

New Jersey Court of Errors and Appeals.

BETWEEN

M. HAUPT COMPANY,
Complainant-Appellant.

AND

BOARD OF EDUCATION OF THE BOROUGH
OF EDGEWATER, JOHN V. SIGNELL,
SELBACH MEYER COMPANY, and
ANTONIO T. PETRILLO,
Defendant-Respondents.

*On Appeal From
Chancery.*

BRIEF FOR JOHN V. SIGNELL, DEFENDANT-RESPONDENT.

STATEMENT OF THE CASE.

The petition for appeal filed in this cause brings up for review, so much of a certain Final Decree entered in the Court of Chancery, bearing date on the Eighteenth day of July, Nineteen Hundred and Sixteen, in a cause wherein said M. Haupt Company was Complainant, and the Board of Education of the Borough of Edgewater, et als. were Defendants, as adjudged that the Complainant's Bill be dismissed because: "the Complainant's action was not brought within ninety (90) days from the filing of the claim of lien, and therefore, it was not entitled to the relief sought and prayed for by its Bill of Complaint."

This is an action based upon the Municipal Lien Act (Compiled Statutes, page 3315).

The Complainant-Appellant, M. Haupt Company, sought to file a municipal lien upon certain moneys in the hands of the Board of Education of the Borough of Edgewater, due John V. Signell, the Defendant-Respondent.

A notice of claim provided for by the lien act was filed April 13th, 1915. (State case, page 7, paragraph 5.)

Notice of pendency of suit served on financial officer July 10th, 1915. (State case, page 4.)

The Bill of Complaint by M. Haupt Company, was filed on July 12th, 1915. (State case on page 5.)

The subpoenas in said cause were tested July 26th, 1915. (State case on page 24, paragraph 21.)

The subpoenas in said cause were served upon Defendant-Respondent, John V. Signell, on July 29th, 1915. (State case on page 24, paragraph 21.)

Specification of Grounds for Affirming the Decision in the Court Below:

1. The Municipal Lien Act provides a statutory remedy, and must be strictly followed, and we submit, that the Complainant-Appellant has failed to show a compliance with the requirements of the above Statute.

BRIEF OF ARGUMENT.

POINT I.

The Municipal Lien Act provides a statutory remedy, and must be strictly followed.

Complainant-Appellant is wholly dependent upon the force of the Statute entitled, "Lien for labor and materials in public improvements." (Compiled Statutes, page 3315.)

"The omission of any claimant to comply with the requirements of said Statute must operate to defeat his claim." (*Somers Brick Company vs. Soudder, et als.*, 70 Equity, page 391.)

"The Statute creates a right of action which theretofore had no existence. It prescribes certain conditions and limitations, and declares that if they be not observed, the right, given only by the Statute, shall not arise, or shall be defeated." (*Ibid.*)

"In such cases, the observance of the prescribed statutory conditions is necessary to the acquirement or maintenance of the right. It is for the Legislature only, and not for the Courts, to change the requirements of those statutory conditions. The Courts do not make, they only administer the law." (*Ibid.*) ALSO: (*National Fire Proofing Company vs. Daly*, 76 Equity, page 47.)

POINT II.

Complainant-Appellant has failed to show a compliance with the requirements of above statute.

The Statute provides that, "no lien provided for in this Act shall be binding upon the property therein described, unless an action be commenced within ninety (90) days from the filing of the same; and a notice of pendency of such action be filed with the financial officer of the said city, town, township or other municipality." (Compiled Statutes, page 3318, Section 39.)

The Statute does not give any effect to the notice of pendency required to be filed until the Bill is filed, and subpoenas issued. (*Houghwout vs. Murphy*, *C. E. Green*, 118, at page 120; ALSO: *C. E. Green*, 531, at page 545; ALSO CITED WITH APPROVAL: (*White vs. White*, 61 *Equity*, 629, at page 634.)

The Statute which fixes the time when suit on a municipal lien must be commenced places a limitation upon the Complainant-Appellant, by reason of which Statute of Limitation if the Complainant-Appellant failed to comply therewith, the action is barred.

"A suit is begun when process duly tested and issued, is actually put in motion for the purpose of being served. Whatever be the phraseology, the point to be guarded is, that the repose intended to be granted to defendants and to the public by statutes of limitation shall not be dependent upon either the will or the diligence of the party whose interests are adverse to the policy of the law." (*County vs. Pacific Coast Borax Company, et al.*, 50 *Atlantic*, 906, at page 909.)

Referring to the argument advanced by the Counsel of the Complainant-Appellant on page 4 of his brief, we submit, the statute provides, (Chancery Act, Compiled Statutes, page 411, Section 3), "no subpoena or other process for appearance shall issue out of the Court of Chancery until after the Bill shall have been filed." (Dickinson Chancery Precedents, page 1, is the beginning of the forms in Chancery proceedings as prepared by Honorable S. Meredith Dickinson.)

We submit, that the author in making the statement on page 1, to wit, "a suit in a Court of Chancery is commenced by filing the Bill," refers to the general procedure in Chancery, and had in mind the provision of the statute which is to the effect, that the Bill must be first filed before process is issued. The statement therefore made by the author, cannot and does not fix the time when an action in Chancery is commenced.

We believe, that Vice-Chancellor Backes, in the case if *Hermann vs. Mexican Petroleum Corporation*, 96 *Atlantic*, page 492, which is the latest case on the question of "when an action in Chancery is commenced," has laid down the rule so clearly that it leaves no room for dispute. The Bill in that case was filed for the purpose of obtaining an injunction. An order to show cause was granted with a temporary stay.

The learned Vice-Chancellor, in his opinion, held as follows:

"At the hearing, I was of the impression that the filing of the bill started the suit, and then stated that, instead of dismissing the bill, as was formerly required, the cause would be transferred to the Supreme Court, under the provisions of the Transfer of Causes Act of 1912 (Pamph. Laws, p. 417), where the complainant could use the pleadings and proofs before this court for relief there. Upon further examination and reflection, I have come to the conclusion that the order of transfer should not have been made. No subpoena was issued. The act provides, for the transfer of causes 'pending' in any court. Before the statute of 4 *Anne*, C. 16, 22 (*A. D.*, 1705), suits in Chancery were begun by the issuing of process, after which the bill was filed. Though that statute, from which section 3 of our Chancery Act (C. S., 411) was modeled, ordained that process should not issue till after the bill is filed, it did not alter the rule that the *issuance of the writ was the commencement of the suit.*"

AND further held:

"The presentation of a bill to the Chancellor and the granting thereon of an order to show cause why an injunction should not issue, with an ad interim stay, brings the litigation before him for a limited purpose, and is not the

institution of the suit. It is merely before him on a motion to consider the question, whether an injunction should issue when the suit should be commenced, to which the defendant enters but a special appearance for the purpose of combating the application—a privilege accorded him, which has grown into popular practice within recent years. The earlier method was to, in the first instance, grant a preliminary injunction, with the sealing of which a subpoena had to be issued, and obviously because the writ of injunction could not go forth except in a suit which had been begun. In *Allman vs. United Brotherhood of Carpenters, supra*, the present Chancellor had occasion to call attention to the correct practice.”

“The result of my investigation is, that at the time the order of transfer was made there was no cause ‘pending’ in this court, within the meaning of the Transfer Act, and it will be stricken out and a decree entered dismissing the bill.”

We call the Court’s attention to the statement made by the learned Vice-Chancellor, in the case above quoted, that no subpoena had been issued, only a rule to show cause, and that therefore no action was pending at the time the case was before the court. That an action can only be pending after it has been commenced.

“An action is pending from the time of its commencement until its final determination * * *” (30 *Cyc.*, page 1364, *Note.*)

We direct the attention of the Court to that part of the opinion of the learned Vice-Chancellor, in the case of *Hermann vs. Mexican Petroleum Corporation*, 96 *Atlantic*, 492, at page 493, in which he states, “before the Statute in 4 Anne, C. 16, Section 22 (A. D., 1705) suits in Chancery were begun by the issuing of process after which the bill was filed. Though that statute from which Section 3 of our Chancery Act (C. S. 411) was modeled, ordained that process should not issue until after the bill is filed, it did not alter the rule that the *issuance of the writ was the commencement of the suit.*”

We respectfully refer to the cases cited by the learned Vice-Chancellor, to wit, (*Fitch vs. Smith*, 10 *Paige, Ch. (N. Y.)* 9, and *Terry vs. Smith*, 10 *Paige, Ch. (N. Y.)* 9.

We respectfully refer to the cases by which the rule in

the Federal Courts is established; and which will be found in the opinion rendered by Mr. Justice Holmes, in the case of *Linn and Lane Timber Company vs. United States*, 236 U. S., 574, at page 578.

One of the purposes of the action contemplated by the municipal lien act is, that the Complainant by commencing such an action, gives notice to all parties interested in the fund held by the municipal body, setting forth the amount of Complainant's claim, and the priorities between the Complainants and other parties to said suit. We submit, that the parties made defendant, by virtue of any such proceeding, have no notice whatever of the commencement of such action until process is served. In this connection we believe, that the rule laid down in the following cases, are in point, to wit:

In the case of *Houghwout and Pomeroy vs. Murphy*, 6 C. E. Green, 118, at page 120, 7 C. E. Green, 531, at page 545.

We direct special attention to that part of the opinion of the Chancellor, which is found on page 120 of the case quoted from 6 C. E. Green, and which reads as follows:

"On the 31st day of August, Houghwout filed a bill in this court against Boisubin to compel a conveyance of the whole tract, but did not make Murphy a party. A notice of lis pendens was filed in the County Clerk's Office, September 1, 1865. It does not appear that any subpoena was issued or served. It is from the service of the subpoena only that lis pendens has effect. The statute does not give any effect to the notice required to be filed by it, but declares that the suit shall not be notice until such filing; in the case quoted from 7 C. E. Green, on page 545, the court held as follows:

"Before any statutory provision was made requiring notice of the pendency of the suit to be filed in order to charge a subsequent purchaser from the defendant with notice of the litigation, it became the established practice that subpoena served and bill filed were necessary before the suit was considered as commenced, so as to make its pendency constructive notice to persons deriving title from the parties, and to give the decree a conclusive effect against such persons."

The case of *Turner vs. Houpt*, 53 *Equity*, page 526, is in point with the proposition that the action, so far as the parties to the proceeding are concerned, is not commenced until they have had notice of the pendency of such proceeding, and that the issuing and serving of the process is the notice that such action has been commenced.

We quote from that part of the opinion of the learned Vice-Chancellor, in the above case found on page 550, to wit:

“The files of the court show that the subpoena to Houpt and wife was issued on the day the bill was filed, December 31st, 1891, returnable January 12th, 1892; that the order of publication was taken on the 15th day of January, 1892, returnable March 17th, and that it provided for service, personally, upon Houpt and wife of a notice of the order within twenty (20) days, and that such notice was served upon both Houpt and wife on the 28th day of January,” * * *.

“By the strictest rule respecting constructive notice of a pending suit, this suit was commenced on the 28th day of January, 1892, the date of the service of the notice of the order of publication.”

In the case of *Benner vs. Cassatt*, 84 *Atlantic*, page 780 (Pennsylvania case) we find on page 782 this dictum:

“It may be said in a genral way, that except where there is a voluntary appearance the issuing and service of formal process is essential effectively to constitute a party defendant. In this State therefore, before any person is bound to consider himself a party defendant to a bill in equity, the bill must have been filed in the office of the prothonotary, and the defendant must have been served with a copy thereof, having endorsed upon it a notice to appear within fifteen (15) days in the Court where the bill has been brought, and observe what such court shall direct.

We call the attention of the Court, to the case cited by Counsel for Complainant-Appellant in his brief, on page 4, to wit: (*Clark vs. Slayton*, 1st *Atlantic*, page 113.) The Court in that case holds as follows:

“An action at law is in general regarded as commenced so as to avoid the statute of limitations when the writ is completed with the purpose of making immediate service.

But where there is no intention to have it served, or it cannot be served until some further act is done, the action is not deemed to be commenced until such act is performed. (Cases cited.) The same rule is applicable to suits in equity. A bill in equity must be filed in the Clerk's Office, and an order of notice obtained before it can be served upon the defendant. (Rules 11 and 13.) The date of the filing is therefore the earliest time which can be taken as the commencement of the suit. The Plaintiff's action is barred by the statute of limitations." It would seem from the reading of the opinion rendered by the court, in the above case, that counsel has misinterpreted the rule therein laid down. As we take it, the holding of the court in that case is to this effect: "That an action at law is regarded as commenced so as to avoid the statute of limitations when the writ is completed, for the purpose of making service, and that the same rule is applicable to suits in equity."

As we understand it, the holding of the court in that case, is that where process cannot be served until some further act is done the action is not deemed to be commenced until such act is performed, hence, an action in Chancery under this rule would not be commenced until the subpoenas were issued.

