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BILL OF COMPLAINT.

(Filed Oct. 22, 1927.)

IN CHANCERY OF NEW JERSEY.

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

The complainant, the Atlantic City Lumber Co.,
a corporation of the State of New Jersey, with its
principal office and place of business in the City of
Atlantic City, in the County of Atlantic, says that:

10

1. On or about August 2, 1926, the M. B. Mark-
land Co., a corporation of the State of New Jersey,
entered into a contract with the City of Atlantic
City, a municipal corporation, which contract pro-
vided for the excavation and foundations for the
convention hall in Atlantic City.

20

2. That on or about the twenty-eighth day of Jan-
uary, 1927, the complainant agreed to furnish cer-
tain lumber and other material to be used in the
excavation aforesaid and in the erection and con-
struction of the foundation for said convention hall,
for which the complainant was to be paid the reason-
able market value thereof.

3. That said agreement was made with the Metal
Mould Erection Co., a corporation of the State of
Delaware, who was a sub-contractor under M. B.
Markland Co., the general contractor.

30

4. That in accordance with said agreement com-
plainant furnished lumber and other material as set

forth in the schedule attached hereto and made a part hereof and for the purpose of identification marked Exhibit A. That opposite the various items set forth in the itemized statement attached hereto and made a part hereof are set the prices of said lumber and other material furnished, which prices are in every case the reasonable market of the same. That all of said material was used in the excavation and the erection and construction of the
10 foundation aforesaid.

5. That the complainant has fully performed its part of said agreement and furnished all material required by said agreement to be furnished by it.

6. That by virtue of said agreement, the complainant became a materialman furnishing material to the Metal Mould Erection Co., a corporation as aforesaid, a sub-contractor of M. B. Markland Co.,
20 general contractor, in the erection and construction of the public work aforesaid.

7. That the total amount originally due for material so furnished by the complainant was \$4,012.27; that the Metal Mould Erection Co. has paid to the complainant on account of said material the sum of \$289.38.

8. That there is a balance justly due and owing
30 to the complainant in the sum of \$3,722.89, no part of which has been paid by the Metal Mould Erection Co., but, on the other hand, the Metal Mould Erection Co. and M. B. Markland Co. have refused and neglected to pay the complainant any part of the said balance due.

9. The complainant on or about August 25, 1927,

filed with the City of Atlantic City a notice of its claim duly verified, a copy of which said claim is attached herto and made a part hereof and for the purpose of identification marked Exhibit B.

10. That said notice of claim was filed as aforesaid with the City of Atlantic City before the City of Atlantic City had accepted the whole work to be performed by the said M. B. Markland Co., contractor.

10

11. That on or about September 3, 1927, H. Hoffman & Sons filed a claim with the City of Atlantic City aforesaid, claiming that the said Metal Mould Erection Co. owed them for material furnished and work and labor performed in the sum of \$795.50.

12. That the complainant alleges the fact to be that if the said amount is due to the said H. Hoffman & Sons, their said claim was filed after complainant's claim and that said H. Hoffman & Sons' claim should not be paid until after complainant's claim has been paid.

20

13. Complainant is without adequate remedy in the courts of law and is entitled to relief in this court by virtue of Chapter 280 of the Pamphlet Laws of 1918 of this State, and the supplements thereto and amendments thereof.

Complainant, therefore, prays that:

30

1. All of the parties who have filed claims, or assignments or orders with the said City of Atlantic City in connection with the excavation and foundation of said convention hall may be made parties hereto and may answer this suit.

2. That this Court may determine the amounts and priorities of the claims of all parties to this action and that it may order and decree that there be paid to the complainant the sum of money so due and owing to it as aforesaid in accordance with the priorities that may more fully hereafter appear.

3. That there issue out of this court subpoenas directed to M. B. Markland Co., the City of Atlantic
 10 City and H. Hoffman & Sons in accordance with the practice of this court requiring them to answer this complaint and to set forth their claims.

4. That complainant may have such other and further relief as may be equitable and just.

And your complainant will ever pray, &c.

THOMPSON & HANSTEIN,
Solicitors for and of Counsel
 with Complainant.

20

STATE OF NEW JERSEY, }
 COUNTY OF ATLANTIC, } ss.

30 I, WALTER C. BRICK, of full age, being duly sworn according to law upon my oath depose and say that I am the general manager of the Atlantic City Lumber Co., the complainant named herein, and that I am the duly authorized for said company for the collection of this claim and the taking of this affidavit; that the Atlantic City Lumber Co. is a corporation of the State of New Jersey, with its principal office and place of business in the City of Atlantic City, New Jersey; that the complainant, Atlantic City Lumber Co. has performed its part of the agree-

ment made with the Metal Mould Erection Co., a corporation of the State of New Jersey, sub-contractor under M. B. Markland Co., general contractor, and has furnished the lumber and other material according to its agreement; that there is now due in accordance with the said agreement to this complainant a balance of \$3,722.89, no part of which has been paid by the Metal Mould Erection Co., but, on the other hand, the Metal Mould Erection Co. refuse and neglect to pay the complainant any part of the said balance due; that said lumber and other material furnished by the said complainant were to be used in the excavation and foundation for the convention hall in Atlantic City; that the whole amount of \$3,722.89 is still justly due and owing to this complainant, and that all the facts set forth in the within bill of complaint are true to the best of my knowledge and belief. 10

WALTER C. BRICK.

Sworn and subscribed before me this 20th day of 20
October, A. D. 1927.

ALICE M. LANGE,
Notary Public of N. J.

My commission expires Feb. 23, 1932.

TO THE CITY OF ATLANTIC CITY, ANTHONY M. RUFFU, JR., Mayor of the City of Atlantic City; to Joseph A. Paxson, Director and Commissioner of Revenue and Finance; to Joseph A. McNamee, City Clerk of the City of Atlantic City, and to Bessie M. Townsend, City Comptroller of the City of Atlantic City: 30

NOTICE IS HEREBY GIVEN by the Atlantic City Lumber Co., a corporation of the State of New Jersey, having its principal place of business at 22

N. Illinois Avenue, in the City of Atlantic City, in the County of Atlantic and State of New Jersey, claimant, that said corporation claims the sum of \$3722.89 from the Metal Mould Erection Co., a corporation of the State of Delaware, for materials furnished, as per the attached statement marked Schedule "A", and by this reference made a part hereof, to the said Metal Mould Erection Co., and used by it in carrying out its contract with M. B. Markland Co., a corporation of the State of New Jersey, the general contractor with the City of Atlantic City for the excavation and foundation for the convention hall in Atlantic City, which contract bears date August 2, 1926. Said materials were used in the performance or completion of said contract.

Said materials as set out in said Schedule "A" were furnished to the said Metal Mould Erection Co. as subcontractor under the M. B. Markland Co. and all of said materials were actually used in the execution or completion of said contract with the said City of Atlantic City; that said Schedule "A" shows the prices charged for said materials which were agreed to be paid by the said Metal Mould Erection Co. and also shows all just credits and set-offs and the amount of the demand, as nearly as may be, after deducting all just credits and off-sets; that said money is now due to this claimant.

And this claimant claims a lien for the value of the said unpaid material, as shown on Schedule A, upon the moneys in the control of the City of Atlantic City, due or to grow due under said contract to the full value of said claim or demand, pursuant to the statute in such case made and provided.

ATLANTIC CITY LUMBER CO.

By Isaac Bacharach

President.

SCHEDULE "A."

MONTHLY STATEMENT

Atlantic City, N. J., June 30, 1927.

Metal Mould Erection Co.

Convention Hall Job.

10 To ATLANTIC CITY LUMBER CO., Dr.

Dealers in

LUMBER AND MILL WORK

Phone Marine 69 for Lumber

22 N. Illinois Avenue

1927. To Balance

To Mdse. as per Bill Rendered

Jan. 31,	"	"	482.44
Mar. 31,	"	"	157.26
Apr. 30,	"	"	424.87
20 Apr. 30,	"	"	549.37
Apr. 30,	"	"	414.72
May 31,	"	"	939.33
May 31,	"	"	1044.28

CREDITS

Apr. 8, Cash	250.00
Apr. 28, Cash	39.38

4012.27	289.38
289.38	

30

3722.89 Balance

Isaac Bacharach, President

R. B. Fletcher, Secy. & Treas.

Walter C. Brick, Manager

Metal Mould Erection Co.

Convention Hall Job, S. Miss. Ave.

To ATLANTIC CITY LUMBER CO., Dr.

Dealers in

LUMBER AND MILL WORK

North Illinois Avenue

Lumber, Stock and
Special Mill Work
Glass, Sash Weights
Cord, Roofing
Upson Board, Insulite
Parquetry Flooring, Etc.
Phone Marine 69

Fixtures
Storm Enclosures
Screens
Our Specialties

Terms: Net cash 60-days from date
of invoice

Atlantic City, N. J. January 28, 1927.

Date	Articles	Charges	Credits	Balance
	To Bills Rendered			
	30			
		20		
			10	

Bill of Complaint

Vertical stamp: 1927 1928 1929 1930

1927
Jan. 28
D3551

	30	20	10
1151 Ft. BM 1 x 4 N. C. Box S2S 13/16			
6637 Ft. BM 1 x 5 N. C. Box S2S 13/16			
4942 Ft. BM 1 x 6 N. C. Box S2S 13/16			
3748 Ft. BM 1 x 8 N. C. Box S2S 13/16			
158 Ft. BM 1 x 10 N. C. Box S2S 13/16			
<hr/>			
16636 Ft. BM		@ \$29.	482 44
Car ACL #41586		F.O.B. Car	
No claim allowed unless reported upon receipt of lumber—			

Isaac Bacharach, President

R. B. Fletcher, Secy. & Treas.

Walter C. Brick, Manager

Metal Mould Erection Co.

Miss & Pac.

To ATLANTIC CITY LUMBER CO., Dr.

Dealers in

LUMBER AND MILL WORK

North Illinois Avenue

10

Bill of Complaint

Lumber, Stock and
 Special Mill Work
 Glass, Sash Weights
 Cord, Roofing
 Upson Board, Insulite
 Parquetry Flooring, Etc.
 Phone Marine 69

Fixtures
 Storm Enclosures
 Screens
 Our Specialties

		Atlantic City, N. J. March 1927.		
Date	Articles	Charges	Credits	Balance
	To Bills Rendered			
6301	21 1500 Ft. 8" Sheath.	58 50		
	50—2 x 4—16 Sap	21 36		
6401	22 50—3 x 4—12 Sap	25 20		
6333	23 50—2 x 4—16 Sap	21 36		
6530	26 200 Ft. 8" Sheath.	7 80		
6732	31 12—2 x 12—16 Sap Ripped like sketch	23 04		157 26

Bill of Complaint

Isaac Bacharach, President

R. B. Fletcher, Secy. & Treas.

Walter C. Brick, Manager

Metal Mould Erection Co.

Miss. & Pac.

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To ATLANTIC CITY LUMBER CO., Dr.

Dealers in

LUMBER AND MILL WORK

North Illinois Avenue

12

Lumber, Stock and
 Special Mill Work
 Glass, Sash Weights
 Cord, Roofing
 Upson Board, Insulite
 Parquetry Flooring, Etc.
 Phone Marine 69

Fixtures
 Storm Enclosures
 Screens
 Our Specialties

Bill of Complaint

Atlantic City, N. J., April, 1927.

Date	Articles	Charges	Credits	Balance
	To Bills Rendered			
7045	5 25—2 x 4—16 Sap	10	68	
	50—3 x 4—12 Sap	25	50	
7306	7 25—2 x 4—16 Sap	10	68	
7452	8 1500 FT. BM 2 x 12 N. C. P. Ripped to 2 x 11 exact. Send ripping.	78	75	
7341	11 81—1 x 12—5—0 Rgh. Sheath. cut to size.	22	68	

7395		30—2 x 4—14 Sap	11 20
7551		30—2 x 4—14 Sap	11 20
		81—1 x 12—5—0 N. C. Box Rgh. cut to length.	22 68
7674	14	25—2 x 4—14 Sap	9 36
7689		25—2 x 4—14 Sap	9 36
		334 Ft. Lin. 1 x 8 Sheath. Ripped 3 Pcs.	11 15
7729	15	25—3 x 4—12 Sap	
		25—3 x 4—14 Sap	27 63
7730		25—3 x 4—12 Sap	
		25—3 x 4—14 Sap	27 63
7868	19	500 Ft. 1 x 12 Rgh. Sheath. Ripped to 10½". Send rippings.	25 00
		25—3 x 4—12 Sap	
		25—3 x 4—14 Sap	27 63
		10—2 x 4—12 Sap	
		10—2 x 4—14 Sap	
		10—2 x 4—16 Sap	11 24
7891	20	50—1 x 12—16 Rgh. Sheath. Cut 5—4	42 00

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Sill of Complaint

13

	30		20		10	
7967		300 Ft. 1 x 12 Rgh. Sheath. Ripped to				
		10 $\frac{1}{2}$ ". Send rippings.			15 00	
8136	22	50—3 x 4—12 Sap			25 50	424 87
					<hr/>	

Isaac Bacharach, President

R. B. Fletcher, Secy. & Treas.

Walter C. Brick, Manager

Metal Mould Erection Co.

Miss. & Pac.

To ATLANTIC CITY LUMBER CO., Dr.

Dealers in

LUMBER AND MILL WORK

North Illinois Avenue

Lumber, Stock and
 Special Mill Work
 Glass, Sash Weights
 Cord, Roofing
 Upson Board, Insulite
 Parquetry Flooring, Etc.
 Phone Marine 69

Fixtures
 Storm Enclosures
 Screens
 Our Specialties

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Bill of Complaint

Atlantic City, N .J., April, 1927.
Charges Credits Balance

Date Articles
To Bills Rendered
6802 6 18012 Ft. BM 1 x 8 YP #1 Box D4S 549 37
Car P. R. R. #46274

Isaac Bacharach, President

R. B. Fletcher, Secy. & Treas.
Walter C. Brick, Manager

Metal Mould Erection Co.
Miss. & Pac.
To ATLANTIC CITY LUMBER CO., Dr.
Dealers in
LUMBER AND MILL WORK
North Illinois Avenue

Lumber, Stock and
Special Mill Work
Glass, Sash Weights
Cord, Roofing
Upson Board, Insulite
Parquetry Flooring, Etc.
Phone Marine 69

Fixtures
Storm Enclosures
Screens
Our Specialties

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Bill of Complaint

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		30	20	10			
		Atlantic City, N. J., April, 1927.					
Date	Articles	Charges	Credits	Balance			
	To Bills Rendered						
8097	25 50—3 x 4—12 Sap	25		50			
	2—2 x 12—14 Sap. Ripped to detail		3	50			
8430	27 1000 Ft. BM 1 x 4 Rgh. Sheath. Ripped	55		00			
	25—2 x 4—14 Sap		9	36			
8456	28 50—2 x 4—16 Sap	21		36			
8455	29 160—1 x 12 cut 6—0 Sheath. Rgh.	50		40			
8518	2003 Ft. BM 1 x 8 Sheath. Rip to 6"						
	Send rippings	90		14			
8570	50—2 x 4—16 Sap	21		36			
8701	1002 Ft. 1 x 12 N. C. Box Rgh. Ripped						
	to 11". Send rippings	50		10			
8702	2200 Ft. BM 8" Sheath.	88		00		414	72

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Bill of Complaint

Isaac Bacharach, President

R. B. Fletcher, Secy. & Treas.

Walter C. Brick, Manager

Metal Mould Erection Co.

Geo. & Pac.

