New Jersey Court of Errors and Appeals

CHARLES S. SHULTZ, et al., co-partners trading as CHARLES S. SHULTZ & SON (claimants), Plaintiffs-Respondents, vs. KATE A. MIAL, et als. (owner), Defendant-Appellant.	On Appeal.

STATEMENT OF THE CASE.

Notice of Appeal.

To

SMITH, MABON & HERR, Esqs.,
Attorneys of Plaintiffs,

Take notice that the defendant, Kate A. Mial, owner, appeals to the Court of Errors and Appeals from the whole of the Judgment entered in this cause.

SAMUEL A. BESSON,
Attorney for Appellant.

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

Clifford Stephenson, being duly sworn according to law on his oath, deposes and says:

That he served the within notice on Smith, Mabon & Herr on the 12th day of July, 1913, by leaving a true copy thereof at their office with Miss Cytron, the stenographer.

(Signed) CLIFFORD STEPHENSON.

Subscribed and sworn to before me
this 12th day of July, A. D. 1913.

(Signed.) HARLAN BESSON,
Master in Chancery of New Jersey.

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

CHARLES S. SHULTZ and WALTER C. SHULTZ, co-partners trading as CHARLES S. SHULTZ & SON (claimants), Plaintiffs, vs. SONNTAG COMPANY, a corporation (builder), KATE A. MIAL (owner), and ROBERT D. FOOTE (mortgagee), Defendants.	Action at Law. On Mechanics' Lien Claim. Grounds of Appeal.

The appellant, Kate A. Mial, states the following grounds of appeal:

Grounds of Appeal.

1. The contract together with the specifications accompanying the same were filed in the office of the Clerk of the County in which the building lien is situate before the work was done or materials furnished for which the lien was filed, and the said building and the lands whereon it stands are liable to the contractor alone for whatever work was done or materials furnished in pursuance of such contract.

2. The contract provides that the contractor shall and will provide all the materials and perform all the work for the erection and completion of the building and in such case it is not necessary to file the specifications, but the filing of the contract will be sufficient to protect the building and lands from liens by all persons except the contractor, notwithstanding the language of Section 2 of the Mechanics' Lien Law.

3. The interest of the defendant Kate A. Mial in the lands liened is not lienable.

SAMUEL A. BESSON,
Attorney of Appellant,
Kate A. Mial.

Filed July 15th, 1913.

JOHN F. CROSBY,
Clerk.

Judgment Record.

HUDSON COUNTY CIRCUIT COURT.

CHARLES S. SHULTZ and WALTER C. SHULTZ, co-partners trading as CHARLES S. SHULTZ & SON (claimants),
Plaintiffs,
vs.
SONNTAG COMPANY, a corporation (builder), KATE A. MIAL (owner), and ROBERT D. FOOTE (mortgagee),
Defendants.

Judgment Record.

The defendants in this cause were summoned to answer unto the plaintiff's herein in an action at law upon the following complaint:

Plaintiffs, Charles S. Shultz and Walter C. Shultz, co-partners trading as Charles S. Shultz and Son, doing business in the City of Hoboken, County of Hudson and State of New Jersey, say that:

1. Plaintiffs furnished certain materials hereinbelow set forth for the erection and construction of a two-story reinforced concrete and brick building on the following described lots and curtilage, to wit:

All those lots of land situate in the City of Hoboken, in the County of Hudson and State of New Jersey, which are known on a map of Hoboken made by Charles Loss, duly filed in the Clerk's office of the County of Bergen, as lots number one

hundred sixty-one (161), one hundred sixty-two (162) and one hundred and sixty-three (163), beginning at a point in the northeasterly corner of Washington and Sixth Streets; running thence northerly along the easterly line of Washington Street seventy-five (75) feet. more or less; thence easterly and parallel with Sixth Street one hundred feet to an alley; thence southerly along said alley seventy-five (75) feet, more or less, to the northerly line of Sixth Street; and thence westerly along the northerly line of Sixth Street one hundred (100) feet to place of beginning. Being the same premises conveyed to Henry H. Hankins by Patience T. Hankins et als. by deed dated May seventeenth, eighteen hundred and seventy-six, and recorded in Hudson County Register's office in Book 297 of Deeds at page 417.

2. The amount and kind of materials so furnished by plaintiffs, and the prices at which and times when the same were furnished are as follows, to wit:

Aug. 1,	To 80 bbls. Port. Cemt. in bags ex car del'd		1.45	116.
2,	" 69½ bbls. do " " " "			100.78
23,	" 30 Ft. 8½x13 Flue Lg del'd		.20	6.
"	" 30 " 13x18 do "		.40	12.
"	" 16 " 4—13 do "		.14	2.24
24,	" 150 bbls Port. Cemt. in bags ex car		1.35	202.50
27,	" 2250 Hd. Bk. Del'd		8.10	18.22
28,	" 1500 Lgt. Hd Bk Del'd		6.10	9.15
"	" 150 bbls Port Cemt in bags ex car		1.35	202.50
29,	" 3000 Hd Bk Del'd		8.10	24.30
30,	" 1000 do "		"	8.10
"	" 10 bbls. Palmer Line Del'd		1.15	11.50
				713.29

			Cr.				
			By 893 Cemt bags at 7c.	62.51			
			" ½ bbl. Port Cemt in bags at 1.35	.73			
						63.24	650.05
	Sept.	4,	To 300 bbls. Port Cemt in bags ex car		1.35	405.	
		5.	" 150 " do		" "	202.50	
		10,	" 1500 Hd Bk Del'd		8.10	12.15	
		12,	" 1500 do "		"	12.15	
		16,	" 40 Ft. 7½x7½ Flue Lg. Del'd		.12	4.80	
		23,	" 3000 Hd Bk	"	8.10	24.30	
		30,	" 6000 do	"	"	48.60	
			Cr.			709.50	
			By 506 Cemt. Bags at 7c.,			35.42	674.08
	Oct.	1,	To 6 bbls. R. Lime	Del'd	1.25	7.50	
		"	" 5750 Hd Bk.	"	8.10	46.58	
		2,	" 3000 do	"	8.10	24.30	
		3,	" 5750 do	"	"	46.57	
		"	" 6 bbls. R. Lime	"	1.25	7.50	
		4,	" 3000 Hd Bk	"	8.10	24.30	
		5,	" 1500	"	"	12.15	
				Forward		168.90	1324.13

Oct.	7,	To 3000 Hd Bk	Del'd	8.10	24.30		
	8,	" 2750 do	"	8.10	22.28		
	"	" 6 bbls. R. Lime	"	1.25	7.50		
	9,	" 5250 do	"	8.10	142.52		
	"	" 14 do	"	1.25	17.50		
	10,	" 8250 do	"	8.10	66.83		
	11,	" 10500 Hd Bk	"	"	85.05		10
	14,	" 1500 do	"	"	12.15		
	15,	" 3000 do	"	"	24.30		
	"	" 50 Ft. 8½x13 Flue Lg.	"	.20	10.		
	16,	" 10 bbls. R. Lime	"	1.25	12.50		
	17,	" 5250 Hd Bk	"	8.10	42.52		
	18,	" 12000 do	"	"	97.20		
	19.	" 1000 do	"	"	8.10		
	"	" 10 bbls. R. Lime	"	1.25	12.50		
	22,	" 10 bbls. R. Lime	"	1.25	12.50		
	"	" 5000 Lath	"	4.75	23.75		20
	"	" 9000 Hd Bk	"	8.10	72.90		
	23,	" 10000 Lath	"	4.75	27.50		
	25,	" 2250 Hd Bk	"	8.10	18.23		
	26,	" 3000 do	"	"	24.30		
	28,	" 4500 do	"	"	36.45		
	"	" 14 bbls. R. Lime	"	1.25	17.50		
	29,	" 1500 Hd Bk	"	8.10	12.15		
	30,	" 14 Ft. 13x18 Flue Lg.	"	.40	5.60		
					925.03		30
		Cr.					
		By 14 Empty Bbls at 5c.		.70			
		" 931 Cement Bags at 7c.		65.17			
		" 28 ft. 7½x7½ Flue Lg. at 12c.		3.36	69.23	855.80	
						2719.93	
	23,	Check,				371.80	
							40
						1808.13	

3. There has been one payment made on account thereof, being the sum of Three hundred Seventy-one dollars and Eighty cents ($371.80) on the twenty-third day of October, Nineteen hundred and twelve, there are no other deductions which ought to be made therefrom.

4. The balance justly due to the plaintiff therefore is One thousand Eight Hundred Eight Dollars and Thirteen cents ($1808.13), with interest from the thirtieth day of October, Nineteen hundred and Twelve.

5. All of said materials were furnished at the request of Sonntag Company (which is the name of the person which contracted the said debt) between the first day of August, Nineteen Hundred and Twelve, and the thirtieth day of October, Nineteen Hundred and Twelve, which said last mentioned date is the date of the last materials furnished for which said debt is due.

6. Plaintiffs claim a lien upon the building and lands above described, for the amount of said debt and interest as aforesaid, under and by virtue of an ACT of Legislature of the State of New Jersey entitled, "An Act to secure to 'mechanics and others payment for their labor and material' in erecting any supplemental thereto."

7. The name of the owner of said land and of the estate therein on which said lien is claimed is Kate A. Mial.

8. Said Robert D. Foote is made a party defendant because he holds a mortgage of record a-

gainst the property affected by the claim to enforce which this suit is brought, which said mortgage would be cut off by a sale under said lien claim.

9. Plaintiffs demand the said sum of One Thousand Eight Hundred and Eight Dollars and Thirteen cents, with interest thereon computed as aforesaid, and costs of suit.

SMITH, MABON & HERR,
Attorneys of Plaintiffs.

Filed—Clerk's office, January 16, 1913, Hudson County, N. J.

JOHN F. CROSBY,
Clerk.

Answer.

The defendant answers as follows:

Kate A. Mial, one of the defendants in the above entitled cause, of the City of Morristown, in the County of Morris, State of New Jersey, says that:

1. As to the statements in paragraphs one and two defendant has not any knowledge or information thereof sufficient to form a belief.

2. Defendant denies on information and belief paragraph three.

3. Defendant denies the fourth paragraph of plaintiff's complaint.

4. As to the statements contained in paragraphs five and six defendant has not any knowledge thereof sufficient to form a belief.

5. Defendant denies that Kate A. Mial is the owner of said land, and does not know the estate of the said Kate A. Mial in said land.

6. Defendant admits the eighth paragraph on information and belief.

7. Defendant further says that the said plaintiff ought not to have this action against her and said buildings and lands, because she says that neither said buildings nor said lands are liable to the said supposed debt.

S. A. BESSON,
Attorney of Defendant Kate A. Mial.

Filed—Clerk's office, January 30th, 1913, Hudson County, N. J.

JOHN F. CROSBY,
Clerk.

Judgment.

This action was tried before Judge William H. Speer, with a jury at a Hudson Circuit, on April 25, 1913.

The cause having been heard and submitted to the jury, they return their verdict as follows: They say they find the defendant guilty as in the

plaintiff's complaint is charged upon it, and they assess the damages of the plaintiff on occasion of the premises at the sum of One Thousand Eight Hundred and Sixty Dollars and Fifty-six cents ($1,860.56) and their costs which are taxed at the sum of Sixty-three Dollars and Fifty-four cents ($63.54) making in the whole the sum of One Thousand Nine Hundred and Twenty-four Dollars and Ten cents ($1,924.10).

Judgment entered this April 25, 1913.

WILLIAM H. SPEER,
Judge.

Attest:
JOHN F. CROSBY,
Clerk.

Circuit Court's Return.

The answer of William H. Speer Esquire, Judge of the Circuit Court, holden in and for the County of Hudson and within named, the record and proceedings of the plaint whereof mention is within made with all things touching the same, I send to the Judges of our Court of Errors and Appeals of the last resort of all causes at Trenton, at the day and year within contained, in a certain schedule to this appeal annexed as within I am commanded.

WILLIAM H. SPEER,
Judge.

Opening of Defendant's Counsel.

Mr. Besson opened for the defendant in accordance with the requirements of the New Practice Act as follows:

"Mr. Herr said he was bringing these suits as I understand, to establish a lien claim and to obtain a judgment against the builder, the Sonntag Company and the owner, he calls her Kate A. Mial. Now, we defend on the ground that there was a contract filed which is sufficient to protect the property from any lien; and as to the ownership, we do not know who is the owner. All we can do is to present to the Court the records which show the status of the title and let the Court decide who is the owner."

Plaintiffs' witnesses testified as follows:

(The introductory unimportant matters and matters not relative to the questions raised on review being omitted).