We respectfully submit, that the contention of Counsel for Complainant-Appellant, on page 6 of his brief, that the statute would not operate as a bar, "where the statute of limitation had expired, and Complainant showed good faith and an attempt to commence within the statutory time," is not borne out by the cases there cited. The question of good faith does not enter into the case now before the Court. The only question now is, whether or not the action of the Complainant-Appellant was actually commenced within the statutory time, so as to entitle it to the statutory relief.

We are of the opinion, that Counsel has misinterpreted the holding of the Court in the cases cited by him on page 6 of his brief. The rule laid down in each case cited by Counsel, is in our opinion, in perfect accord with the opinion of Justice Garrison in the case of *County vs. Pacific Coast Borax Company, and others*, 50 *Atlantic*,

906, at page 909, and heretofore referred to by us in our brief. We repeat the rule laid down by the learned Justice in that case, which is as follows, to wit:

“A suit is begun when process, duly tested and issued, is actually put in motion for the purpose of being served. Whatever be the phraseology the point to be guarded is, that the repose intended to be granted to defendants and to the public by statutes of limitation shall not be dependent upon either the will or the diligence of the party whose interests are adverse to the policy of the law.”

The rule laid down by Vice-Chancellor Backes in the case of *Hermann vs. Mexican Petroleum Corporation*, 96 *Atlantic*, page 492, is the same rule stated by Justice Garrison, in the case of *County vs. Pacific Coast Borax Company, and others*, above cited.

In view of the rules laid down in the cases above cited, we submit, that it is quite apparent, that something more is required to constitute the commencement of an action in Chancery, or Equity, than the mere filing of the Bill of Complaint.

IN CONCLUSION WE SUBMIT:

1. The Municipal Lien Act provides a statutory remedy, and must be strictly followed;

2. Complainant-Appellant has failed to show a compliance with the requirement of above statute; and

THEREFORE, the decree rendered in the Court of Chancery in this cause is agreeable to equity, and we humbly pray that the same may be affirmed with costs to be adjudged to this Respondent.

DEMAREST & DEBAUN,

*Solicitors for and of Counsel with the
Defendant-Respondent.*



Answer of John V. Signell to Petition of Appeal.

(Filed Aug. 13, 1916.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

M. HAUPT COMPANY,
Complainant-Appellant,

and

BOARD OF EDUCATION OF THE
BOROUGH OF EDGEWATER, JOHN
V. SIGNELL, SELBACH-MEYER
COMPANY, and ANTONIO T.
PETRILLO,
Defendants-Appellees.

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On Appeal from
Chancery.
Answer to Petition
of Appeal.

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The answer of John V. Signell, one of the above named respondents, to the petition of appeal of the above named appellant.

This respondent, not acknowledging all or any of the matters which in said petition of appeal are contained, to be true, for answer thereto, nevertheless, says and admits that a final decree was, on the eighteenth day of July, last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced.

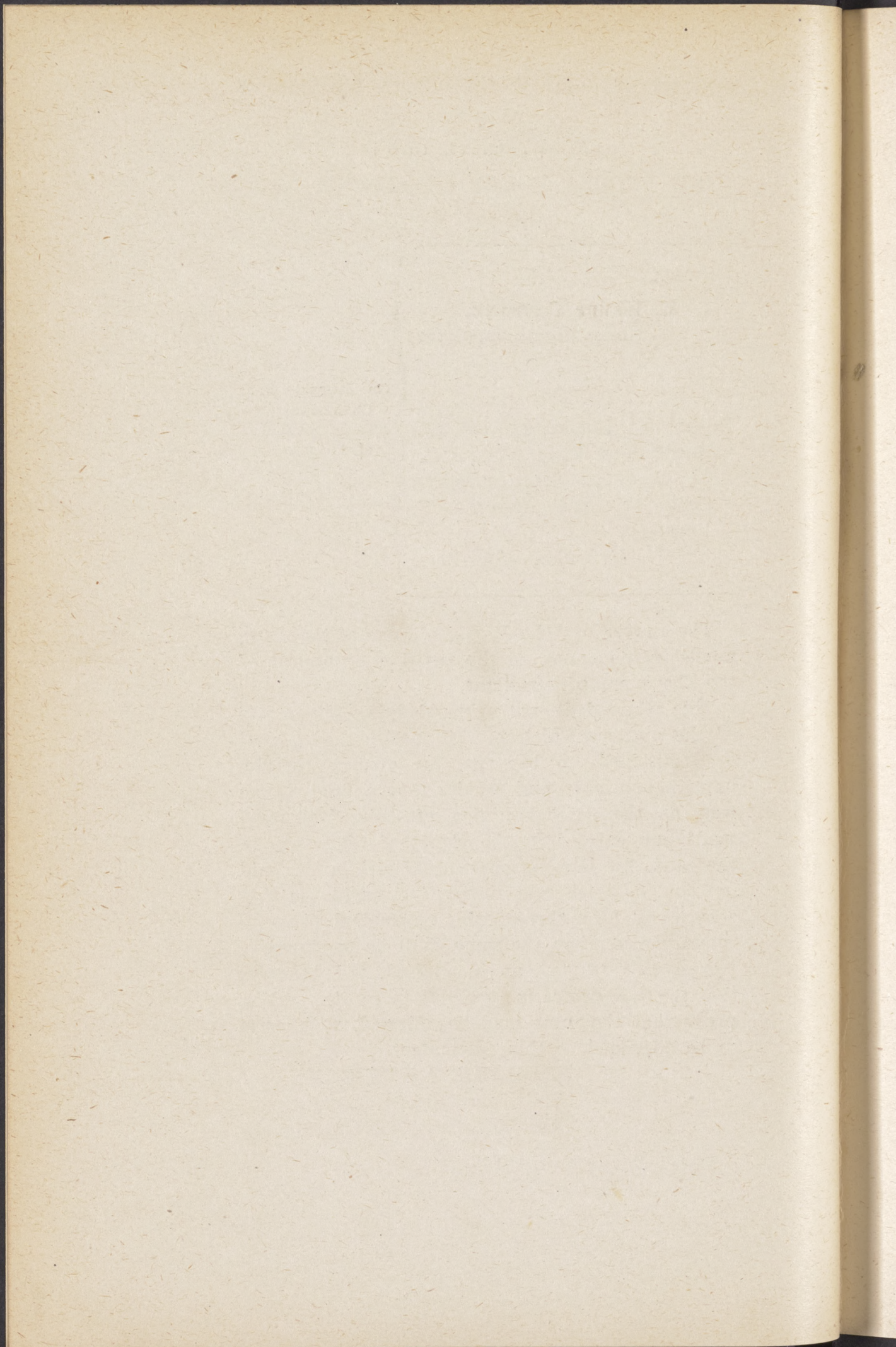
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And this respondent is advised and believes, that the said decree is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to this respondent.

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DEMAREST & DE BAUN,
Solicitors and of Counsel with
the Defendant, John V. Signell.

Dated August 9th, 1916.



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Notice of Appeal.

(Filed July 28, 1916.)

In Chancery of New Jersey. 10

Between

M. HAUPT COMPANY,
Complainant-Appellant,

and

BOARD OF EDUCATION OF THE BOR-
OUGH OF EDGEWATER, JOHN V.
SIGNELL, SELBACH MEYER COM-
PANY and ANTONIO T. PET-
RILLO,
Defendants-Appellees.

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The complainant hereby appeals from so much of the final decree made in this Court in the above stated cause by the Honorable Frank P. McDermott, Advisory Master as declares "And it appearing that the complainant's action was not brought within ninety days from the filing of the claim of lien, and that it is not entitled to the relief sought and prayed for by it in its bill of complaint, and to that part of the decree that orders, adjudges and decrees that the complainant's bill be and the

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same is hereby dismissed," to the Court of Errors and Appeals in the last resort in all causes.

Dated, July 24th, 1916.

MACKAY & MACKAY,
Solicitors and of Counsel
with Complainant-Appellant.

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

MACKAY & MACKAY,
Solicitors and of Counsel with
Complainant-Appellant.

Petition of Appeal.

(Filed July 28, 1916.)

IN CHANCERY OF NEW JERSEY.

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Between

M. HAUPT COMPANY,
Complainant-Appellant,

and

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BOARD OF EDUCATION OF THE BOR-
OUGH OF EDGEWATER, JOHN V.
SIGNELL, SELBACH MEYER COM-
PANY and ANTONIO T. PET-
RILLO,
Defendants-Appellees.

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

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The petition of M. Haupt Company, the appel-
lant in the above stated cause, respectfully shows
that your petitioner finds itself aggrieved by the

final decree made in the Court of Chancery by his Honor Frank P. McDermott, one of the Advisory Masters of our Court of Chancery, bearing date the eighteenth day of July, nineteen hundred and sixteen, wherein, the said M. Haupt Company was complainant and the said Board of Education of the Borough of Edgewater, John V. Signell, Selbach Meyer Company and Antonio T. Petrillo were defendants, in this respect, to wit, that the said decree adjudges that the complainant's action was not brought within ninety days from the filing of the claim of lien, and that it was not entitled to the relief sought and prayed for by it in its bill of complaint, and because of such finding by the said Advisory Master, the decree adjudged that the complainant's bill be dismissed. And your petitioner humbly appeals from that part of the decree of the Advisory Master which decrees that the complainant's action was not commenced within ninety days, and that the complainant's bill be dismissed as aforesaid upon the ground that the same is erroneous for that your petitioner contends that its action was commenced within ninety days from the filing of the lien by the filing of its completed bill with the Clerk of the Court of Chancery, and diligently prosecuted to final hearing.

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Your petitioner, therefore, prays that the said decree of the said Honorable Frank P. McDermott, Advisory Master, may be in the particulars aforesaid reversed, set aside and for nothing holden, and that your petitioner may have such further relief in the premises as to this Honorable Court shall seem meet.

MACKAY & MACKAY,
Solicitors and of Counsel
with the Complainant-Appellant.

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

MACKAY & MACKAY,
Solicitors and of Counsel with the Appellant.

Notice of Pendency.

(Served on financial officer July 10, 1915.)

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IN CHANCERY OF NEW JERSEY.

Between

M. HAUPT COMPANY,
Complainant,

v.

BOARD OF EDUCATION OF THE BOR-
OUGH OF EDGEWATER *et al.*,
Defendants.

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On Bill, &c.
Notice.

To Charles Van Gilder, Financial Officer and Custodian of School Moneys of the Borough of Edgewater, County of Bergen and State of New Jersey.

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Take notice, that a suit has been commenced in the Court of Chancery by M. Haupt Company for the purpose of establishing its lien on all moneys due and to grow due to John V. Signell under a certain contract made between the said John V. Signell and the Board of Education of the Borough of Edgewater, for building a retaining wall, improving the ground, putting in walks, grading and excavating on the school grounds known as School No. 1, on Undercliff Avenue, between Hudson Street and Russell Avenue, in the Borough of Edgewater, County of Bergen, State of New Jersey, and the bill of com-

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plaint was filed on the tenth day of July, nineteen hundred and fifteen.

Yours respectfully,
MACKAY & MACKAY,
Solicitors for M. Haupt Company.

Bill of Complaint.

(Filed July 12, 1915.)

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IN CHANCERY OF NEW JERSEY.

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

Humbly complaining, shows unto your Honor, your orator, M. Haupt Company, a corporation organized under the Laws of the State of New York, having its principal office at No. 615 West 129th Street, New York City. That on or about the seventh day of October, nineteen hundred and fourteen, the Board of Education of the Borough of Edgewater, a municipal corporation of the State of New Jersey, entered into a contract with John V. Signell, for building a retaining wall, improving the ground, putting in walks, grading and excavating on the school grounds, known as School No. 1, on Undercliff Avenue, between Hudson Street and Russell Avenue, in the Borough of Edgewater, County of Bergen and State of New Jersey. That at the special instance and request of the said John V. Signell and in pursuance of the terms of the agreement, your orator entered into an agreement with the said John V. Signell to do all the grading and excavating for the walls and walks on the said school grounds. That your orator has performed labor in the performance of the said agreement with the said John V. Signell to the extent of four thousand and six hundred and

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thirty-one dollars (\$4,631). That your orator has received nothing on account of the said agreement with the said John V. Signell excepting the sum of thirty-one hundred dollars (\$3100). That there is a balance due your orator from the said John V. Signell of fifteen hundred and thirty-one dollars (\$1531).

10 2. Your orator further shows that the said labor was performed and employed by your orator at the request of the said John V. Signell as aforesaid, and was actually employed in, upon and about the completion of the said contract made between the Board of Education of the Borough of Edgewater and the said John V. Signell.