To ATLANTIC CITY LUMBER CO., Dr.
 Dealers in
 LUMBER AND MILL WORK
 North Illinois Avenue

Lumber, Stock and
 Special Mill Work
 Glass, Sash Weights
 Cord, Roofing
 Upson Board, Insulite
 Parquetry Flooring, Etc.
 Phone Marine 69

Fixtures
 Storm Enclosures
 Screens
 Our Specialties

Bill of Complaint

		Atlantic City, N. J., May, 1927.		
Date	Articles	Charges	Credits	Balance
	To Bills Rendered			
9064	7 160—1 x 12—7—0 Sheath. Rgh	56 00		
9098	1400 Ft. BM 1 x 8 Sheath.	56 00		
9126	9 1003 Ft. BM 1 x 8 Sheath.	40 12		
9302	100—2 x 4—14 Sap			
	100—2 x 4—16 Sap	80 04		
	100—3 x 4—12 Sap			
	100—3 x 4—16 Sap	119 00		
9351	10 2000 Ft. BM 8" Sheath.	80 00		
	30			
		20		
			10	

17

		30	20	10	
9241	11	1500 Ft. 1 x 8 Sheath.			
		500—Ft. 1 x 10 Sheath.		80 00	
9364	12	25—3 x 4—16 Sap		17 00	
9368		50—2 x 4—14 Sap		18 68	
9385		50—3 x 4—14 Sap		29 75	
		50—2 x 4—12 Sap		16 00	
9452		8942 Ft. BM 1 x 6 N. C. Box D4S			
		from Car ACL #40779		312 97	
9605	16	50—2 x 4—14 Sap		18 68	
10012	21	4—2 x 6—16 Sap ripped to pattern		3 84	
10103		3—2 x 12—14 Sap S4S		3 57	
10111	24	8—2 x 6—16 Sap Cut to pattern			
		Send rippings		7 68	
				939 33	

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Bill of Complaint

Isaac Bacharach, President

R. B. Fletcher, Secy. & Treas.

Walter C. Brick, Manager

Metal Mould Erection Co.

Miss. & Bdwk.

To ATLANTIC CITY LUMBER CO., Dr.

Dealers in

LUMBER AND MILL WORK
North Illinois Avenue

Lumber, Stock and
Special Mill Work
Glass, Sash Weights
Cord, Roofing
Upson Board, Insulite
Parquetry Flooring, Etc.
Phone Marine 69

Fixtures
Storm Enclosures
Screens
Our Specialties

		Atlantic City, N. J., May, 1927.		
Date	Articles	Charges	Credits	Balance
	To Bills Rendered			
8597 3	1520 Ft. BM 1 x 8 Sheath. Ripped to 6"			
	Send rippings	68 40		
8677	1680 Ft. BM 1 x 8 Sheath. Ripped to 6"			
	send rippings	75 60		
	1008 Ft. BM 1 x 3 Rgh. Sheath. Rip 12"	55 44		
8684	1800 Ft. BM 1 x 8 Sheath. Ripped to 6"			
	send rippings	81 00		
8725	25—1 x 10—16 Sheath. Ripped into			
	3 Pcs.	16 70		
	6—2 x 4—16 Sap Ripped into 2 Pcs.	2 88		
	30		10	
		20		

Bill of Complaint

19

	30	20	10
8813	1000 Ft. 1 x 12 N. C. Box Rgh. Rip to 11"		
		send rippings	50 00
8835	4 50—3 x 4—14 Sap		29 75
		25—1 x 10—16 Sheath. Rip 3 Pcs.	16 70
8837	512 Ft. BM 1 x 3 Rgh. Sheath.		28 16
8885	2070 Ft. BM 1 x 8 Sheath. Ripped to 6"		
		send rippings	93 15
8911	50—3 x 4—16 Sap		34 00
		502 Ft. BM 1 x 8 Sheath.	20 08
8741	5 1800 FT. BM 1x8 Sheath. Rip 6" Send		
		Rippings	81 00
8776	1130 FT. BM 1x8 Sheath. Rip 6" Send		
		Rippings	50 85
8789	742 FT. BM 1x8 Sheath. Rip 6" Send		
		Rippings	33 39
8796	25—2 x 4—16 Sap		10 68
		25—3 x 4—16 Sap	17 00
8934	3000 Ft. Sheath. 1x8 Rip 6" send		
		rippings	135 00
9003	25—3 x 4—12 Sap		12 75

8948	6	1000 Ft. BM 1 x 3 Rgh. Sheath.	55 00	
9063		25—3 x 4—12 Sap	12 75	
9011	7	1600 Ft. 1 x 8 Sheath.	64 00	1044 28
			<hr/>	

Bill of Complaint

21

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ORDER TO AMEND COMPLAINT.

(Filed Sept. 7, 1928.)

IN CHANCERY OF NEW JERSEY.

10 Between
 ATLANTIC CITY LUMBER
 Co.,
 Complainant,
 and
 CITY OF ATLANTIC CITY,
 et al.,
 Defendants.

On Bill, &c.
 Order to Amend
 Complaint.

20

On motion of Thompson & Hanstein it is on this 7th day of September, 1928, ordered that the bill heretofore filed in this cause be and the same is hereby amended in the following particulars, that is to say by inserting a paragraph in said bill to be known as paragraph 10A and to read as follows:

30

“10A. That there is due and owing and in the hands of the City of Atlantic City an amount of money more than sufficient to pay the lien claims of the complainant and the defendants, H. Hoffman & Sons, which money is due and owing from the City of Atlantic City to M. B. Markland Co., under the contract referred to in paragraph one of the bill.”

It is further ordered that copies of this order which may be certified as true copies by the soli-

citors for the complainant shall be served on the defendants herein within one day from the date hereof, which service may be made on M. B. Markland Co. by serving a copy on Cole & Cole, solicitors for M. B. Markland Co. and on H. Hoffman & Sons by serving a copy to Cassman & Gottlieb, solicitors for Harry Hoffman, Reuben Hoffman, and Leon Hoffman, trading as H. Hoffman & Sons, and on the City of Atlantic City by delivering to the office of the city solicitor of the City of Atlantic City, 10 a copy as aforesaid, and on the defendant Metal Mould Erection Co. by mailing a copy as aforesaid addressed to said Metal Mould Erection Co., a corporation of the State of Delaware to its post office address, care of the Corporation Trust Company of America, Du Pont Building, Wilmington, Delaware, which letter shall be sent registered mail, postage prepaid.

It is further ordered that the defendants shall have ten days from the date of said service to answer said amended complaint. 20

E. R. WALKER,
C.

Respectfully advised:

R. H. INGERSOLL,
Vice-Chancellor.

We hereby consent to the making and entering of the above order.

CASSMAN & GOTTLIEB, 30
Solicitors for H. Hoffman & Sons,
COLE & COLE,
Solicitors for M. B. Markland Co.,
JOSEPH B. PERSKIE,
Solicitor for City of Atlantic City.

ORDER TO AMEND.

(Filed Oct. 26, 1927.)

IN CHANCERY OF NEW JERSEY.

10

Between

ATLANTIC CITY LUMBER
COMPANY,*Complainant,*

and

CITY OF ATLANTIC CITY,

*et al.,**Defendants.*On Bill, &c.
Order to Amend.

20

On motion of Thompson & Hanstein, solicitors of complainant in the above entitled cause:

It is, on this 26th day of October, 1927, ordered that paragraph 3 of the prayer of said bill of complaint be amended to read as follows:

30

“3. That there issue out of this Court subpoenas directed to M. B. Markland Co., the City of Atlantic City, H. Hoffman & Sons and Metal Mould Erection Co., in accordance with the practice of this Court requiring them to answer this complaint and to set forth their claims.”

E. R. WALKER,
C.

On motion of:

THOMPSON & HANSTEIN,
Sols. of Complainant.

ANSWER OF M. B. MARKLAND CO.

(Filed Nov. 7, 1927.)

IN CHANCERY OF NEW JERSEY.

10

Between
ATLANTIC CITY LUMBER
Co.,
Complainant,
and
CITY OF ATLANTIC CITY,
et al.,
Defendants.)

On Bill, &c.
Answer of M. B.
Markland Co.

20

Defendant, M. B. Markland Co., a corporation of the State of New Jersey, doing business in the City of Atlantic City, answering the bill of complaint, says:

1. Paragraph 1 is admitted.
2. It is without information touching the aver- 30
ments in paragraph 2 of the bill save by the bill,
and therefore can neither affirm nor deny, and
prays proof.
3. It is without information as to the alleged
agreement between complainant and the Metal

Mould Erection Co., but admits that said Metal Mould Erection Co. was a subcontractor under it as general contractor.

4. It is without information touching the averments in paragraph 4 save by the bill and, therefore, can neither affirm nor deny, and prays proof.

10 5. It is without information touching the averments in paragraph 5 save by the bill and, therefore, can neither affirm nor deny, and prays proof.

6. Paragraph 6 is denied.

7. It is without information touching the averments in paragraph 7 save by the bill and, therefore, can neither affirm nor deny, and prays proof.

20 8. It admits that it has refused to pay complainant as alleged and as to the other averments it is without information save by the bill and, therefore, can neither affirm nor deny, and prays proof.

9. It is without information touching the averments in paragraph 9 of the bill save by the bill and, therefore, can neither affirm nor deny, and prays proof.

30 10. It is without information touching the averments in paragraph 10 of the bill save by the bill and, therefore, can neither affirm nor deny, and prays proof.

11. It is without information touching the averments in paragraph 11 of the bill save by the bill and, therefore, can neither affirm nor deny, and prays proof.

12. It is without information touching the averments in paragraph 12 of the bill save by the bill and, therefore, can neither affirm nor deny, and prays proof.

13. Further answering the claimant, defendant says that the complainant's claim is not within the provisions of the act under which its bill is filed for the reason that it is not a subcontractor of defendant as a general contractor but is, according to the bill, a contractor under a subcontractor of defendant. 10

Defendant, M. B. Markland Co. reserves the right to move to dismiss the bill on or before the hearing of the cause.

COLE & COLE,
Solicitors for Defendant,
M. B. Markland Co.

ANSWER.

(Filed Nov. 21, 1927.)

IN CHANCERY OF NEW JERSEY.

10

Between

ATLANTIC CITY LUMBER
Co.,*Complainant,*

and

CITY OF ATLANTIC CITY,
*et al.,**Defendants.*On Bill, &c.
Answer.

20

Defendants, Harry Hoffman, Reuben Hoffman and Leon Hoffman, trading as H. Hoffman & Sons, answering the complainant's bill of complaint say that:

1. They admit paragraph 1.
2. They have no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 2 to 10, inclusive.
3. They admit paragraph 11.
4. They deny paragraph 12, and say that if the complainant has a claim as therein stated, that the said liens of the complainant and these defendants

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are concurrent claims and they are entitled to *pro rata* distribution of the funds in the hands of the City of Atlantic City.

5. They have no knowledge or information sufficient to form a belief as to the statements contained in paragraph 13.

6. These defendants further say that on the dates mentioned in the schedule hereto annexed and marked "Schedule A," these defendants sold and delivered to Metal Mould Erection Co., a corporation of the State of Delaware, which was a subcontractor under M. B. Markland Co., general contractor for the erection and construction of the public work as alleged in paragraph 1 of the complainant's bill, materials mentioned in said schedule, and said Metal Mould Erection Co., in consideration thereof, agreed to pay to these defendants the prices thereof respectively in said schedule stated. 10 20

7. That the total amount originally due for the materials so furnished by these defendants was \$1347.85; that the Metal Mould Erection Co. has received a credit for the return of goods in the sum of \$27.35, as shown in said schedule, and has paid to these defendants on account of said materials the sum of \$525.00, as shown on said schedule, leaving a balance justly due and owing to these defendants in the sum of \$795.50, no part of which has been paid to these defendants, but on the other hand, the Metal Mould Erection Co. and M. B. Markland Co. have refused and neglected to pay these defendants any part of said balance due. 30

8. That on September 3, 1927, these defendants

filed with the City of Atlantic City notice of their claim, duly verified, a copy of which said notice is attached hereto and made a part hereof, and for the purpose of indentification marked "Schedule B."

9. That said notice of claim was filed as aforesaid with the City of Atlantic City before the City of Atlantic City had accepted the whole work to be
10 performed by said M. B. Markland Co., general contractor.

CASSMAN & GOTTLIEB,
Solicitors of Defendants,
Harry Hoffman, Reuben
Hoffman and Leon Hoff-
man, trading as H. Hoff-
man & Sons.

SCHEDULE A.

A-B Gas Ranges
Leonard Refrigerators
Sargent Builder's Hardware
Barrett Roofing
Du Pont Paints

Phone Marine 2039
Built-In Medicine Cabinets
" " Ironing Boards
" " Beds
" " Incinerators
Columbia Window Shades

H. HOFFMAN & SONS
Wholesale Distributors
Hardware—Gas Ranges—Refrigerators
1809 Atlantic Avenue
Atlantic City—N. J.

8/23/27

Sold to
Metal Mold Erection Co.,
127 S. Mississippi Ave.,
Atlantic City, N. J.

Made by Baker-Vawter Co.

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Answer

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Date	Order No.	Description	Charges	Credits	Total	32
1926						
10-25	2728	1 Leveling Instrument	150 00			
		1 Target	15 00		165 00	
26	2792	1 Target		15 00		
11-4	3085	20 Rolls #9 Wire	70 00			
		1 Stone #18 Galv. Soft Annealed Wire	1 80			
		1 Stone Black Soft Annealed	1 44		73 24	
6	3142	2 Stones 22 Ga. Galv. Annealed Wire	3 60		3 60	
6	3142	2 Stones 18 Ga. Wire		3 60		
9	3193	2 Kegs 16D Common	net 7 40		7 40	
17	3433	2 3" #SC 915 3" Safety Hasp	20			
		2 pr. Lt. Strap Hinges	40			
		1 pr. Klein Pliers	net 3 75		4 35	
19	3528	2 Keg 8D Common	" 7 80		7 80	
20	3567	125 ft. Hvy. Black Electric Cord	8 75			
		1 Attach Plug	15			
		1 Key Socket	30		9 20	
23	3607	1 8 lb. Sledge	net 1 20			
		2 Sledge Hammer Handles	1 00		2 20	

Answer

24	3637	3 Railroad Picks		1 50	
		2 Pick Handles		1 10	2 60
12-11	4200	3 pc. Pipe		75	
		1 Elbow		25	
		1 Wood Heater		3 50	
		1 Collar		10	
		1 Damper		25	4 85
14	4253	2 #4 Lg. Hdle Sq. Pt Shovels		2 50	2 50
15	4294	1 Keg 8D Common	net	3 90	3 90
16	4363	2 9/16 x 3/4 Open End Wrenches	"	1 10	
		2 Mall Handles	"	80	1 90
7	4057	1 Wooden Mall	"	5 00	5 00
22	4557	1 Keg 8D Common	"	4 05	4 05
12-23	4580	50 3/8 x 2 1/2 M Bolts		1 40	
		25 3/8 x 3 "		75	
		25 3/8 x 4 "		85	
		25 3/8 x 5 "		95	3 95
29	4704	10 Rolls #9 Wire	net	35 00	
		Cutting	"	4 50	39 50
30	4707	1 pr. Jaws replaced on #2 Porter			
		Bolt Clipper	"	3 50	3 50
1931	4772	1 Keg 8D Common	"	3 90	3 90
				10	

