither be equitable nor just to set aside the decree or order of April 10, 1928, and compel complainants to pay this claim twice.

If any "error" was committed (and complainants respectfully deny that any error was in fact committed) that "error" is chargeable to the defendants themselves as between the defendants themselves. Appellant is not appealing either from this Decree or from any other Order and Decree, except that refusing to vacate the restraint of December 3, 1927. Appellant is not appealing from the restraint imposed on January 9, 1928 which is still in effect and supersedes that of December 3, 1927.

The Court of Chancery—with the consent of all the defendants, also with the consent of the Receiver and Trustee in Bankruptcy—being constrained to hold that all of the fund must be distributed among the lien claimants, there was nothing to administer upon by the trustee in bankruptcy. Consequently there is no assets of George E. Thomas, bankrupt. The orders or decrees accordingly made by the Court of Chancery in these proceedings, were not such as to restrain said Harry G. Hendricks, trustee in bankruptcy from the due administration of the bankrupt estate and the collection of debts owing the bankrupt as nothing was done by the Court of Chancery affecting "debts

owing the bankrupt" in view of the admission by the appellant trustee that the lien claims were valid and that the lien claimants were entitled to the fund and not the trustee, and therefore, the Court of Chancery by approving and filing the Interlocutory Decree and Final Decree on January 9, 1928, and the Amended Final Decree on February 7, 1928, aided rather than interfered with "the due administration of the bankrupt estate." The Bankruptcy Court had jurisdiction only of amount remaining in Chancery Court in excess of payments to lienors.

The obligation resting upon the owner is to pay the principal contractor unless mechanics' liens of sub-contractors and materialmen or workmen are filed and suit instituted thereon, and when such mechanics' liens are filed and suit instituted thereon and it is admitted that said mechanics' liens claims are valid, then the owner may pay to the principal contractor all sums in excess of what is required to meet the claims of lienors. The lienors should be paid first and if there is any money left thereafter, then the sum remaining should be paid to the principal contractor, and if the principal contractor be a bankrupt, then to the trustee in bankruptcy of the said principal contractor.

> Ocumpaugh vs. Linde and Griffith Co. *et al.*, 95 N. J. Equity 228 reversing 94 N. J. Equity 602.

> "The bankrupt himself would not be entitled to recover the moneys and his trustee is in no better position than he would be. The only interest the bankrupt had in these moneys was in whatever surplus there might be after the mechanics' lien claims had been paid."

> In re Cotton, 209 Federal Reporter 124.

Payments in discharge of a valid lien are not unlawful preferences within the Bankruptcy Act.

> Root Mfg. Co. vs. Johnson, 219 Federal Reporter 397.

The contention of appellant that liens obtained under the Mechanics' Lien Law are dissolved or annulled by the bankruptcy of the contractor and that therefore the United States Courts have jurisdiction of the fund is without merit. The United States Courts themselves have held to the contrary.

> "A mechanics lien is not a lien obtained through legal proceedings" (within the meaning of Section 67 (f) of the Bankruptcy Laws of the United States). 4 Remington on Bankruptcy Page 138.

In re Kerby-Dennis Co., 95 Fed. 116, 36 C. C. A. 677, the law is stated in the third headnote in the following words:

> "A statutory lien for the wages of labor is not dissolved or annulled by proceedings in bankruptcy against the employer merely because such liens are not expressly preserved by the Bankruptcy Act. On the contrary, the intention of the Bankruptcy Act is to protect all liens, whether arising by contract or by statute, except only such as are expressly declared to be annulled or invalidated."

In Henderson v. Mayer, 225 U. S. 631, 32 Sup. Ct. 699, 56 L. Ed. 1233, Mr. Justice Lamar, in speaking for the United States Supreme Court, after referring to the liens that are superseded or affected by bankruptcy proceedings, in the course of the opinion says:

"But the statute was 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 they are not created by judgments, nor are they treated as having been 'obtained through legal proceedings.' "

To the same effect are South End, etc., Co., v. Harden (N. J.) 52 Atl. 1127; In re Grissler, 136 Fed. 754, 69 C. C. A. 406, 13 Am. Bankr. Rep. 508; Savings Bank v. Jewelry Co., 123 Iowa, 432, 99 N. W. 121, 12 Am. Bankr. Rep. 781; In re Horton, 102, Fed. 986, 43 C. C. A. 87; Moreau Lumber Co. v. Johnson, 29 N. D. 113, 150 N. W. 563, L. R. A. 1915 F. 1132.