WALTER C. SHULTZ, a witness produced on the part of the plaintiffs, testified: I am a member of the copartnership of Charles S. Shultz & Walter C. Shultz, trading as Charles S. Shultz & Son, the plaintiffs, in this case. I am familiar with the matters concerning the contract on the building at Sixth and Washington Streets, Hoboken, N. J.; my firm furnished materials for the erection and construction of that building. I have

with me the books showing that account. The nature of the materials furnished was the mason material, in the nature of brick, lime and cement.

These materials were ordered by the Sonntag Company by Mr. Warmbold, who is the treasurer and secretary of the company. That arrangements were made with him. Witness produced his firm's books of account and proved each and every item of material furnished on the building in question for which the lien was filed and the suit thereon brought. The witness continuing, testified: That the entire amount of material delivered amounted to $2,179.93 and a credit of $371.80, leaving a balance due of $1,808.13.

It is admitted that all of the materials which were the subject matters of the suit and the mechanics liens were furnished in and for the erection and completion of the building in question. The last delivery of material was made on the job on October 30th, 1912. My firm has received no other moneys on account other than what I have testified to and the whole balance is now due and owing to us.

(Witness) I think it was early in November, when I discovered that the specifications of this contract were not filed. I do not recall the exact date. I think it was more than two months after the job had been started when we had the matter looked up, because it was a question as to whether the job could be finished at the contract price, then we looked to see what the contract was and whether there had been a contract.

WILLIAM H. DAVIS, a witness produced on the part of the plaintiffs, testified: That he was

the truckman working for the plaintiffs who carted all the material in question to the premises in question.

WALTER R. WARMBOLD, a witness produced on the part of the plaintiffs, testified: That from August 1st, 1912, he was in the contract-building business with the Sonntag Company; that he was the secretary and treasurer of the company during that period and still is. The Sonntag Company had charge of erecting the building at the corner of Sixth and Washington Streets, Hoboken, N. J. It was a reinforced concrete structure intended for stores and a theatre building, covering a plot of 75 feet by 100 feet; that he ordered the materials for that work on behalf of the Sonntag Company from Charles S. Shultz & Son; that he was in charge of the work of the building as an officer of the company; that he knew of his own knowledge that the goods and materials charged for in the account of Charles S. Shultz & Son against Sonntag Company were delivered to the building for the use in the erection thereof. The balance due for these materials is $1,808.13.

It was admitted that Kate A. Ebbetts mentioned in the Will of Henry H. Hankins, which was marked Exhibit P5 is now Kate A. Mial, and that she is the executrix under the Will; that Isabel Hankins, mentioned in the Will, Exhibit P5 afterwards married George W. Chandler who has since died and that she is still living.

Statement of Documents Offered in Evidence by Plaintiffs.

Plaintiffs offered in evidence the following documents:

Contract entered into between Sonntag Company and Kate A. Mial, which contract is marked Exhibit P3 and is hereto annexed.

Lien Claim filed by the plaintiffs and the same is marked Exhibit P4 and is hereto annexed;

Will of Henry H. Hankins, marked Exhibit P5 and is hereto annexed;

Agreement dated November 24th, 1906, between Isabel Chandler, formerly Isabel Hankins, of the first part, and Katharine A. Mial, of the second part, which is marked Exhibit P6 and is hereto annexed.

The Court directed that the fourth and fifth paragraphs of said agreement only should be read to the jury. Plaintiffs thereupon rested their case and the defendant moved for a nonsuit on the grounds that the lands and building in question were not liable to claimants' lien; that the filing of the contract offered in evidence was sufficient to protect the building and lands from liens by all persons except the contractor; that the interest of the defendant, Kate A. Mial, in the lands in question is not lienable.

The Court refused to grant the motion for a nonsuit and defendant entered an objection to the ruling of the Court.

Kate A. Mial, the defendant, offered no witnesses in her behalf.

The Court thereupon charged the Jury as follows:

I think in this case then, gentlemen, what I will have to do is to direct a verdict. The suit is brought by Charles S. Shultz and Walter C. Shultz, co-partners, trading as Charles S. Shultz & Son, who are the plaintiffs against the Sonntag Company, a corporation, Kate A. Mial and Robert D. Foote, as mortgagees, The claim made by the plaintiffs is for $1808.13 and there is interest on this sum amounting to $52.43, making the total amount $1860.56. The proof has established that the goods were purchased by Mr. Warmbold, who was the agent of the Sonntag Company for this building, and the proof has even gone further than was necessary, because the statute provided that if it be established that the materials be furnished for the building, whether they be used in it, is immaterial. But in this case the proof seems to be established conclusively that the goods were delivered at the job and the jury might reasonably infer, and I will infer, they were actually used in the job. So that there is not any question at all about the fact of the goods having been furnished for the job. The contractors offered no defense whatever, and consequently there must be a direction of a general verdict against them—I am speaking now of the Sonntag Company, the builders—for the sum of $1860.86. The question then arises as to whether there should be a special judgment fastening this amount as a lien upon the property owned by Mrs. Mial. First of all, it is established conclusively that the suit was commenced and the materials were furnished within four months from the time that the last work was done on the job, and therefore the formalities of the statute have been complied with so far as those requirements are concerned; the next question is

as to whether or not Mrs. Mial was the owner of the property at the time these materials were furnished in such wise as to make her ownership subject to this lien. There is admitted in this case that a man, named Hankins, was the owner of the property and that he died having first made a Will and willed the property or rather the usufruct of the property—the use and enjoyment of it—to Isabel Hankins, making her his executrix, and that he gave the remainder in the property to Mrs. Mial, the defendant in this suit. Now, Mrs. Hankins was not an absolute life tenant of this property, owning a life estate in the property. What she had was for her life, a usufruct of the property, so that what the estate of Mrs. Mial really amounted to, whether it was a plain, ordinary vested remainder—and it would be a vested remainder ordinarily, if she were given the remnant of the estate after the estate had been carved out of it by the same instrument that created the life estate—there would be a vested remainder, she being the person upon whom this remainder descended. I think that a remainder, without more, is quite sufficient to warrant the attachment of a mechanic's lien claim, such remainder in an estate in the property, such estate is a vested estate and such an estate is an estate at law, and I understand under the mechanic's lien law that a lien will attach to any legal estate. There are decisions in this State, one of Curry vs. Cumming, 13 Stu., 145, and another in 10th N. J. Law Journal, page 12, Scott vs. Reeve, where it has been held that a vendee, who is in possession under a contract of purchase, where the contract has never been executed and in fact where it never is executed and has been revoked afterward, has

such an estate as will warrant the attachment to it of a mechanic's lien. I am perfectly well aware that the general proposition is that a mechanic's lien does attach to equitable estates, but we have those two decisions, and those are equitable estates, they are based upon the equitable notion that where a contract to purchase has been made, the vendor becomes the trustee of the legal title of the purchase money of the vendor and they are pure, equitable estates. But it is to be observed in these cases that in both of them the equitable owner was in possession of the property, and that may in the minds of the judges who decided these cases, have made some difference. But I am not going to the length of holding, and do not now hold, that a mechanic's lien will attach to a mere equitable estate. I hold, first of all, in this case that the lien attaches to the remainder which is a vested remainder and is a legal estate and that consequently is such an estate as the lien may attach to. But that is not all that we have in this case. We have in this case these further facts, there is a contract existing between Isabel Hankins and Mrs. Mial whereby Isabel Hankins renounces the executorship of the estate in which presumably Mrs. Mial is in possession of these premises and we have furthermore that Mrs. Mial actually did make a payment while the work was going on to Sonntag, who was the contractor on this job, showing that Mrs. Mial had claimed to have or exercised rights which indicated that she did have some interest in the property in addition to the possession. Not only that, but by this fifth section of the contract, which has been offered in evidence, Mrs. Hankins absolutely releases and relinquishes all rights which she had under the Will of Mr.

Hankins, deceased, and agrees to give any further assurance that may be ncessary, either by way of release or releases or by way of conveyance or whatever may be necessary to assure to Mrs. Mial this property, amongst other things which she got under the Will of Hankins. So it seems to me to be perfectly clear that Mrs. Mial had some estate of a legal character, part of which, if you please, was the remainder, the rest of which was created by contract under seal between Mrs. Hankins and Mrs. Mial, whereby this person who had the mere usufruct of the property for her life, relinquished that right and gave it up and put Mrs. Mial in possession of the premises. Now, whatever this estate may be —and I do not attempt to give it any name—I simply attempt to fasten upon it an attribute and to call it a legal estate—an estate growing out of the express agreement of the parties whereby the one relinquishes the usufruct and transfers the possession to the other and agrees to assure to her the thing which she has conveyed. Now, whatever we may call it and whatever it may amount to, it is a legal estate, and I think, therefore, that it is such an estate as a lien would attach to and I shall therefore direct so far as that point is concerned, that the lien does attach to the property for the sum of $1860.56. It is hardly necessary for me to say after the lengthy argument which we had that I do not think that the construction contended for by the counsel for the defendant, with respect to the construction of the second section of the mechanic's lien law can find favor with me at this time since the decision of the Court of Errors and Appeals in the case of Campbell, Morrell & Company vs. Lehockey, a case where the Court of

Errors and Appeals, speaking by Mr. Justice Trenchard, said that "the amendment of 1895 therefore under the maxim inclusio unius est exclusio alterius indicates conclusively that while the written specifications must be filed in every case, the plans or drawings need not be" seems to me to express what would be the indubitable conclusion that must be reached in the light of the history of this legislation, starting as it did with the mere word "contract" used, then the decision that the contract was quite sufficient without filing specifications even though the specifications were made a part of the contract; then having the Legislature add the word "specifications"; then having the courts engraft on it the word "plans"; then having the Legislature strike out that apparent construction of "Plans" and leave it standing "contract and specifications." Now, I do not think without judicial legislation I can whistle that section of the contract down the wind and I think I simply have got to stand by the clear wording of the statute and say that when the Legislature said "when" and then put in parenthesis the word "ever" indicating the universality of the statute, they meant just what they said. Prior to the inclusion of the parenthetical section "together with the specifications accompanying the same or a copy or copies thereof" the statute simply read "when any building shall be erected" and the Legislature did not want to leave any doubt or ambiguity about the word "when" so they put in parenthesis, "whenever," meaning at every time and in every case the building should be erected in whole or in part, then the contract should be filed together with the specifications or a copy or copies thereof, so it seems to me that the Legisla-

ture clearly intended and signified their meaning by that in every case that a building should be thus erected, the contract together with the specifications must be filed. Now, for these reasons, therefore, I think I must direct a verdict as I have indicated generally for the plaintiffs against the Sonntag Company, a corporation, for $1860.56 and direct the jury to declare by their verdict that that amount shall be a lien upon the premises described in the lien claim for the sum of $1860.56.

Exhibit P-3.

THIS AGREEMENT, made the Fifth day of July in the year one thousand nine hundred and twelve by and between Sonntag Company a corporation organized and doing business under the laws of the State of New Jersey party of the first part (hereinafter designated the Contractor), and Kate A. Mial of Morristown, N. J. party of the second part (hereinafter designated the Owner),

WITNESSETH, that the Contractor, in consideration of the agreements herein made by the Owner, agree with the said Owner as follows:

ARTICLE I. The Contractor shall and will provide all the materials and perform all the work for the Erection and completion of a two story and cellar Motion Picture Theatre, stores and Hall biulding, at the North-east corner of Washington and Sixth Streets, known as Nos. 601-603-605 Washington Street, Hoboken, N. J. as shown on the drawings and described in the specifications pre-

pared by F. H. Koenigsberger Architect, which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract.

ART. II. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said Architect, and that his decision as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as set forth in specifications may be necessary to detail and illustrate the work to be done are to be furnished by said Architect, and they agree to conform to and abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in Art. I.

It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the purposes of this contract by the said Architect are and remain his property, and that all charges for the use of the same, and for the services of said Architect, are to be paid by the said Owners.

ART. III. No alterations shall be made in the work except upon written order of the Architect; the amount to be paid by the Owners or allowed by the Contractor by virtue of such alterations to be stated in said order. Should the Owners and Contractor not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree, the

determination of said amount shall be referred to arbitration, as provided for in Art. XII of this contract.

ART. IV. The Contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Architect or his authorized representatives; shall, within twenty-four hours after receiving written notice from the Architect to that effect, proceed to remove from the grounds or buildings all materials condemned by him, whether worked or unworked, and to take down all portions of the work which the Architect shall by like written notice condemn as unsound or improper or as in any way failng to conform to the drawings and specifications, and shall make good all work damaged or destroyed thereby.

ART. V. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect, the Owners shall be at liberty, after three days written notice to the Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owners shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for

the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractor they shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owners in finishing the work, such excess shall be paid by the Owners to the Contractor; but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owners. The expense incurred by the Owners as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architect, whose certificate thereof shall be conclusive upon the parties ready for occupancy.