20 3. Your orator further shows that it has demanded of the said John V. Signell, for the labor done, used and employed in said work as aforesaid, payment of the said sum of money so due and owing as aforesaid, to wit: the sum of fifteen hundred and thirty-one dollars (\$1531), and the said John V. Signell has refused to pay the same or any part thereof.

30 4. Your orator further shows that it has a lien for the said value of the labor used and employed in, upon and about the completion of the said contract, upon the moneys in the control of the said Board of Education of the Borough of Edgewater, Bergen County, due or to grow due under the contract made between the said Board of Education of the Borough of Edgewater, Bergen County, and the said John V. Signell as aforesaid, to the full value and amount thereof, to the value of fifteen hundred and thirty-one dollars (\$1531), by virtue of the provisions of an Act of the Legislature of the State of New Jersey,
40 entitled, "An Act to secure the payment of laborers, mechanics, traders and persons employed

upon or furnishing materials towards the performance of any work in public improvements, in cities, towns, townships and other municipalities in this State," approved March 30, 1892, and of the acts supplementary thereto and amendatory thereof.

5. Your orator further shows that on or about the thirteenth day of April, nineteen hundred and fifteen, and before the whole of the work to be performed by the said contractor, John V. Signell for the Board of Education of the Borough of Edgewater, County of Bergen and State of New Jersey, under the terms of the contract aforesaid had been completed or been accepted by the Board of Education of the Borough of Edgewater pursuant to the provisions of the Act of the Legislature aforesaid, it served upon and filed with William Williams, President of the Board of Education aforesaid, and on the thirteenth day of April, nineteen hundred and fifteen, your orator served upon and filed with Thomas F. Rigney, Clerk of the Board of Education aforesaid, and on the thirteenth day of April, nineteen hundred and fifteen, your orator served upon and filed with Charles Van Gilder, Collector of Taxes and Custodian of School Moneys of the Borough of Edgewater and Chief Financial Officer of the Borough of Edgewater, notices stating the name and the location of the principal office of your orator duly verified by the oath of your orator and in said notices further stated the amount due and claimed to be due from the said John V. Signell for labor performed and after deducting all just credits and offsets in said notices filed as aforesaid, your orator also stated the name of John V. Signell as the person for whom the said labor was performed, applied and used and also a statement of the terms, time given and the condition of the agreement

under which said labor was performed, and also that said labor performed and supplied to the said John V. Signell had been actually used and applied in the completion of the said contract between the said John V. Signell and the Board of Education of the Borough of Edgewater as aforesaid.

10 6. Your orator further shows that at the time of filing said notices as aforesaid it did also file with the said Charles Van Gilder, Custodian of School Moneys and Chief Financial Officer of the Borough of Edgewater aforesaid, a bond in the sum of three hundred and fifty dollars (\$350), being at least twenty per cent. of the amount
20 claimed by your orator in the notices filed as aforesaid, which bond was conditioned for the payment of legal interest for the time the money may be withheld from the said contractor in the event that your orator does not perfect its lien upon said moneys by instituting an action or that a decree be made in favor of said contractor, and conditioned further for the payment of costs of any such action, if judgment or decree be made in favor of said John V. Signell, a copy of which said notices and affidavit, and also a copy of
30 which bond is hereto attached, and to which your orator, for greater certainty, begs leave to refer, should it be necessary so to do.

40 7. Your orator further shows that it made inquiry of the Board of Education of the Borough of Edgewater on the 9th day of July, nineteen hundred and fifteen, to ascertain whether or not any other claims had been filed against said John V. Signell on account of the said contract work as aforesaid, and on the ninth day of July, 1915, it inquired of Charles Van Gilder for bonds given as required by law, and it was informed that

the following claims and bonds had been filed, to wit:

Name, Selbach Meyer Company; claim filed, March 31, 1915; amount, \$1,301.70; bond filed, July 6, '15.

Name, M. Haupt Company (your orator); claim filed, April 13, 1915; amount, \$1,531; bond filed.

Name, National Excavating & Foundation Company; claim filed, April 30, 1915; amount, \$718; no bond.

Name, Antonio T. Petrillo; claim filed, May 12, 1915; amount, \$226.17; bond filed.

8. Your orator asked the Board of Education of the Borough of Edgewater, its agents and servants, on the day last mentioned, for the names of any person or persons who had filed notices and the said Board of Education of the Borough of Edgewater, its agents and servants, gave your orator the information above set forth so that your orator verily believes that there are no other persons who have complied with the statute aforementioned to entitle them to be made party defendants in this action, and your orator verily believes it ought to be paid first out of the moneys due or to become due to the said John V. Signell from the Board of Education of the Borough of Edgewater by reason of the contract as aforesaid, and that the claim of your orator should be a first lien on the same because your orator's claim is undisputed by the said John V. Signell and is against the money due or to grow due to the said John V. Signell by virtue of said contract hereinbefore set forth.

9. Your orator further shows that at the time of filing its notices as aforesaid on the thirteenth day of April, nineteen hundred and fifteen, there were moneys due to the said John V. Signell from the Board of Education of the Borough of Edgewater,

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10 Bergen County, under and by virtue of said contract hereinbefore set forth, and that your orator has a lien on the same and is entitled to be paid the same, and although it has duly demanded payment of the said John V. Signell, payment by him has been refused; and although your orator has demanded payment of the Board of Education of the Borough of Edgewater, its agents and servants, payment by them has been refused.

20 10. Your orator further shows that it is informed and believes it to be true that there is at least the sum of twenty-two hundred dollars (\$2200) or some other sum exceeding the claim of your orator in the hands of the Board of Education of the Borough of Edgewater, Bergen County, due to the said John V. Signell by virtue of the said contract, and by reason thereof your orator has a lien on the same and is entitled to payment.

30 In consideration whereof and forasmuch as your orator is remediless at the common law and cannot have adequate relief except by the aid of this Honorable Court, to the end therefore that the said Board of Education of the Borough of Edgewater, in the County of Bergen, a municipal corporation, John V. Signell, Selbach Meyer Company, National Excavating & Foundation Company and Antonio T. Petrillo, defendants hereto, may without oath, full true, direct and perfect answer make to all and singular the premises, according to the best of their knowledge, information and belief, and that they may set forth and show how and in what manner the said contract has been completed and performed, and when, how and in what manner and for what work performed or what materials furnished the liens are claimed, if any upon moneys due or to become due to the said John V. Signell and now in the control of the Board of

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Education of the Borough of Edgewater, Bergen County, and when and in what manner and upon whom the notices of the liens claimed were filed, and when and upon whom and in what manner and in what amounts the bonds, if any, were filed by any other person or persons in connection with their notices of lien claimed and what amount, if any, is now due or to become due from the Board of Education of the Borough of Edgewater to the said John V. Signell, and when, and in what manner the same is to be paid, and that this Honorable Court, may, by its decree decide as to the extent, justice and priority of the claims of all parties to this action, and that the defendant, the Board of Education of the Borough of Edgewater, County of Bergen, be decreed to pay first to your orator the full amount due and owing to it for labor performed, used and employed as aforesaid, with interest and costs thereon, out of the moneys in the control of the Board of Education of the Borough of Edgewater, County of Bergen, due to the said John V. Signell, contractor as aforesaid, and your orator may have such other and further relief in the premises as the nature of the case may require and as may be agreeable to equity and good conscience.

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May it please your Honor, the premises considered, to grant unto your orator the State's writ of subpoena, issuing out of and under the seal of this Honorable Court, directed to the said Board of Education of the Borough of Edgewater, John V. Signell, Selbach Meyer Company, National Excavating & Foundation Company, and Antonio T. Petrillo, therein and thereby commanding them and each of them at a certain date and under a certain penalty to be therein expressed personally to be and appear before your Honor in this Honor-

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able Court, then and there to answer the premises, and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet and as shall be agreeable to equity and good conscience.

And your orator will ever pray, etc.

MACKAY & MACKAY,

10 Solicitors and of Counsel with Complainant.

To William Williams, President of the Board of Education of the Borough of Edgewater, County of Bergen.

To Thomas Reggney, Clerk of the Board of Education of the Borough of Edgewater, County of Bergen.

20 To Charles Van Gilder, Collector and Custodian of the Borough Moneys of the Borough of Edgewater.

Gentlemen:

Please take notice that M. Haupt Company, having their place of business at 615 W. 129th Street, New York City, does hereby claim a lien upon any and all moneys due and to grow due to John V. Signel under a certain contract made between the said John V. Signel and the Board of Education of the Borough of Edgewater for building a retaining wall, improving the ground, putting in walks, grading and excavating on the school grounds, known as School No. 1, on Undercliff Avenue, between Hudson Street and Russell Avenue, in the Borough of Edgewater, County of Bergen. The said M. Haupt Company entered into an agreement with the said John V. Signel to do all the grading and excavating for the walls and walks on the said school grounds and the said John V. Signel agreed to pay thirty-five cents per

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cubic yard for excavating the earth and two dollars and seventy-five cents per cubic yard for excavating the rock. The said M. Haupt Company performed work, labor and services under the said agreement as follows:

Grading.

6,000 cubic yards @ 35c. per cubic yard	\$2,100.00	
590 cubic yards of rock @ \$2.75 per cubic yard	1,622.50	10
Excavating for the wall and walks 1,310 cubic yards @ 35c. per cubic yard	458.50	
Excavating rock for walls 164 cubic yards @ \$2.75	451.00	
	<hr/>	
Total	4,631.00	
Credit	3,100.00	
Balance	\$1,531.00	20

Claimant has received nothing on account thereof except the credit above set forth and the total amount of fifteen hundred and thirty-one dollars is now due and owing.

The person from whom the above amount is due is John V. Signal and the whole sum of fifteen hundred and thirty-one dollars is now due.

The amount aforesaid is the balance due to date after deducting all just credits and offsets. 30

The name of the person for whom the labor was performed is John V. Signal with whom the claimant had the agreement as aforesaid.

That the aforesaid labor performed was actually furnished to John V. Signal, the contractor, and was actually performed in grading and excavating for the walls and walks according to the agreement made between the said John V. Signal and the Board of Education of the Borough of Edgewater which said agreement and work done there- 40

under was for a public improvement and designed for public use.

The said labor was performed between the seventh day of October, 1914, and the tenth day of April, 1915.

10 And you are hereby notified that the claimant has and claims a lien for the sum of fifteen hundred and thirty-one dollars (\$1531.00) against the said John V. Signal against any money or moneys in the hands and possession of the Board of Education of the Borough of Edgewater, Bergen County, New Jersey, due and to grow due to the said John V. Signal under and by virtue of the said contract above set forth.

M. HAUPT COMPANY,

Sec'y

Pres.

Matth. Haupt.

Johannah Haupt.

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State of New Jersey,)
County of Bergen,)^{ss. :}

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Matthew Haupt, of full age, being duly sworn, according to law, on his oath says that he is the Secretary and Treasurer of M. Haupt Company, the claimant named in the foregoing notice. That the place of business of the said M. Haupt Company is at No. 615 W. 129th Street, New York City.

Deponent further says that he knows of his own knowledge that the facts and circumstances, matters and things set forth in the foregoing notice are true.

MATTHEW HAUPT.

Subscribed and sworn to before me)

this 13th day of April, 1915. }

Howard Mackay,

Master in Chancery,

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of N. J.

KNOW ALL MEN BY THESE PRESENTS,
that M. Haupt Company and John J. Ferry
are held and firmly bound unto the Board
of Education of the Borough of Edgewater,
County of Bergen and State of New Jersey,
and Charles Van Gilder, Custodian of Bor-
ough Moneys, in the sum of three hundred and fifty
dollars, lawful money of the United States of
America, to be paid to the said Board of Education
of the Borough of Edgewater, Bergen County, and
Charles Van Gilder, Collector and Custodian as
aforesaid, or to their certain attorneys, successors,
executors, administrators and assigns:

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To which payment well and truly to be made we
bind ourselves, our successors, heirs, executors and
administrators, jointly and severally firmly by
these presents.

Sealed with our seals and dated the thirteenth
day of April, nineteen hundred and fifteen.

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The condition of the above obligation is such
that whereas, M. Haupt Company has filed a claim
with the Board of Education of the Borough of
Edgewater, Bergen County, New Jersey, in the
manner required by law, in the sum of fifteen hun-
dred and thirty-one dollars under and by virtue
of the provisions of an act of the Legislature of
the State of New Jersey, entitled, "An Act to
Secure the Payment of Laborers, Mechanics, Mer-
chants, Traders and Persons employed Upon or
Furnishing Materials towards the Performance of
any work in Public Improvement in Cities, Towns,
Townships, or other Municipalities in this State,"
approved March 30th, 1892, and the several sup-
plements and amendments thereof.