A mechanics lien is not a lien given by way of preference to secure a pre-existing debt. It comes under none of the heads of those liens or conveyances or transfers that are void as against the trustee. Such a mechanics lien, rather comes under the exception of clause d of Section 67 of the U. S. Bankruptcy Act of July 1, 1898 which provides that "liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice shall to the extent of such present consideration only not be affected by this Act."

> In re Kerby-Dennis Co., 95 Fed. 116 affirming 94 Fed. 818, In re New England Breeders Club, 175 Fed. 501.

This becomes plain when one comes to reflect upon the nature of a mechanics lien. A mechanics

lien arises *by operation of law* and begins with the first stone laid, the first nail driven or the first load of material dumped on the premises. It grows as the edifice grows and expands with the development. It is there in an inchoate form from the beginning. It is essentially and clearly a lien arising upon a presently passing consideration. Liens created by statute are considered *per se* "in good faith". Therefore such a lien is one given and accepted "for a present consideration" and "in good faith and not in contemplation of or in fraud upon" the Bankruptcy Act. 4 Remington on Bankruptcy, pages 139-140. This also applies to subcontractors liens.

Fehling vs. Goings, 67 New Jersey Equity 375.

Mechanic liens suits are legal proceedings that do not themselves operate to create liens, but simply to enforce or give effect to *pre-existing rights or liens,* and are not affected by the Bankruptcy Act. The case of Lazarus vs. Prentice, 234 U. S. 263 quoted on page 8, in appellant's brief, is therefore not applicable, for the reason that a mechanics lien" is not a "subsequent lien" within the meaning of the Bankruptcy Act. A mechanics lien is not a lien obtained through legal proceedings, under the Bankruptcy Act (Section 67 f). In re New England Breeders Club, 175 Fed. 510; 4 Remington on Bankruptcy Section 1430. The cardinal principle of the Bankruptcy Act is to grant to creditors only those rights which would have been theirs had bunkruptcy not intervened.

In re Cohn, 171 Fed. 568.

The bankrupt himself would not be entitled to recover the moneys *and his trustee is in no better position than he would be.* The only interest the

bankrupt had in these moneys was in whatever surplus there might be after the mechanics' lien claims had been paid.

> Ocumpaugh vs. Linde & Griffith Co., 95 N. J. Equity, 228 reversing 94 N. J. Equity 602, In re Cotton, 209 Federal Reporter 124.

The Court of Chancery did not therefore "change the status of general creditors in the bankruptcy court to that of preferred creditors" it appearing conclusively that the lien claimants were entitled to be paid out of the fund held by complainants, for the work done and materials furnished by the lien claimants, and it having also been admitted that the lien claims are valid and correct. A proceeding to enforce a lien claim will not be dismissed at the instance of a trustee in bankruptcy on the theory that the funds sought to be recovered are assets of the bankrupt and that the subcontractors (lien claimants in this present case) are required to come in under the bankruptcy proceedings and share with general creditors.

> Ocumpaugh vs. Linde & Griffith Co., 95 N. J. Equity 228, reversing 94 N. J. Equity 602.

The Court of Chancery did not (as contended by appellants) change the status of general creditors in the Bankruptcy Court to that of preferred creditors, neither did the Court of Chancery make any order affecting assets of George E. Thomas, Bankrupt, within the jurisdiction of the Bankruptcy Court or affecting the authority of the Trustee over such assets. After payment of the lienors by the Court of Chancery there was no money remain-

ing, and therefor no "assets" for the Bankruptcy Court. The restraint imposed by the Court of Chancery was not beyond the scope of its jurisdiction.