ART. VI. The Contractor shall complete the several portions, and the whole of the work comprehended in this Agreement by and at the time or times hereinafter stated, to wit: not later than Seventy-five (75) working days, beginning July 10th, 1912. In case the Contractor shall fail to complete the work hereunder in accordance with the specifications and drawings, and to the satisfaction of the Architect, within the time aforesaid, the Contractor shall and will pay to the Owners, the sum of Twenty-five ($25.00) Dollars for each and every day the time consumed in said performance and completion may exceed the time herein before allowed, which said sum is hereby agreed

upon, fixed and determined by the parties hereto, as "liquidated damages," and not as penalty; and the Owners shall and may deduct and retain the amount of such liquidated damages out of the final payment, which may be due or become due to the Contractor under this agreement.

ART. VII. Should the Contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the Owners, of the Architect, or of any other contractor employed by the Owner upon the work, or by any damage caused by fire or other casualty for which the Contractor are not responsible, or by combined action of workmen in no wise caused by or resulting from default or collusion on the part of the Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined and fixed by the Architect; but no such allowance shall be made unless a claim therefor is presented in writing to the Architect within forty-eight hours of the occurrence of such delay.

ART. VIII. The Owners agree to provide all labor and materials essential to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the Contractor, agree that they will reimburse the Contractor for such loss; the Contractor agree that if they shall delay the progress of the work so as to cause loss for which the Owner shall become liable, then they shall reimburse the Owner for such loss. Should the Owners and Contractor fail to agree

as to the amount of loss comprehended in this Article, the determination of the amount shall be referred to arbitration as provided in Art. XII of this contract.

ART. IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be Twenty-six Thousand Four Hundred Two ($26,402.00) Dollars subject to additions and deductions as hereinbefore provided and that such sum shall be paid by the Owner to the Contractor, in current funds, and only upon certificates of the Architect, as follows:

ADDENDA

to form part of the Contract.

I. Entire to reinforced contract work must be executed strictly according to the specification furnished by the Trussed Concrete Steel Co. of N. Y., in conjunction with the Architect's specification and any part not contained in one but appearing in the other shall be construed as fully set forth in either of them.

II. Main stairs from Basement to 2nd story to be constructed in its entirety as specified in reinforced concrete.

III. All sidewalk work, as specified, to be included in this Contract.

IV. All floors in stores, halls and toilets to be covered with the Sanitary Composition Flooring,

including 6″ high base with Sanitary Cove, as specified for floor of Billiard Room.

V. Billiard Room, passage, between Billiard Room and Available Space, as well as all stores, to have a 6″ high Sanitary Composition base with cove instead of wood specified.

VI. If Architect should desire damp proofing specified for inside of all walls, to be applied on outside, using "Lapadas" or other approved damp resisting material, instead of as specified.

VII. Tile, Exterior panels below 2nd story window sills shall be formed of a small stucco frame or band, with glazed tile panel inside, as per detail.

VIII. Roofing. Contractor to install complete, as per specification, the "Asbestos Built Up Roof," in place of Slag Roof which his estimate was based upon.

IX. The Contractor must allow $45.00 for painting of walls asd ceilings in main staircase hall, toilet hall in 1st floor and all toilets, in case Owners should decide to omit this work.

X. Metal Work. All soffits of store entrances which are specified to be covered with ceiling boards, must be covered, in place of boards, with galvanized iron, forming plain sunk panels.

XI. All the stamped stell wall and ceiling coverings to be of materials as manufactured by Canton Steel Ceiling Co. All this work to receive 1

good coat of oil paint on both sides before erection. The side walls of Moving Pictures Theatre covered with stamped steel to be boarded up 6″ from finish floor with ½″ sheathing boards and furring strips above sheathing boards before metal is applied.

XII. Omit plaster work of walls and ceilings and finished cement floor in room beneath (Platform) stage.

XIII. Omit finish floor of (Platform) stage.

XIV. An extra shall be granted for substituting of 2″ solid plaster built up on channels, as specified, in place of wooden railing between Billiard Room and Bowling Alleys to the amount of $22 per square foot, including wooden casings around openings and brackets of wood or composition material, if so ordered by Owners.

XV. Galvanized Metal for fronts entering this work shall be 24 gage, instead of 22 gage as specified.

XVI. The trap doors for cellar entrances must be all galvanized steel plain flush doors as manufactured by American 3-Way Prism Co.

XVII. The Contractor must allow the sum of $35.00 in case the 4 Fireproof Sashes in 2nd Story wall enclosing the skylight shaft are omitted.

XVIII. The partition dividing Picture Theatre from Stores must be built up in frame, as specified, and filled in with brick or hollow tile, laid up in

cement mortar and side facing stores to be plastered on expanded metal lath. Side facing Theatre to be sheathed from floor to ceiling before stamped steel covering is applied. In case of the building inspector, or other authorities having jurisdiction, require a fireproof partition same shall be built of hollow tile blocks, laid in cement mortar, plastered on store side, sheathed on Theatre side 6″ high and furred above.

XIX. In case architect decides to use "Marble Stucco" in place of "Asbestos Stucco" same shall be done by Contractor without additional cost to Owners. The Marble Stucco shall be composed of approved fineness, mixed in proportion and applied as will be directed.

XX. The store front at Washington Street and 6th Street exclusive of Stores Nos. 4-5-6-7 and 8 and workroom must be constructed of Bronze "Kawneer" casings and fittings as per specifications submitted by the "Kawneer Co."

XXI. All transoms to all store fronts to be glazed with "3-Way Prism Glass" set in heavy bronze metens as per design shown on plans.

XXII. Windows in 2nd story above Theatre entrance to be glazed with 3-Way Prism Glass lights instead of double thick American. Every second window and transom to be pivoted as will be directed.

XXIII. All glass of show fronts of all stores to be glazed with American plate glass as mentioned in specifications.

XXIV. Contractor shall allow $.17 per foot for all store partition work which might be omitted by Owners.

XXV. Skylights must be "Puttyless Skylights" of approved make.

XXVI. All interior trim throughout, specified to be North Carolina or Cypress, to be best quality, well seasoned, kiln dried, clear Chestnut, free of any defects.

XXVII. All walls, etc., specified to be of "brick or concrete," to be built of Brick, as specified.

XXVIII. Front on Court Street to be stuccoed with Portland Cement Stucco of a finish as will be directed and white washed if desired by Owners.

XXIX. In case Owners desire to change location of Ladies Toilet 2nd story and place same adjoining to steps leading to Available Space, the Contractor shall receive the additional sum of $95.00. This price includes 3-Way Prism glass in windows, additional line of soil and vent pipes, extra door, extra electric and gas outlet and all other work required in connection with this change. Toilet room to be about the same square area and arrangement as Toilet room shown at present in rear of this story.

XXX. Plumbing. No vent pipes for connection for future sinks in stores are included in this contract and provisions for only 10 gas outlets, located, as directed, are to be made in Billiard Room

and Bowling Alley in place of gas outlets as shown on plans.

XXXI. In case the Steam Heating system is installed at the price of $811.00 as per bid obtained by the Architect the Contractor shall allow the sum of $198.00

XXXII. Radiators to be used throughout in place of coils.

XXXIII. All roofing tiles to be used must be Ludowici-Celandon Co. Glazes Spanish Tiles of approved color, or others, approved by Architect.

XXXIV. All addendas to specifications or parts of specifications (which call for separate estimates) to be included in this contract unless otherwise mentioned in this addenda.

XXXV. All orders must be given in writing by Architect or Owners, and verbal orders not to be considered binding to either party.

XXXVI. Only Union Labor must be employed in all work connected with the erection of this building.

XXXVII. The Contractor must award the different parts of the work to the Contractor or firms, whose estimates have been turned over by the Architect to this Contractor to be used in his General Estimate.

XXXVIII. In case the Owner should decide to omit portions of the composition floor covering in Stores, this Contractor must make an allowance

for same at the rate of $.13 per sq. ft. including base, and lay in place of such portions, the concrete floor and wooden base, as specified in the "Specifications" without any extra charge to the Owners.

(Seal) SONNTAG COMPANY,
EDWARD M. SONNTAG, Pres.
WALTER P. WARMBOLD, Sec'y.

HANKINS ESTATE,
Kate A. Mial, Extx.

85% of the work done during each proceeding two weeks to be paid about two days after the Contractor has filed with the Architect, an application for payment stating in same, in detail, all work completed during the aforesaid two weeks.

15% to be retained sixty (60) days after completion, when said 15% is to be paid. The sixty (60) days after completion, to commence the day the Architect gives written notice to the Contractor, that in his opinion the building can be considered ready for occupancy, and after all written guarantees called for in the specifications are in the Architect's possession.

The final payment shall be made within sixty (60) days after the completion of the work included in this contract as set forth above, and all payments shall be due when certificates for the same are issued.

If at any time there shall be evidence of any lien or claim for which, if established, the Owners of the said premises might become liable, and which is chargeable to the Contractor, the Owner shall have the right to retain out of any payment then

due or thereafter to become due an amount sufficient to completely indemnify them against such lien or claim. Should there prove to be any such claim after all payments are made, the Contractor shall refund to the Owners all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contractor's default.

ART. X. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

ART. XI. The Owners shall during the progress of the work maintain insurance on the same against loss or damage by fire to the amount of work completed, the policies to cover all work incorporated in the building, and all materials for the same in or about the premises, and to be made payable to the parties hereto, as their interest may appear.

ART. XII. In case the Owners and Contractor fail to agree in relation to matters of payment, allowance or loss referred to in Arts. III or VIII of this contract, or should either of them dissent from the decision of the Architect referred to in Art. VII of this contract, which dissent shall have been filed in writing with the Architect within ten days of the announcement of such decision, then the matter shall be referred to a Board of

Arbitration to consist of one person selected by the Owners, and one person selected by the Contractor, these two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. Each party hereto shall pay one-half of the expense of such reference.

ART. XIII. The Contractor must within three days after signing the contract deliver to the Owners, a qualified bond from an approved Surety Company, in the sum of the amount of this contract, for the strict fulfillment of the contract and freedom from Mechanic's liens. Failure to furnish such bond shall render the contract void at option of the owners.

ART. XIV. The Contractor must be solely responsible as far as the Safety and construction of the building is concerned.

The said parties for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals, the day and year first written.

SONNTAG COMPANY,
EDWARD M. SONNTAG, Pres.
WALTER P. WARMBOLD, Secy.
(Seal) KATE MIAL.
L. L. MIAL.

In presence of:

F. H. KOEIGSBERGER.

Exhibit P-3.

Endorsed:

The
UNIFORM CONTRACT
Form of Contract
Adopted and recommended for general use by the
American Institute of Architects
and the
National Association of Builders.
Revised 1905 and 1907.
AGREEMENT
Between

.....

Contractor
and
Owner
For

.....

Filed
Clerk's Office Jul. 12, 1912.
Hudson County, N. J...19
ARCHITECT
Amount of Contract
$.....

Exhibit P-4.

HUDSON COUNTY CLERK'S OFFICE.

CHARLES S. SHULTZ and WALTER C. SHULTZ, co-partners trading as CHARLES S. SHULTZ & SON, Claimants, vs. SONNTAG COMPANY, a corporation, builder, and KATE A. MIA[illegible], owner.	Lien Claim.

Be it known that Charles S. Shultz and Walter C. Shultz co-partners trading as Charles S. Shultz and Son, doing business in the City of Hoboken, County of Hudson and State of New Jersey, claims a lien upon the building and lands hereinafter described, pursuant to the statute in such case made and provided, for a debt contracted and owing to them for materials furnished for the erection and construction of said building and therefore show:

1. The said building is a two story reinforced concrete and brick building on the lots or curtilage upon which this lien is claimed, and which is situate in the City of Hoboken in the County of Hudson and State of New Jersey, which is known on a map of Hoboken made by Charles Loss, duly filed in the Clerk's office of the County of Bergen, as lots number one hundred and sixty-one (161) one hundred sixty-two (162) and one hundred sixty-three (163). Beginning at a point in the northeasterly corner of Washington and Sixth Streets, running thence northerly along the easterly line of

Washington Street Seventy-five (75) feet more or less, thence easterly and parallel with Sixth Street one hundred feet to an alley, thence southerly along said alley seventy-five (75) more or less to the northerly line of Sixth Street and thence westerly along one hundred (100) feet to place of beginning. Being the same premises conveyed to Henry R. Hankins by Patience F. Hankins, et als. by deed dated May seventeenth Eighteen hundred and seventy-six, and recorded in Hudson County Register's office in Book 297 of Deed at page 417.