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NOW, THEREFORE, if the said M. Haupt
Company shall pay legal interest for the time
said moneys or any moneys may be with-

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held from the said John V. Signell, contractor, in the event said claimant does not perfect his lien by instituting an action as provided by the aforesaid statute, or that in the event that the decree made in said proceedings shall be made in favor of said contractor, and further that said M. Haupt Company, claimant, shall make payment of and satisfy any and all costs of any such action under said statute in the event that judgment or decree thereunder be entered in favor of said contractor, then this obligation to be void, otherwise to remain in full force and virtue.

JOHN J. FERRY.

Signed, sealed and delivered }
in the presence of }

State of New Jersey, }
County of Bergen, } ss.:

John J. Ferry, of full age, being duly sworn, according to law, on his oath says that he is the person who signed the foregoing bond for M. Haupt Company as surety thereon. That he is a resident of the County of Bergen and State of New Jersey; that he is the owner in his own name and rights, of lands and real estate situate in the County of Bergen, State of New Jersey, worth at least three hundred and fifty dollars over all encumbrances thereon, and other debts and liabilities of this deponent are paid. That the title to said land and real estate is in his own name and the deed therefor is recorded in the official records of the County of Bergen.

JOHN J. FERRY.

Subscribed and sworn to before me }
this 13th day of April, 1915. }

William Conklin,
Commissioner of Deeds,
of N. J.

Answer.

(Filed October, 1915.)

IN CHANCERY OF NEW JERSEY.

Between M. HAUPT COMPANY, Complainant, and BOARD OF EDUCATION OF THE BOR- OUGH OF EDGEWATER <i>et al.</i> , Defendants.	}	Answer.	10
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The answer of John V. Signell, one of the defendants in the above-entitled cause to the bill of complaint of M. Haupt Company, complainant. 20

This defendant answering says:

(1) This defendant has no knowledge or information sufficient to form a belief, as to whether the complainant is a corporation organized under the Laws of the State of New York, having its principal office at No. 615 West 129th Street, New York City.

(2) This defendant admits, that on the 7th day of October, 1914, the Board of Education of the Borough of Edgewater, a municipal corporation of the State of New Jersey, entered into a contract with this defendant for doing certain work upon the school building and grounds of said Board, known as School No. 1, in the Borough of Edgewater; which contract and the specifications of the work to be done thereunder, this defendant is ready to produce and prove at such time and place as this Honorable Court shall direct. 30
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(3) This defendant admits, that subsequent to the making of the contract between this defendant and the Board of Education above-mentioned, that he entered into an agreement with the complainant to do a certain portion of the work called for under the contract, and specifications made between this defendant and said Board.

10 (4) This defendant denies that the complainant "has performed labor in the performance of the said agreement with this defendant to the extent of \$4631.00;" and further denies, that there is a balance due said complainant from this defendant of the sum of \$1531.00, or any other sum.

20 (5) This defendant avers the fact to be, that on or about October 20th, 1914, the said complainant, sub-contractor, entered into an agreement with this defendant, "to do the grading as called for in the specification made by George W. Stagg, for the Board of Education of the Borough of Edgewater, Bergen County, N. J., and all work under the heading of excavating and digging for walls, including trenches to a depth of 18" below finished grades, and refilling against walls after same have been erected; also to excavate for sidewalks and stairways where necessary and to re-
30 move all trees and poles as would be directed by the engineer; to do the final leveling, rolling, and grading at the completion of the work satisfactory to the engineer, and acceptable to the Board of Education, for the sum of \$2420.60, and to accept payments for said work as outlined in the contract above-mentioned, dated October 7th, 1914, less five cents per yard, based on the engineer's estimate for 6916 yds. when said payments are made, less
40 20% retained by the Board for completion, as called for in the contract. To keep a competent

foreman on the work, and furnish all materials and labor necessary to comply with the conditions, as called for in the contract of this defendant with said Board, and to complete the work on or before December 1, 1914. Which last mentioned agreement this defendant is ready to prove at such time and place as this Honorable Court shall direct.

(6) This defendant denies, that labor was performed and employed by said complainant to the extent of \$4631.00, in, upon, and about the completion of the said contract made between the Board of Education of the Borough of Edgewater, and this defendant. 10

(7) This defendant denies that the complainant has demanded of him, the payment of the sum of \$1531.00; defendant says, that the first he knew of any such claim on the part of the complainant against him, the said defendant, was when the complainant filed his notice with the Board of Education of the Borough of Edgewater. 20

(8) This defendant says, that he has paid to the complainant, and advanced and expended for him, for work and labor performed in and upon the school building and grounds of School No. 1, above mentioned, in pursuance of the agreement made between said defendant and complainant, and also for extra work done by said complainant, the sum of \$3325.39. 30

(9) This defendant says, that no work has been done by said complainant upon said school building grounds, since February 1st, 1915, but that upon said date there was certain work still to be performed by said complainant to complete that which it was required to do, in pursuance of the contract made between said complainant and this defendant. That upon said date, this defendant 40

paid to the complainant the sum of \$400.00, being the last amount paid by this defendant to said complainant, on account of the work done by the complainant, pursuant to the agreement between said complainant and this defendant; and at the same time, they adjusted and stated their accounts; and it was then and there agreed that a balance of \$300.00 still remained due and owing to the complainant for the completion of its work according to specifications of George W. Stagg, and satisfactory to the Board of Education.

(10) This defendant says, that the complainant did not complete its work, as required by the agreement before mentioned, and on March 4th, 1915, this defendant served upon said complainant, a notice as follows:

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“I hereby give you notice and require you forthwith to proceed diligently, and in a proper and workmanlike manner, with the grading, leveling and completion, in accordance with the contract entered into by you with me, dated the (20th) twentieth day of October, Nineteen Hundred and Fourteen, of the grounds of School Number One (1) situate on the easterly side of Undercliff Avenue between Russell Avenue and Hudson Street, in the Borough of Edgewater, in the County of Bergen, and State of New Jersey; and that in case you shall neglect to proceed with the grading, leveling and completion thereof as aforesaid for three days after the service of this notice, I shall then enter upon said premises and employ such other workman and supply such other material as may be necessary to complete said work at your risk and expense; and that I shall take all such proceedings as may be

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necessary for the purpose of completing the work in accordance with said contract, and obtaining payment of all such moneys as shall be due or become due to me pursuant to the said contract, without any further notice.

“Dated April 19th, 1915.

“JOHN V. SIGNELL.”

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(11) This defendant says, that notwithstanding the service of said notice, the complainant failed to complete its work upon said school building and grounds, and this defendant was compelled by reason thereof to employ workmen and supply material for the completion of the same, and that in so doing he expended the sum of \$892.91. That the amount agreed upon by this defendant and said complainant, to complete said work, was the sum of \$300; that the amount due this defendant from said complainant for completing the work required under said agreement so made as aforesaid between them, is the sum of \$592.91, which said sum of \$592.91 this defendant claims he is entitled to have and receive from the said complainant.

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(12) This defendant denies, that the said complainant has a lien upon any moneys in the control of the Board of Education of the Borough of Edgewater, Bergen County, due or to grow due under the contract made between the said Board of Education of the Borough of Edgewater, Bergen County, and this defendant, to the amount of \$1531, or any other sum, because this defendant says, that he owes nothing to said complainant, but that the said complainant is indebted to him as above set forth, and mentioned in Paragraph 11.

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(13) This defendant is informed and believes it to be true, that on or about the 13th day of April,

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1915, a notice was served by the complainant and filed with the President of the Board of Education, and also served and filed with the Clerk of said Board, and with the collector of taxes or custodian of school moneys of said Borough, but this defendant says, that the notice served by said complainant is not a notice such as is required by the statute in such case made and provided; in that, 10
said notice does not comply with said statute stating the residence of the claimant, nor is the notice verified by the oath or affirmation of the claimant, stating the amount claimed from him due, and if not due when it will be due, giving the amount of the demand after deducting all just debts, credits and offsets with the name of the person by whom employed, to whom the materials were furnished; 20
nor does said verification, oath or affirmation of said claimant contain a statement of the terms, time given, conditions of his contract, and also that the labor was performed, or materials furnished to the said contractor, and when actually performed or used in the execution and completion of the said contract, with said Board of Education of the Borough of Edgewater.

(14) This defendant says, that the complainant 30
by reason of his failure to file and serve a notice with verification, as required by the statute in such case made and provided, has no lien upon any fund in the control of the Board of Education of the Borough of Edgewater, and therefore prays that the complainant's bill be dismissed as against this defendant.

(15) This defendant says, that he has no knowl- 40
edge or information sufficient to form a belief, whether the complainant filed a bond with the financial officer of the Borough of Edgewater, in the sum of \$350, or any other sum.

(16) This defendant has been informed and believes it to be true, that certain claims have been filed with the Board of Education of the Borough of Edgewater, as follows:

Selbach Meyer Co.,	\$1301.70	
M. Haupt Company	1531.00	
National Excavating & Foundation Co.,	718.00	
Antonio T. Petrillo,	226.17	10

(17) This defendant admits, the correctness of the following claims:

Selbach Meyer Co.,	\$1301.70
Antonio T. Petrillo,	226.17

(18) This defendant denies, that he owes anything upon the claim of M. Haupt Company, the complainant, and also denies that he owes anything upon the claim of the National Excavating and Foundation Company. As to the claim of the National Excavating and Foundation Company defendant says, that said company has no lien or claim upon any fund in the hands of the Board of Education of the Borough of Edgewater, for the reason that it did not file a bond, nor serve a notice as required by the statute in such case made and provided. 20

(19) This defendant denies, that the claim of the complainant is a first lien, or any other lien, upon whatever funds may be in the hands of the said Board of Education due to this defendant. 30

(20) This defendant says, that there is still retained by the Board of Education for this defendant, for and on account of work and labor performed by him under his said contract with said Board, about the sum of \$2200.00, but he denies that the said complainant, or that the said claimant, the National Excavating and Foundation 40

Company, have any lien or claim upon said fund whatsoever.

10 (21) This defendant says, that the complainant's bill in this cause, was filed in the office of the Clerk of the Court of Chancery of the State of New Jersey on July 12th, 1915; that the subpoenas in said cause were tested July 26th, 1915, and service made upon this defendant on July 29th, 1915. That the action of the complainant was not commenced within ninety (90) days from filing notice of its claim, as required by the statute in such case made and provided; and that by reason of the failure of said complainant to commence its said action within ninety (90) days from the serving of its notice, it has no lien or claim upon the funds in the hands of the Board of Education of the Borough of Edgewater, due 20 and owing to this defendant; and therefore prays, that the said bill of complaint may be dismissed as against this defendant.

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

DEMAREST & DEBAUN,
Solicitors and of Counsel with
30 Defendant John V. Signell.

Replication.

(Filed January 13, 1916.)

IN CHANCERY OF NEW JERSEY.

Between:

M. HAUPT COMPANY,
Complainant,

and

BOARD OF EDUCATION OF THE BOR-
OUGH OF EDGEWATER *et al.*,
Defendants.On Bill, etc.,
Replication.

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The complainant joins issue on the answer filed
by the defendants, the Board of Education of the
Borough of Edgewater, John V. Signell, Antonio
T. Petrillo and Selbach Meyer Company.

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MACKAY AND MACKAY,
Solicitors of Complainant.

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Minutes of Final Hearing.
IN CHANCERY OF NEW JERSEY.

	Between M. HAUPT COMPANY, Complainant, and BOARD OF EDUCATION OF THE BOR- OUGH OF EDGEWATER <i>et al.</i> , Defendants.	} Minutes of } Final Hear- } ing.
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Jersey City, April 26, 1916.

Before—Hon. FRANK P. McDERMOTT, Advisory
 20 Master.

APPEARANCES:

MACKAY & MACKAY, Esqrs., Solicitors for
 the Complainant;
 MILTON DEMAREST, Esq., Solicitor for the
 Defendant, John V. Signell;
 WILLIAM E. ELLIS, Esq., Solicitor for the
 Board of Education of the Borough of
 Edgewater;
 30 CLYDE A. BOGERT, Esq., Solicitor for the
 Defendant, Antonio E. Petrillo;
 DIPPEL & DAVIS, Esqrs., Solicitors for the
 Defendant, Selbach-Meyer Co.

Mr. Demarest: There is one matter we might
 settle now: I appear for a particular defendant,
 a contractor, and I must confess that I am in
 rather a strange position so far as the trial is con-
 40 cerned today; Mr. Signell went away a month or
 six weeks ago, and no one seems to know where he
 is, and I have not been able to get in touch with

him, so as to make myself conversant with the proofs, and my proposition is that the Court might permit this course to be pursued, that the complainant puts in its testimony so far as possible, and then another day might be set giving us a chance to meet such proof that might be brought out today. We do not want any delay except as to the Haupt Company claim, the Selbach-Meyer Company claim is virtually admitted by the contractor, Mr. Signell; the National Excavation and Foundation Company should be excluded by the Court, as there was no bond filed by that company; they didn't file any answer and they are not here, but the order of reference has been taken out in relation to all the parties, so I presume in considering this matter the Court will exclude that company when it comes to establishing facts, I am not told what proofs I should offer, and until I have heard what is required, after the complainant's case is put in. I am in a strange position; I had a very brief consultation with the defendant, Signell, while preparing the answer, and I am not certain just how far I can produce proofs; I do not want any unnecessary delay, but it seems to me, under the circumstances, that we ought to be entitled to some consideration.