The United States District Court (Case, page 14) having directed that the Trustee interplead in the proceedings before the Court of Chancery and it being settled law that the Court of Chancery has jurisdiction in interpleader proceedings, and having also jurisdiction of the case at bar under the Bill of Complaint filed by Complainants and facts therein set forth, and it appearing conclusively that the Complainants, under the facts in the case at bar, had no adequate remedy at law and were therefore as a matter of right entitled to the protection of the Court of Chancery against the embarrassment of adverse and conflicting claims and double vexation in respect to one liability, and all parties being before the Court the Court of Chancery of New Jersey had jurisdiction to determine and adjudicate the controversy before it.

An order of the United States District Court, (Case, page 14) that Trustee interplead and determine his rights in the interpleader proceedings and comply with all orders and decrees of the Court of Chancery relating to said interpleader proceedings, is conclusive and appellant cannot question that order in a State Court. It is conclusive, and also binding upon all State Courts and they are bound to take due notice thereof. Grinnell, etc. vs. Merchants, etc., 42 Sup. Ct. 51.

No money remained in the fund (deposited with the Clerk in Chancery) after payment of the lien claims and consequently there was no "assets" belonging to George E. Thomas, bankrupt. The orders of the Court of Chancery entered in the interpleader proceedings were therefore proper, cor-

rect and within its jurisdiction. This conclusion is beyond contradiction.

In the case of Nelson Supply Co. vs. Leary, 164 Pacific Reporter 1050, the Court said:

> "In view that we are constrained to hold that all of the fund in question here must be distributed among the claimants who are parties to this action, there will be nothing to administer upon by the trustee in bankruptcy. But, even if the fund exceeded the claims of the materialmen, still the state court could determine the questions involved and order those claims satisfied out of the fund and turn the remainder, if any, over to the bankruptcy court to be there administered".

POINT V I.

All parties defendants should have been made parties to this appeal.

The lien claimants defendants in the above entitled cause, have not been made parties-appellees or respondents in these proceedings by the Appellant. The rights of these remaining defendants may be affected, should this Court order the moneys received by them in the interpleader proceedings, returned to the Clerk in Chancery to await the further order of the Court.

If a mistake was made either in law or in fact, all defendants are entitled to be heard thereon and in connection therewith.

The general rule is that all parties to the record who may be affected by the reversal of a decree should be made parties to the appeal.

Davis vs. Mercantile Trust Co., 152 U. S. 590, 593; Powell vs. Yearance, 73 N. J. Equity Reports 117, page 124.

But the question of necessary parties on any appeal is one for the final judgment of the Court of Errors and Appeals.

Powell vs. Yearance, *supra.*

The appellant having failed to include the lien claimants defendants as respondents to this appeal, this Court should take cognizance of this non-joinder of parties and dismiss this appeal.

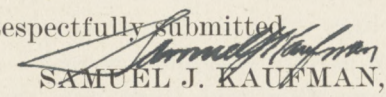
The Complainants-Respondents respectfully submit to this Honorable Court that the decree entered by the Court of Chancery on April 10, 1928 (Case, pages 65-67), having been entered by and with the consent of the appellant herein, that this decree is agreeable to equity and law and these respondents, therefore, pray that the appeal of the appellant may be dismissed for the reasons more particularly set forth in this Brief, and that the decree of the Court of Chancery of New Jersey made and entered on April 10, 1928, may be affirmed, with costs and counsel fee to be taxed in favor of these complainants-respondents. It is further respectfully submitted that the Court of Chancery did not erroneously deny the motion of the Union County Coal & Lumber Company, *a general creditor of George E. Thomas, Bankrupt,* to dissolve the restraint imposed or intended to be imposed upon the receiver and trustee of the bankrupt. The trustee himself *did not* move to vacate the restraint and it is well settled in law that a creditor of the bankrupt cannot do this for him. No one but a party to the suit can make any motion in it. The money deposited by Day with the Court

of Chancery having already been distributed by order of the Court of Chancery *and with the consent of this appellant,* it would neither be just nor equitable to set aside the order entered April 10, 1928. To do so would result in defendants being obliged to pay the same debt twice. **There is no equity in the application of this appellant.**

For the reasons above, we respectfully submit that this appeal should be dismissed, with costs and counsel fees.

If the appeal is to be considered on its merits, we then respectfully submit that the decree below should be affirmed, with costs and proper allowance to counsel.