2. The name of the owner of the land and of the estate therein on which the lien is claimed is Kate A. Mial.

3. The name of the person who contracted the debt and at whose request the materials were furnished for which said lien is claimed is the said Sonntag Company a corporation.

4. The following is a bill of particulars exhibiting the amount and kind of materials furnished and the price at which and times when the same was furnished and giving credit for all the payments made thereupon and deductions that ought to be made therefrom and exhibiting the balance justly due to the said Charles S. Shultz and Walter C. Shultz from the said Sonntag Company, viz.:

The Sonntag Company.
Bought of Chas. S. Shultz & Son.

(Here follows the same bill of particulars set out in the Complaint and heretofore printed as part of the Complaint).

Balance justly due claimant $1808.13 Eighteen Hundred Eight Dollars and Thirteen Cents, with interest from October thirtieth, Nineteen Hundred and Twelve.

Exhibit P-4.

All the above materials were furnished between the first day of August, Nineteen Hundred and Twelve, and the Thirtieth day of October, Nineteen Hundred and Twelve which said last mentioned date is the date of the last materials furnished for which such debt is due.

CHARLES S. SHULTZ,
WALTER C. SHULTZ,
Claimants,
by Smith, Mabon and Herr,
their attorneys and agents.

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

Walter C. Shultz, of full age, being duly sworn on his oath doth depose and say that he is a partner of Charles S. Shultz doing business under the firm name and designation of Charles S. Shultz and Son, and that he and said Charles S. Shultz are the claimants named in the foregoing claim; that the bill of particulars and statements therein set forth, shown in said claim are true; that the same is for materials furnished in the erection of the building in such claim described, at the times therein specified and that the amount as claimed therein is justly due and owing from the said Sonntag Company to said claimants.

WALTER C. SHULTZ.

Sworn to and subscribed before me
this twenty-sixth day of December, A. D.,
Nineteen Hundred and Twelve.

H. HENRY F. PLATE,
Attorney at Law of New Jersey.

(Endorsed).

Received in the Hudson County, N. J. Clerk's office December 27th, A. D. 1912, and filed and Recorded in Lien Docket No. 11 on Page 193.

JOHN F. CROSBY,
Clerk.

Summons hereon was issued this 8th day of January 1913 in favor of Chas. S. Shultz and Walter C. Shultz co-partners Claimants against Sonntag Company (A corp) builder and against Kate A. Mial, Owner. Robert D. Foote Mtgee.

JOHN F. CROSBY,
Clerk.

Summons endorsed for Morris Co., Jan. 8/13.

JOHN F. CROSBY,
Clerk.

Exhibit P-5.

Exhibit P-5. Fourth and Fifth paragraphs of the Last Will and Testament of Henry H. Hankins, deceased.

4th paragraph:

"The income of my estate real and personal I give and bequeath unto my wife Isabel Hankins for and during the time of her natural life."

5th paragraph:

"After the death of my wife Isabel Hankins I give, devise and bequeath unto my niece Kate A. Ebbetts and to her heirs and assigns

forever all the rest, residue and remainder of my estate real and personal."

It is admitted that Kate A. Ebbetts afterwards married Dr. Mial and that she is now Mrs. Kate A. Mial.

Mrs. Isabel Hankins afterwards married a man by the name of George W. Chandler, who has since died and she is living.

Exhibit P-6.

Agreement dated November 24, 1906, between Isabel Chandler, formerly Isabel Hankins of the first part and Katharine A. Mial of the second part. The Court directed that the fifth paragraph only of this agreement should be read to the jury, which reads as follows:

> "Said party of the first part shall and will upon the execution and delivery of this agreement immediately resign as executrix and trustee of the last will and testament of the said Henry H. Hankins, deceased, and hereby agrees to accept the said sum of $4,000, payable in quarter yearly payments of $1,000 each, every three months in each year from the date hereof during her life, in full payment of any interest which she has in the estate of the said Henry H. Hankins, deceased, under and by virtue of the last will and testament of said Henry H. Haskins, deceased, and will execute such release or releases or such other instrument as may be necessary to effectually carry out said agreement."

Titles of five cases tried later, involving same questions as those of Shultz vs. Mial:

NEW JERSEY COURT OF ERRORS AND APPEALS.

NATIONAL FIRE PROOFING COMPANY, a corporation (claimant), Plaintiff-Respondent, vs. KATE A. MIAL, owner, et als., Defendant-Appellant.	On Appeal.
LAWSON & MCMURRAY, a corporation, Plaintiff Respondent, vs. KATE A. MIAL, owner, et als., Defendants-Appellant.	On Appeal.
EDMUND D. VANDERBILT and FREDERICK SCHILL, partners trading as VANDERBILT & SCHILL, Plaintiff-Respondents, vs. KATE A. MIAL, owner, Defendant-Appellant.	On Appeal.

EDMUND D. VANDERBILT, trading as E. D. VANDERBILT & COMPANY, Plaintiff-Respondent, vs. KATE A. MIAL, owner, Defendant-Appellant.	On Appeal.
HARRIET DAVIS, Plaintiff-Respondent, vs. JAMES A. GORDON, Receiver of Sonntag Company, a corporation, builder; KATE A. MIAL, owner, and ROBERT D. FOOTE, mortgagee, Defendants-Appellants.	On Appeal.

The above five cases were tried in succession immediately after the case of Charles S. Shultz & Son and the questions of appeal arising in each of them are exactly the same as the questions arising in the case of Charles S. Shultz & Son and the same judgment will be given in each of them with the exception of the case of Harriet Davis. In that case the plaintiff's witness, William H. Davis, testified as follows: I am a truckman, the proprietor and owner of the business is my mother, Harriet Davis; I did all the labor mentioned, consisting of carting terra cotta bricks from the dock and ashes and delivered them at the place where the building was being erected; I carted four loads of crushed stone and I carted one iron bar from the Delaware, Lackawanna & Western Railroad,

eleven bundles of steel pieces and thirty-five pieces; I paid $1.25 of freight charges and a quantity of cinders as specified in the bill annexed to the complaint; the total bill is $119.25. I did the carting for Sonntag Company, the contractors on the building; there is an item of $2 which should not be in the bill for carting three iron girders. The Court ordered said item taken out and at the conclusion of the case counsel of defendant made the same motions on the same grounds as in the preceding cases and also on the further ground that the labor sued for in this case is not of a kind that is lienable; that this service was a mere matter of labor between Sonntag Company and the plaintiff; it had no particular conection with this building or construction of the building and is not lienable. By consent of counsel the Jury was dismissed and counsel for plaintiff and defendant afterwards submitted briefs to the Court and the Court decided in favor of the plaintiff.

Judge's Decision and Opinion.

HUDSON COUNTY CIRCUIT COURT.

HARRIET DAVIS vs. JAMES A. GORDON, Receiver, et al.	On Mechanic's Lien. Decision.

APPEARANCES:

RUDOLPH SCHROEDER and JOHN D. PIERSON, Esqs., for Plaintiff.

S. A. BESSON, Esq., for Defendant.

WILLIAM H. SPEER, Circuit Judge.

The questions in this case are two in number:

1. Whether a lien is allowed in New Jersey in behalf of a claimant for transporting materials delivering them on the job for use in the building where the carting is done by the claimant for the builder?

2. If such a claim will not lie, whether the claimant in a lien suit will be entirely defeated because he has put in his claim both for items for delivery and for items for materials sold, said items being severable?

The answer at which I have arrived in this first question makes the decision of the second unnecessary, but I have no hesitation in saying that it is my opinion that the second question should be answered in the affirmative. I take it to be well settled in New Jersey that a claim is not necessarily bad, for including illegitimate as well as legitimate items; for it may stand *quo ad* the good items; but if the good items and the bad are inseparably blended, the claim will be bad.

Associates, etc. vs. Davison, 5 Dutch, 415; Edwards vs. Derrickson, 28 N. J. L., 39; Whiteneck vs. Nos. 11, N. J., E., 312. The first question is one of the novel impressions in New Jersey. After a careful consideration of the text books, the cases decided elsewhere than in New Jersey, and the arguments of counsel, I have come to the conclusion that a lien should be allowed for the charge for transportation of the material to be used in the construction of the building.

Section 1, of the statute, under which this claim falls, provides "for the payment of any debt con-

tracted and owing to any person for labor performed or materials furnished for the erection and construction" of a building? It is perfectly manifest that this claim is *not* for "materials furnished for the erection and construction of a building," and that if sustainable at all it must be "for *labor* performed *for* the erection and construction of the building."

The statute is remedial in its nature and must by its terms receive a liberal construction. It is designed for the protection of a needy and most meritorious class of persons and should receive such construction as will further the benign purposes which the Legislature had in view in its passage. Looking first to the language itself employed by the Legislature, we observe that the lien will lie "for labor performed *for* the erection and construction of a building." The labor need not necessarily enter *into* the erection or construction, it is sufficient if it be for the erection and construction. The construction contended for by defendant would oust the hod-carrier from the protection of the act, for ordinarily, he merely carries the material from the street where it is mixed to the scaffold where the masons are employed. It would also exclude the architect, and yet Mutual Benefit & Co. vs. Roland, 11 C. E. Green, 189, decides that he is entitled to a lien under our statute. When a man furnishes materials he is nominally being paid for the materials as materials and not for the labor that went into them as labor. He charges so much for materials and if unpaid, his lien claim in not nominally for labor performed in the erection and construction of the building, but for materials fur-

nished for the erection and construction of the building. Can anyone doubt, however, that, in substance, the lien is being maintained for labor. When the manufacturer fixes his price at so much "delivered at the building" does anyone doubt that the price includes an allowance for cartage. In the case at bar it is sought to subject the building to a lien for labor performed in the erection and construction of the building because had the transportation charges been included in the price of the goods there could have been no doubt of the right to a lien. I am clear that such service constitutes labor performed for the erection and construction of a building.

This is the view enunciated in Cyc. Vol. 27, page 44, where the following language is used:

> "A lien is usually allowed for transportation of the material to be used in the construction of a building."

This is the view supported by the following cases:

McClain vs. Hutton, 131 Cal., 132; 61 Pac., 213; 63 Pac. 182, 622.
Fowler vs. Pompelli, 76 S. W., 173.
McKeen vs. Haseltine, 46 Minn., 426.
Hill vs. Newman, 38 Penn. St., 151; and many others.

The only openly antagonistic decision that I have found is Webster vs. Real Estate Imp. Co., 140 Mass., 526. I cannot adopt the reasoning used in that case. It is against the great weight of authority. The reasons upon which it rests

would oust a hod-carrier and an architect of a lien.

No other Court has followed it, and there were circumstances which would seem to vindicate the decision upon the ground that the real *ratio decidendi* was that the materials carted were not furnished *for* the building, or not to be used in its erection and construction.

The other two cases cited on defendant's brief have no application to the case at bar. The idea underlying them is that if the labor in building materials is for the material man, no lien can be had therefore, because the contractor owes such a laborer no liability.

Under these circumstances I must find for the plaintiff on the questions reserved.

Defendant's counsel objected to the ruling of the trial judge on the two questions stated in the beginning of said judge's decision, and has appealed from said judgment.

This action was tried before Judge William H. Speer, with a jury at the Hudson Circuit, on August 5, 1913.

The cause having been heard and submitted to the jury, they return their verdict as follows: They say they find the defendant guilty as in the plaintiff's complaint is charged upon it, and they assess the damages of the plaintiff on occasion of the premises at the sum of One Hundred Twenty-Two Dollars and Ninety-six Cents.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of One Hundred and Twenty-Two Dollars and Ninety-six Cents ($122.96) and their costs which are taxed at the sum of Sixty One Dollars and Ninety-three Cents

($61.93), making in the whole, the sum of One Hundred and Eighty-Four Dollars and Eighty-nine Cents ($184.89).

Judgment entered this August 5, 1913.

WILLIAM H. SPEER,
Judge.

Attest:
JOHN F. CROSBY,
Clerk.

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

HARRIET DAVIS (claimant), Plaintiff, vs. JAMES A. GORDON, Receiver of Sonntag Company, a corporation (builder); KATE A. MIAL (owner), and ROBERT D. FOOTE (mortgagee), Defendants.	Actions at Law. On Mechanic's Lien claim. Grounds of Appeal.

The appellant, Kate A. Mial, states the following grounds of appeal:

1. The contract, together with the specifications accompanying the same, were filed in the office of

the Clerk of the County in which the building lien is situated, before the work was done or materials furnished for which the lien was filed; and the said building and the lands whereon it stands are liable to the contractor alone for whatever work was done or materials furnished in pursuance of such contract.