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Mr. Mackay: I think the Court ought to know all the circumstances in this matter. There was a fire in Edgewater, and Mr. Signell, was indicted and he skipped, and he is now a fugitive from justice, and there is not much danger of his coming back. I think the Court ought to know the reason why he is not here, and also the fact that there is hardly a possibility of his being here, even if the case were adjourned today.

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The Court: We will proceed with the case.

Mr. Mackay: I will ask Mr. Ellis to produce the

minutes of the Board of Education of the Borough of Edgewater in order that they may be read into the record.

Mr. Ellis: Do you want the minutes or the contract?

Mr. Mackay: The contract first.

Mr. Ellis: I will produce all the papers on file.

10 Mr. Demarest: Let me submit to the Court, in order to shorten the matter that we confine ourselves to the question involved. I think it will be admitted beyond question that the National Excavation & Foundation Company has filed no bond with the Clerk.

The Court: Won't that come out when Mr. Ellis makes his statement of what papers has been filed, and then we can have a motion made in that respect.

20 Mr. Mackay: I offer the contract with specifications attached, and plans in evidence, between the Board of Education of the Borough of Edgewater in the County of Bergen, N. J., and John V. Signell, Contractor, dated October 7, 1914, and a duplicate of which was filed in the County Clerk's office on October 8, 1914.

30 The Court: It will be admitted without objection and marked.

Marked Cl.

Mr. Mackay: Now, Mr. Ellis, you have the stop notices that were served on the different officials, is that shown in the minutes?

40 Mr. Ellis: I do not know but they were marked by the Clerk when they were received. One, the M. Haupt Company stop notice, was received by the Clerk, at four-thirteen P. M. April 13th, 1915.

Mr. Demarest: I desire at this time to note an objection to the offer of these notices, the ques-

tion being raised by the answer that it is not in form as required by the statute.

Mr. Bogert: I desire to enter the same objection.

The Court: This stop notice is admitted in evidence subject to the objections, and it will be marked.

Marked C2. 10

Mr. Ellis: The next paper is the bond filed with the Custodian of School Money.

Mr. Mackay: I desire to offer this paper in evidence.

Mr. Demarest: I also desire to object to the bond being offered, as it is not properly executed, and is not the bond required by the statute.

Mr. Bogert: I desire to enter the same objection. 20

The Court: It will be admitted subject to the objections.

Mr. Demarest: There are certain jurisdictional facts that must be established before the Court can take cognizance of this matter, and I object to the bond being offered on the ground that the bond was made out by M. Haupt Company, but it was never signed by that company.

Mr. Bogert: I desire to enter the same objection. 30

The Court: I will receive the bond and determine that question later on.

Mr. Mackay: I am willing to stand on the objection as stated.

Bond marked Exhibit C3.

Mr. Mackay: I offer the notice of pendency of the suit in evidence. 40

Marked C4.

Mr. Ellis: The lien claim of Antonio E. Petrillo, dated May 10th, 1915, and filed with the Clerk May 12, 1915, at 8:40 P. M., is offered in evidence.

Marked P5.

Mr. Ellis: I offer the bond filed by Petrillo.

10 Marked P6.

Mr. Ellis: The next one is the lien claim of the Selbach-Meyer Company filed with the Board on the 9th day of July, 1915, I offer that in evidence.

Marked S7.

Mr. Ellis: The next one is the bond of Selbach-Meyer Co.

20 Mr. Demarest: That is one of the claims which the contractor admits.

The Court: That bond is made to the Board of Education and John V. Signell. It will be admitted in evidence.

Marked S8.

Mr. Ellis: That is all the papers.

30 The Court: Mr. Ellis, is there enough money in hand to pay all of these claims?

Mr. Ellis: No, sir; there is \$1,379.32 in hand.

The Court: There was another defendant; what papers did the Board of Education receive from this defendant?

Mr. Ellis: I don't believe that they received anything, except a letter.

The Court: This letter is produced by the Board of Education and will be marked.

40 Marked N9.

The Court: Mr. Ellis, did the Board of Education receive any bond, or other papers than the

letter which you have produced, from the National Excavation & Foundation Company?

Mr. Ellis: No, sir.

Mr. Demarest: Now, I move at this time that the National Excavation & Foundation Company be eliminated from consideration in this case.

Mr. Mackay: What is your motion, Judge?

Mr. Demarest: My motion, is that the claim of the National Excavation & Foundation Company be eliminated from consideration in this matter.

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The Court: Unless some further evidence is offered on this claim, I see no course open but to eliminate it from this proceeding. No bond has been filed, and the letter, which is produced, is not a complete notice within the purview of the statute.

Mr. Demarest: Of course there are some questions as to whether the pleadings are to be read into the record.

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The Court: I understand your objection was made as to the claim and to the bond. As the witnesses are here, I would rather hear what they have to say about it, and I will pass upon that question a little later.

Mr. Mackay: I will call Mr. Haupt.

MATTHEW HAUPT, sworn.

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Direct examination by Mr. Mackay:

Q. Where do you live? A. Edgewater.

Mr. Demarest: Before proceeding with this witness, I wish to state that there is another question that is raised under this claim, we claim that the action was not begun within the ninety days after the work was finished, as the statute requires.

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Mr. Ellis: I can give you the dates when

the Board of Education accepted the work; that will show that the work was completed.

10 The Court: In view of the objection of Judge Demarest, this ought to be made a matter of actual proof. The stop notice was filed April 13th, the notice of pendency states that the bill was filed July 10th, 1915, I have the bill itself here.

Q. Mr. Haupt, you are a member of M. Haupt Company? A. Yes, sir.

Q. And didn't you know Mr. Signell, one of the defendants in this cause? A. Yes, sir.

Q. Did you have any agreement with him as to the work under the contract in this case? A. Yes, sir.

20 Q. And what did that work consist of? A. Thirty-five cents for earth.

Q. Was the contract in writing or verbal? A. It was a verbal contract.

Q. And what was it? A. Thirty-five cents for earth and \$2.75 for rock.

Q. And when was that agreement made? A. A few days before he got the contract from the School Board.

30 Q. And after that did you commence any work under this contract? A. Yes, sir.

Q. Did you finish your work? A. I excavated about six thousand yards on the grading end of it, and I excavated for the grades and walls.

Q. Did you finish your contract work? A. I finished six thousand yards of grading work and all the walls, and I back filled the walls.

Q. And what was the amount of your bill? A. \$4,631.00.

40 Q. Did you receive anything on account of that? A. Yes, sir.

Q. How much did you receive? A. \$3,100.00.

Q. Making a balance due you of \$1,531.00? A. Yes, sir.

Q. Did you make a demand for the balance of it? A. Yes, sir.

Q. And what was said? A. Why, he told me to wait, that he had a lot of payments to make and so on, and he told me that he would have to give the other contractors so much money; that is the way he done it.

10

Q. Did he object to the balance due you? A. No, sir.

Q. He never did? A. No, sir.

Q. And he agreed to pay it to you? A. Yes, sir.

Q. And the balance due you now, is how much? A. \$1,531.00.

Q. Do you know where Mr. Signell is now? A. No, sir.

Q. This work was done under this contract, was it, that is offered in evidence? A. Yes, sir.

20

Q. Was there any objection ever made by Mr. Signell as to your work? A. No, never.

Q. Did he ever serve you with a notice of any kind to proceed with your work? A. Yes, sir.

Q. And did you proceed with your work? A. No, sir; I told him if he would give me so much money I would go ahead and finish it up.

Q. He was owing you money at that time? A. Yes, sir.

30

Q. And you refused to proceed with the work unless he paid you the amount that was due you? A. Yes, sir.

Q. And is that the same amount that is due you now? A. Yes, sir, thirty-five cents for earth and \$2.75 for rock and the back filling was five to six dollars per team per day.

Q. And that was all included in the agreement? A. Yes, sir.

40

Cross examination by Mr. Demarest:

Q. Was not the agreement that you made with Mr. Signell reduced to writing but never signed by both of you? A. I never saw any agreement.

10 Q. Wasn't it a fact that the terms of the agreement of work to be done by you reduced to writing by Mr. Signell, but it was never signed by either one of you, a memo made of what was to be done with the figures on? A. No, sir; we made this agreement and he said to me that he was glad he could make a contract like that, it was an old fashioned contract, where two people got together, and would go ahead and do it.

20 Q. Wasn't it a fact that the agreement between you and Mr. Signell was to the effect that you were to do all the grading first for this work on this school property; that you were to do all the excavating called for in the specifications? A. Yes, sir; at so much per yard.

30 Q. And, under the heading of "excavating and digging for walls including trenches to a depth of 18" below finished grades and refilling against walls after same have been erected. I also agree to excavate for sidewalks and stairways where necessary, and to remove all trees and poles, as will be directed by the engineer. I will do the final levelling, roughing and grading at the completion of the work, satisfactory to the engineer, and acceptable to the Board of Education for the sum of \$2,420.61;" wasn't that a fact, or not? A. No.

Q. You say that Mr. Signell did serve a three days' notice upon you? A. Yes, sir.

Q. And you did not do any work after that? A. No, sir.

40 Q. Do you remember when that three days' notice was served on you? A. I don't just remember the date, no, sir.

Q. Well, now, try and fix it. A. I can hardly do that; it must have been the latter part of March, I suppose, or the beginning of April.

Q. Now, whatever agreement you had with Mr. Signell was made while he was figuring on the general contract? A. Before he figured.

Q. Well, wasn't it for the purpose of getting your figures so that he could include them in his contract? A. Yes, sir, to put them in his figures.

10

Q. Will you look at this paper, which I now show you? A. Yes, sir (witness looking at paper).

Q. Is that your signature? A. Yes, sir.

Q. Is that your endorsement on that check? A. Yes, sir.

Q. This check was given you at the same time you signed this paper? A. Yes, I got the check and then I signed the paper.

20

Mr. Demarest: I offer this paper and check for identification.

Marked S1 and S2 for identification.

Q. Now, you have not done any work upon that building on that school property over there, since February 1st, 1915, have you? A. I don't know what you call work.

30

Q. You have not done any work since you signed that receipt? A. No, sir.

Q. Now, don't you recall the fact, Mr. Haupt, that it was after February 1st, after the signing of that check, and the signing of that receipt, that Mr. Signell served upon you a three days' notice to go on and complete the work? A. Yes, sir.

Q. Wasn't that notice served upon you in March? A. I said it was about the latter part of March.

40

Q. And you did not complete your work? A. No, sir.

Q. And you didn't do anything after February 1st, 1915? A. No, sir.

10 Q. And, of the work that remained for you to finish, do you know whether Mr. Signell had to finish it and did finish it? A. I don't know who finished it.

Q. Have you a copy of the notice that was served upon you by Mr. Signell in March? A. No, sir.

Mr. Demarest: Have you such a copy among your papers, Mr. Mackay? If you have, I now ask you to produce it.

Mr. Mackay: I don't know, I will look among my papers. Is this it?

20 Mr. Demarest: Yes.

Q. That is the notice that was served upon you? A. Yes, sir.

Mr. Demarest: Will you agree that they be offered now, Mr. Mackay?

Mr. Mackay: Yes.

Marked S3.

30 Mr. Bogert: I have no questions to ask the witness: I should like to ask, however, that if we go on, on another day, that I be allowed to ask the engineer one or two questions, simply on the computation of the excavation that he has made.

Redirect examination by Mr. Mackay:

Q. This paper that has been offered for identification S1, whose handwriting is it in? A. I guess it is Mr. Signell's handwriting.

40 Q. Mr. Signell's handwriting? A. Yes, sir.

Q. And how much of the handwriting is yours, if any? A. The words "\$400."

Q. Anything else? A. No, sir.

Q. You signed your name to it, didn't you? A. Yes, sir.

Q. Now, what was on the paper when you signed it? A. "Received \$400."

Q. Above Signell's name and the date? A. Yes.

Q. Anything else? A. No, sir.

The Court: The papers have been identified by the witness, and I will permit you to examine him about anything that is on the papers; he admitted his signature, as I understand, and naturally we can offer them at any time. 10

Q. After the words "\$400" referring to S1 for identification, it reads as follows "being all moneys due to date as per agreement, dated October 20th, 1914, and payment in full for all claims for extra work and rock excavating at School No. one, and it is also agreed by us that the balance of grading and levelling will be completed for an additional payment of \$300, work to be according to specifications of George W. Stagg, and satisfactory to the Board of Education;" was that that I have just read, written in the receipt at the time that you signed it? A. No, sir. 20

Q. Was what I have just read to you, written in the receipt at the time you signed it? A. No, sir. 30

Q. I show you a check marked S2 for identification, dated January 30, 1915, made to M. Haupt Company for \$400; was that in full for your claim against Mr. Signell? A. No, sir.