Answer

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	30	20		10	
1927					
1-29	5551	1 Keg 6D Common	"	4 20	
		1 " 8D "	"	3 90	
		1 " 16D "	"	3 70	11 80
31	5563	1/2 Gal. Turps		70	
		1 Qt. Dk Green Paint		1 25	
		1 #3A Thumb Latch		30	
		1 Jug		10	2 35
31	5576	2 Rolls #9 Wire		7 00	7 00
31	5377	125 ft. Rubber Covered Wire		13 75	13 75
		125 ft. Wire			8 75
29	5549	2 3/8 SS Drills	net	80	
		1 1/2" " "	"	75	1 55
20	5317	1 Keg 8D Common	"	3 90	
		Parts & Repairs to Bolt Cutter	"	3 75	7 65
25	5453	2 Bushed Sockets		50	
		100 ft. SBRC #14 Wire		2 00	
		6 4" Prc. Tubes		18	
		25 Do. Cleats		75	
		3 Coils #9 Wire		10 50	13 93
15		Cash			200 00
1-3	4791	2 Hammers	net	1 50	

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Answer

		2 Wrecking Bars	"	1 70	
		1 pr. Cutting Pliers	"	2 70	5 90
6	4911	1 Keg 8D Common	"	3 90	
		1 " 6D "	"	4 20	8 10
6	4928	50 3/8 x 3 Machine Bolts		1 50	
		2 3/8 Str. Shank Drills	net	80	2 30
105007		2 Germantown Second Hammers	"	1 50	1 50
13	5108	5 lb. 3D Common		30	30
15	5171	5 Rolls #9 Wire		17 50	17 50
13	5126	2 Rolls #9 Wire		7 00	
		1 Keg 6D Common	net	4 20	11 20
17	5214	1 Keg 6D Common	"	4 20	4 20
18	5245	2 Keg 6D Common	"	8 40	8 40
11	5056	1 Keg 8D Common	"	3 90	
		1 " 6D "	"	4 20	8 10
19	5272	5 Rolls #9 Black Wire		17 50	17 50
21	5342	5 Rolls #9 Black Wire		17 50	17 50
24	5400	1 Keg 16D Common	net	3 70	
		1 " 8D "	"	3 90	
		1 " 6D "	"	4 20	11 80
25	5467	3 Rolls Med. Tomahawk	"	5 25	
		1 1/2 coils wire		5 25	10 50

Answer

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	30	20		10		36
26	5481	1 4" Paint Brush		1 50		1 50
26	5473	10 Rolls #9 Wire		35 00		
		2 pr. 6" Strap Hinges		40		
		2 pr. 8" Hvy T Hinges		90		36 30
27	5497	1 pc. 5" Stove Pipe		20		
		1 pc. 5" Elbow		20		40
27	5501	1 Padlock		1 00		
		1 Switch		40		1 40
2-1	5621	10 Rolls Blk Ann. Wire	net	50 00		50 00
1	5623	1½ coil #9 Ann. Wire	"	5 25		5 25
3	5666	2 Keg 6D Common	"	8 40		
		1 " 16D "	"	3 70		12 10
3	5691	6 Rolls #9 Wire		30 00		30 00
4	5730	1 ½" High Speed Drill		75		
		1 Keg 8D Common		3 90		4 65
4	5735	4 Rolls #9 Wire		20 00		20 00
7	5817	2 pr. Jaws for Pexto Wire Cutters	net	2 20		2 20
8	5825	1 Keg 8D Common	"	3 90		
		1 " 6D "	"	4 20		
		1 " 16D "	"	3 70		11 80
12	6001	3 Rolls #9 Wire		15 00		15 00

Answer

	30	20		10	
30	7793	1 Hack Saw	"	75	
		1/2 doz. Blades	"	40	1 15
26	7649	40 ft. 1/2" Conduit		3 40	
		3 HS Blaces	net	21	3 61
4-2	7919	1 Keg 6D Common	"	4 20	
		1 " 8D "	"	3 90	
		1 " 16D "	"	3 80	11 90
6	8087	10 Rolls #9 Wire		35 00	
		2 Kegs 16D Common	net	7 40	
		1 " 8D "	"	3 90	46 30
6	8138	1 Handle for Bolt Cutter & Install	"	2 50	2 50
6	8154	1 Gal. Asphalt Roof Cement		1 50	
		1 #6 Furl Paint Brush		45	1 95
8	8175	2 ft. 3" 24/1/8 CW Wire	net	54	64
8	8230	5 lb. 3/8 Sq. Mach Nuts		10	10
11	8353	2 Gal. Kerosene		40	
		2 Gal. Floor Oil		1 00	
		1 Keg 8D Common	net	4 05	5 45
12	8365	1 D 23 8 Pt. Disston Saw	"	3 50	3 50
12	8421	4 1/2 x 2 1/2 Machine Bolts		17	
		12 1/2" Washers		10	27

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Answer

20	8765	2 Keg 6D Common	net	8 70	8 70
22	8852	3 Germantown Second Hammers	"	2 25	
		2 Kraueter bars	"	1 50	
		1 Disston Bar	"	85	4 60
22	8856	2 Kegs 16D Common	"	7 40	7 40
23	8921	1 Gal. Asphalt Roof Paint		1 00	1 00
8-23	8929	3 Open End Wrench	net	1 50	
		1 " " S "	"	75	
		4 Hammers	"	2 80	5 05
25	8941	10 Rolls #9 Wire		35 00	35 00
27	9046	2 Keg 8D Common	net	7 80	7 80
27	9099	2 Rolls #9 Wire		7 00	7 00
28	9119	8 Rolls #9 Wire		28 00	
		1 Keg 6D Common	net	4 20	32 20
14	8526	Parts & Labor Repairing			
		2 Bolts	"	5 25	5 25
29	9226	3 12 lb. Malls		5 40	
		6 Mall Handles		2 40	7 80
5-2	9333	3 Kegs 8D Common	net	11 70	
		2 " 6D "	"	8 40	20 10
1		Cash			125 00

Answer

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	30	20		10	
4	9431	2 Keg 6D Common	net	7 80	
		1 " 16D "	"	3 70	
		12 Hammer Handles		1 80	13 30
4	9453	10 Rolls #9 Wire		35 00	35 00
9	9660	2 Kegs 8D Common	net	8 10	8 10
10	9743	1 Keg 8D Common	"	3 90	
		1 " 6D "	"	4 20	
		1 " 16D "	"	3 70	11 80
11	9804	5 Rolls #9 Wire		17 50	17 50
12	9901	5 Rolls #9 Wire		17 50	17 50
18	10200	5 Rolls #9 Wire		17 50	17 50
18	10215	2 Keg 8D Common	net	7 80	
		2 " 6D "	"	8 40	
		1 " 16D "	"	3 70	19 90
23	10499	1 can Asphalt Roof Coating		1 25	
		1 #6 Fury Sash Brush		40	1 65
20	10391	10 Rolls #9 Wire		35 00	35 00
5-24	10552	200 $\frac{3}{8}$ x 1 Mach. Bolts		4 80	4 80
25	10596	1 Keg 16D Common	net	3 70	
		1 Hatchet Handle		20	
		1 Roll Friction Tape		15	4 05
12	9890	4 Gro. $\frac{3}{8}$ Sq. Nuts		5 25	5 25

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Answer

27	10767	1 Keg 8D Common	net	3 90	3 90
27	C10	1 Gal. Asphalt Roof Paint		1 00	1 00
31	C71	5 Rolls #9 Wire		17 50	17 50
4-29	C38	2 Rolls Hvy Durite		4 20	4 20
6-6	462	1 Keg 16D Common	net	3 70	
		1 " 8D "	"	2 90	7 60
7	502	2 Rolls #9 Wire		7 00	7 00
15	994	5 Rolls #9 Wire		17 50	17 50
17	1102	100 $\frac{3}{8}$ x 1 Mach Bolts		2 40	2 40
20	1191	1 Keg 16D Common	net	3 85	3 85

TOTAL THIS MONTH

PREVIOUS BALANCE

TOTAL

DUPLICATE

795 50

Answer

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SCHEDULE B.

TO THE CITY OF ATLANTIC CITY, ANTHONY M. RUFFU, JR., Mayor of the City of Atlantic City; JOSEPH A. PAXSON, Director and Commissioner of Revenue and Finance; JOSEPH A. McNAMEE, City Clerk of the City of Atlantic City; and BESSIE M. TOWNSEND, City Comptroller of the City of Atlantic City:

10 NOTICE IS HEREBY GIVEN by Harry Hoffman, Reuben Hoffman and Leon Hoffman, trading as H. HOFFMAN & SONS, Claimants, whose place of business is at No. 1809 Atlantic Avenue, Atlantic City, New Jersey, that they have furnished materials which have actually been used in the execution and completion of a certain contract for the excavation and foundation for the Convention Hall
20 building in the City of Atlantic City, New Jersey, made between the said City of Atlantic City and M. B. Markland Co., a corporation of the State of New Jersey, contractor, dated August 2, 1926.

The said materials were furnished to Metal Mould Erection Co., a corporation of the State of Delaware, which is a sub-contractor under the said M. B. Markland Co.

A statement of the materials furnished as aforesaid by claimants is annexed hereto and made a
30 part hereof.

The amount of claimants' demand, after deducting all just credits and offsets, is the sum of \$795.50, which is the amount claimed as justly due and owing to claimants from the said Metal Mould Erection Co., sub-contractor.

For the full value of the said materials supplied by claimants, a lien is claimed upon the moneys in

the control of the City of Atlantic City, due or to grow due under the said contract between said City and the said M. B. Markland Co.

Dated August 31, 1927.

H. HOFFMAN & SONS,
By Reuben Hoffman.

10

State of New Jersey, }
County of Atlantic, } ss.

REUBEN HOFFMAN, of full age, being duly sworn according to law, on his oath deposes and says that he is a member of the partnership of H. Hoffman & Sons, the above named claimant, and the agent of Harry Hoffman and Rubin Hoffman, the other members of said partnership, for the purpose of making this affidavit. 20

Deponent further says that he has read the foregoing notice of claim, and that all the matters and things therein stated and alleged are true.

REUBEN HOFFMAN.

Sworn and subscribed before me this 31st day of August, 1927.

(SEAL)

ELIZABETH R. POWELL.
NOTARY PUBLIC OF N. J. 30

REPLICATION.

(Filed Dec. 22, 1927.)

IN CHANCERY OF NEW JERSEY. 10

Between
ATLANTIC CITY LUMBER
Co.,
Complainant,
and
CITY OF ATLANTIC CITY,
et al.,
Defendants.)

On Bill, &c.
Replication.

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Complainant, Atlantic City Lumber Co., replying to defendants' answer, says that:

1. It denies all the allegations contained in the answer of the defendants, Harry Hoffman, Reuben Hoffman and Leon Hoffman, trading as H. Hoffman & Sons, and joins issue on the same. 30

THOMPSON & HANSTEIN,
Solicitors of Complainant.

be a motion to dismiss on the ground that the affidavit which the statute requires to be made is not in accordance with the terms of the statute. The statute says that the affidavit must show that the materials were actually used on the premises, and the affidavit, I think, does not say that. I don't care to argue that now. I think we better take the proof, but I thought I better make the timely motion.

The Court: Any reply to that motion? 10

Mr. Hanstein: Yes, your Honor, there is no notice of it. I was never advised of any such motion.

Mr. Cole: I think it is jurisdictional at any time, so we could make it after the facts were in.

The Court: Whom do you represent, Judge Cole?

Mr. Cole: I represent Mr. Markland. 20

The Court: Any objection made in the answer or motion to strike?

Mr. Hanstein: No, sir.

The Court: You may proceed, gentlemen.

Mr. Hanstein: Your Honor, I will state to you that this is a suit filed under the Municipal Me- 30
chanics Lien Act. The facts with regard to this case are, that in the first place, M. B. Markland Company, being a corporation, the defendant, entered into a contract with Atlantic City, providing for the excavation and foundations for the Convention Hall in Atlantic City. That much is admitted by the an-

swer. That the Markland Company entered into a contract with the Metal Mold Erection Company as sub-contractors under Markland, the Metal Mold Erection Company, that company being employed as sub-contractors under Markland for the purpose of erecting forms into which the concrete was to be poured. The fact that that company was a sub-contractor is admitted by the answer of the Markland Company. We allege that we supplied material to the sub-contractors, the Metal Mold Company, which was used in the erection of the building, that there is more than sufficient money in the hands of the city to pay our claim in full, and that we gave a notice in accordance with the statute to the City of Atlantic City. We made parties-defendant, H. Hoffman & Sons, who had likewise filed a claim with the city. The city was made a party-defendant, as was the Metal Mold Construction Company, and neither corporation filed an answer and within a short time we sent a decree *pro con* up as against both of them. I fail to see it in the files, but it may be the files were sent down in advance of the recording of a decree *pro con* in Chancery.

Mr. Cole: In so far as the Markland Company is concerned, in the notice that was served, it stated that a personal judgment would be asked against it. Now, our answer —

Mr. Hanstein: What notice?

Mr. Cole: Either the notice or the bill or something. I know there was some paper came from your office which said that a personal judgment would be asked against Markland. Now our answer to this claim is, first, that when this lien was filed there was no money due from Markland Company

to this contractor, the Metal Mold Company. It had been paid in full.

Secondly, that we say that these goods were not sold to the Metal Mold Company but sold to some other company, the name of which I do not presently recall. We say that the goods—at least not all of them—were not actually used in the building, and we say also that on its face this bill does not show jurisdiction for the reason that the affidavit required by the statute does not show that the goods were actually used in the premises and that this point can be availed of at any time during the trial. 10

The Court: The affidavit says that the materials were to be used.

Mr. Cole: Yes, but the statute uses the word "actually used."

The Court: You may proceed. 20

Mr. Gottlieb: Your Honor, on behalf of the defendant, Hoffman & Sons, we filed a notice with the proper city officials in compliance with the Act. The complaint made us a party and we came in and we denied that they were a prior claimant to the claim of Hoffman & Sons and that under the Act we were entitled to pro rata distribution of the fund in compliance with the law. We have filed our answer in which we allege the balance due to us from the defendant, the Metal Mold Construction Company, a sub-contractor of the general contractor. 30

Mr. Hanstein: I might state that it is conceded that the Markland Company is a contractor in the City of Atlantic City for the erection of the Con-

vention Hall and that Metal Mold Erecting Company was a sub-contractor under the Markland Company, all in connection with the excavation and foundation work of the Convention Hall in Atlantic City. That is correct, isn't it?

Mr. Cole: I think so.

- 10 Mr. Hanstein: It is also conceded that the work has not yet been accepted by the city.

Mr. Cole: No.

The Court: Mr. Gottlieb, just at a glance on your bill, you claim such items as a levelling instrument and other tools are a proper item for a mechanic's lien?

- 20 Mr. Gottlieb: They were materials furnished and used specially on that job.

The Court: You mean to say a levelling instrument is a part of a job any more than a truck which would cart the material there would be? The very first item is a levelling instrument which evidently is not a part of the job. It is an instrument used in the work, but —

- 30 Mr. Gottlieb: We claim those instruments were used, and the fact is, I think, they are all still there, never been removed.

The Court: That would be just exactly the same, wouldn't it, as charging on a road for a steam roller which was used in putting the surface on a road? Is there any distinction?

Mr. Gottlieb: It is the question as to the amount due. I don't know whether that is material, your Honor, the amount due to the Metal Mold Company, if we have a lien there we have a lien for what they owe us.

The Court: No, not at all. You have a lien for the materials used in the construction of the building.

10

Mr. Gottlieb: I suppose we will have to go item by item, if that is your Honor's ruling, and we will have to check it up.

The Court: I simply ask before we start so there will be no misunderstanding. You may proceed.

Mr. Cole: I am wondering whether we might save a lot of time—I don't know—but there is a sharp question of law here between us, and if I am right, it seems to me to be folly to take a lot of time on the facts.

20

The Court: Suppose we hear it.