2. The contract provides that the contractors shall and will provide all the materials and perform all the work for the erection and completion of the building and in such case it is not necessary to file all the specifications, but the filing of the contract will be sufficient to protect the building and lands from liens by all persons, except the contractor, notwithstanding the language of Section 2 of the Mechanic's Lien Law.

3. The interest of the defendant, Kate A. Mial, in the lands liened is not lienable.

4. The plaintiff performed no labor and furnished no materials on said building which would render said building and the lands whereon the same is situated liable to a lien.

SAMUEL A. BESSON,
Attorney of Appellant.

Notice of Appeal.

HUDSON COUNTY CIRCUIT COURT.

HARRIET DAVIS (claimant), Plaintiff, vs. JAMES A. GORDON, Receiver of Sonntag Company, a corporation (builder); KATE A. MIAL (owner), and ROBERT D. FOOTE (mortgagee), Defendants.	Action at Law. On Mechanic's Lien claim. Notice of Appeal.

To

RUDOLPH SCHROEDER,
Attorney of Plaintiff.

TAKE NOTICE that the defendant, Kate A. Mial (owner), appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

SAMUEL A. BESSON,
Attorney of Appellant.

ENDORSED:

Service of the within grounds of appeal is acknowledged this 14th day of August, A. D. 1913.

RUDOLPH SCHROEDER,
Attorney of Plaintiff.

Filed Clerk's Office, Aug. 28, 1913, 10:40 A. M., Hudson County, N. J.

13219.

New Jersey Court of Errors and Appeals

CHARLES S. SHULTZ, et al., co-partners, trading as CHARLES S. SHULTZ & SON (Claimants), Plaintiffs-Respondents, vs. KATE A. MIAL, et als. (Owner), Defendant-Appellant, and four similar cases by different plaintiffs against the same defendant.	On Appeal from Hudson County Circuit Court. Judgment on Mechanic's Lien Claim.

BRIEF FOR KATE A. MIAL, DEFENDANT-APPELLANT.

I.

Facts.

On July twelfth, Nineteen hundred and twelve, Kate A. Mial filed in the office of the Clerk of Hudson County, New Jersey, a building contract which is set out in full on page 21 of the printed case as Exhibit P-3. This contract had annexed to it and forming part of it certain specifications

which are set out in full on pages 26 to 32 inclusive of the printed case and constitute a part of said Exhibit P-3. The contract was made between Sonntag Company, a corporation organized and doing business under the laws of the State of New Jersey, designated as Contractor in the contract, Kate A. Mial designated as Owner in the contract. And the said Contractor agreed to provide all the materials and perform all the work for the erection and completion of a two-story and cellar motion picture theatre, stores and hall building at the northeast corner of Washington and Sixth Streets, known as Numbers 601-603-605 Washington Street, Hoboken, N. J., as shown on the drawings and described in the specifications prepared by F. H. Koenigsberger, Architect, which drawings and specifications are identified by the signatures of the parties thereto and became thereby a part of this contract. See printed case, page 21, lines 30 to 40, and page 22, lines 1 to 8 inclusive. Work was begun on the said building on the first day of August, Nineteen hundred and twelve and the plaintiffs-respondents furnished materials of the amount and kind and at the prices set out on page 5 of the printed case, from pages 5 to 7 inclusive. Sonntag Company, the Builder and Contractor, became insolvent and was unable to finish the building. The plaintiffs-respondents filed a lien claim which is set out on page 36 of the printed case as Exhibit P-4. On the eighth day of January, Nineteen hundred and thirteen summons was issued with complaint annexed; the defendant-appellant filed an answer; the cause was tried on the twenty-fifth day of April, Nineteen hundred and thirteen before the Hudson County Circuit Court and a Jury and the Jury by direction of the Trial Judge, Honorable William H. Speer,

found a verdict in favor of the plaintiffs-respondents for One thousand eight hundred and sixty dollars and fifty-six cents. The costs of the suit were afterwards taxed at Sixty-three dollars and fifty-four cents and judgment in favor of the plaintiffs-respondents was entered against Sonntag Company generally for One thousand nine hundred and twenty-four dollars and ten cents and specially against the lands described in the said lien claim for said last mentioned sum. The defendant-appellant has appealed to this Court. On motion of the plaintiffs-respondents to dismiss the appeal made in this cause on December third, Nineteen hundred and thirteen, it was stipulated in open Court that the facts stated in the charge of Judge Speer, pages 16 to 21 inclusive, of the printed case to the Jury should be taken as true, and that the four similar cases by different plaintiffs against the same defendant should be decided in the same manner as this case.

II.

Argument.

The first ground of appeal is set out on page 3 of the printed case and reads as follows:

> "1. The contract together with the specifications accompanying the same were filed in the office of the Clerk of the County in which the building liened is situate before the work was done or materials furnished for which the lien was filed, and the said building and the lands whereon it stands are liable to the Contractor alone for whatever work was done or materials furnished in pursuance of said contract."

First Point.

If the contract or a duplicate thereof, together with the specifications accompanying the same, or a copy or copies thereof be filed in the office of the Clerk of the County in which the building is situate before any work is done or materials furnished, the building and the land whereon it stands cannot be liened except by the Contractor alone. See Section 2 of "An Act to secure to Mechanics and others payment for their labor and materials in erecting any building (Revision of 1898)," as amended by Chapter 271 of the Laws of 1910. See P. L., 1910, pages 472 and 473. Note the peculiar phraseology in the amended section "together with the specifications accompanying the same." The contract, Exhibit P-3, page 21 of the printed case, was filed July twelfth, Nineteen hundred and twelve, in the office of the Clerk of Hudson County, New Jersey. See printed case, page 35, lines 20 to 30. There was a set of specifications accompanying the same and filed together with it in the office of said Clerk. See printed case, pages 26 to 32 inclusive and signed by Sonntag Company, with its corporate seal and also by Kate A. Mial, the supposed owner. Was this such a compliance with amended Section 2 of the Mechanics' Lien Law that it made the building immune from all liens except that of the Contractor? Here was a building erected in whole by contract in writing. The contract together with the specifications accompanying the same was filed in the office of the Clerk of the County in which said building is situate, before any work was done or materials furnished to or for said building. It seems to be a literal compliance with the requirements of the Statute. So far as concerns the owner of the lands and building, this Statute is a Penal Statute and

according to the established rules of construction Penal Statutes must be construed strictly and confined to the legitimate import of the terms used therein. If an act of the Legislature is clearly and unequivocally expressed, it is neither void in its direct or collateral consequences, however absurd and unreasonable they may appear. Where the signification of a Statute is manifest, no authority less than that of the Legislature can restrain its operation. The learned Trial Judge erred in refusing to grant a non-suit on motion of defendant's counsel, see printed case, page 15, lines 25 to 30 inclusive.

The judgment of the Hudson County Circuit Court should be reversed and judgment in favor of the defendant-appellant should be given by this Court.

III.

Second Ground of Appeal.

(See Printed Case, page 3.)

"2. The contract provides that the Contractor shall and will provide all the material and perform all the work for the erection and completion of the building and in such case it is not necessary to file the specifications, but the filing of the contract will be sufficient to protect the building and lands from liens by all persons excepting the Contractor, notwithstanding the language of Section 2 of the Mechanics' Lien Law."

In the case of Campbell, Morrell & Co. vs. Lehocky, 83 N. J. L., 505, this Court construed the

third section of the Mechanics' Lien Law, P. L., 1898, page 538. The second section of the Mechanics' Lien Law was amended in 1895, P. L., page 313, by inserting the words "together with the specifications accompanying the same." In giving the opinion of the Court in Campbell, Morrell & Co. vs. Lehocky, Justice Trenchard says:

> "Construing this section as it stood prior to the amendment of 1895, our Courts held that when the contract covered all the work to be done and all the material to be furnished, it was not necessary to file the plans and specifications."

Ayres vs. Revere, 1 Dutcher, 474.
Babbit vs. Condon, 3 ib., 154.
Budd vs. Lucky, 4 ib., 484.
Pimlott vs. Hall, 26 Vr., 192.
LaFoucherie vs. Knutzen, 24 ib., 234.
Freedman vs. Sandknop, 8 Dick. Ch. Rep., 243.

In the case of Babbitt vs. Condon, 3 Dutcher, 154, the contract being to do all the work and furnish all the material, Chief Justice Henry W. Green declared that the specifications formed no essential part of the contract and were not required to be filed.

In a concurrent opinion Justice Haines said:

> "Where all the labor and all the materials are to be done and furnished by the builder, then the contract alone will give the notice required by the Statute and that alone is sufficient to be filed, and although the contract may refer to the specifications and declare

them to be a part of it, yet for the purpose of such notice it is not an essential part nor necessary to be filed with it. If placed on file it could give no further notice than is given by the contract itself. In this case the contract refers to the specifications for the description of the work to be done and the materials to be found; but the builder was to perform all the work in the best and most workmanlike manner and to supply all the materials of the best quality of their several kinds. There was no allegation of any extra work for which the materials in question were found. On the contrary, by the proof it appeared that all were furnished for the building erected pursuant to the contract. As to such, the plaintiff had the statutory notice that the builder was to find all and that no other lien than that of the builder could be placed upon the building or land. The plea that the house and land described in the lien were not liable to the plaintiff's claim was fully sustained by the proof of such filing of the contract; and this also was a sufficient reason why the plaintiff was not entitled to a verdict."

The counsel who argued this cause were men of high standing in their profession, being F. T. Frelinghuysen for defendant and J. P. Bradley for plaintiff. Notwithstanding the amendments that have been made to the Mechanics' Lien Law since the decision of Babbitt vs. Condon, the reasoning of that case is as sound and as good to-day as it was in 1858, and is just as applicable to the language of Section 2 of the present Statute as it was to the language of the Statute of 1858.

Campbell, Morrell & Co. vs. Lehocky only applies to Section 3 of the present Mechanics' Lien Law, so that Section 2 is yet open to construction.

The contract (see printed case, page 21, line 31) reads:

> "The Contractor shall and will provide all the materials and perform all the work for the erection and completion of a two-story and cellar motion picture theatre, stores and hall building at the northeast corner of Washington and Sixth Streets, known as Nos. 601-603-605 Washington Street, Hoboken, N. J., as shown on the drawings and described in the specifications prepared by F. H. Koenigsberger, Architect, which drawings and specifications are identified by the signatures of the parties hereto and become hereby a part of this contract."

No claim for extra work was made in any of the complaints filed by the various plaintiffs in these suits. The plaintiffs-respondents had the statutory notice that the builder was to find all and do all and that no other lien than that of the builder could be placed upon the building or land. If there was not a sufficient filing of the specifications to comply literally with the requirements of the second section of the Mechanics' Lien Law, then the rational and logical decision in this case is that such a filing is not essential and it is not necessary that such specifications be filed with the contract, because if placed on file it could give no further notice than is given by the contract itself, therefore the judgment of the Circuit Court should be reversed and judgment in favor of the defendant-appellant should be ordered entered.

IV.

The Third Ground of Appeal

is that the interest of the defendant, Kate A. Mial, in the lands liened is not lienable.

Henry H. Hankins, deceased, died seized of the lands upon which the building in question was erected. By the fourth paragraph of his will he gave and bequeathed the income of his estate, real and personal, unto his wife, Isabel Hankins, for and during the time of her natural life. She afterwards married George W. Chandler, who has since died and she is now called Isabel Chandler. Henry H. Hankins by the fifth paragraph of his will said:

> "After the death of my wife, Isabel Hankins, I give, devise and bequeath unto my niece, Kate A. Ebbetts, and to her heirs and assigns forever all the rest, residue and remainder of my estate, real and personal."

This included the lands in question. Kate A. Ebbetts afterwards married Doctor Mial, and is now known as Mrs. Kate A. Mial (see printed case, page 39, lines 25 to 40 inclusive, and page 40, lines 1 to 12 inclusive). Mrs. Chandler afterwards made an agreement with Mrs. Mial, of which the fifth paragraph only concerns this case. It is found in printed case, page 40, lines 15 to 40. The questions for the Court to resolve are:

(1) Can Mrs. Chandler, the window and beneficiary of her deceased husband under his will, make an agreement with Mrs. Mial which destroys the will of the testator, during the lifetime of Mrs. Hankins?

(2) Can the materialman fasten a Mechanic's Lien on the land which Mrs Mial holds under such an agreement and deprive Mrs. Hankins of the provision which her deceased husband made for her by his will?

In Corcoran vs. Jones, 12 N. J. L. J., 38, Justice Scudder, at Circuit, held that a court of law in a suit on a lien claim cannot take cognizance of an equitable estate such as the right of a tenant to exercise an option of purchase on the expiration of his tenancy.