Q. Was that the balance at the time that was due you? A. No, sir; at that time there was \$1632.15 due, that was the rock money that he promised to give me, but the best I could do was to get \$400. 40

Q. Did he say anything about when he would give you anything more? A. Yes, sir; when he got the next payment.

Q. Did he ever give you anything more after that? A. No, sir; he did not.

Mr. Demarest: I offer the check and receipt in evidence.

10

Marked S1 and S2 in evidence.

Recross examination by Mr. Demarest:

Q. Do you mean to tell us that when you signed that receipt that there was nothing written on that paper except the sum of \$400? A. No, sir, there was not.

20

Q. Do you mean to tell us now that you signed a receipt for \$400 and it didn't say on that receipt what it was for? A. Well, that is all that Mr. Signell showed me.

Q. Was not this matter talked over between you and Mr. Signell, in Mr. Carlson's Hotel in Fort Lee, on the day on which you signed this paper? A. What, this matter?

Q. This very matter, when Mr. Signell gave you the check and you signed the receipt? A. No, there was nothing talked over at all.

30

Q. Was not those papers signed in Mr. Carlson's Hotel? A. Yes, upstairs in a room.

Q. You saw Mr. Carlson there? A. Yes, sir.

Q. And wasn't there some talk or controversy between you and Mr. Signell before you signed this paper, and after this talk those papers were signed? A. Yes, sir.

40

Q. And now you mean to tell us that there was nothing written on that receipt except the sum of \$400? A. That is all that was on it.

Redirect examination by Mr. Mackay:

Q. What was that check for? A. Mr. Signell

was to give me all the rock money that day; it amounted to \$1632.15, that is before he got the payment, he promised to give me it; he got wind that I was going to put in a stop notice, and he begged me not to put in a stop notice, he said that it would hurt him through Edgewater, and he promised me that as soon as he got the check he would turn it over to me, and it took me two or three days before I could find him, I 'phoned the house at eight o'clock and Mrs. Signell told me that he had left the house, and I went over, when I was coming off the boat he was going on the boat, and I asked him what he was going to do in this matter, and I said, "come over to Judd's saloon on 127th Street, New York," and we went over there; when we got there we had a few drinks, and he said, "I have got to go back to Edgewater," and I said, "come in my office; I don't want to be here all day," and he said "we will get this check" and when we got over to Carlson's Hotel he said to Mr. Carlson, "is there anybody upstairs?" and Mr. Carlson said, "No," and he said, "come upstairs," he said, "I want you to come up here" and when we got upstairs he said, "I can't give you all this money, I have to give the iron man so much and I have to give the coping man so much, and all I can spare out of it is \$400;" I said, "I don't want that, I want the whole amount," and I argued with him for three or four hours, but I could not get any more than \$400.

10

20

30

Q. Where did he get that blank receipt from?

A. Why he had it in his pocket.

Q. And that is all that was on it, "\$400?" A. Yes, sir.

Recross examination by Mr. Demarest:

40

Q. Was not there something said between you and Mr. Signell to the effect that there was cer-

tain work to be finished and talked over—was that talked over between you? A. Yes, sir.

Q. Wasn't there a talk between you and Mr. Signell at that time about how much it would cost to finish the work that you had still to do? A. Yes, sir.

10 Q. And that was understood? A. Sure, I was to finish the work if I got the money, but I refused to do it unless I got the money.

Q. And that was talked over? A. Yes, that was talked over.

Mr. Mackay: Will you refer to that minute book of the date of completion of the work?

The Court: Do you want to use Mr. Ellis?

20

WILLIAM E. ELLIS, sworn:

Direct examination by Mr. Mackay:

Q. What minutes are you referring to? A. July 30, 1915.

30 Q. Is there any resolution in there relating to the completion of the work under the contract that has been offered in evidence in this case? A. Yes, sir.

Q. Will you read it? A. On page 117: "Resolved that the Board does hereby accept the work done on School ground Number 1, by John V. Signell as being satisfactory as per his contract and specifications with this Board."

40 Q. Is there anything else mentioned? A. Yes, "Be it further resolved that this Board render Mr. Signell a vote of thanks for completing the work properly."

Q. And that was the date of the acceptance of the work? A. Yes, sir.

Q. Was there anything further relative to the work of that date? A. No, sir.

Mr. Bogert: I have a witness here who comes from away up in New York State, Mr. Petrillo, and I would like to examine him now.

The Court: You may do so.

10

ANTONIO T. PETRILLO, sworn.

Direct examination by Mr. Bogert:

Q. Did you have a contract with Mr. Signell for work on a school for the Board of Education of Edgewater? A. Yes, sir.

Q. I show you a paper dated November 2, 1914, and ask you what that is? A. That is the acceptance of my estimate which I gave him.

20

Q. That is the acceptance of your estimate which you gave him for that work? A. Yes, sir.

Q. What work was to be done by you? A. The coping on School No. 1 at Edgewater.

Q. And how much was it according to this contract? A. \$610 according to this contract.

Mr. Bogert: I will offer the contract in evidence.

30

Contract marked without objection, Exhibit P1.

Q. Now, Mr. Petrillo, I show you another paper dated November 2, 1914, and ask you what that is? A. That is the estimate of my proposal that I gave to Mr. Signell.

Q. That is your estimate? A. Yes, sir.

Mr. Bogert: I offer that in evidence.

Estimate marked without objection Exhibit P2.

40

Q. Mr. Petrillo, this provides that no extra charge is to be made unless the extras exceed twenty feet crown, the estimate, however, to have 1260 square feet? A. Yes, sir.

Q. Did the extra work exceed twenty feet? A. Yes, sir.

Q. How much was that extra work? A. Thirty-three or thirty-four feet, something like that.

10 Q. And how much did that amount to, do you know, the extra thirty-three feet? A. Why, it amounted to \$16.17.

Q. Making a total amount due you of how much? A. The total amount due was \$626.17.

Q. Have you received anything on account of that? A. Yes, sir.

Q. How much? A. \$400.

20 Q. When? A. On or about the 4th of February, 1915.

Q. And how much is due you now? A. \$226.17.

Q. Have you demanded this from Mr. Signell? A. Yes, quite a few times; I went to see him and sent him letters.

Q. Has he refused to pay you? A. No, he offered me notes.

Q. Has it ever been paid? A. No, he offered me notes.

30

No Cross Examination.

Mr. Dippel: Our answer sets forth two different contracts. There is only one that seems to be before you; the question is whether we are all to put in proof or not. All I want to prove is the first contract. I want to prove is the first contract.

The Court: Mr. Dippel you may take these contracts and look them over.

40

Mr. Dippel: I don't think I want to do that, Mr. Selbach knows what the contracts are.

The Court: Very well, whenever you are ready I will swear him.

FRANK SELBACH, sworn.

Direct examination by Mr. Dippel:

Q. What is your official position with the Selbach-Meyer Company? A. President of the company. 10

Q. Did the Selbach-Meyer Company do any work on number one School at Edgewater? A. Yes, sir.

Q. I show you a paper writing and ask you if this is the contract you had with Mr. Signell? A. Yes, sir.

Mr. Dippel: The contract reads as follows: "West New York, November 7, 1914, Mr. J. Signell, Dear Sir: We propose to furnish and erect on School No. 1, Edgewater, a railing for the sum of \$1.15 per lineal foot, all as per blue prints submitted. Yours truly, Selbach-Meyer Company. Accepted by John V. Signell, Edgewater, N. J., November 9th, 1914." 20

Marked Exhibit S-1.

Q. Do you know how many feet of railing was put up on that contract? A. I have got the bill here. 30

Q. How many feet were there? A. 639 feet at \$1.15, amounting to \$734.85, and then there were some extras on the same contract.

Q. And will you read the items of that extra work? A. 10 $\frac{3}{4}$ square iron 12.6, 7 square iron 10.6, 6 square iron 8.6, 10 square iron 5.6, 14 square iron 4.6, \$21.75. 40

Q. The total amount due you under this contract is \$756.60? A. \$756.60, yes, sir.

Q. Has any of that account been paid? A. No, I never have received anything.

Q. It all went into this building? A. Yes, it all went into this building, that is the retaining wall and levelling off the ground around the school, I had nothing to do with the work of the school building.

10 Q. And that amount was due on that day? A. It was due on the 26th of February, 1915.

Q. Did you serve notice on the officials of the School Board? A. I did serve the officials of the School Board.

Q. Do you know the custodian's signature? A. Yes, sir.

Q. On what day did you serve the notice on the custodian? A. On the 9th of July, 1915.

20 Q. On the same day did you serve it on the District Clerk, Herman Wrigley—the notice is marked S-7? A. Yes, sir.

Q. And also on William Williams on the same day, the President? A. Yes, sir.

Q. You also filed with the Custodian, a bond, did you not? A. Yes, sir.

Q. The bond is already marked S8? A. Yes, sir.

30 The Court: I may not require the other defendants in this case to produce their proofs at this time, but will in the meantime, hear the argument on the part of the contractor, John V. Signell and M. Haupt Company, touching the validity of the claim and bond, and proceeding on the claim. Counsel for John V. Signell will serve his brief on the counsel of the complainant within ten days from this date, and counsel of the complainant will deliver both briefs to the Master within ten days thereafter.

40

Minutes of Final Hearing.
IN CHANCERY OF NEW JERSEY.

<p>Between</p> <p style="padding-left: 40px;">M. HAUPT COMPANY, Complainant,</p> <p style="text-align: center;">and</p> <p>BOARD OF EDUCATION OF THE BOROUGH OF EDGEWATER, <i>et</i> <i>als.</i>,</p> <p style="padding-left: 40px;">Defendants.</p>	}	<p>Minutes of Final Hearing.</p>	10
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Chancery Chambers, Jersey City,
July 7th, 1916, at 10:30 A. M. 20

Before—Hon. FRANK P. MCDERMOTT, Advisory
Master.

APPEARANCES:

Messrs. MACKAY & MACKAY, Solicitors
for the Complainant.

Messrs. DEMAREST & DEBAUN (Mr. WEST-
ERVELT) Solicitors for John V. Signell.

WILLIAM E. ELLIS, Esq., Solicitor for
the Board of Education. 30

CLYDE A. BOGERT, Esq., Solicitor for the
Defendant, Antonio T. Petrillo.

Messrs. DIPPEL & DAVIS, Solicitors for the
Defendant, Selbach-Meyer & Company.

The Court: Now, gentlemen, I will hear
any further testimony you may wish to
present.

Mr. Ellis: I do not believe there is any
testimony to be offered on the part of the
Board of Education; it has been admitted 40

that the balance of the funds that we have in hand is \$1,379.32.

10 Mr. Westervelt (for Judge Demarest): There were two questions that were left open in the hearing the other day; one, the question raised by the M. Haupt Company, on page 11 of the testimony, in regard to the amount of excavation that was done on the premises; that is one of the questions we wanted to take up, but we are not in a position to take that question up now as we are unable to have the engineer, who had charge of the work, present this morning, and we got word from him stating that it would take about a week to get those figures; that relates to the claim of M. Haupt Company; Mr. Haupt testified that he estimated on a certain amount of excavation and that he claimed for so much excavation. We propose to show that that was an excessive rate and we are not in a position this morning to do so, and we would like an opportunity to put in that testimony at another time, if the Court will grant us that permission.

20
30 The Court: I will take that matter up later in the morning, and will ask you to put in whatever testimony you have now.

Mr. Westervelt: I will call Mr. Carlson.

ENOCH J. CARLSON, sworn:

Direct examination by Mr. Westervelt:

Q. Mr. Carlson, what is your full name? A. Enoch J. Carlson.

40 Q. Are you acquainted with Mr. Haupt of the M. Haupt Company? A. Yes, sir.

Q. Were you also acquainted with John V. Signell? A. Yes, sir.

Q. Were you present at a consultation between those parties in Edgewater during February, 1915? A. Yes, sir.

Q. And where? A. At my saloon over in Edgewater, New Jersey.

Q. What is your place known as? A. Enoch's hotel.

10

Q. And where did you meet those parties on that day? A. They came into my barroom that day.

Q. What day; can you fix, approximately, the day? A. I could not say; I think it was around the middle of the month, around the 15th of the month.