Mr. Cole: Here is what I understand my opponent claims. So long as there is any money due from Atlantic City to the Markland Company, the general contractor, that any sub-contractor or material man who has given labor or material to that sub-contractor may file a lien, and if he proves his claim, get a lien on any money that may yet be due Markland, even though there is no money due from Markland to the sub-contractor; even though he has paid him off lien filed.

30

The Court: Before lien or notice given?

Mr. Cole: Yes. Now, I don't think that is the law. I think the law is the other way and in this case we are claiming, of course, when this lien was filed we did not owe the Metal Mold Company anything, in fact they owed us, they abandoned the work and we had to finish it, I am not sure about the figures, either five or six or seven thousand dollars. If he is correct that they really get a personal judgment against Markland for this debt, in other words,
10 they use money that is coming to Markland from the city to pay a debt that Markland has already paid, if we are correct in our statement of fact. Now I have two cases that expressly hold that is not so.

The Court: Even on the payment by Markland to the sub-contractor without any advance on the terms of the contract or anything of that sort?

20 Mr. Cole: No claim of that sort, but that doesn't matter, the test is whether there is any money when the lien was filed to attach to, that is the test, and there wasn't any. The Metal Mold Company were out of the picture entirely, and nothing due. Now, I understand them to claim it don't make any difference whether we paid them two or three times over, if there is money in the hands of the city due us, that that can be used to pay that debt. Now I have two cases here that hold just the opposite and
30 I wondered whether my friend had something more recent.

The Court: Is that the proposition, Mr. Hanstein?

Mr. Hanstein: Yes.

The Court: How can a sub-contractor expect pay from Markland as a credit to a payment to him as a sub-contractor if there is nothing due to him?

Mr. Hanstein: Your Honor is not confusing money due from the city to Markland with money due from Markland to the contractor? I understand you concede there is more than sufficient due from the city to Mr. Markland to pay our claim and Hoffman's claim in full?

10

Mr. Cole: I don't know. What is the fact about that, Mr. Markland?

Mr. Markland: Yes, the city owes us about \$115,000 on the foundation contract.

Mr. Hanstein: So there is enough money in the hands of the city to take care of this claim. Now, Judge Cole has some cases that I rather suspect, from the books that he has before him, are cases under the old Act, the old Municipal Lien Act. We, of course, are relying under the Act of 1918, and the specific question has been ruled on, both by Vice-Chancellor Leaming, and his opinion has been approved by the Court of Errors and Appeals in *Wills, et al., against James, et al., 131 Atlantic 878*, under the provisions of the Mechanics Lien Law, Revision 1918, Pamphlet Laws of 1918, page 1041, 1 Cumulative Supplements to Compiled Statutes, page 1859, and affirmed *134 Atlantic*, by a per curiam opinion.

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The Court: Have there been any amendments to the Mechanics Lien Law since 1926?

Mr. Hanstein: You mean there might be some statutory changes?

The Court: I am wondering whether the Legislature has not amended the Act to cover this since then?

Mr. Cole: I don't recall it, but certainly does seem to me like a monstrous doctrine. I make an
10 agreement to pay a man immediately upon the work. It amounts to his having a personal judgment against him for the debt he has already paid.

The Court: Without question that is the effect of this ruling, but if that is the Court of Errors and Appeals, I am bound. Of course, in that case it apparently was upon a case where an assignment had been made prior, but if it was it was exactly the same and so stated.
20

Mr. Cole: I haven't analyzed it as to whether that part of the opinion may be dicta. The case rather seemed to turn on the question of assignment. In view of that, I suppose we better get our proof in and prepare for war.

Mr. Hanstein: I might mention Judge Cole has not raised by any pleading the proposition.

30 Mr. Cole: We don't have to raise anything. This is entirely jurisdictional.

Mr. Hanstein: Your Honor, the fact that Markland may have paid the sub-contractor isn't anything jurisdictional, that is a matter of affirmative defense.

The Court: You say that doesn't make any difference under this decision.

Mr. Hanstein: Yes, I do, exactly.

CHARLES N. APPLE, SWORN.

Direct examination.

10

By Mr. Hanstein:

Q. Mr. Apple, I show you a form of notice, what purports to be a notice, with some bills annexed and affidavit, and ask you if you made service of that?

Mr. Hanstein: This is a notice we served on the city officers.

A. Yes, sir.

20

Q. Can you recall when it was that you served that and on whom?

A. I served it personally on Miss Townsend, Commissioner Paxon, the Mayor, upon Mr. Perskie, and it seems to me I served one on Miss Delaney.

Q. At the city clerk's office?

A. Yes, sir, because Mr. McNamee told me to at that time. Yes, sir.

Q. Do you know when you served it?

A. On the 23rd of August, 1927.

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Mr. Hanstein: I offer that.

Mr. Cole: I make the formal objection that the notice is not in accordance with the statute touching the question of the actual use of the materials in

the building. The affidavit thereto. I suppose I have the advantage of that even after the paper is in, but I want to make the objection in defense. I don't object to the fact the notice was served.

Mr. Hanstein: I might call your Honor's attention to the fact the notice said materials were used to performance or completion of said contract, at the bottom of the first paragraph of the notice.
10 Judge, there is the affidavit of Mr. Apple as to this service annexed. Shall I take it off or leave it on?

Mr. Cole: I don't care.

WALTER BRICK, SWORN.

Direct examination.

20 By Mr. Hanstein:

Q. Mr. Brick, what is your position with the Atlantic City Lumber Company?

A. Manager.

Q. Do you know the Metal Mold Erection Company?

A. Yes.

Q. Did you receive a call or visit from some officer of that company relative to purchasing lumber
30 from you?

A. Yes.

Q. Now, did the Metal Mold Erecting Company buy lumber from you?

A. Yes.

Q. Do you know where this lumber was delivered?

A. Some of it.

Q. What is that?

A. Some of it. I saw some of it delivered.

Q. You saw some. Now, will you explain to me so that we will have it straight on the record—will you explain to me the operation of your bookkeeping system? What is the first piece of paper that you have in your business relative to charges?

A. Right there before you. It is bound up in these delivery tickets, call them delivery tickets, the order is made direct on those as soon as received. 10

Q. The first thing you have in your system is the delivery ticket?

A. That is right, that is in duplicate.

Q. Delivery tickets are in duplicate; then do you make any entries of those delivery tickets into any other book?

A. Yes.

Q. Where do you make that entry?

A. The entry is then made in the sales book.

Q. Is this book L N 3 1927 your sales book? 20

A. Yes.

Q. From there, where do you make your entries?

A. Posted direct to the ledger.

Q. Posted directly into the ledger? Now to whom was the material which you now claim was sold to the Metal Mold Company, to whom was that material first charged?

A. To the Metal Mold Erection Company.

Q. Has it ever been charged to anyone else?

A. It has not. 30

Q. Now we have here a large number of delivery tickets and I ask you do each one of these delivery tickets represent a delivery, that is, each one of these little books contain at least one delivery ticket relating to the materials delivered to Metal Mold Company?

A. Yes.

Q. I show you delivery ticket dated January 28, 1927, and ask you what material is represented by that delivery ticket?

A. That represents a carload of lumber which was delivered—I don't remember whether it was on Georgia Avenue siding or Mississippi Avenue siding, the car was delivered right there to them and they unloaded it.

Q. Now delivered to them where?

10 A. At the Convention Hall?

Q. At the Convention Hall?

A. Yes.

Q. Did you see that lumber down there?

A. I didn't see this particular car.

Q. You didn't see this particular lumber down there?

A. No.

Q. I ask you if you recognize the signature on that receipt?

20 A. No, I can't say that I do.

Q. You don't know that you recognize that?

A. No.

(Delivery ticket marked C2 for identification.)

Q. Do you know a man named Brown who had some connection with the Metal Mold Company?

A. Yes.

30 Q. What was his connection with the Metal Mold Company?

A. He was foreman.

Q. Did you ever see him working down at the Convention Hall operation?

A. Yes, on several occasions.

Q. Do you know—what was the name of the other man who signed receipts?

A. Harris.

Q. Did you know a man named Harris?

A. Yes.

Q. What was his connection with the Metal Mold Company?

A. Mr. Brown told me that the Harris was the superintendent.

Q. Did you ever see him working down there?

A. Oh, yes.

Q. Now, have you got any letters from the Metal Mold Company relating to orders for material? 10

A. Yes.

Q. Will you produce them?

(Letters produced.)

Q. I show you then letter dated January 26, 1926, to the Atlantic Lumber Company from the Metal Mold Erection Company, J. Harris, and ask you if this letter relates to the carload shipment that was shown on delivery receipt I just showed you a moment ago? 20

A. I do; it is. But I notice now, the first time, that it is dated 1926. That letter didn't come in until 1927.

Q. Didn't come in until 1927?

A. Evidently an error there.

Q. But this carload of material was delivered to the Convention Hall?

A. That is right. 30

(Letter offered in evidence.)

Mr. Cole: I object. I don't see how we can be bound by a letter passing between Atlantic City Lumber Company and Metal Mold.

The Court: Let it be marked for identification.

(Letter marked C3 for identification.)

Q. Have you any other letters?

(Letters produced.)

Q. Is this letter dated 4/29/1927, to Atlantic City
10 Lumber Company from Metal Mold Erection Com-
pany, by J. Harris, does that relate to a carload of
lumber that you delivered down at the Convention
Hall job?

A. Yes.

Mr. Hanstein: I want to offer that in evidence.

Mr. Cole: I object to any letters coming from
the Metal Mold to the Atlantic City Lumber Com-
20 pany.

The Court: Do you object to the form of proof?

Mr. Cole: I don't object that those letters were
received, but I object as any proof that they came
from Metal Mold, certainly we are not bound by
what they contain.

The Court: I will rule upon the letter. I assume,
of course, they are not proven as being letters of
30 the company.

Mr. Cole: Can hardly prove the delivery of goods
by an order.

Mr. Hanstein: We are not trying to prove the
delivery of the goods to this defendant. We are

trying to prove the delivery of goods to another defendant. I can prove these letters technically if there is any point in that. I didn't assume that they made any point of that.

(Letter marked C4 for identification.)

Q. You have referred to Mr. Harris being connected with the Metal Mold Erection Company?

A. Yes.

Q. He ever in your office? Did you ever talk to him? 10

A. Yes.

Q. Did you see him working at the Metal Mold Erection Company?

A. Yes.

Q. What did you say his position was?

A. Superintendent.

Q. Did you receive any of these letters after talking to Mr. Harris? 20

A. Yes.

Q. Do you know Mr. Harris' signature?

A. I have seen it several times. I don't know as I ever remember seeing him write it.

Q. Have you received letters from Metal Mold signed by Harris ordering materials?

A. Yes.

Q. You sent the material down?

A. Yes.

Q. Did these letters come to you in confirmation of verbal conversations? 30

A. Yes.

Mr. Hanstein: Now I offer them.

Q. I ask you if you received this letter April 30, 1927, from Metal Mold Erection Company?

A. Yes.

(Letter marked C5 for identification.)

A. That is a copy of our letter enclosing invoices for the car represented there, speaking of that on account of that 1926.

Mr. Hanstein: Judge, I served a demand on you to produce a letter dated January 28, 1927, from the Atlantic City Lumber Company addressed to the
10 Metal Mold Erection Company. Do you have such letter?

Mr. Cole: I asked Mr. Markland if he had the letter and he said he had not, and I haven't it.

Mr. Hanstein: I would like to offer then a carbon copy of that letter.

Mr. Cole: I haven't any objection to the carbon
20 copy, but I object to the letter as not being admissible against us.

The Court: I will permit them all to be marked as exhibits and later determine the value as evidence.

Q. Mr. Brick, did you send that letter?

A. Yes.

30 (Letters referred to admitted in evidence and marked Exhibits C3, 4 and 5; and the last copy of letter offered, received in evidence and marked Exhibit C6.)

Q. You say this letter C6 which you sent to the Metal Mold Erection Company January 28, 1927, related to this material ordered in C3, is that it?

A. Yes.

Q. Did your company receive this order from the Metal Mold Erection Company?

A. Yes.

Q. Did you deliver lumber pursuant to it?

A. Yes.

Q. Where was the lumber delivered, do you know?

A. At the Convention Hall job.

Mr. Cole: We object to anything passing between the Metal Mold and the Lumber Company. 10

The Court: I will admit it on the same condition as before.

(Order slip offered, received in evidence and marked Exhibit C7.)

Cross-examination.

20

By Mr. Cole:

Q. Mr. Brick, did you ever approach Mr. Markland and ask him for payment of this bill?

A. I asked him if he would be responsible for it, yes.

Q. If he would be responsible for it?

A. Yes.

Q. You mean before you sold any goods?

A. No, not before we sold any goods. 30

Q. After?

A. After.

Q. Did you show him a bill against McFarland Mead Company?

A. No.

Q. Was there any discussion between you and him about McFarland Mead Company?

A. I asked him about McFarland Mead Company.

Q. How did that come about?

A. Because Mr. McFarland was president of the Metal Mold Company, was interested in the McFarland Mead Company.

10 Q. Didn't you present a bill or make a claim against the McFarland Mead Company, and didn't Mr. Markland tell you that he had no contract or anything of the sort with McFarland Mead Company, and you said, "Well, the Metal Mold Company is the same as the McFarland Mead Company?"

A. No.

Q. No such conversation as that?

A. No.

Q. By the way—what is the system you have, the delivery slips and what else?

Mr. Hanstein: Sales book.

20

A. Delivery tickets and sales book and ledger.

Q. They are all here, are they?

A. Yes.

FRANK JOHNSON, SWORN.

Direct examination.

30

By Mr. Hanstein:

Q. Mr. Johnson, you work for the Atlantic City Lumber Company?

A. Yes, sir.

Q. You are a driver?

A. Yes, sir.

Q. All right, I will show you some delivery slips and ask you if you delivered the merchandise? I show you delivery slip marked number D8456, and ask you if you delivered that merchandise?

A. Yes, sir.

Q. Where?

A. Georgia and Pacific.

Q. Who signed for it?

A. Brown.

Q. Who is Brown? 10

A. Superintendent of the—or boss there, some kind, foreman; foreman there.

Q. For whom?

A. For the Metal Mold Company.

Mr. Hanstein: It is number 28, five 2 x 4, \$21.36. I offer this in evidence, Judge Cole.

(Delivery ticket received in evidence and marked Exhibit C7.) 20

Q. I show you delivery ticket April 28, 1927, for 160 pieces of 1 by 12, is that?

A. Yes, six foot.

Q. And ask you if you delivered that?

A. Yes, sir.

Q. Where?

A. Mississippi and Pacific.

Q. Who signed for it?

A. J. W.—I don't know him. 30

Q. Who was he working for, do you know?

A. Metal Mold Company.

Q. You delivered the goods to the company?

A. Yes, sir.

The Court: What are the items on that?

Mr. Hanstein: 160 pieces 1 by 12, April 28.

The Court: 29th on your bill.

(Delivery ticket offered, received in evidence and marked Exhibit C9.)

By Mr. Cole:

10 Q. Who told you Brown was working for the Metal Mold Company?

A. I knew him because he used to work for the Atlantic City Lumber Company.

Q. How did you know he was working that day for the Metal Mold Company?

A. One man used to come down there and tell him how to go about with the forms.

Q. What did you know about the Metal Mold Company?

20 A. I delivered lumber there.

Q. How did you know it was the Metal Mold Company?

A. Because that is what the slips call for.

Q. Is that all you know, what the slips call for?

A. That is where I went.

Q. In other words, that is all you knew, you saw the slips called for Metal Mold Company, and you assumed it was the Metal Mold Company?

A. I couldn't do any more.

30 Q. I didn't ask you what you could do. You saw the name Metal Mold Company on the slip and that is where you delivered the goods?