Respectfully submitted,



SAMUEL J. KAUFMAN,
Solicitor for and of Counsel with
Joseph P. Day and Pauline M. Pope Day,
his wife, Complainants-Respondents.

Appendix A.

Copy of Judge Clark's Order of March 12, 1928, restraining appellant and trustee from bringing suit against complainants.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

In the Matter of GEORGE E. THOMAS, Bankrupt.	In Bankruptcy. Order Dismissing Rule to Show Cause entered February 16, 1928. Order Vacating Order entered March 7, 1928.

This matter coming on to be heard by this Court in the presence of Samuel J. Kaufman, Esq., attorney appearing specially for Joseph P. Day, and E. A. Merrill, Esq., attorney appearing for Union County Coal & Lumber Company, an alleged general creditor of the Bankrupt herein, and it appearing that on February 16th, 1928, the Honorable William N. Runyon, Judge of this Court, entered a Rule to Show Cause returnable February 27, 1928, why the Trustee of the Bankrupt should not transfer, assign and set over to said Union County Coal & Lumber Company and to all other general creditors who shall join with such Company, the claim of the Bankrupt herein against Joseph P. Day and Pauline E. Pope Day, his wife, in the sum of $8337.72 for the purpose of bringing suit thereon; and it further appearing that pursuant thereto on March 7th, 1928, an Order was signed by the Honorable William Clark, Judge of this Court, in which Order the said Union County Coal & Lumber Company is authorized to bring suit

against Joseph P. Day for and on account of the claim of the Bankrupt in the sum of $8337.72 as the same appears on the books of the Bankrupt, in the name of the Receiver and Trustee, for the benefit of the estate of said Bankrupt, but without expense to said Estate and at the proper costs and charges of said Union County Coal & Lumber Company; and upon an examination by the Court, it appears that neither the said Rule to Show Cause nor the said Order entered on March 7, 1928, contain any reference to the fact that on November 22, 1927, an Order was entered in this Court by the Honorable William N. Runyon, Judge thereof, directing the Receiver and Trustee herein to interplead in Court of Chancery of New Jersey to determine his right to payment of said $8337.72, or any part thereof, and that the said Rule to Show Cause and Order of March 7, 1928, does not disclose that said Court of Chancery of New Jersey enjoined and restrained the said Receiver and Trustee herein from commencing or instituting any action, suit or other proceedings against the said Joseph P. Day and Pauline M. Pope Day, his wife, or either of them, to recover said sum of $8337.72, or any part thereof; and the Court (Honorable William Clark) not having heretofore been informed of the Order entered on November 22, 1927, by Honorable William N. Runyon, Judge or of the interpleader proceedings instituted in the Court of Chancery of New Jersey, and being now of the opinion that suit should not be instituted against the said Joseph P. Day and Pauline M. Pope Day, his wife, (or either of them) to recover the said sum of $8337.72, or any part thereof, it is on this twelfth day of March 1928,

ORDERED, ADJUDGED AND DECREED, that the rule to Show Cause entered and signed by Honorable William N. Runyon, Judge of this Court, on Feb-

ruary 16, 1928 be and the same is hereby dismissed and for nothing holden, and the request to institute suit against Joseph P. Day and Pauline M. Pope Day, his wife, (or either of them) to recover the sum of $8337.72, or any part thereof, is hereby denied; and it is further

ORDERED, ADJUDGED AND DECREED that the Order entered in this Court on March 7, 1928 (and signed by the Honorable William Clark, Judge thereof) permitting the Union County Coal & Lumber Company to bring suit against Joseph P. Day for and on account of that certain claim of George E. Thomas, bankrupt, in the sum of $8337.72 as the same appears on the books of said Thomas, in the name of Harry G. Hendricks, Receiver and Trustee for said George E. Thomas, bankrupt, for the benefit of the estate of the said George E. Thomas, bankrupt, be and the said Order of March 7, 1928, is hereby vacated, set aside, made void and for nothing holden; and that no suit whatsoever be instituted against the said Joseph P. Day and Pauline M. Pope Day, his wife, (or either of them) to recover said sum of $8337.72, or any part thereof. If any suit has been commenced under said Order of March 7th, 1928 aforesaid, the Receiver and Trustee of the Bankrupt herein, and the Union County Coal & Lumber Company, are hereby directed to forthwith discontinue, cancel and discharge of record any such suit so instituted, the same to be discontinued at the cost and expense of the said Union County Coal & Lumber Company. And it is further

Ordered, that nothing herein contained shall be construed as prohibiting the Receiver and Trustee of the Bankrupt herein from expunging the said claim of $8337.72.