Q. The 15th of what month? A. I believe it was October.

20

Q. Was it in the Winter, or Fall or Spring of the year? A. It was in October, in the Fall.

Q. Of what year? A. 1914.

Q. 1914? A. Yes, sir.

Q. What took place in the room at your hotel? A. Mr. Signell had a receipt made out and he asked Mr. Haupt to sign it; all I remember is that Mr. Signell was to give Mr. Haupt \$400 and that receipt was supposed to be made out so that the payment was in full.

30

Q. I show you a paper, which has been marked S1, and ask you if you recognize that paper? A. Yes, it looks like the one I seen.

Q. What is it? A. It is a receipt.

Q. Is that the receipt that you referred to just now in your testimony? A. Yes, sir.

Q. I call your attention particularly to the date on that receipt; did you notice that on the day in which this consultation took place? A. No, I can't say that I do. I know that they were in my place

40

Q. Were they in your place on more than one occasion? A. Just in on that occasion on that day.

Q. Was that paper written in your presence on that day? A. Yes, sir.

Q. And did you read it over after it was written? A. It was shown to me, and I did read it over, yes, sir.

10

Q. Was the paper in the same condition then as you see it here today, as far as you can recall? A. Yes, sir.

Q. Did you see Mr. Haupt sign that receipt that day? A. Yes, sir, I did see Mr. Haupt sign it.

By the Court:

20

Q. What condition was the receipt in when he signed it? A. As far as I can recall, I do not see any difference in it now than it was that day.

Q. Was it discussed or talked about before you? A. There was a little discussion; Mr. Haupt said that he had some more money coming to him, and Mr. Signell said he did not and they sat down and figured things over and when they got through, Mr. Haupt signed this receipt, and Mr. Signell gave Mr. Haupt a check for \$400.

30

By Mr. Westervelt:

Q. After the signing of the receipt was there any further discussion between the parties as to the balance due? A. Not to me, but there was something said about more money, \$300 more to be paid after the work was done to the satisfaction of the Board of Education.

40

Q. What did you do after that receipt was signed? A. I went downstairs and attended to me own business.

Q. Did the other two gentlemen come down with

you? A. No, I believe they came down shortly afterwards.

Q. I show you a check and ask you if that is the check that was paid at the time? A. I could not say; I know that Mr. Singell handed Mr. Haupt a check for \$400.

Q. You saw a check handed to Mr. Haupt? A. Yes, sir.

10

Cross examination by Mr. Mackay:

Q. You do not know whether this is the same check or not, do you? A. I could not swear that it is, but it looks like it.

Q. You know there was a check passed hands that day? A. Yes, sir.

Q. But you did not see it? A. I did see it.

Q. Did you examine it? A. No, I did not examine it.

20

Q. How far were you when the check was handed to Mr. Haupt? A. I saw it was a check made out to Mr. Haupt for \$400.

Q. How far away were you when it was handed to Mr. Haupt? A. About as far as you are from me now.

Q. And when was it handed, after you were getting ready to go downstairs? A. No, up in the room where they were setting, where the receipt was signed.

30

Q. How long were you up there? A. Maybe fifteen or twenty minutes.

Q. Do you know what time it was when you went upstairs? A. It was in the afternoon.

Q. About what time? A. Oh, I should judge around one o'clock.

Q. And you came downstairs about half-past one? A. Yes, I believe so.

40

Q. And you came down when they were all

through? A. As far as I can remember they came down shortly after I went down.

Q. Why did you go downstairs? A. To attend to my business.

Q. Did anybody send for you? A. Not that I know of.

Q. Nobody sent for you? A. No, sir.

10 Q. Didn't a messenger come upstairs and say to you that Mr. Ready wanted to see you? A. I don't remember.

Q. Did you see Mr. Ready there that day? A. I believe I did.

Q. He was in your place that day? A. Yes, sir.

Q. And you came downstairs and talked to him, didn't you? A. I can't say for sure about that; I don't remember.

20 Q. Didn't Mr. Ready go up to you when you came downstairs and talk to you about certain matters? A. Mr. Ready was there quite frequently but I don't remember the days he was there.

Q. But you saw him there on this day? A. I don't remember; I would not be sure.

30 Q. You are sure that nobody sent for you? Didn't a messenger come upstairs and say that Mr. Ready was downstairs and wanted to see you? A. I am not positive about that.

Q. Just think and see if you can't remember about that? A. I don't remember about that, no, sir.

Q. And yet you remember about this receipt and the check? A. Yes, sir.

40 Q. And you remember that that receipt now is in the same condition that it was in on the day that it was signed? A. As far as I can remember, yes; I can't see any change in it.

Q. And you saw Mr. Signell sign it? A. No, I saw Mr. Haupt sign it.

Q. Did you see Mr. Signell write it? A. Yes, sir.

Q. Where were you when Mr. Haupt signed it? A. I was sitting by the side of the table.

Q. Tell us where you were and where Mr. Haupt and Mr. Signell were sitting? A. It was a small round table and Mr. Signell sat there (indicating). Mr. Haupt sat there (indicating) and I sat on the opposite side of the table. 10

Q. And you were looking over and saw Mr. Signell write this receipt? A. Yes, sir.

Q. And you could see what he was writing? A. I saw that he was writing it.

Q. You saw it while he wrote it? A. Yes, and I read it after he wrote it.

Q. Did you go around to the other side of the table and stand alongside of him and see him write it and then read it? A. After he wrote it I went over and read it; he turned it over to me; he just simply handed it over the table and showed it to Mr. Haupt before he signed it, and then he showed it to me. 20

Q. Isn't it a fact that he took the receipt and handed it over to Mr. Haupt and said, you sign that receipt and I will give you \$400? A. It was supposed to be the full amount.

Q. He said I will give you \$400 on account and you sign this receipt? A. He said that that was the balance of the amount coming up to date. 30

Q. Didn't he say that that was all that he could give him that day? A. I don't remember that.

Q. You were not up there all the time? A. Yes, I was up there all the time.

Q. You went downstairs, didn't you? A. I was there all the time.

Q. And what did you say about this receipt? A. That calls it to my mind, that everything that is on there was on there that same day; I do not 40

see anything different in that receipt now that I can recollect.

Q. What is there on there that calls it to your mind? A. What do you mean; that is on the receipt?

10 Q. That that is exactly the same receipt that was signed that day? A. Why, I remember the amount and I remember the conversation they had between them.

Q. And what was their conversation? A. The same as I stated before, about the money, the balance being paid in full \$400 up to date and that the \$300 would be paid as soon as the work would be completed according to the specifications and satisfactory to the Board of Education.

Q. And did they put that on there? A. I guess so; I guess it is there.

20 Q. How long have you known Mr. Signell? A. As long as I can remember back.

Q. Quite a long while? A. Yes, sir.

Q. He used to come to your place quite often? A. Not very often.

Q. How often? A. There were months that I did not see him at all, and then there were days that I saw him once or twice a day.

30 Q. Did he come to your place of business? A. Yes, sir.

Q. And on this day that he came to your place of business, didn't he ask you to come upstairs? A. Yes, sir.

Q. What did he say? A. He just asked me to come upstairs with Mr. Haupt and himself.

Q. How did he say it? A. Just the way I said.

40 Q. What did he call you? A. Enoch, he was standing at the bar and took a couple of drinks and then he asked me to come upstairs.

Q. And you went upstairs? A. Yes, sir.

Q. And you were not up there very long when

some one came up and said that Mr. Ready wanted to see you downstairs? A. I don't remember.

Q. And yet you remember everything in connection with the check and the receipt? A. I remember the receipt because I read it.

Q. You are very clear on that? A. Yes, sir.

Q. You would swear to that? A. I would swear that that is the receipt, yes, sir.

Q. But you would not swear to anything else?

A. Yes, sir, to anything that I remember.

10

Mr. Westervelt: That is all the testimony I have to offer except the engineer and he is not here today.

Mr. Mackkay: I will call Mr. Ready.

PATRICK READY, sworn.

20

Direct examination by Mr. Mackkay:

Q. Mr. Ready, where do you live? A. 78 West 120th Street, New York City.

Q. Do you know Mr. Carlson, the last witness on the stand? A. Yes, sir.

Q. How long have you known him? A. Oh, really I don't know, a few years, I suppose.

Q. Did you hear him testify that you were at his place of business on the day that the receipt and check that were offered in evidence were signed?

30

A. Yes, sir.

Q. On that day when you went to Mr. Carlson's place, did you speak to Mr. Carlson? A. Yes, sir.

Q. When you went into his place, was he there?

A. No, sir.

Q. Where was he? A. Upstairs.

Q. What did you do? A. I had told his bartender that I wanted to see Mr. Signell, that I was looking for some money myself.

40

Q. Did Mr. Signell owe you any money? A.

Yes, sir; and he said that Mr. Signell was upstairs with Mr. Carlson and Mr. Haupt, and I told him to go upstairs and tell Mr. Signell that I wanted to see him, and he went upstairs, and instead of him coming down Mr. Enoch Carlson came down.

Q. And did he come right down? A. Yes, sir.

10 Q. Do you know about what time it was? A. I really don't know exactly the time, but it was sometime in the afternoon, sometime around two or three o'clock, I could not exactly tell.

Q. Did you see Mr. Haupt there that day? A. Yes, sir.

Q. And did you see Mr. Signell there that day? A. Yes, sir.

Q. Did you ask Mr. Signell for some money that day? A. Yes, sir.

20 Q. And what did he say to you? A. He told me that he got the money from the Board of Education but there was only one man to sign his check, but that was not so because the check was already signed.

Q. Did Mr. Signell tell you to come there on that day? A. No, I don't think so, I came there looking for him, because it was a couple of days after he got his payment.

30 Q. You went there to see him? A. Yes, sir.

Q. And after Mr. Carlson came downstairs did he go back again? A. Not until I left there.

Q. Did Mr. Haupt come downstairs before you left? A. Yes, sir.

By the Court:

40 Q. When did you say this was? A. I believe it was the latter part of January; I think it was the last days of January; I could not exactly say.

No Cross Examination.

MATTHEW HAUPT, recalled.

Direct examination by Mr. Mackay:

Q. Mr. Haupt, you have heard Mr. Carlson testify that on the date that the receipt was signed by you that everything was written on there by Mr. Signell that is on it now? A. No, sir; it is not so.

Q. It is not so? A. No, sir.

10

Q. And you said, I believe, on your direct examination, that the only thing that was on that receipt at the time you signed it was, what? A. Received \$400.

Q. And what was your understanding about this check that Mr. Signell gave you? A. He claimed that that was all the money that he could spare that day; he said that he had to give the iron man some money and Mr. Ready some money.

20

Q. And what did Mr. Signell say about the balance? A. Why, that he was going to give me that on the next payment.

Q. Was there anything said about the balance being \$300 when the work was completed? A. There was nothing said about that at all.

Q. You never made any agreement of that kind? A. No, sir.

Q. On the day that Mr. Carlson testified that that receipt was signed, how long did he stay upstairs? A. Well, we were arguing for about an hour or more.

30

Q. And what took place during that time? A. Well, I wanted to get all the money that he got that time for the rock; he promised me that he would give it to me out of this payment; he said, as soon as I get this rock money, and he got \$1531, and all he wanted to give me was the \$400.

40

Q. Was that the payment in full? A. No, sir; that was not the payment in full.

Q. And at the time the receipt was drawn up how much work had you done? A. I had done all the work except about 9,000 yards on the grading end of it.

10 Q. And how much money were you entitled to at that time? A. I was entitled to \$4631.

Q. How much had you received? A. I had only received \$3100 with this \$400.

Q. Including the \$400? A. Yes, sir.

Q. And did Mr. Signell make you these payments in installments?

Mr. Westervelt: I object; I think we have all this in the testimony now, and is practically cross examining his own witness.

20 The Court: I will admit the question.

Q. (Last question repeated by stenographer.)
A. Yes, sir, sure; whenever he got a payment he would give me so much on account.

Q. On account? A. Yes, sir.

Q. I show you a receipt, you have probably seen it before? A. Yes, sir.

Q. Did you sign it? A. Yes, sir, I signed it.

30 Q. Was Mr. Carlson in the room when you signed it? A. No, sir.

Q. Where was he? A. He was downstairs.

Q. How do you know? A. Because the bartender came upstairs and said, Mr. Signell, Mr. Ready wants to see you, and Mr. Signell said, "For God's sake go down and keep him down there for I don't want him up here."

Q. Was Mr. Carlson there when the check was given to you? A. No, he was not.

40 Q. What did Mr. Signell say to you? A. He said that he had to give the iron man some

money, and that he would fix me up from the next payment.

Cross examination by Mr. Westervelt:

Q. You have already said that you signed this receipt? A. Yes, sir; but this was not on there; there was only \$400 on it.

Q. (Showing witness receipt): That is your signature? A. Yes, sir.

10

Q. Now, then, show the Court on that receipt where the writing stopped, when you signed that paper? A. All I seen on it was \$400 when he handed it over to me to sign.