A. Yes.

Q. This man Brown told you he was working for the Metal Mold Company?

A. Metal Mold Company.

Q. That is all you know about it?

A. Yes.

By Mr. Hanstein:

Q. Did you see Brown doing work around there?

A. Yes.

Q. What was he doing?

A. Handling 2 by 4's, helping carpenters, showing where the forms went. 10

Q. What work was he doing, I don't care whether he was hammering a nail, what was the general thing he was doing?

A. Always had a blue-print in his hand, showing the men that were building forms.

Q. What was he doing?

A. Showing the men how to do with them, with the forms.

Q. Was he setting forms?

A. Yes, setting forms. 20

Q. Mr. Johnson, I show you delivery slip dated April 7, 1927, for 25 pieces 2 by 4, 16 sap, and ask you if you made that delivery?

A. Yes, sir.

Q. Where?

A. At Mississippi and Pacific.

Q. Who receipted for it?

A. Brown.

Q. You say Brown that you saw erecting forms?

A. Yes, sir. 30

(Delivery ticket offered, received in evidence and marked Exhibit C10.)

Q. I show you April 14th delivery slip for 25 2 by 4, 14 sap, and ask you if you made that delivery?

A. Yes, sir.

Q. Whereabouts?

A. Georgia and Pacific.

Q. To whom did you make your delivery?

A. J. W.

Q. Who is that?

A. I couldn't tell you that.

Q. You have seen the man around there?

A. Oh, yes.

10 Q. What was he doing?

A. He was kind of foreman around there, too.

Q. On the forms?

A. Yes, sir.

(Delivery ticket offered, received in evidence and marked Exhibit C11.)

Mr. Hanstein: Judge, I have got every one of these for every item on this bill, if you want me to
20 go through the business of proving all of them.

The Court: Can there be any agreement as to these? If not, I am very much inclined to think I will refer it to some master to take testimony on this. This looks like a two or three-day job proving the delivery of materials.

Mr. Hanstein: Yes, I am perfectly willing to lay them all open for Judge Cole's inspection and Mr.
30 Markland.

Mr. Cole: Just let me have a moment to talk with Mr. Markland for a moment.

(Recess taken for a brief conference.)

Mr. Cole: The defense will admit that the goods

or material in question were charged to the Metal Mold Erection Company and that they were delivered on the premises where the Convention Hall was in course of erection, that the items are correct, the charge is correct and that, so far as the total amount claimed is concerned, that is correct. In other words, we relieve you of the necessity of proving each item.

The Court: Does that admission go to the extent 10
of covering the fact that they have not yet been paid for?

Mr. Cole: I assume that is so or, of course, they wouldn't be prosecuting us.

Mr. Hanstein: I think that completes our case. I don't recall anything else.

The Court: Now, you want Mr. Gottlieb to pro- 20
ceed with his claim?

Mr. Gottlieb: We have the notice and person serving it.

Mr. Cole: No objection to that.

(Notice offered, received in evidence and marked Exhibit D1.)

REUBEN HOFFMAN, SWORN.

Direct examination.

By Mr. Gottlieb:

Q. Mr. Hoffman, in what manner are you connected with H. Hoffman & Sons?

10 A. Partner.

Q. Are you familiar with the account of the Metal Mold Erection Company?

A. I am.

Q. Who has charge of the contract in question?

A. I do.

Q. Did your firm do business with the Metal Mold Company?

A. We did.

Q. Have you got the account?

20 A. I have the original papers here.

Q. Now what is this you hand me?

A. They are the original pages showing the items Metal Mold bought from us.

Q. This is a carbon copy?

A. No, that is our original.

Q. Where is the other copy?

A. In the hands of the Metal Mold Erection Company.

Q. That is delivered to him?

30 A. They were sent to him.

Q. This account shows what balance to your firm?

A. That is on the first page, \$795.50.

Q. That amount still due?

A. That amount is still due.

Mr. Gottlieb: We offer that.

(Sheet received in evidence and marked Exhibit D2.)

Q. I show you here a large batch of slips; tell me what these are.

A. This is a delivery slip showing the signature of the man that received certain items on this bill.

Q. Are they the returned slips to you?

A. Those are the slips that were returned to us.

10

Mr. Gottlieb: You want me to go over these?

Mr. Cole: No.

(Delivery slips offered, received in evidence and marked Exhibit D3.)

Q. Where was this stuff used?

A. On the Convention Hall, on the foundation of the Convention Hall.

20

MATTHEW B. MARKLAND, SWORN.

Direct examination.

By Mr. Cole:

Q. You are the president of the M. B. Markland Company? 30

A. Yes, sir.

Q. You have your copy of the contract with the Metal Mold Company?

A. No, I haven't. It has been mislaid. I don't know where it is. We couldn't find it.

Q. Were not able to locate it?

A. No.

Q. Do you remember its provisions generally?

A. In what way?

Q. Do you remember what it provided for, how much money was to be paid?

A. The price to be paid was so much per square foot of contract area for the forms.

Mr. Hanstein: Just a minute, your Honor. I
10 object to any testimony in regard to this. I think it is entirely irrelevant, immaterial, incompetent.

Mr. Cole: I will make the offer so we will have the record. The offer is to show what the contract was between Markland Company and the Metal Mold, that all the money that was due under that contract was paid by the Markland Company before these proceedings and before the filing of the lien, and at that time there was money due from the
20 Metal Mold to Markland because Markland had to take over the contract which the Metal Mold did not perform, and complete it at an expense in excess of the amount of the contract. That is the only thing I want to prove by him.

Mr. Hanstein: As to that, the tenor of it, of course, is that they desire to prove payment, which I take it is a matter of affirmative defense which must be pleaded, and it is not pleaded; and in the
30 second place, of course, I rely on the case of Wills against James to the effect that the fact that Mr. Markland may have paid the claim in full would be no defense.

The Court: In view of that case it seems inadmissible. I will make the ruling distinct upon that,

and following the case of Wills versus James, decided by Vice-Chancellor Leaming, and, as I am informed, affirmed by per curiam opinion which holds that that makes no difference.

Q. Did the Metal Mold Company perform the contract they made with you?

Mr. Hanstein: Please your Honor, I want to object to that. I think that is immaterial. The only material thing about the Metal Mold Company is that they were a sub-contractor under Mr. Markland.

The Court: I will permit that question.

Q. Did the Metal Mold Company perform its contract with the Markland Company?

A. Not complete, no.

Q. Did you have to complete the contract? 20

A. Yes, sir.

Q. Why didn't they complete, if you know?

A. Beg pardon?

Q. Why didn't they complete their contract?

Mr. Hanstein: I want to make the same objection to that I just made.

The Court: I will permit it if he knows.

A. It was poorly managed and the job was costing them more money than the contract price. 30

Q. Did they abandon it?

Mr. Hanstein: I think that ought to be stricken as being purely a conclusion and certainly the first part is.

The Court: He may know. I will permit it to remain, for what it may be worth.

Q. Did they abandon the contract?

A. Yes.

Q. Then did you have to go in and perform?

A. Yes, sir.

Mr. Hanstein: May I have an objection to that
10 entire line?

The Court: Yes.

Q. How much did it cost you to finish the contract they agreed to make with you?

A. I haven't the exact figures with me, but they were about between five and six thousand dollars.

Q. You mean in excess of what they agreed to do it for?

20 A. Yes.

Q. Now, was there any money due from you to the Metal Mold Company at the time that this lien was filed?

A. No.

Mr. Hanstein: Same objection.

The Court: Yes.

30 Q. Did you know at any time during the performance of the work by the Metal Mold Company that it was purchasing material from the Atlantic City Lumber Company?

A. No, sir.

Mr. Hanstein: Object to that. That is immaterial.

The Court: I will permit it.

Q. You say no?

A. No.

Q. When did you first learn with relation to the work itself that the Atlantic City Lumber had furnished or was claiming to furnish material there?

A. When Mr. W. C. Brick came in to my office and presented a bill to me made out in the name of McFarland Mead, and I told him McFarland Mead 10 didn't have any contract with us, and he said that they done business with McFarland Mead, therefore that they, that their credit was given because they have the business, I said, "Well, Metal Mold Erection Company did the work."

Q. At that time had that work been completed, the Metal Mold work?

A. Not entirely, no. They were off the job, but we were doing it.

Q. Then after that was there, ever any bill submitted to you in the name of the Metal Mold Company? 20

A. There was an order signed by the Metal Mold Erection Company per J. C. McFarland, and that was given to us by Mr. Brick,

Q. But did the Atlantic City Lumber Company submit any bill to you against the Metal Mold Company itemized, making a demand for a specific sum of money?

A. No.

30

Cross-examination.

By Mr. Hanstein:

Q. Have you got that bill that you say Mr. Brick

brought to you made out to the McFarland Mead Company?

A. I have got the order.

Q. Not the bill?

A. There wasn't any bill.

Q. Didn't you say that Mr. Brick brought in a bill made out to the McFarland Mead?

A. Made out to McFarland Mead, which he showed me, and he took it away with him.

10 Q. You have it?

A. No, he took it away with him.

Q. When do you fix the time of that?

A. I don't remember what time it was, I think it was in—but you don't want what I think, you want what I know.

Q. You knew the Atlantic City Lumber Company had delivered lumber down there?

A. I did not until Mr. Brick came in.

Q. Didn't you ever see their teams down there?

20 A. Not that I remember.

Q. Did you know where they were buying, the Metal Mold was buying its lumber?

A. I knew only that they were buying from Somers Lumber Company, and I advised the Somers Lumber Company that —

Q. I don't think you can tell what you told the Somers Lumber Company. You knew they were not buying all their lumber from the Somers Lumber Company?

30 A. No, I did not.

Q. Didn't know that? Did you have any conversation with Mr. Brick about this before the Metal Mold went off the job?

A. Before they went on the job?

Q. Off the job.

A. Before they went off the job? Not that I remember. First I knew was when I said when Mr.

Brick presented that statement made out in the name of McFarland Mead Company.

Q. You don't remember when that was he presented that to you?

A. No, I don't.

Q. Did you ever hear of the McFarland Mead Company before?

A. Yes, done business with them.

Q. For the Convention Hall job?

A. Yes.

10

Q. The McFarland president of that is president of the Metal Mold Erection Company, isn't he?

A. Yes. As a matter of fact, we made our first contract, that is, we drew our contract in the name of McFarland Mead, we thought it was with McFarland Mead we were doing business until we submitted this draft, and then they returned it and had it changed to Metal Mold Erection Company.

Q. Was that before any work was done?

A. That was before any work was done, yes, sir. 20

By Mr. Cole:

Q. Did you know anything about the Hoffmans there at all?

A. No, I didn't know anything about them until Mr. Hoffman came in to see me. I knew they were buying something from some place, but I didn't know what or where.

Q. Was the work then completed?

30

A. No. The work was completed when Mr. Hoffman came in to see me, that is, the Metal Mold Erection Company were off the job.

Q. Did you ever have any bill submitted to you for payment by Hoffman?

A. Not until Mr. Hoffman brought that bill in.

Q. That was after they had gone, after the Metal Mold Company had left the job?

A. After they were off the job.

By Mr. Gottlieb:

Q. Who were they made out to, who were the bills made out to when you saw those bills?

A. That was made out Metal Mold Erection Com-
10 pany.

The Court: Judge Cole, is there any objection to the items which the Court has already called attention to?

Mr. Cole: Yes, I understand the contract, your Honor. I don't see how a lot of these things can go. Of course, I haven't had time to pick them out.

20 The Court: I don't know whether the Court should pick them out, any other items of tools, items of construction.

Mr. Cole: Now I have this to suggest, your Honor, I don't know whether it will agree with counsel —

Mr. Hanstein: Just a moment. I want Mr. Brick to go on the stand with regard to this McFarland
30 Mead bill.

Mr. Cole: He denied it on cross-examination. I am bound to admit this case is a surprise to me. I don't understand it. Now there is another phase. That question which seemed to be concluded here, the question whether this act is a good act in the light of that against us which amounts to a personal

judgment. I don't know, and I want time to think it over. Now, it is in a very narrow compass and I am wondering whether we can submit a brief here. I want to look into this question of the affidavit also.

The Court: Yes, I would like to hear you upon the question of the affidavit.

Mr. Cole: Because, after all, if they haven't complied with the statute, they have no lien and they are bound to go out. I notice Mr. Gottlieb's affidavit says used in the construction; that seems to comply, but the other does not. 10

Mr. Hanstein: I think mine does, too, Judge.

The Court: What are you going to do with reference to the items on the Hoffman bill?

Mr. Cole: I think Mr. Gottlieb ought to take those out which he thinks are no good. 20

Mr. Gottlieb: I still think the amount of the claim would be more than covered by the items that are lienable, the balance of the claim I think is less than the amount lienable.

The Court: Then your suggestion is that, if there are any items there which are not lienable, that you have been paid for those? 30

Mr. Gottlieb: Yes.

The Court: Perhaps you have a right to select the items you credit on general credit.

(Ten days allowed to each side to file briefs.)

Atlantic City, N. J.,
December 4, 1928.

Trial of the cause resumed.

APPEARANCES:

10 For the defendant, Hoffman & Sons: MESSRS.
CASSMAN & GOTTLIEB.

REUBEN HOFFMAN, SWORN.

Direct examination.

By Mr. Gottlieb:

20

Q. Mr. Hoffman, have you gone over the account of the Metal Mold Erection Company?

A. I have.

Q. With your firm?

A. Yes, I have.

Q. You have the original sheets there of the account?

A. I do.

30 Q. I refer you to Exhibit D2 and instruct you to give the credit of the cash payments by the Metal Mold Company to your company on your account; how far would that credit bring that bill down to as being paid in accordance with your books?

A. That brought the bill down to a point where the entire account would be paid up to January 26, 1927.

Q. Did you give them such credit in that manner?

A. We did.

Q. Now starting at that point, will you compare—have you the original slips upon which the sales were made?

A. We have.

Q. Receipted as delivered?

A. Yes, sir.

Q. Compared with that bill?

A. Yes, sir.

10

Q. Starting at that point, have you made up a list of those slips covering the items delivered to the Metal Mold Erection Company at the Convention Hall which went into the erection and construction of that building?

A. I have.

Q. You have personally?

A. Yes, sir.

Q. Now starting at that point, having given them the credit, will you give us slip by slip those various items and amounts? 20

A. Slip 5473, ten rolls number 9 wire, 2 pair six-inch strap hinges, 2 pair 8-inch heavy hinges. Slip 5651, 2 rolls black nail wire.

Mr. Gottlieb: Mr. Markland suggests to the Court if we have the slips signed for these items, he will admit they were delivered and used.

Mr. Markland: We don't admit they were used. 30
We admit they were delivered.

The Court: Just take the slips and show how they are signed.

Q. Have you got those slips there?

A. We have the slips right here.

Q. As you mention each slip—I have Mr. Wood here who signed those slips; I think I will prove that by him.

Mr. Gottlieb: It is admitted that the items you have there signed by Mr. Wood were delivered to the Metal Mold Company at the Convention Hall.

10 Q. Now, according to those slips, starting from the point where the last credit was given, what is the balance due to your firm from the Metal Mold Company?

A. Balance due is \$742.52.

Q. In those slips have you eliminated those items which were, in your judgment—could not have been used in the erection and construction of that building?

A. All those items have been eliminated.

Q. That were not actually in use?

20 A. Actually not used, such as tools, and so forth.

Q. And the items you have there are those items?

A. Which we think were actually used in the construction of the foundations.

Q. What does that amount to?

A. \$742.52.

(Bill offered, received in evidence and marked Exhibit H1.)

JOHN J. WOOD, sworn.