In Dalrymple vs. Ramsey, 18 Stew., 494, V. C. Van Fleet, with excellent reasoning, held that the Statute does not extend to equitable, but only to legal estates and that a claim could not be enforced as a lien against the estate of the beneficiary under a resulting trustee who was in possession of the land and caused the buildings to be erected thereon.

A lease or contract to convey the lands does not constitute the requisite written consent of the owner to subject his interest in the land to the lien.

Currier vs. Cummings, 13 Stew., 145.
Dalrymple vs. Ramsey, 18 Stew., 496.
Dey vs. Davis, 18 N. J. L. J., 301.

Is Isabel Chandler trustee under said will? If so, can she divest herself of the trust? If she is not trustee, who holds the legal estate during her lifetime, Mrs. Kate A. Mial being the owner of the vested estate in remainder? Is not this title in the same condition as the title to the property in Babbitt vs. Condon, 3 Dutcher, 154? If so, should not judgment be reversed and judgment in favor of the defendant-appellant be ordered entered? Mrs. Chandler has not been made a party to

the suit. If she is a trustee and cannot divest herself of the trusteeship it prevents the lien from operation. Mrs. Mial's estate in remainder will remain as it is until the death of Mrs. Chandler.

Respectfully submitted,

SAMUEL A. BESSON,
Attorney for Defendant-Appellant,
Kate A. Mial.

New Jersey
Court of Errors and Appeals

CHARLES S. SHULTZ, *et al.*, co-partners trading as Charles S. Shultz & Son, Plaintiffs-Respondents, vs. KATE A. MIAL, *et als.*, owner, Defendant-Appellant, And four similar cases by different plaintiffs against the same defendant.	On Appeal from Hudson County Circuit Court. Judgment on Mechanics' lien claim.

BRIEF FOR RESPONDENTS, CHARLES S. SHULTZ, ET AL.

On application made by the respondents before this Court on December 3, 1913, to dismiss the appeal, the following stipulations, embodied in an order, were made in open Court, and we were asked to call attention to the fact in this brief.

STIPULATION I. That the appellant will not urge any ground of appeal other than her second ground,

to wit, that

> *"the contract provides that the contractor shall and will provide all the materials and perform all the work for the erection and completion of the building and in such case it is not necessary to file the specifica-*

tions, but the filing of the contract will be sufficient to protect the building and lands from liens by all persons except the contractor, notwithstanding the language of Section 2 of the mechanic's lien law."

STIPULATION II. The facts contained in the judge's charge as printed in the state of the case are true.

STIPULATION III. If the state of the case in our judgment fails to set forth any necessary facts or sets forth any facts improperly, we have leave to supply or correct such facts in this brief.

In spite of the stipulation and order, appellant's brief contains points on all of her three grounds of appeal.

We submit that the Court should consider the second ground of appeal only.

The Facts

The facts are stated with sufficient certainty and correctness in the Judge's charge and in the appellant's brief, *except as to the filing of the specifications.* The very essence of the whole matter is omitted in failing to state that there were specifications, accompanying the contract and "addenda," and that these specifications were not filed.

The "addenda" printed as a part of the contract (case page 26), are in effect alterations of the specifications, and not alterations of the contract; and are of value only when read in connection with the specifications, but are of no value whatever when read in connection with the contract.

The simple recital of these facts is a sufficient answer to the appellant's first ground of appeal.

The Law

The appellant's sole ground of appeal (under the stipulation and order of the Court) is her second ground, to wit, that since the contractor was to do all the work, the building and land could not be liened upon by any person other than the contractor even though the specifications were not filed.

The Statute reads as follows:

> "2. Whenever any building shall be erected in whole or in part by contract in writing, such building and the land whereon it stands shall be liable to the contractor alone for work done or materials furnished in pursuance of such contract; provided, said contract, or a duplicate thereof, together with the specifications accompanying the same, or a copy or copies thereof, be filed in the office of the clerk of the county in which such building is situate before such work done or materials furnished; provided further, that it shall not be necessary to file the plans for such building in said clerk's office, whether such plans are referred to in said contract or not" (P. L., 1910, p. 473).

We had supposed that no one, in view of the plain requirements of this section for the filing of the specifications, would have the temerity to argue that the filing could ever be dispensed with.

But the appellant calls attention to the fact that in the evolution of this section of the law, a rule arose by which the filing might sometimes be dispensed with, and argues, first, that she comes within this old rule and, secondly, that the present act has not changed the old rule.

It therefore seems proper to trace the history of the second section.

History of the Legislation

At the trial below the history of Section 2 of the Act was thoroughly discussed, and it is a pity that this argument was not printed in the "Case," for it would have made unnecessary its inclusion in the brief.

In 1874, Section 2 of the Act read as follows:

> "When any building shall be erected in whole or in part by contract in writing, such building and the land whereon it stands shall be liable to the contractor alone for work done or materials furnished in pursuance of such contract, provided, said contract, or a duplicate thereof be filed, &c."

(Revision §2.)

This Section 2 of the Revision omitted express reference to the specifications, and the statute continued in the same form until its amendment in 1895.

The following cases were decided under this section of the Revision:

Ayres vs. Revere, 1 Dutch., 474.
Babbitt vs. Condon, 3 Dutch., 154.
Budd vs. Lucky, 4 Dutch., 484.
Hill vs. Carlisle, 14 N. J. L. J., 114.
Neill vs. Watson, 15 N. J. L. J., 138.
Pimlott vs. Hall, 26 Vroom, 192.
Freedman vs. Sandknop, 8 Dick., 243.
LaFoucherie vs. Knutzen, 29 Vroom, 234.

Thereupon the section in question was amended to read as follows

> "When*ever* any building shall be erected in whole or in part by contract in writing, such building and the land whereon it stands shall be liable to the

CONTRACTOR ALONE FOR WORK DONE OR MATERIALS FURNISHED IN PURSUANCE OF SUCH CONTRACT; PROVIDED, SAID CONTRACT, OR A DUPLICATE THEREOF, *together with the specifications accompanying the same, or a copy or copies thereof,* BE FILED, &C."

P. L. 1895, p. 313.

(The italics indicate the additions to the Statute of 1874.)

The following cases followed the Amendment of 1895:

Murphy Co. vs. Nicholas, 37 Vroom, 414.

English vs. Warren, 20 Dick., 30.

Campbell-Morrell Co. vs. Lehocky, 54 Vroom, 505.

Then came the Amendment of 1910, already quoted, which changed the section by adding a provison dispensing with the filing of plans.

Under the statute as it was in 1874, the question arose whether the specifications must always be filed.

In *Ayres vs. Revere,* the contract by its terms expressly made the specifications a part of it (as in the case at bar) but the contract provided that the builder was to do only a part of the work called for by the specifications. On this state of facts it was held that the specifications should have been filed. Chief Justice Green remarked that

> "*one* design of requiring the contract to be filed must have been to apprise all mechanics and materialmen to what extent the building was exempt from liens and how far they must look to the responsibility of the builder alone for remuneration."

In *Babbitt vs. Condon,* the contract was to do all the work and furnish all the materials, and it was held that the specifications need not be filed. The case was virtually decided upon other grounds, however, making it unnecessary to decide this question. It appears from the opinion of Haines, J., that while the contract referred to the specifications it did not constitute them a part of itself.

Judge Haines, in *Budd vs. Lucky,* again laid down the principles established by *Ayres vs. Revere,* and by *Babbitt vs. Condon,* and held that where the contract was to do all the work and furnish all the materials the specifications need not be filed, upon the theory (in effect) that the *only* purpose of this Section was the purpose referred to by Green, C. J., in *Ayres vs. Revere* as "*one* design." It does not appear whether the contract expressly provided that the specifications should be a part of itself.

In *Hill vs. Carlisle,* Van Fleet, V. C., adopting the same reasoning found in the former cases, holds that where a contract was to do so much of the work only as the specifications called for, the latter must be filed. Here also it does not appear whether the contract made the specifications expressly a part of itself.

In *Neill vs. Watson,* Mr. Frederick Adams as master intimated that even where the contract made the specifications a part of it they need not be filed where the contract was to do the whole work. Depue, J. in sustaining the master did not give any attention to this point but decided the case on another ground. The facts do not show whether the specifications were made a part of the contract in this case or whether that part of the master's decision was *obiter.*

Pimlott vs. Hall (by Dixon, J), following the precedents, stated the rule to be:

> "That if the contract between the owner and contractor, without the specifications, will inform the materialman, knowing the use to be made of his materials, that they are materials which the contractor must furnish pursuant to his contract, then the filing of the contract, without the specifications, will exclude any lien in favor of the materialman; but that if the contract makes it necessary to refer to the specifications in order to obtain this information, then the specifications also must be filed to bar his lien."

And the same rule is adopted in *Freedman vs. Sandknop* (McGill, Ch.), and *LaFoucherie vs. Knutzen,* (Gummere, J.).

At this point comes the amendment of 1895. In view of the decisions under the Act of 1874, it seems impossible to read into the amendment any other legislative intent than that the specifications must in every case be filed. What could the legislature have intended, otherwise, knowing the rule of the construction adopted by the Courts for the old section?

The requirements of the Section as amended in 1895, were first carefully considered by Collins, J., in the case of *Murphy-Hardy Lumber Company vs. Nicholas.*

He lays down this rule of construction:

> "The normal effect of this legislation (*i. e.* the mechanic's lien act) is to subject lands upon which a building is erected, by authority of the owner, to a lien in favor of anyone who furnishes labor or material therefor. To limit this effect, strict compliance with the proviso of the second section of the act is essential."

He strongly suggests that the old rule adopted first in *Budd vs. Lucky* had been an example of judicial legislation rather than of rational interpretation, and that the specifications could never have been dispensed with when the contract expressly made them a part of it. The amendment is said to evince a legislative intent that the document filed should show a complete contract, by which it is evidently meant that the document filed should show a contract not sufficient merely to satisfy the old rule by apprising the materialman how far the building and land might be made subject to his lien, but sufficient also to exhibit all the details necessary to estimate whether the contract price be sufficient to cover the work.

Following this case came the case of *English vs. Warren,* in which it was held that the amendment of 1895 required the filing of the specifications in all cases. Pitney, V. C., remarked concerning the requirement for filing specifications:

> "This proviso for filing the specifications found its way into our system of legislation by the act of March 14th, 1895 (P. L., 1895, p. 313) and was intended to clear up the confusion in the law arising out of the old statute, which did not expressly include the specifications * * *
>
> "Probably the immediate occasion of the amendment was the opinion of this Court in *Freedman vs. Sandknop,* 8 Dick., 243. Be that as it may, I am clearly of the opinion that the statute is peremptory and that the failure to file the specifications left the land and building subject to the filing of lien claims * * *"

Finally, in *Campbell, Morrell & Co. vs. Lehocky,* (54 Vr., 505, 507), this Court, speaking through Mr. Justice Trenchard, said in part (p. 507):

> "The sole office of the amendment of 1895 was to add the words 'together with

the specifications accompanying the same.'

"Construing this section as it stood prior to the amendment of 1895, our Courts held that when the contract covered all the work to be done and all the material to be furnished it was not necessary to file the plans and specifications (cases cited).

"The doubtful soundness of this construction of the statute seems more than once to have been intimated, but since the decision of *Ayres vs. Revere* it was always followed as being settled law. The doubt suggested in judicial opinions, however, doubtless led the Legislature in 1895 to change the provision with relation to the filing of the contract by adding the words 'together with the specifications accompanying the same.' When the Legislature at the time of the amendment of 1895, with knowledge that the scope of the provision relating to filing was considered doubtful by the Courts, added only the word 'specifications,' it seems plain that they intended to require that only the contract with the specifications should be filed and not the plans."

We can not understand the argument that the amendment of 1895 does not mean what it clearly says. If, before the amendment of 1895, it was considered to be judicial legislation for the Court ever to dispense with the filing of the specifications, although the statute said nothing expressly about it how *much* more would it be judicial legislation for the Court to read out of the act, conditions expressly contained in it?

The appellant contends that the amendment only adopts the case law which existed prior

thereto and does not in any way alter the rule of construction so established. But that rule of construction was that in some case the specifications should be filed and in other cases need not be filed, while the amendment provides for filing in *all* cases. What criterion of statutory construction can be invoked upon which to found the contention that the Legislature in 1895, knowing the rule of construction which the Courts had adopted for the old section, by an amendment providing for the filing in *all* cases of the specifications, thereby evinced an intent to dispense with that filing in *some* cases?

However mistaken the old rule may have been, it was a rule adopted by the Courts for the construction of a statute otherwise not clear; a statement of legislative intent not appearing in the act itself; now that the amendment makes clear both the provision and the intent, the *raison d'etre* for the old rule of construction no longer exists.