Q. Show us where the writing stopped when you signed it? A. Just "\$400."

Q. Take a pencil and mark on that exhibit where the writing stopped when you signed the receipt? A. Well, that is all I seen on it, "\$400."

20

Q. You don't know where the writing stopped when you signed it? A. Well, it stopped here (indicating).

Q. Mark on it where it stopped? A. I cannot say whether he had a line on the back or not; all I read was "\$400."

Testimony Closed.

The Court: Mr. Westervelt, I will deny your motion for a postponement of the case and decide the matter now.

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Memorandum of Advisory Master.

(Filed July 18, 1916.)

IN CHANCERY OF NEW JERSEY.

10	Between M. HAUPT COMPANY, Complainant, and BOARD OF EDUCATION OF THE BOROUGH OF EDGEWATER <i>et</i> <i>al.</i> , Defendants.	}	On Bill, etc., Memorandum.
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20 The stop notice and bond of the complainant, M. Haupt Company, were filed on April 13th, 1915. The statute provides that any lien provided for in this act shall not be binding upon the property therein described unless an action be commenced within ninety days from the filing of the same, and the notice of pendency of such action be filed with the financial officer of the city, etc. The bill of complaint was filed on July 12th, 1915, which is within the ninety days mentioned in the statute. The subpoena was issued July 26th, 1915, 30 some fourteen days after the expiration of the ninety days. Under the authorities, as I find them, an action in chancery is not begun by the filing of the bill only within the required time, but process must also be issued within that time. Some authorities hold that this includes also a reasonable effort to serve the subpoena. I am constrained to hold, therefore, that this action was not brought within the time limited by the statute. 40 The cases which are useful in this connection are found, some of them, in the recent opin-

ion of Vice-Chancellor Backes in the case of Hermann v. Mexican Petroleum Corporation, 96 Atlantic Reporter, 492.

The cases by which the rule in the Federal Courts is established are set out by Mr. Justice Holmes, in *Linn & Lane Timber Co. v. United States*, 236 U. S., 574, at page 578.

I am obliged therefore to hold that the claim of the complainant, M. Haupt Company, cannot be allowed. 10

The other claims, however, do not fall by reason of this holding, under the authority of the case of *National Fire Proofing Company v. Daly*, 76 Equity, pages 35 and 45, and I will therefore determine their validity and priority.

That of Antonio P. Petrillo was served on the Board of Education on May 12th, 1915, but no notice of the pendency of any suit, naming Petrillo as claimant was filed by him, nor was any such notice filed by any one else in which he was named. This claim must therefore be disallowed. 20

The claim of the National Excavation and Foundation Company seems never to have been perfected and a decree *pro confesso* was taken against it.

The only other claim before me is that of Selbach-Meyer Company, which was served on the Board of Education on July 9th, 1915. This claim must be disallowed as no notice of the pendency of any suit naming Selbach-Meyer Company as a claimant was filed by it or by any one else. 30

July 18, 1916.

FRANK P. McDERMOTT,
Advisory Master.

Final Decree.

(Filed July 19th, 1916.)

IN CHANCERY OF NEW JERSEY.

10	Between M. HAUPT COMPANY, Complainant, and BOARD OF EDUCATION OF THE BOROUGH OF EDGEWATER <i>et</i> <i>al.</i> , Defendants.	}	On Bill, <i>etc.</i> Final Decree.
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20 This cause coming on to be heard in the presence of Mackay & Mackay, solicitors for the complainant; Milton Demarest, solicitor for the defendant John V. Signell; William E. Ellis, solicitor for the defendant the Board of Education of the Borough of Edgewater; Clyde A. Bogert, solicitor for the defendant Antonio T. Petrillo, and Dippel & Davis, solicitors for the defendant Selbach-Meyer Company, and the complainant's bill having been heretofore taken as

30 confessed against the defendant, the National Excavation and Foundation Company, and the pleadings and proofs having been read, and the arguments of the respective counsel having been considered and the Court having duly considered said pleadings, proofs and arguments, and it appearing that the complainant's action was not brought within ninety days from the filing of the claim of lien and that it is not entitled to the

40 relief sought and prayed for by it in its bill of complaint, and it further appearing that no notice of pendency of any suit naming Antonio

T. Petrillo as a claimant was filed by him, nor was any such notice filed by anyone else in which he was named, and that no notice of pendency of any suit naming Selbach-Meyer Company as a claimant was filed by it nor was any such notice filed by anyone else in which it was named;

It is, on this 18th day of July, 1916, by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed, that the complainant's bill be and the same is hereby dismissed, and the claims of the said Antonio T. Petrillo and Selbach-Meyer Company be and the same are hereby disallowed. 10

And it is further ordered, adjudged and decreed that the costs of the defendant, the Board of Education of the Borough of Edgewater, including a counsel fee of \$100 to William E. Ellis, solicitor for said defendant, which is hereby allowed, be paid out of the funds in the hands of said defendant. 20

Respectfully advised,

FRANK P. McDERMOTT,
Advisory Master.

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New Jersey Court of Errors and Appeals

Between
M. HAUPT COMPANY,
Complainant-Appellant,

and

BOARD OF EDUCATION OF THE
BOROUGH OF EDGEWATER,
JOHN V. SIGNELL, SELBACH
MEYER COMPANY and AN-
TONIO T. PETRILLO,
Defendants-Appellees.

Brief for
Complainant-
Appellant.

BRIEF FOR COMPLAINANT-APPELLANT.

This action is an appeal from a final decree advised by Honorable Frank P. McDermott, Advisory Master, on July 18th, 1916. The Appellant appeals from that part of the decree which dismisses the Bill of Complaint filed by the Appellant on the grounds that the action was not commenced within the time required by the statute. The whole point involved in the case is "When is an action commenced in the Court of Chancery so as to prevent the running of the Statute of Limitations," and the facts in the case ^{are} briefly as follows:

The Appellant, M. Haupt Company, was employed as a sub-contractor by John V. Signell, who entered into an agreement with the Board of Education of the Borough of Edgewater to erect a school building. John V. Signell failed to pay the Appellant, and under the statute a municipal lien claim was filed and served within the time.

Section 4 of the Municipal Lien Law provides as follows:

"That no lien provided for in this act shall be binding upon the property therein described unless an action be commenced within ninety days from the filing of the same, and a notice of pendency of said action be filed with the Financial Officer of said city, town, township or other municipality."

The Advisory Master in his memorandum on page 58 of the State of the Case says:

"The Bill of Complaint was filed on July 12th, 1915, which is within the ninety days mentioned in the Statute."

On page 4 of the State of the Case is set out the notice of pendency provided by the statute which was served on the Financial Officer on July 10th, 1915, which was within the ninety days, but the Advisory Master held that the action was not commenced until the subpoena was issued, which was July 26th, 1915, and was more than ninety days from the time of the filing of the lien claim, and because of that fact, dismissed the Bill of Complaint, and for that reason this appeal is taken.

POINT ONE.

Commencement of an Action.

The learned Advisory Master in his memorandum held that an action in equity was not commenced until the issuing of the subpoena, and relied on the case of *Herman against Mexican Petroleum Corporation*, decided by Vice Chancellor Backus, and reported in 96 Atlantic Reporter, page 492. A careful examination of this case dis-

closes the fact that the decision was based on an application to transfer the cause from the Court of Chancery to a Court of Law under the Transfer of Causes Act of 1912. In reading the opinion of the learned Vice Chancellor, we notice that in the Chancery suit, a Bill of Complaint was filed, *but no subpoena was ever issued*, and that ^{at} the time the application was made, the Bill of Complaint had been filed for about a year without any further proceeding being taken, and it would appear that the intention of the complainants in that case to proceed had been abandoned, and we submit that the good faith should be taken into consideration.

In 26 Cyc., page 1299, we find the following:

“Since the passage of this statute (referring to the Statute of 4 Anne), however, requiring the filing of the Bill before the issuance of the subpoena, the commencement of the suit is reckoned for the purpose of preventing the operation of the Statute of Limitations from the time of the filing of the Bill, and not from the service of the subpoena.”

There seems to be a distinction in New Jersey between the commencement of an action at law and the commencement of an action in equity, and on 25 Cyc., page 1298, we find:

“^{”let} An attempt to commence an action is provided by statute in some states that the attempt to commence an action shall be equivalent to its commencement when the Summons is delivered to the proper officer with the intent that it shall actually be served providing such is followed by service within a specified time.”

This evidently refers to an action at law, but it ~~appears~~ ^{is} to be our contention that the Courts

lean toward the good faith of the party commencing the action at the time the step is taken.

The first step in an action at law was the issuing of a Summons. The first step in an action in Chancery was the filing of the Bill of Complaint as shown by Section 3 of the Chancery Act, Compiled Statutes, Volume 1, page 411, which provides:

“That no subpoena or other process for appearance shall issue out of the Court of Chancery until the Bill shall have been filed.”

Dickenson's Chancery Precedents, page 1, recites:

“A suit in the Court of Chancery is commenced by filing the Bill.”

And we submit that when an authority such as Mr. Dickenson is known to be in Chancery pleadings and practice in the Courts of New Jersey holds that the commencement of a suit in equity is the filing of the Bill, your Honors should give some weight to his opinion.

We have been unable to find any case in New Jersey directly on point, but we do find the case of *Clark* against *Slaton*, a New Hampshire case, 1 Atlantic Reporter, page 113, which holds:

“A suit in equity is not commenced so as to avoid the statute of limitations until the bill is filed in the Clerk's Office.”

Carpenter, Judge, speaking for the Court, said:

“A bill in equity must be filed in the Clerk's Office and an order of notice obtained before it can be served upon the defendants. *Rules 11 and 13. The date of the filing is however, the earliest time which can be taken as the commencement of the suit.*”

See also *Venner v. Cassett*, a Pennsylvania case, in 84 Atlantic Reporter, page 780.

The Advisory Master in his memorandum cited the case of *Hermann* against *Mexican Petroleum Corporation*, 96 Atlantic Reporter, page 492, and as pointed out by us in the opening of this Brief, it appeared that that was an application to transfer the case from the Court of Chancery to a Court of Law under the Transfer of Causes Act, and the learned Vice Chancellor found that the only proceeding so filed in the Chancery suit was the Bill which had been filed for about a year without any attempt on the part of the Complainant to proceed further, and although he held that the Chancery action had not been commenced, we believe that his opinion was rendered as a matter of dictum, possibly upon the theory that the Complainants ~~were~~ ^{by} were not taking any further proceedings after filing the bill for about a year, they had abandoned the idea of commencing an action, and the Courts in our opinion inclined toward the good faith of the parties, and wherever there is a doubt as to when an action has really been commenced so as to prevent the running of the Statute of Limitations have inclined toward the upholding of a claim.

POINT TWO.

Appellant commenced its action in good faith.

Everything on the face of the pleadings of the Chancery action goes to show that the Complainant diligently prosecuted its action, which was an action to establish a lien against moneys due to one of the defendants, to wit: John V. Signell from another of the defendants, to wit: Board of

Education of the Borough of Edgewater, for the amount of the lien filed by the Appellant, and which the defendant, John V. Signell, tried to avoid payment of by trying to have a strict consideration placed on the statute which has been held by our highest Court to afford an equitable remedy and should be liberally construed. *Delafield Construction Company* against *Thayer*, 60 N. J. Law, page 449.

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There are a number of cases in actions at law where the Courts have deemed actions to be commenced, where the Statute of Limitation had expired and Complainant showed good faith and an attempt to commence within the statutory time, and among them, we cite the following cases:

Updike v. Tenbroeck, 3 Vroom, 105;
Whittaker v. Turnbull, 3 Harr., 122;
McCracken v. Richardson, 17 Vr., 50;
County Adm'x v. Passaic Coast Borax Co., 67 N. J. Law, 48;
County Adm'x v. Passaic Coast Borax Co., 68 N. J. Law, 273;

which all ^{bear} appear on the question of good faith.

Now, then, if the Court of law allows such leeway to the Complainant, we submit that a Court of Equity should go still further and extend every opportunity to the Complainant so as to prevent a miscarriage of justice, and we contend that the proceedings in the case commenced with the Bill of Complaint. If your Honor decides that the service of the subpoena is the commencement, then we submit that your Honor would be obliged to take proceedings from that time to date, and in doing this, he would have to omit the Bill of Complaint, and would be without any data on which to decide the issues. This would be a strict ~~con-~~ *consideration* *construction*.

Before closing, we wish to call your Honor's attention to the fact that the Bill of Complaint was filed within ninety days, and also a Notice of Pendency required by the Statute was served upon the Financial Officer within ninety days, and the proceedings from that time on were diligently carried to a final hearing.

Respectfully submitted,

MACKAY & MACKAY,
Solicitors and of Counsel
with the Appellant.

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