Direct examination.

By Mr. Gottlieb:

Q. Mr. Wood, I show you a batch of slips attached to Exhibit H1, and I ask you whether you signed those slips? 10

A. All but nine.

Q. All but what?

A. Nine.

Q. There are nine there that you did not sign?

A. Yes.

Q. Which ones were they? You better pick them out.

(Witness picks out ten.) 20

Q. With the exception of ten of the slips you signed all the other slips as shown to you?

A. I did.

Q. By whom were you employed at the time you signed those slips?

A. Metal Mold Erection Company.

Q. Were those articles delivered to the Convention Hall?

A. They were delivered to the Convention Hall. 30

Q. Atlantic City?

A. Yes, sir.

Q. Were they used in the erection of that building?

A. No. Some of them were used in other jobs.

Q. Some of these items used in other jobs?

A. Yes, sir.

Q. What other jobs were they?

A. At the Arcade Building, between Florida and Georgia, on the Boardwalk, and the garage out on the Absecon Boulevard, right at Venice Park there.

Q. Weren't they delivered to the Convention Hall?

A. They were delivered to the Convention Hall, yes.

10 Q. For the purpose of erecting the Convention Hall?

A. Possibly. We had no offices on the other two jobs and they delivered them to the Convention Hall.

Q. I show you that bill of the 1/26/1927, and ask you whether those goods were delivered to the Convention Hall and used there?

A. They were all delivered to the Convention Hall. Just what dates they were in use there I can't say.

Q. Was that used, do you know?

20 A. It was possibly used, but where I can't tell you.

Q. You don't know of your own knowledge that any of this stuff was used in any other place?

A. I do.

Q. Why isn't it?

A. It was sent from the office; I didn't send it, the superintendent did.

Q. You don't know it was sent, though?

A. I do.

30 Q. How do you know of your own knowledge it was sent?

A. I was right there when they were sent.

Q. You were right there?

A. Yes.

Q. How much of it was sent, do you know?

A. That is hard to say. It was going and coming all the time.

Q. Who was Brown?

A. He was the carpenter foreman.

Q. Do you know his signature?

A. Yes, I do.

Q. I show you the ten slips, nine slips rather, one of which is blank, and ask you whether they are the signature of Brown?

A. Four of them are.

Q. Who signed the rest, do you know?

A. That one I don't know anything about it. 10

Q. Whose signature?

A. I don't know.

Q. Don't know the signature?

A. Don't know the signature at all.

Q. Let me have the four that are signed by Brown which you say is his signature.

A. Three appears to be signed by Brown, Junior, and one by Jesse, and one by Herman Brown, that is four; this other is the carpenter foreman, and this Brown is the labor pusher. 20

Q. There are two Browns?

A. Yes, sir.

Q. Were they also employed by the Metal Mold Company at that time?

A. Yes, sir.

Q. Were they authorized to sign for goods delivered?

A. They were, yes.

30

By the Court:

Q. Were any of these articles delivered after you had ceased working on the foundation?

A. No, we had completed the other two jobs at the time the foundation contract was terminated.

By Mr. Gottlieb:

Q. What was the nature of the contract with the Metal Mold Company?

A. To furnish and erect forms, concrete forms on the Convention Hall.

Q. For the foundations?

A. For the foundations.

Q. Was this metal primarily ordered for that purpose?
10

A. Possibly, as far as those two jobs go, they may have ordered that particular material they needed on these other two jobs down to the Convention Hall all together at the time, because they had no offices on those other two jobs.

Q. Can you tell me where those other two jobs were and when they were in operation?

A. I don't remember the exact dates.

Q. Have you any records?

20 A. Last spring.

Q. Last spring?

A. Yes—spring previous, that is, spring before last.

Q. Spring, 1927?

A. Spring, 1928—1927, yes.

Q. Spring a year ago?

A. Yes.

Q. What job was that?

A. What do you mean, what job?

30 Q. What job do you say the spring of 1927?

A. Both were around the same time, the garage job on the Absecon Boulevard and foundations for this Arcade Building between Georgia and Florida on the Boardwalk.

Q. Where is that?

A. Between Georgia and Florida on the Boardwalk. These are signed by McFarland.

Q. Do you know his signature?

A. Yes, sir.

Q. Was he also employed by the Metal Mold Company?

A. He is president of the firm. These two are by Joseph Harris.

Q. Do you know whether he is also employed?

A. He is superintendent.

Q. Was he authorized to sign for goods received?

A. Yes. S. B. Leon I don't know anything about. 10

Q. How about Harris?

A. That is the same as that one there.

Q. So that all of the slips with the exception of three slips were signed by yourself or persons connected with the Metal Mold Company authorized to sign for them?

A. That is correct.

Q. All the stuff was delivered to the Convention Hall.

A. Convention Hall. 20

Q. That is the only office the firm had?

A. Yes, sir.

By the Court:

Q. Do you know of your own knowledge whether Hoffman knew you had the other contracts as well?

A. No, I know nothing about that.

30

The Court: It is suggested you go over these items with Mr. Gottlieb and mark all the items that were not used there.

Mr. Markland: I can tell you positively what was not used. Some of these may not have been.

Mr. Gottlieb: Your Honor, Mr. Markland has stricken from the bill as presented by Mr. Hoffman attached to the slips marked H1 various items totaling \$23.76, the total amount claimed to be due according to that bill is \$742.52, making the balance due of \$718.76. Those items Mr. Markland says, those items could have been used in the construction or erection of that building or execution of the contract, but that he does not know, but they could have
10 been used.

REUBEN HOFFMAN, recalled.

Direct examination.

By Mr. Gottlieb:

20 Q. Mr. Hoffman, you have heard the testimony of Mr. Wood that some of the items sold by your firm to the Metal Mold Erection Company and delivered to the Convention Hall were subsequently sent by the Metal Mold Company to a job out on the Absecon Boulevard, this city, and one on the Boardwalk known as the Arcade Building, between Georgia Avenue and Mississippi. Did you have any knowledge of the fact that those articles were sent to those jobs?

30 A. I had no knowledge.

Q. If they were sent?

A. I have no knowledge of those jobs. I knew of only one other job and that was the Professional job, and the material used there, they paid cash for and delivered on to the job.

Q. You delivered that material right to the job?

A. Right to the job.

Q. And were paid for it?

A. We were paid cash.

Q. On delivery?

A. Before delivery. I don't know whether Mr. Wood was working for them then or not.

HARRY HOFFMAN, SWORN.

Direct examination.

By Mr. Gottlieb:

Q. Are you the Harry Hoffman of H. Hoffman & Sons?

A. Yes.

Q. Are you familiar with the account of the Metal Mold Erection Company?

A. Somewhat.

Q. Do you have any knowledge that some of the goods which were sold to that company and delivered to the Convention Hall were ever used on a job by the same company out on the Absecon Boulevard in this city and on the Boardwalk between Georgia and Mississippi Avenue?

A. The only one is the Professional Art Building, and they paid cash before it was delivered. That is the only one.

Mr. Markland: They done other work, they built other shanties for other people on the job down there, and got paid for it, and all those things were not used in the foundation. I don't know how much they amounted to.

The Court: I will take the matter up.

CONCLUSIONS.

(Filed Nov. 15, 1928.)

IN CHANCERY OF NEW JERSEY.

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Between

ATLANTIC CITY LUMBER
COMPANY,*Complainant,*

and

CITY OF ATLANTIC CITY,
*et als.,**Defendants.*On Bill, &c.
Conclusions.

20

(These conclusions are not be published in the
official reports.)MESSRS. THOMPSON & HANSTEIN for the complainant.
MESSRS. COLE & COLE for the defendant, M. B. Mark-
land Co.30 MESSRS. CASSMAN & GOTTLIEB for the defendants, H.
Hoffman & Sons.

INGERSOLL, V. C.:

A bill of complaint is filed under the provisions
of the Municipal Mechanics Lien Law (Revision of
1918).

The defendant, M. B. Markland Co. entered into a contract with the City of Atlantic City for the excavations necessary and constructions of the foundation for the Convention Hall of Atlantic City.

The Markland Co. entered into a contract with the Metal Mould Erection Company as a subcontractor to furnish certain materials and labor necessary in the performance of said contract.

The complainant furnished lumber and other material used in the excavation and the erection and construction of said foundation and filed with the City of Atlantic City a notice of its claim duly verified. 10

The defendants, Hoffman & Sons, filed a claim with the City of Atlantic City claiming that the Metal Mould Erection Company owed them for materials furnished and work and labor performed.

A large amount of money is due Markland Co. by the City of Atlantic in accordance with the terms of its contract. 20

The Metal Mould Erection Company defaulted in the performance of its contract, and Markland Co. completed it at a loss and there is no money due the subcontractor.

The points raised by the solicitor for M. B. Markland Co. are:

I. The subcontractor, Metal Mould Erection Company is not made a party to the action.

It was not in the original bill filed, upon which fact counsel is evidently relying. On October 26, 1927, an order was made amending the bill to include that company as a defendant. 30

II. That there is no money due from Markland to the Metal Mould Company, the creditor of the complainant and defendant Hoffman & Sons.

Counsel concedes that this point has been decided adversely to him, in *Wills, et al. v. James*, 99 N. J. Eq. 10; *Aff. 100 N. J. Eq. 360*.

10 III. That the affidavit to the bill did not state that the materials were actually used in the execution or completion of the contract between Markland and the city, and that a notice must be filed and verified, that the notice of the complainant is independent of the affidavit, and that affidavit is likewise independent of the notice.

My attention has not been called to any statute requiring the bill to be verified. The verification may therefore be treated as superfluous.

The notice as attached to the bill of complaint consists of several parts.

1. The notice of claim to the City of Atlantic City;

20 2. The verification—and

3. The itemized schedule of material furnished, and the amount due thereon.

Sec. 2 of the Municipal Mechanics Lien Law (Revision, 1918). *Cum. Sup. Comp. Stat.* page 1859 reads:

30 “At any time before the whole work to be performed by the contractor for the municipality is either completed or accepted by resolution of the municipality, or within sixty days thereafter, any claimant may file with the chairman or other head officer, or with the secretary or clerk of the county, city, town, township, public board or commission, or other municipality, with which the contract for said work

was made, a notice of claim, verified by oath or affirmation, which notice shall state the residence or place of business of the claimant, the amount claimed, from whom due, and if not due, when it will be due, and shall state as nearly as may be the amount of the demand after deducting all just credits and offsets, the name of the person by whom employed, or to whom the materials were furnished, and shall state whether such person is the contractor 10 with the municipality or a subcontractor, and shall state generally the nature of the public work to which the contract relates, and give the name of the contractor with the municipality and the county, city, town, township, public board or commission or other municipality with which the contract was made, and shall allege that the labor was performed or materials furnished to the said contractor or subcontractor, specifying which, and that they 20 were actually performed or used in the execution or completion of the said contract with the said municipality; but no variance as to the name of the contractor or subcontractor or name of the municipality shall affect the validity of said claim or lien."

The notice of the complainant was filed within time with the proper officer of the city. Said notice stated the place of business of the complainant, the amount claimed, from whom due, the name of the person to whom the materials were furnished stating such person to be the subcontractor, stated the nature of the work to be for the excavation and foundations for the Convention Hall in Atlantic City, gave the name of the contractor, and that the said materials were actually used in the execution 30

or completion of the said contract with the City of Atlantic City.

The notice of claim was verified by the oath of the general manager of the claimant and is as follows:

10 “Walter C. Brick of full age being duly sworn according to law upon his oath deposes and says that he is the manager of the Atlantic City Lumber Co. and is for this purpose its duly authorized agent; that he is conversant with all the facts set out in the above claim and that all the facts therein set forth are true.”

This affidavit is sufficient.

Gregory v. Lewis, 87 N. J. Eq. 127.

The 4th point is that there is no proof that the materials set forth in the complainant's claim were actually used in the execution or completion of the contract between Markland and the city.

20 The verified claim stated “that all of said materials were actually used in the execution or completion of the said contract (of Markland) with the said City of Atlantic City.”

Using the language of the late Justice Hendrickson in *Bell v. Mecum*—75 N. J. Law 547.

30 “There was evidence tending to support the plaintiff's charges as for supplies delivered in good faith for use in the erection of the building, and when that is established it is no defence that, in the absence of fraud on the part of the creditor, there may have been a failure to use materials thus furnished or a diversion of the same from the purpose for which they were intended. *Morris County Bank v. Rockaway Manufacturing Co.*, 1 McCart. 189; *Campbell v. Taylor Manufacturing Co.*, 19 Dick. Ch. Rep. 344.”

While the cited cases was under the Mechanic Lien Act (P. L. 1898, p. 538), it applies as well to the Municipal Mechanics Lien Law (Revision of 1918) by virtue of which these proceedings are had.

This disposes of the objections to the complainant's claim, and results in a decree in its favor.

The 5th point refers to the defendants, Hoffman & Sons', claim, and is:

"It is manifest that there are items in the Hoffman bill that could not have been used in the building. The practical effect of the opinion in 131 Atlantic is to procure a personal judgment against Markland. It was, therefore, the plain duty of Hoffman to establish the fact, if it were a fact, that all his materials were used in the building. There was no proof. There was no part of the burden on Markland to disprove it."

An examination of the schedule attached to the answer of Hoffman & Co. shows clearly that a considerable portion of the charges made is not for lienable materials but was for instrumentalities used in the performance of the contract. 20

The first item. Leveling instrument, \$150.00, is clearly one for which the claimant is not entitled to be allowed under the Mechanics Lien Act. There are many others which appear to be of a like nature.

There are cash credits amounting to \$425.00, which may or may not have been credited to the items for which a lien cannot be claimed, no proof was submitted upon these matters. 30

If application is made I will name a short day to hear such testimony (if there is any); otherwise I will advise a decree in favor of defendant as to Hoffman's claim.

SUPPLEMENTAL CONCLUSIONS.

(Filed Dec. 10, 1928.)

IN CHANCERY OF NEW JERSEY.

10 Between
 ATLANTIC CITY LUMBER
 COMPANY,
Complainant,
 and
 CITY OF ATLANTIC CITY,
et als.,
Defendants. } On Bill, &c.
 Supplemental
 Conclusions.

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(These conclusions are not to be published in the
 official or unofficial reports.)

MESSRS. THOMPSON & HANSTEIN for the complainant.
 MESSRS. COLE & COLE for the defendant, M. B. Mark-
 land Co.

30 MESSRS. CASSMAN & GOTTLIEB for the defendant, H.
 Hoffman & Sons.

INGERSOLL, V. C.

In pursuance with the conclusions heretofore
 filed, further testimony has been taken, and I will
 advise a decree in favor of H. Hoffman & Sons for
 \$718.76.

FINAL DECREE.

(Filed Dec. 7, 1928.)

IN CHANCERY OF NEW JERSEY.