WILLIAM CLARK,
Judge, United States District Court.

Appendix B.

Letter of Vice Chancellor Berry to Counsel of Complainants re filing in Court of Chancery of Order of Judge Clark.

COURT OF CHANCERY OF NEW JERSEY.

Chambers of Maja Leon Berry, Vice-Chancellor.

Toms River, N. J., January 30, 1929.

Samuel J. Kaufman, Esq.,
Federal Trust Building,
Newark, N. J.

Dear Sir: —

I have your letter of the 26th instant in *Day* vs. *Hendricks,* Docket No. 66, page 249, my decision in which has now been taken to the Court of Errors and Appeals, and I note that the State of the case does not include a copy of the order made by Judge Clark in the United States District Court. This order, as I recall it, was made a part of the files by my direction and in my judgment should be a part of the record on appeal.

Very truly yours,

MAJA LEON BERRY.

Appendix C.

Letters of January 19, 1928 and July 25, 1928 from Counsel of Trustee to Counsel of Complainants agreeing to expunge book account claim of Trustee.

ALAN BRUCE CONLIN
Attorney at Law
37 Elm Street
Westfield, N. J.

Westfield, N. J.
January 19, 1928.

Mr. Samuel J. Kauffman,
20 Clinton Street,
Newark, N. J.

Dear Mr. Kauffman:

You advise me that you are dissatisfied with the contents of the release signed by Harry G. Hendricks yet I am reluctant to submit a new release when the Vice-Chancellor has approved the one you have received. However, for your personal satisfaction be advised that as attorney for Harry G. Hendricks as Trustee, I shall not start any proceedings against Joseph P. Day on the alleged book account and in view of the result of our litigation I shall ask that the claim be expunged at the final meeting of creditors.

Very truly yours,

A. B. CONLIN.

ALAN BRUCE CONLIN
Attorney at Law
37 Elm Street
Westfield, N. J.

Westfield, N. J.
July 25th, 1928.

Mr. Samuel J. Kaufman,
24 Commerce Street,
Newark, N. J.

Dear Mr. Kaufman:

I do not have my letter of January 19th before me but I do expect to ask that the claim against Day be expunged at the final meeting of creditors. No date has been set for this final meeting and it will probably be a long way off due to litigations which will hold up the closing of the estate.

Very truly yours,

A. B. CONLIN.

~~Schedule~~ Appendix D.

Notice of Motion to Dissolve Restraint.

Filed April 5, 1928.

IN CHANCERY OF NEW JERSEY.

66/249.

Between JOSEPH P. DAY and PAULINE M. POPE DAY, Complainants, and HARRY G. HENDRICKS, Receiver and Trustee of George E. Thomas, Bankrupt, *et als.*, Defendants.	On Bill in the Nature of a Bill of Interpleader. Notice.

To Mr. A. B. Conlin, Westfield, New Jersey, Solicitor of Harry G. Hendricks, Receiver and Trustee of George E. Thomas, bankrupt.

Take Notice, that on Tuesday, April 3, 1928, at ten o'clock in the forenoon, or as soon thereafter as counsel may be heard, I shall appear specially before the Chancellor in the person of Vice-Chancellor Berry, at Chancery Chambers, Industrial Building, Newark, New Jersey, for the purpose of requesting the Court to make an order dissolving the restraint imposed, or intended to be imposed, upon Honorable Harry G. Hendricks, receiver and trustee of George E. Thomas, bankrupt, dated December 3, 1927, if in the opinion of the Court it shall seem necessary or desirable to make such order.

E. A. MERRILL,
Solicitor of Union County Coal
& Lumber Company, a General Creditor
of George E. Thomas, Bankrupt.