We therefore answer appellant's contention as follows:

POINT I

The contract having expressly by its terms included the specifications as a part of itself; the filing of the specifications can not, and never could, be dispensed with.

(As authority see cases already cited.)

POINT II

The appellant is held to a strict compliance with the provision relating to filing.

Murphy-Hardy Lumber Co. vs. Nicholas, *supra.*
English vs. Warren, *supra.*

POINT III

Section 2 of the Mechanic's Lien Act, as amended in 1910, requires the filing of the specifications in all cases.

English vs. Warren, *supra.*
Campbell-Morrell Co. vs. Lehocky, *supra.*

POINT IV

It is necessary to construe the section strictly against the owner, in favor of the materialman, because it is not optional with the materialman to serve a stop notice under Section 3.

Summerman vs. Knowles, 4 Vroom, 202.
Carlisle vs. Knapp, 22 Vroom, 329.
Frank vs. Freeholders, 10 Vroom, 347.
Beckhard vs. Rudolph, 2 Rob., 740.
Weaver vs. Atlantic Roofing Co., 12 Dick., 547.

McNab, etc., Co. vs. Paterson, etc., Co.,
1 Buch., 133.

The materialman must either file a lien or serve a notice. He can not do both. If the contract, or specifications, are not filed, (or are not properly filed), he can not give the stop notice.

Id.

Therefore, any construction of Section 2 which does not require a strict compliance therewith by the owner, renders the position of the material man uncertain and dangerous in the extreme.

But the materialmen and workmen are the very class for whose benefit and protection the Mechanics' Lien law was passed. If, therefore, any uncertainty be permitted to exist concerning the construction of the section in question, such as to render doubtful the correct procedure to be followed by the materialmen and workmen, and to cast upon them the burden of choosing, at their peril, the procedure to be followed in any case of doubt, the very object of the statute would be defeated. The materialmen and workmen would no longer be the favored class. Their rights would be jeopardized or defeated in the interest of the owner.

Should the Court desire to consider the appellant's first and third grounds of appeal, we answer:

I. The Specifications Were Not Filed.

Both the contract and the "addenda" refer to "specifications" as something outside of themselves, *i. e.*, another paper or document. The contract refers to such "specifications" in Secs. 1, 2, 6 and 9. The "addenda" refer to "specifications" in Secs. 1, 2, 3, 4, 5, 6, 8, 10, 14, 15, 18, 20, 23, 26,

27, 34 and 38. Admittedly the only papers on file in the Clerk's office are the contract and the "addenda."

III. The Appellant Has an Estate Sufficient To Support the Lien.

She is in possession. She has by the will a vested estate in remainder. By the contract she also has the life estate. She is the only person exercising rights of possession. If she has not a full estate in fee simple absolute in the land, it is at any rate an estate in fee simple, part of which (the life estate) is subject to be defeated by failure to pay an annuity.

This is a sufficient estate to support the lien. Even the vested remainder alone is sufficient.

Clark vs. Butler, 5 Stew., 664.
Mackintosh vs. Thurston, 10 C. E. Gr., 242.
Coddington vs. Beebe, 2 Vr., 477.
Leaver vs. Kilmer, 59 Atl. Rep., 643.
Atkinson vs. Shields Co., 72 Atl. Rep., 81.
Babbitt vs. Condon, 3 Dutch, 154.
Stewart Co. vs. Trenton R. R. Co., 42 Vr., 568.
Scott vs. Reeve, 10 N. J. L. J., 12.
Corcoran vs. Jones, 12 N. J. L. J., 38.
Dalrymple vs. Ramsey, 18 Stew., 494.
Currier vs. Cummings, 13 Stew., 145.
National Bank vs. Sprague, 5 C. E. Gr, 13.

Respectfully submitted,
SMITH, MABON & HERR,
Attorneys of Respondents.

Dougal Herr,
Of Counsel.

INDEX TO SHULTZ VS. MIAL.

INDEX TO HARRIET DAVIS VS. MIAL.

New Jersey Court of Errors and Appeals

CHARLES S. SHULTZ, et al., co-partners trading as CHARLES S. SHULTZ & SON (claimants), Plaintiffs-Respondents, vs. KATE A. MIAL, et als. (owner), Defendant-Appellant.	On Appeal.

STATEMENT OF THE CASE.

Notice of Appeal.

To

SMITH, MABON & HERR, Esqs.,
Attorneys of Plaintiffs,

Take notice that the defendant, Kate A. Mial, owner, appeals to the Court of Errors and Appeals from the whole of the Judgment entered in this cause.

SAMUEL A. BESSON,
Attorney for Appellant.

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

Clifford Stephenson, being duly sworn according to law on his oath, deposes and says:

That he served the within notice on Smith, Mabon & Herr on the 12th day of July, 1913, by leaving a true copy thereof at their office with Miss Cytron, the stenographer.

(Signed) CLIFFORD STEPHENSON.

Subscribed and sworn to before me
this 12th day of July, A. D. 1913.

(Signed.) HARLAN BESSON,
Master in Chancery of New Jersey.

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

CHARLES S. SHULTZ and WALTER C. SHULTZ, co-partners trading as CHARLES S. SHULTZ & SON (claimants), Plaintiffs, vs. SONNTAG COMPANY, a corporation (builder), KATE A. MIAL (owner), and ROBERT D. FOOTE (mortgagee), Defendants.	Action at Law. On Mechanics' Lien Claim. Grounds of Appeal.

The appellant, Kate A. Mial, states the following grounds of appeal:

Grounds of Appeal.

1. The contract together with the specifications accompanying the same were filed in the office of the Clerk of the County in which the building lien is situate before the work was done or materials furnished for which the lien was filed, and the said building and the lands whereon it stands are liable to the contractor alone for whatever work was done or materials furnished in pursuance of such contract.

2. The contract provides that the contractor shall and will provide all the materials and perform all the work for the erection and completion of the building and in such case it is not necessary to file the specifications, but the filing of the contract will be sufficient to protect the building and lands from liens by all persons except the contractor, notwithstanding the language of Section 2 of the Mechanics' Lien Law.

3. The interest of the defendant Kate A. Mial in the lands liened is not lienable.

SAMUEL A. BESSON,
Attorney of Appellant,
Kate A. Mial.

Filed July 15th, 1913.

JOHN F. CROSBY,
Clerk.

Judgment Record.

HUDSON COUNTY CIRCUIT COURT.

CHARLES S. SHULTZ and WALTER C. SHULTZ, co-partners trading as CHARLES S. SHULTZ & SON (claimants),
Plaintiffs,
vs.
SONNTAG COMPANY, a corporation (builder), KATE A. MIAL (owner), and ROBERT D. FOOTE (mortgagee),
Defendants.

Judgment Record.

The defendants in this cause were summoned to answer unto the plaintiff's herein in an action at law upon the following complaint:

Plaintiffs, Charles S. Shultz and Walter C. Shultz, co-partners trading as Charles S. Shultz and Son, doing business in the City of Hoboken, County of Hudson and State of New Jersey, say that:

1. Plaintiffs furnished certain materials hereinbelow set forth for the erection and construction of a two-story reinforced concrete and brick building on the following described lots and curtilage, to wit:

All those lots of land situate in the City of Hoboken, in the County of Hudson and State of New Jersey, which are known on a map of Hoboken made by Charles Loss, duly filed in the Clerk's office of the County of Bergen, as lots number one

hundred sixty-one (161), one hundred sixty-two (162) and one hundred and sixty-three (163), beginning at a point in the northeasterly corner of Washington and Sixth Streets; running thence northerly along the easterly line of Washington Street seventy-five (75) feet. more or less; thence easterly and parallel with Sixth Street one hundred feet to an alley; thence southerly along said alley seventy-five (75) feet, more or less, to the northerly line of Sixth Street; and thence westerly along the northerly line of Sixth Street one hundred (100) feet to place of beginning. Being the same premises conveyed to Henry H. Hankins by Patience T. Hankins et als. by deed dated May seventeenth, eighteen hundred and seventy-six, and recorded in Hudson County Register's office in Book 297 of Deeds at page 417.

2. The amount and kind of materials so furnished by plaintiffs, and the prices at which and times when the same were furnished are as follows, to wit:

Aug. 1,	To 80 bbls. Port. Cemt. in bags ex car del'd		1.45	116.
2,	" 69½ bbls. do " " " "			100.78
23,	" 30 Ft. 8½x13 Flue Lg del'd		.20	6.
"	" 30 " 13x18 do "		.40	12.
"	" 16 " 4—13 do "		.14	2.24
24,	" 150 bbls Port. Cemt. in bags ex car		1.35	202.50
27,	" 2250 Hd. Bk. Del'd		8.10	18.22
28,	" 1500 Lgt. Hd Bk Del'd		6.10	9.15
"	" 150 bbls Port Cemt in bags ex car		1.35	202.50
29,	" 3000 Hd Bk Del'd		8.10	24.30
30,	" 1000 do "		"	8.10
"	" 10 bbls. Palmer Line Del'd		1.15	11.50
				713.29

			Cr.				
			By 893 Cemt bags at 7c.	62.51			
			" ½ bbl. Port Cemt in bags at 1.35	.73			
						63.24	650.05
	Sept.	4,	To 300 bbls. Port Cemt in bags ex car		1.35	405.	
		5.	" 150 " do		" "	202.50	
		10,	" 1500 Hd Bk Del'd		8.10	12.15	
		12,	" 1500 do "		"	12.15	
		16,	" 40 Ft. 7½x7½ Flue Lg. Del'd		.12	4.80	
		23,	" 3000 Hd Bk	"	8.10	24.30	
		30,	" 6000 do	"	"	48.60	
			Cr.			709.50	
			By 506 Cemt. Bags at 7c.,			35.42	674.08
	Oct.	1,	To 6 bbls. R. Lime	Del'd	1.25	7.50	
		"	" 5750 Hd Bk.	"	8.10	46.58	
		2,	" 3000 do	"	8.10	24.30	
		3,	" 5750 do	"	"	46.57	
		"	" 6 bbls. R. Lime	"	1.25	7.50	
		4,	" 3000 Hd Bk	"	8.10	24.30	
		5,	" 1500	"	"	12.15	
				Forward		168.90	1324.13

Oct.	7,	To 3000 Hd Bk	Del'd	8.10	24.30	
	8,	" 2750 do	"	8.10	22.28	
	"	" 6 bbls. R. Lime	"	1.25	7.50	
	9,	" 5250 do	"	8.10	142.52	
	"	" 14 do	"	1.25	17.50	
	10,	" 8250 do	"	8.10	66.83	
	11,	" 10500 Hd Bk	"	"	85.05	
	14,	" 1500 do	"	"	12.15	
	15,	" 3000 do	"	"	24.30	
	"	" 50 Ft. 8½x13 Flue Lg.	"	.20	10.	
	16,	" 10 bbls. R. Lime	"	1.25	12.50	
	17,	" 5250 Hd Bk	"	8.10	42.52	
	18,	" 12000 do	"	"	97.20	
	19.	" 1000 do	"	"	8.10	
	"	" 10 bbls. R. Lime	"	1.25	12.50	
	22,	" 10 bbls. R. Lime	"	1.25	12.50	
	"	" 5000 Lath	"	4.75	23.75	
	"	" 9000 Hd Bk	"	8.10	72.90	
	23,	" 10000 Lath	"	4.75	27.50	
	25,	" 2250 Hd Bk	"	8.10	18.23	
	26,	" 3000 do	"	"	24.30	
	28,	" 4500 do	"	"	36.45	
	"	" 14 bbls. R. Lime	"	1.25	17.50	
	29,	" 1500 Hd Bk	"	8.10	12.15	
	30,	" 14 Ft. 13x18 Flue Lg.	"	.40	5.60	
					925.03	
		Cr.				
		By 14 Empty Bbls at 5c.		.70		
		" 931 Cement Bags at 7c.		65.17		
		" 28 ft. 7½x7½ Flue Lg. at 12c.		3.36	69.23	855.80
						2719.93
	23,	Check,				371.80
						1808.13

3. There has been one payment made on account thereof, being the sum of Three hundred Seventy-one dollars and Eighty cents ($371.80) on the twenty-third day of October, Nineteen hundred and twelve, there are no other deductions which ought to be made therefrom.

4. The balance justly due to the plaintiff therefore is One thousand Eight Hundred Eight Dollars and Thirteen cents ($1808.13), with interest from the thirtieth day of October, Nineteen hundred and Twelve.

5. All of said materials were furnished at the request of Sonntag Company (which is the name of the person which contracted the said debt) between the first day of August, Nineteen Hundred and Twelve, and the thirtieth day of October, Nineteen Hundred and Twelve, which said last mentioned date is the date of the last materials furnished for which said debt is due.