Between ATLANTIC CITY LUMBER COMPANY, <i>Complainant,</i> and CITY OF ATLANTIC CITY, <i>et al.,</i> <i>Defendants.</i>	}	On Bill, &c. Final Decree.	10
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This cause coming on to be heard before Honorable Robert H. Ingersoll, one of the Vice-Chancellors, sitting for the Chancellor, in Chancery Chambers, Real Estate and Law Building, Atlantic City, New Jersey, on September 20th, 1928, in the presence of Walter Hanstein, Esquire, of Thompson & Hanstein, of counsel with the complainant, Atlantic City Lumber Company; C. L. Cole, Esquire of Cole & Cole, of counsel with the defendant, M. B. Markland Company; and Harry Gottlieb, of Cassman and Gottlieb, of counsel with the defendant, Harry Hoffman, Reuben Hoffman and Leon Hoffman, trading as H. Hoffman & Sons;

The complainant's bill having been taken as confessed as against the defendants: City of Atlantic City, and Metal Mould Erection Co., and the pleadings having been read, and the testimony taken, and the arguments of the respective counsel having been

heard and considered; and the Court having found that the defendants, M. B. Markland Company entered into a contract with the City of Atlantic City for the excavation necessary, and the construction of the foundation for the Convention Hall of Atlantic City, a public improvement, and that the M. B. Markland Company had entered into a contract with the Metal Mould Erection Co., as a subcontractor, to furnish certain material and labor necessary in the performance of said contract, and the complainant, Atlantic City Lumber Company, having furnished lumber, and other material to the Metal Mould Erection Co., which was used in the excavation and the erection and construction of said foundation, and used in the execution, or completion of the contract of the said M. B. Markland Company with the City of Atlantic City; and

10
20 The defendant, H. Hoffman & Sons, having furnished material to the Metal Mould Erection Co., which was used in the excavation and the erection and construction of said foundation, and used in the execution, or completion of the contract of the said M. B. Markland Company with the City of Atlantic City; and

That the complainant, Atlantic City Lumber Company, filed with the City of Atlantic City, a notice of its claim, duly verified; and

30 That the defendant, H. Hoffman & Sons, filed with the City of Atlantic City, a notice of its claim, duly verified; and

The Court having found, as was stipulated by counsel of the respective parties in open court, that a large amount of money is due M. B. Markland Company by the City of Atlantic City, in accordance with the terms of its contract, which sum is more than sufficient to pay the lien claims filed by the claimants herein against said funds; and

That the lien of the complainants, Atlantic City Lumber Company, was in due form and filed with the proper officers of the City of Atlantic City, before the work to be performed by the M. B. Markland Company for the City of Atlantic City was accepted by resolution of the City of Atlantic City, and that the lien of the complainant is valid; and

That the lien of the defendants, H. Hoffman & Sons, was in due form and filed with the proper officers of the City of Atlantic City, before the work to be performed by the M. B. Markland Company for the City of Atlantic City was accepted by resolution of the City of Atlantic City, and that the lien of said defendant, H. Hoffman & Sons, is valid; and

That there was due from the said defendant, Metal Mould Erection Co. to the said complainant, Atlantic City Lumber Company on May 31st, 1927, the sum of \$3722.89; and

That there was due from the said defendant, Metal Mould Erection Co. to the said defendants, Harry Hoffman, Reuben Hoffman and Leon Hoffman, trading as H. Hoffman & Sons, on July 20th, 1927, the sum of \$718.76;

It is, therefore, on this 7th day of December, 1928, ordered, adjudged and decreed, that the lien of the complainant, Atlantic City Lumber Company, and that the lien of the defendants, Harry Hoffman, Reuben Hoffman and Leon Hoffman, trading as H. Hoffman & Sons, are valid liens, and that the amount due from the defendant, City of Atlantic City to the defendant, M. B. Markland Company, under its contract with the said City of Atlantic City, is more than sufficient to pay the lien of complainant, Atlantic City Lumber Company, and the lien of defendants, Harry Hoffman, Reuben Hoffman

and Leon Hoffman, trading as H. Hoffman & Sons, and that there is due from the defendant, subcontractor Metal Mould Erection Co. to the complainant, Atlantic City Lumber Company, the sum of \$3722.89 with interest from May 31st, 1927, to the date of this decree, and that there is due from the defendant, subcontractor, Metal Mould Erection Co. to the defendants, Harry Hoffman, Reuben Hoffman and Leon Hoffman, trading as H. Hoffman & Sons, the sum of \$718.76 with interest from July 20th, 1927, to the date of this decree; and

It is further ordered, adjudged and decreed, that the City of Atlantic City pay out of the moneys due from it to the M. B. Markland Company, unto the complainant, Atlantic City Lumber Company, the sum of \$4061.65, being the sum of \$3722.89, together with interest thereon from May 31st, 1927, to the date of this decree, together with taxed costs.

It is further ordered, adjudged and decreed that the City of Atlantic City pay out of the moneys due from it to the M. B. Markland Company, unto the defendants, Harry Hoffman, Reuben Hoffman and Leon Hoffman, trading as H. Hoffman & Sons, the sum of \$778.17 being the sum of \$718.76, together with interest thereon from July 20th, 1927, to the date of this decree, together with taxed costs.

E. R. WALKER,
C.

Respectfully advised:

30 R. H. INGERSOLL,
V. C.

We hereby consent to the from of the above decree.

COLE & COLE,
Solrs. of Deft., M. B. Mark-
land Co.

NOTICE OF APPEAL.

(Filed Dec. 21, 1928.)

IN CHANCERY OF NEW JERSEY.

Between

ATLANTIC CITY LUMBER
COMPANY,

Complainant,

v.

CITY OF ATLANTIC CITY,
et al.,

Defendants.

On Bill, &c.
Notice of Appeal.

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To *Thompson & Hanstein, Esqs., Solicitors of Com-
plainant:*

The defendant, M. B. Markland Co., a corpora-
tion of the State of New Jersey, hereby appeals
from the final decree made in the above entitled
cause on the 7th day of December, nineteen hundred
and twenty-eight, by the Chancellor on the advice
of Hon. Robert H. Ingersoll, one of the Vice-Chan-
cellors, and from the whole and every part thereof,
to the Court of Errors and Appeals in the last re-
sort in all causes. 30

Dated December 18, 1928.

COLE & COLE,
*Solicitors for Defendant,
M. B. Markland Co.*

I conceive there is good cause for appeal in the above entitled cause.

C. L. COLE,
Of Counsel with Defendant,
M. B. Markland Co.

[ENDORSED]

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Service acknowledged this 19th day
of Dec. 1928.

Thompson & Hanstein,
Solicitors of Complainant.

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I conceive there is good cause for appeal in the above entitled cause.

C. L. COLE,
Of Counsel with Defendant,
M. B. Markland Co.

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[ENDORSED]

Service acknowledged this 3rd day
of Jan., 1929.

Cassman & Gottlieb,
Solicitors of Defendant,
H. Hoffman & Sons.

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PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

ATLANTIC CITY LUMBER
COMPANY,
Complainant-Respondent,
and
CITY OF ATLANTIC CITY,
et al.,
Defendants-Appellant.

On Appeal of M. B.
Markland Co., from
Chancery.
Petition of Appeal.

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*To the Honorable, the Court of Errors and Appeals
in the last resort in all causes:*

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The petition of M. B. Markland Co., a corporation of the State of New Jersey, the appellant in the above entitled cause, respectfully shows that:

1. Petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, on the advice of Hon. Robert H. Ingersoll, one of the Vice-Chancellors, bearing date the 7th day of December, nineteen hundred and twenty-eight, in a certain cause in said Court of Chancery wherein the said Atlantic City Lumber Company was complainant, and appellant and others were defendants, in this respect, to wit, that the said decree adjudges that the complainant and

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defendants, H. Hoffman & Sons have a valid lien on the money due and to grow due from Atlantic City to M. B. Markland Co., appellant.

And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that it should have been determined that neither complainant nor defendant, H. Hoffman & Sons, had a lien and that the bill should be dismissed for want of equity or
10 any interest in either of said parties in said fund.

Petitioner, therefore, prays that the said decree of the Chancellor may be wholly reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this Court shall seem proper.

COLE & COLE,

*Solicitors for and of
Counsel with Ap-
pellant.*

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ANSWER TO PETITION OF APPEAL.
NEW JERSEY COURT OF ERRORS AND
APPEALS.

ATLANTIC CITY LUMBER COMPANY, <i>Complainant-Respondent,</i> and CITY OF ATLANTIC CITY, <i>et al.,</i> <i>Defendants-Appellant.</i>	} Answer to Petition of Appeal.	10
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The answer of the above named respondent to the petition of appeal of the M. B. Markland Company, appellant. 20

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits that a decree was on the 7th day of December, 1928, 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. 30

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

THOMPSON & HANSTEIN,
Solicitors for and of Counsel
with Respondent.

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New Jersey Court of Errors and Appeals

Between

ATLANTIC CITY LUMBER COMPANY,
Complainant-Respondent,

and

CITY OF ATLANTIC CITY, *et al.*,
Defendants-Appellants.

ON APPEAL FROM CHANCERY.

BRIEF FOR M. B. MARKLAND CO.,
APPELLANT.

STATEMENT.

M. B. Markland Co. entered into an agreement in writing with Atlantic City, to build a Convention Hall. Markland Co. entered into a sub-contract with Metal Molding Erection Company to do certain work in aid of the general contract, and the complainant and H. Hoffman & Sons furnished certain material and performed certain labor to and for said Metal Molding Erection Company. Not being paid by said company, the Lumber Company

filed a notice and later a bill in Chancery, pursuant to the terms of the Municipal Lien Act; and H. Hoffman & Sons filed a notice thereunder, pursuant to the statute.

At the time of the filing of the respective notices, there was no money due from Markland Co. to Metal Molding Erection Company, it having abandoned the work under its contract, which forced Markland Co. to complete at an expense of more than \$5,000 in excess of the contract price. Despite this fact, the decree establishes a lien on the money due and to grow due from Atlantic City to Markland Co. From the decree, this appeal is taken.

ARGUMENT.

THE UNDISPUTED FACTS DISENTITLE THE COMPLAINANT TO A LIEN ON THE FUND IN THE HANDS OF ATLANTIC CITY TO THE CREDIT OF MARKLAND CO.

The Vice-Chancellor considered himself bound by the opinion of Vice-Chancellor Leaming in *Wills v. James*, 99 Equity, page 10, affirmed in this court on his opinion in 100 Equity, page 360.

Our effort will be to convince this Court that the instant case is not analogous to the cited case, and that the cited case was erroneously decided.

In the cited case, the sub-contractor had performed his contract and been paid by the general contractor the amount due. Later the one who furnished material, filed a notice under the Municipal Lien Act, and it was determined that the fact that the contractor had already paid his sub-contractor did not deprive the materialman of a right to lien,

and in effect, to compel the general contractor to pay twice.

In the instant case the sub-contractor abandoned his work and nothing was open to the general contractor but to step in and complete. This was done at an expense of about \$5,000 in excess of the contract price. Not only was there nothing due from the contractor to the sub-contractor, but the sub-contractor was indebted to the general contractor in excess of \$5,000.

The question is, does the cited case go to the extent of holding that a materialman or laborer for a sub-contractor may attach the contractor's money in the hands of the owner and be paid, despite the fact that there is no money due, and that there is an outstanding obligation on the part of the sub-contractor to the general contractor, in excess of the amount attempted to be liened? There is no language in the Act to justify such a construction nor does the opinion in the cited case go so far.

Vice-Chancellor Howell discusses the subject in *Meurer v. Kilgus*, 77 Equity, page 175. At the bottom of page 176, he says:

“In my opinion, the proper construction of this agreement is that the sub-contractor was not entitled to his contract moneys until he had finished his sub-contract, nor until the architect was satisfied that the work was properly done. These are conditions precedent to any recovery by him against his contractor.

The complainant, Meurer, furnished materials to this sub-contractor, all of which materials were used in the building. In the latter part of December, 1908, the sub-contractor failed. It abandoned the work under its contract so that the contractor was obliged to have the work finished by other agencies.”

He then proceeds, at page 179, to say:

“We have left therefore a statement of facts which is extremely simple. It raised the question whether the materialman, who furnishes materials to a sub-contractor who had not completed his contract, is entitled to a lien on the money due or to become due from the municipality to the original contractor.”

He then proceeds to decide that the right to lien was non-existent.

There was never a time when the Metal Molding Erection Company had a suable claim against the Markland Co. At the time of the filing of the lien, Markland Co. had a suable claim against the Erection Company in excess of \$5,000.

The effect of the decree is to oblige Markland Co. to pay twice, and, in addition, lose the expense to which it was put in performing the sub-contractor's contract. Such an effect ought not to be ascribed to the statute, except by clear and explicit language, which is not present.

We contend that the cited case was erroneously decided and feel justified in endeavoring to convince the Court that we are right.

Under Section 3 of the Mechanics' Lien Act (Revision of 1898), only a sub-contractor was privileged to serve a stop-notice. The Legislature apparently concluded that the right ought to be extended to materialmen and laborers who furnished material or labor to a sub-contractor, and so the Act was amended in 1917, *Pamphlet Laws*, Chapter 241. The amendment reads:

“Whenever any master workman or contractor, or whenever any contractor under any master workman or contractor shall, upon demand,

refuse to pay any person who may have furnished him material used in the erection of any such house or other building, or any sub-contractor, journeyman or laborer employed by him in erecting or constructing any building, the money or wages due to him, it shall be the duty of such journeyman, laborer, materialman or sub-contractor to give notice in writing, &c."

The same spirit apparently affected the Legislature in 1918 when it enacted the present Municipal Lien Act, and expressly repealed prior legislation on the subject.

Taking the Act as a whole, it is manifest that its substantive purpose was to extend the right of lien to materialmen and laborers under sub-contractors, which did not theretofore exist, or concerning which, at least, there was considerable doubt.

In the case of *Garrison v. Borio*, 61 Equity, page 236, Vice-Chancellor Grey decided that the right existed.

This Court in *Hall Company v. Jersey City*, 64 Equity, at the top of page 769, said:

"Whatever may be the meaning or relation of the word 'sub-contractor,' occurring only in the first section, it seems plain, from the provisions of the statute as a whole, that the lien is given only for work or materials furnished to the contractor with municipality or, under Section 14, to his assigns or legal representatives."

While this statement may be deemed a dictum, nevertheless it clearly expressed the view of the Court.

Our contention is that the primary purpose of the

revision of 1918 was to remove any doubt and to give the right of lien to those furnishing material or providing labor to a sub-contractor. That is the only substantive change in the revision, over and against the Act of 1892. The remaining changes are procedural.

Vice-Chancellor Leaming reaches his conclusion by construing Section 5 of the Act of 1918, and stressing the words "or sub-contractor," which words were not found in the Act of 1892. The quoted words appear several times before the 5th Section is reached, and with the same punctuation. It appears three times in Section 1; once in Section 2; and once in Section 3. It appears in Section 6 and several times in succeeding sections. Section 16 defines the meaning of the word "sub-contractor," and says:

"The term 'sub-contractor' shall be construed as meaning the person having a contract under him for the performance of the same work or any specific part thereof."

The point is that wherever the words "or sub-contractor" appear, they were meant to give to such a person either as a sub-contractor directly with a general contractor or a materialman or laborer under the sub-contractor the right to file a lien. There is no language in the Act that explicitly or expressly says that a right of lien shall exist in favor of a sub-contractor or a materialman or laborer under him if there is nothing due or to grow due from the general contractor to the sub-contractor.

Vice-Chancellor Leaming was able to extract such an interpretation from the use of the words "or sub-contractor" in the 5th Section. We think that

this was a forced construction. Certainly more apt language was at the command of the Legislature if that is what it intended.

When the revision of 1918 was enacted, the Legislature had knowledge of the express law in a number of decisions that no lien could attach unless there was a debt due or to grow due from the contractor to the sub-contractor. The Legislature could have removed any possible ambiguity or doubt as its intention by saying under Section 5, or elsewhere, that the lien should attach in favor of anyone furnishing material or labor to the sub-contractor, notwithstanding that the contractor had paid the sub-contractor. Of course, no lien could attach in favor of the sub-contractor if he had been paid. This being so, the plainest language at the command of the Legislature should have been used to indicate an intention to give to such materialman or laborer privileges superior to the sub-contractor, and especially since the construction expressed by Vice-Chancellor Leaming makes it possible for a contractor to be called upon to pay twice, when he may be ignorant of who may be furnishing materials to the sub-contractor and as to whether or not he has paid his obligations. It places the general contractor in a hazardous position. Under the Mechanics' Lien Act, the contractor is protected by the requirement of a stop notice; the owner is protected against double payment by filing his agreement and specifications. When the Legislature stated that the lien should attach from the time of the filing thereof until the extent of the liability of the contractor or sub-contractor was determined, certainly it presupposed the existence of a debt from the contractor to the sub-contractor. The construction reached places the sub of a sub in a more privileged position than that of the original sub to the

contractor. The inquiry is, why should this be so and did the Legislature intend such a manifest inequitable result?

The contractor can protect himself against a lien by paying his sub whom he knows, but has no protection against the succeeding sub, whom he may not know and may be without means of knowing, even though he pays the one to whom he owes a debt. It seems to us that such a result ought not to be wrought, in the presence of the remotest doubt as to the meaning of the Legislature and we submit such a doubt exists in the 5th Section of the Act.

II.

THERE WAS NO PROOF THAT THE MATERIAL WAS USED IN THE IMPROVEMENT.

The Vice-Chancellor concluded that it was not necessary to prove that the material was actually used in the improvement, relying upon the opinion of this Court in *Bell v. Mecum*, 75 N. J. Law 547. That case was under the general Mechanics' Lien Act and simply interpreted that Act. Section 2 of the Municipal Lien Act here involved, requires that the notice which must be filed with the municipality must be verified and

“Shall allege that the labor was performed or materials furnished to the said contractor or sub-contractor (specifying which), and that they were actually performed or used in the execution or completion of the said contract with the said municipality.”

The notice does so state and the bill so avers, but there was a lack of proof. The language in the

general Mechanics' Lien Act and that in the Municipal Lien Act with relation to the point is quite dissimilar. It seems idle to suppose that the notice required to be verified must allege that the materials were actually used in the execution or completion of the said contract, but that on the hearing it is unnecessary to prove that fact. The language in the first section is:

“Perform any labor or furnish any materials toward the performance or completion of any such contract.”

This clearly states the necessity for the material being actually used in the performance or completion of the contract.

Moreover, this Court in *Camden Iron Works*, 64 Equity 732 (at bottom of page 731), discusses the necessity of a verified claim, quotes the words of the statute with respect to the actual performance or use, and then at the top of page 732, says:

“The statute is not broad enough to cover materials not actually used in the construction of the city work, the reason for this must be quite obvious.”

It seems to us that this expression concludes the respondents. There seems a cogent reason for so holding in the instant case if it is to be said that a contractor may have money due him from the municipality liened, and he must pay therefrom notwithstanding he has previously paid the sub-contractor, even though the sub-contractor does not perform his contract.

We assume that there can be no question that the Vice-Chancellor determined there was no proof before him that the materials were actually used

in the execution or completion of the contract by the fact that he determined that was unnecessary.

III.

THE VERIFICATION OF THE NOTICE WAS INSUFFICIENT.

It is our contention that the affidavit should be circumstantial. This seems to be the conclusion reached by this Court in the Camden Iron Works case, although it is not expressly so decided. The language of the Court is:

“The language of our statute in the case before us requires that the claim shall be verified, stating the amount claimed; that there shall be a deduction of all just credits and offsets, and an affirmation that the labor was performed or the materials were furnished and ‘were actually performed or used in the execution or completion of the said contract with said city.’ ”

It is our submission that the verification should have stated that the materials were actually used in the execution or completion of the contract and that its absence gave no jurisdiction to the Court to hear this case.

For the reasons stated, the decree should be reversed.

Respectfully submitted,

COLE & COLE,
Solicitors for and of Counsel with
M. B. Markland Co., Appellant.

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New Jersey Court of Errors and Appeals

ATLANTIC CITY LUMBER COMPANY,
Complainant-Respondent,

v.

CITY OF ATLANTIC CITY, *et al.*,
Defendants-Appellants.

ON APPEAL.

BRIEF OF ATLANTIC CITY LUMBER COM-
PANY AND H. HOFFMAN & SONS.

In view of the fact that the points raised by the appellant relate equally to the claim of the Atlantic City Lumber Company, and also that of H. Hoffman and Sons, this brief is filed on behalf of both of these respondents.

I.

The first point raised by the appellant is to the effect that inasmuch as the Metal Mould Erection Co. had defaulted in its contract with the defendant, M. R. Markland Co., as a result of which Markland was obliged to finish the contract of the Metal Mould

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and H. Hoffman & Sons*

Erection Co. at expense to itself, therefore, the sub-contractor of the Metal Mould Erection Co. was not entitled to a lien.

The appellant undertakes to argue his point, based upon the authority of *Meurer v. Kilgus*, 77 N. J. Equity 175, and also *Garrison v. Borio*, 61 N. J. Equity 236.

The point is clearly and flatly decided contrary to the contention of the appellant by the case of *Wills v. James*, 99 N. J. Equity 10, affirmed by the Court of Errors and Appeal in 100 N. J. Equity 360. In that case both the case of *Garrison v. Borio* and *Meurer v. Kilgus* were discussed, and the Court took the view that these cases were applicable to the old Act, and that the Legislature had passed the new Municipal Lien Act of 1918, under the terms of which there was no question but that materialmen supplying material to a sub-contractor, was entitled to a lien, even though the contractor had paid the ^{sub-contractor} ~~materialmen~~ in full.

The right to relief in that particular is based upon a construction of the Act that is logical, and the only possible construction. There is nothing about the situation of the sub-contractor owing the main contractor money that makes the situation any different than was present in *Wills v. James*. The right to relief in favor of a materialman under a sub-contractor is based upon the rights given by the statute, and is not affected in any respect by the financial relationship between the contractor and sub-contractor. *Wills v. James* was rightly decided, and we contend is entirely dispositive of the appellant's first point.

II.

The second point argued by the appellant is an objection to the conclusion of the Vice-Chancellor, that it is not necessary for the complainant to prove that the materials were actually used in the building.

The first section of the Act provides that:

"1. Any person who as laborer, mechanic, merchant or trader or sub-contractor, shall hereafter, in pursuance of or conformity with the terms of any contract for any public improvement made between any person or corporation and any county, city, town, township, public commission, public board or other municipality, in this State authorized by law to make contracts for the making of any public improvement, *perform any labor or furnish any materials toward the performance or completion of any such contract shall, on complying with the provision of the second section of this Act, have a lien for the value of such labor or materials, or both, etc.*" New Jersey Mechanics' Lien Law (1923, Luce), page 280.

Section 10 provides that:

"The Court of Chancery shall determine the validity of the lien of the complainant and defendants, and of all other liens, which may be filed within the time prescribed by the Act, and the amount due from the municipality to the contractor under the contract, and from the contractor, or sub-contractor, to the respective complainants, and shall make a decree directing the municipality * * * to pay to the several

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 and H. Hoffman & Sons*

claimants the sum found due to them respectively, with interest and costs, upon claims adjudged to be just, and valid under this Act for work done or material furnished in the execution of the contract or contracts, with the municipality * * *.”

There is no suggestion in the first section that the right to a lien is limited to persons who prove that their material goes into the building. If he comes within the classification of Section 1 and complies with Section 2, he has a lien. After the lien is filed, without any more proof whatever, the city might, under Section 7, issue a rule to show cause, requiring the contractor to show cause why the city should not pay the claim; or, again, Section 4 holds the lien might be lost by failure to institute suit within 60 days after the filing of the lien. We point to those latter two sections merely for the purpose of showing that the lien claim is something entirely separate and distinct from the suit based on the lien claim.

It is only in Section 2 of the Act that any reference is made to showing that the material is actually used in the execution, or completion of the contract. At no other point in the Act is that referred to. The Act nowhere requires that the material be actually used in the building. After the lien is filed, suit is brought, and Section 10 of the Act sets forth just what the Court of Chancery shall determine in the suit.

The first thing that the Court of Chancery has to determine, of course, is the validity of the lien of the complainant. So far as the point in question is concerned, the lien is a valid lien, if it sets forth that

the material was actually used in the execution of the contract. It may be that the defendant could show that the lien was invalid by showing that the material was not actually used in the execution or completion of the contract. However, that is the burden of the defense. There is no suggestion in the Act that the Court of Chancery is called on to determine whether the material is actually used in the building. The Act clearly specified what the Court of Chancery shall determine in regard to the controversy.

The lien filed in this cause was strictly in accordance with the statute. The validity of both the lien of the Atlantic City Lumber Company and H. Hoffman & Sons was the first thing to be determined by the Court. They were both in strict compliance with Section 2 of the Act, and when offered in evidence without any dispute as to the facts set forth therein, there was nothing for the Court to do but to find in favor of their validity. There was no suggestion in the Act that the Court should determine whether or not the material was actually used in the building. It is contended that, if the question is of importance that the defendant must, in the face of a valid lien, show that the material was not used, in order to show that the lien was invalid.

The General Mechanics' Lien Act says:

“Every building, &c., shall be liable for the payment of any debt contracted and owing to any person for *labor performed or material furnished for the erection and construction thereof.*”

When that phraseology is placed against the phraseology in the first section of the Municipal

Lien Act, it is our view that one is bound to reach the conclusion that the Municipal Lien Act is even broader. In the General Act a lien is given for materials furnished for the erection and construction of the building; in the Municipal Lien Act a material man has a lien for furnishing any material *towards* the performance, or completion of any contract for public improvements. We feel that the latter phraseology is very much broader, and standing alone would give a lien for any material used in the performance of the contract, although it does not go into the building. Of course, that is not our case here, and we are merely making the point by way of emphasizing the lack of necessity for our proving that our material actually did go into the building.

In the face of a comparison of the phraseology used in the two Acts, we must not overlook the cases under the General Mechanics' Lien Act, all of which are to the effect that in the absence of fraud, it is immaterial that the materials supplied for the building is not used in the building, and the cases all hold that where material is delivered to the building, even though subsequently removed, a lien will lie.

The New Jersey cases on that subject are, among others, *Morris Bank v. Rochaway*, 1 McCarter 189; *Campbell v. Taylor*, 51 Atlantic Reporter 723; *Bell v. Mechum*, 68 Atlantic Reporter 149. These cases are based upon the old Pennsylvania case of *Hinchman v. Graham*, decided in 1815 and reported in #2 Sergeant and Rawles Reports 172, where Chief Justice Tilghman said:

“I was once inclined to think, that the lien might be restrained to the materials *actually used in the building*. But on reflection, I find

that such a construction is not warranted by the words of the law, and would operate unjustly on those who furnish the materials; for how can they tell the exact quantity that the building will require, or what control have they over the purchaser after delivery?"

We, therefore, contend that there is no necessity for us to prove the actual use of the material in the building.

It is our contention that the delivery by the lien claimants of the material to the operation was sufficient. It is the burden of the appellant to prove that the material was not used in the building. It is obviously impossible for a materialman to stand at a building operation to see that his material was actually used in the building. This very case illustrates the difficulty of making such proof. The Metal Mould Erection Co. was a foreign corporation; none of its officers were within this State, either at the time suit was started, or at the time of trial; only statutory service could be made upon it. It was not possible for these lien claimants to secure the officers of the Metal Mould Erection Co. as witnesses. The defendant, M. B. Markland Co., on the other hand, was the contractor; knew all about the construction of the building, and was in a position to know what material went into the building. His was the burden, and he would have had no difficulty in disproving the liens filed, if the liens were not true.

As a matter of fact the testimony shows beyond a question that the material of the Atlantic City Lumber Company was actually delivered to the Convention Hall, and we contend, further, creates

an inference that the material was actually used, which, if the question was important, should have been rebutted by the testimony of the defendants.

“Q. I show you delivery ticket dated January 28, 1927, and ask you what material is represented by that delivery ticket?

A. That represents a carload of lumber, which was delivered—I don’t remember whether it was on the Georgia Avenue siding, or Mississippi Avenue siding; the car was delivered right there to them, and they unloaded it.

Q. Now, delivered to them, where?

A. At the Convention Hall.” (S. C., p. 58, ll. 1-10.)

“Q. All right, I will show you some delivery slips and ask you if you delivered the merchandise? I show you delivery slip marked Number D8456, and ask you if you delivered that merchandise?

A. Yes, sir.

Q. Where?

A. Georgia and Pacific.

Q. Who signed for it?

A. Brown.

Q. Who is Brown?

A. Superintendent of the—or boss there, some kind, foreman; foreman there.

Q. For whom?

A. For the Metal Mould Company.” (S. C., p. 65, ll. 1-15.)

“Q. Did you see Brown doing work around there?

A. Yes.

Q. What was he doing?

A. Handling 2 x 4's, helping carpenters, showing where the forms went.

Q. What work was he doing, I don't care whether he was hammering a nail, what was the general thing he was doing?

A. Always had a blue-print in his hand, showing the men that were building forms.

Q. What was he doing?

A. Showing the men how to do with them, with the forms.

Q. Was he setting forms?

A. Yes, setting forms.

Q. Mr. Johnson, I show you delivery slip dated April 7, 1927, for 25 pieces 2 x 4, 16 sap, and ask you if you made that delivery?

A. Yes, sir.

Q. Where?

A. At Mississippi and Pacific.

Q. Who receipted for it?

A. Brown.

Q. You say Brown that you saw erecting forms?

A. Yes, sir." (S. C., p. 67, ll. 4-30.)

Besides testimony of that character above referred to, this following admission was made:

"Mr. Cole: The defense will admit that the goods or material in question were charged to the Metal Mould Erection Company and that they were delivered on the premises where the Convention Hall was in course of erection, that the items were correct, the charge is correct and that, so far as the total amount claimed is concerned, that is correct. In other words, we

relieve you of the necessity of proving each item." (S. C. 68, l. 35, p. 69, l. 9.)

As to the claim of H. Hoffman & Sons, it was admitted by John J. Wood, an employee of Metal Mould Erection Company, at the time the materials were delivered, that the same were delivered to the Convention Hall. The testimony on this point is as follows:

"Q. So that all of the slips with the exception of three slips were signed by yourself or persons connected with the Metal Mould Erection Company authorized to sign for them?

A. That is correct.

Q. All the stuff was delivered to the Convention Hall?

A. Convention Hall." (S. C., p. 87, ll. 12-19.)

III.

The third point made is that the verification of the notice was insufficient. It is rather difficult for us to understand exactly what counsel contends by this point. The notice of claim of each of the claimants was filed with the proper officer, and verified by oath. A full affidavit is not required. A notice is required, which notice must be verified. In Volume I of Kocher and Trier (p. 11) a form "Verification of pleading in common form" is set out, which is as follows:

"State of New Jersey }
County of } ss.

A. B., of full age, being duly sworn according to law, upon his oath deposes and says that he

is the complainant in the foregoing bill of complaint named; and that the matters and things therein contained are true. * * *"

Under the hearing of "Verification" in Volume 2 of Kocher and Trier, on page 1141, appears the following:

"All the facts necessary to sustain a restraining order or preliminary injunction must be verified by positive proofs. There should be a special affidavit of the truth of all the material facts alleged in the bill; an injunction issued upon a common affidavit in the form ordinarily annexed to a sworn answer will be dissolved very much as a matter of course."

We point out these forms of affidavit in Chancery practice merely because they confirm our view to verify a notice of claim only requires a verification in common form, and not a special affidavit setting forth, in the affidavit again, all the facts that have been previously set out in the notice. There would certainly be no purpose in such a distinction.

It is our contention that the decree of the Court of Chancery was sound and should be sustained.

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Solrs. for and of Counsel
with Atlantic City Lum-
ber Company, Complain-
ant-Respondent.

CASSMAN & GOTTLIEB,
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Defendant-Respondent.