6. Plaintiffs claim a lien upon the building and lands above described, for the amount of said debt and interest as aforesaid, under and by virtue of an ACT of Legislature of the State of New Jersey entitled, "An Act to secure to 'mechanics and others payment for their labor and material' in erecting any supplemental thereto."

7. The name of the owner of said land and of the estate therein on which said lien is claimed is Kate A. Mial.

8. Said Robert D. Foote is made a party defendant because he holds a mortgage of record a-

gainst the property affected by the claim to enforce which this suit is brought, which said mortgage would be cut off by a sale under said lien claim.

9. Plaintiffs demand the said sum of One Thousand Eight Hundred and Eight Dollars and Thirteen cents, with interest thereon computed as aforesaid, and costs of suit.

SMITH, MABON & HERR,
Attorneys of Plaintiffs.

Filed—Clerk's office, January 16, 1913, Hudson County, N. J.

JOHN F. CROSBY,
Clerk.

Answer.

The defendant answers as follows:

Kate A. Mial, one of the defendants in the above entitled cause, of the City of Morristown, in the County of Morris, State of New Jersey, says that:

1. As to the statements in paragraphs one and two defendant has not any knowledge or information thereof sufficient to form a belief.

2. Defendant denies on information and belief paragraph three.

3. Defendant denies the fourth paragraph of plaintiff's complaint.

4. As to the statements contained in paragraphs five and six defendant has not any knowledge thereof sufficient to form a belief.

5. Defendant denies that Kate A. Mial is the owner of said land, and does not know the estate of the said Kate A. Mial in said land.

6. Defendant admits the eighth paragraph on information and belief.

7. Defendant further says that the said plaintiff ought not to have this action against her and said buildings and lands, because she says that neither said buildings nor said lands are liable to the said supposed debt.

S. A. BESSON,
Attorney of Defendant Kate A. Mial.

Filed—Clerk's office, January 30th, 1913, Hudson County, N. J.

JOHN F. CROSBY,
Clerk.

Judgment.

This action was tried before Judge William H. Speer, with a jury at a Hudson Circuit, on April 25, 1913.

The cause having been heard and submitted to the jury, they return their verdict as follows: They say they find the defendant guilty as in the

plaintiff's complaint is charged upon it, and they assess the damages of the plaintiff on occasion of the premises at the sum of One Thousand Eight Hundred and Sixty Dollars and Fifty-six cents ($1,860.56) and their costs which are taxed at the sum of Sixty-three Dollars and Fifty-four cents ($63.54) making in the whole the sum of One Thousand Nine Hundred and Twenty-four Dollars and Ten cents ($1,924.10).

Judgment entered this April 25, 1913.

WILLIAM H. SPEER,
Judge.

Attest:
JOHN F. CROSBY,
Clerk.

Circuit Court's Return.

The answer of William H. Speer Esquire, Judge of the Circuit Court, holden in and for the County of Hudson and within named, the record and proceedings of the plaint whereof mention is within made with all things touching the same, I send to the Judges of our Court of Errors and Appeals of the last resort of all causes at Trenton, at the day and year within contained, in a certain schedule to this appeal annexed as within I am commanded.

WILLIAM H. SPEER,
Judge.

Opening of Defendant's Counsel.

Mr. Besson opened for the defendant in accordance with the requirements of the New Practice Act as follows:

> "Mr. Herr said he was bringing these suits as I understand, to establish a lien claim and to obtain a judgment against the builder, the Sonntag Company and the owner, he calls her Kate A. Mial. Now, we defend on the ground that there was a contract filed which is sufficient to protect the property from any lien; and as to the ownership, we do not know who is the owner. All we can do is to present to the Court the records which show the status of the title and let the Court decide who is the owner."

Plaintiffs' witnesses testified as follows:

> (The introductory unimportant matters and matters not relative to the questions raised on review being omitted).

WALTER C. SHULTZ, a witness produced on the part of the plaintiffs, testified: I am a member of the copartnership of Charles S. Shultz & Walter C. Shultz, trading as Charles S. Shultz & Son, the plaintiffs, in this case. I am familiar with the matters concerning the contract on the building at Sixth and Washington Streets, Hoboken, N. J.; my firm furnished materials for the erection and construction of that building. I have

with me the books showing that account. The nature of the materials furnished was the mason material, in the nature of brick, lime and cement.

These materials were ordered by the Sonntag Company by Mr. Warmbold, who is the treasurer and secretary of the company. That arrangements were made with him. Witness produced his firm's books of account and proved each and every item of material furnished on the building in question for which the lien was filed and the suit thereon brought. The witness continuing, testified: That the entire amount of material delivered amounted to $2,179.93 and a credit of $371.80, leaving a balance due of $1,808.13.

It is admitted that all of the materials which were the subject matters of the suit and the mechanics liens were furnished in and for the erection and completion of the building in question. The last delivery of material was made on the job on October 30th, 1912. My firm has received no other moneys on account other than what I have testified to and the whole balance is now due and owing to us.

(Witness) I think it was early in November, when I discovered that the specifications of this contract were not filed. I do not recall the exact date. I think it was more than two months after the job had been started when we had the matter looked up, because it was a question as to whether the job could be finished at the contract price, then we looked to see what the contract was and whether there had been a contract.

WILLIAM H. DAVIS, a witness produced on the part of the plaintiffs, testified: That he was

the truckman working for the plaintiffs who carted all the material in question to the premises in question.

WALTER R. WARMBOLD, a witness produced on the part of the plaintiffs, testified: That from August 1st, 1912, he was in the contract-building business with the Sonntag Company; that he was the secretary and treasurer of the company during that period and still is. The Sonntag Company had charge of erecting the building at the corner of Sixth and Washington Streets, Hoboken, N. J. It was a reinforced concrete structure intended for stores and a theatre building, covering a plot of 75 feet by 100 feet; that he ordered the materials for that work on behalf of the Sonntag Company from Charles S. Shultz & Son; that he was in charge of the work of the building as an officer of the company; that he knew of his own knowledge that the goods and materials charged for in the account of Charles S. Shultz & Son against Sonntag Company were delivered to the building for the use in the erection thereof. The balance due for these materials is $1,808.13.

It was admitted that Kate A. Ebbetts mentioned in the Will of Henry H. Hankins, which was marked Exhibit P5 is now Kate A. Mial, and that she is the executrix under the Will; that Isabel Hankins, mentioned in the Will, Exhibit P5 afterwards married George W. Chandler who has since died and that she is still living.

Statement of Documents Offered in Evidence by Plaintiffs.

Plaintiffs offered in evidence the following documents:

Contract entered into between Sonntag Company and Kate A. Mial, which contract is marked Exhibit P3 and is hereto annexed.

Lien Claim filed by the plaintiffs and the same is marked Exhibit P4 and is hereto annexed;

Will of Henry H. Hankins, marked Exhibit P5 and is hereto annexed;

Agreement dated November 24th, 1906, between Isabel Chandler, formerly Isabel Hankins, of the first part, and Katharine A. Mial, of the second part, which is marked Exhibit P6 and is hereto annexed.

The Court directed that the fourth and fifth paragraphs of said agreement only should be read to the jury. Plaintiffs thereupon rested their case and the defendant moved for a nonsuit on the grounds that the lands and building in question were not liable to claimants' lien; that the filing of the contract offered in evidence was sufficient to protect the building and lands from liens by all persons except the contractor; that the interest of the defendant, Kate A. Mial, in the lands in question is not lienable.

The Court refused to grant the motion for a nonsuit and defendant entered an objection to the ruling of the Court.

Kate A. Mial, the defendant, offered no witnesses in her behalf.

The Court thereupon charged the Jury as follows:

I think in this case then, gentlemen, what I will have to do is to direct a verdict. The suit is brought by Charles S. Shultz and Walter C. Shultz, co-partners, trading as Charles S. Shultz & Son, who are the plaintiffs against the Sonntag Company, a corporation, Kate A. Mial and Robert D. Foote, as mortgagees, The claim made by the plaintiffs is for $1808.13 and there is interest on this sum amounting to $52.43, making the total amount $1860.56. The proof has established that the goods were purchased by Mr. Warmbold, who was the agent of the Sonntag Company for this building, and the proof has even gone further than was necessary, because the statute provided that if it be established that the materials be furnished for the building, whether they be used in it, is immaterial. But in this case the proof seems to be established conclusively that the goods were delivered at the job and the jury might reasonably infer, and I will infer, they were actually used in the job. So that there is not any question at all about the fact of the goods having been furnished for the job. The contractors offered no defense whatever, and consequently there must be a direction of a general verdict against them—I am speaking now of the Sonntag Company, the builders—for the sum of $1860.86. The question then arises as to whether there should be a special judgment fastening this amount as a lien upon the property owned by Mrs. Mial. First of all, it is established conclusively that the suit was commenced and the materials were furnished within four months from the time that the last work was done on the job, and therefore the formalities of the statute have been complied with so far as those requirements are concerned; the next question is

as to whether or not Mrs. Mial was the owner of the property at the time these materials were furnished in such wise as to make her ownership subject to this lien. There is admitted in this case that a man, named Hankins, was the owner of the property and that he died having first made a Will and willed the property or rather the usufruct of the property—the use and enjoyment of it—to Isabel Hankins, making her his executrix, and that he gave the remainder in the property to Mrs. Mial, the defendant in this suit. Now, Mrs. Hankins was not an absolute life tenant of this property, owning a life estate in the property. What she had was for her life, a usufruct of the property, so that what the estate of Mrs. Mial really amounted to, whether it was a plain, ordinary vested remainder—and it would be a vested remainder ordinarily, if she were given the remnant of the estate after the estate had been carved out of it by the same instrument that created the life estate—there would be a vested remainder, she being the person upon whom this remainder descended. I think that a remainder, without more, is quite sufficient to warrant the attachment of a mechanic's lien claim, such remainder in an estate in the property, such estate is a vested estate and such an estate is an estate at law, and I understand under the mechanic's lien law that a lien will attach to any legal estate. There are decisions in this State, one of Curry vs. Cumming, 13 Stu., 145, and another in 10th N. J. Law Journal, page 12, Scott vs. Reeve, where it has been held that a vendee, who is in possession under a contract of purchase, where the contract has never been executed and in fact where it never is executed and has been revoked afterward, has

such an estate as will warrant the attachment to it of a mechanic's lien. I am perfectly well aware that the general proposition is that a mechanic's lien does attach to equitable estates, but we have those two decisions, and those are equitable estates, they are based upon the equitable notion that where a contract to purchase has been made, the vendor becomes the trustee of the legal title of the purchase money of the vendor and they are pure, equitable estates. But it is to be observed in these cases that in both of them the equitable owner was in possession of the property, and that may in the minds of the judges who decided these cases, have made some difference. But I am not going to the length of holding, and do not now hold, that a mechanic's lien will attach to a mere equitable estate. I hold, first of all, in this case that the lien attaches to the remainder which is a vested remainder and is a legal estate and that consequently is such an estate as the lien may attach to. But that is not all that we have in this case. We have in this case these further facts, there is a contract existing between Isabel Hankins and Mrs. Mial whereby Isabel Hankins renounces the executorship of the estate in which presumably Mrs. Mial is in possession of these premises and we have furthermore that Mrs. Mial actually did make a payment while the work was going on to Sonntag, who was the contractor on this job, showing that Mrs. Mial had claimed to have or exercised rights which indicated that she did have some interest in the property in addition to the possession. Not only that, but by this fifth section of the contract, which has been offered in evidence, Mrs. Hankins absolutely releases and relinquishes all rights which she had under the Will of Mr.

Hankins, deceased, and agrees to give any further assurance that may be ncessary, either by way of release or releases or by way of conveyance or whatever may be necessary to assure to Mrs. Mial this property, amongst other things which she got under the Will of Hankins. So it seems to me to be perfectly clear that Mrs. Mial had some estate of a legal character, part of which, if you please, was the remainder, the rest of which was created by contract under seal between Mrs. Hankins and Mrs. Mial, whereby this person who had the mere usufruct of the property for her life, relinquished that right and gave it up and put Mrs. Mial in possession of the premises. Now, whatever this estate may be —and I do not attempt to give it any name—I simply attempt to fasten upon it an attribute and to call it a legal estate—an estate growing out of the express agreement of the parties whereby the one relinquishes the usufruct and transfers the possession to the other and agrees to assure to her the thing which she has conveyed. Now, whatever we may call it and whatever it may amount to, it is a legal estate, and I think, therefore, that it is such an estate as a lien would attach to and I shall therefore direct so far as that point is concerned, that the lien does attach to the property for the sum of $1860.56. It is hardly necessary for me to say after the lengthy argument which we had that I do not think that the construction contended for by the counsel for the defendant, with respect to the construction of the second section of the mechanic's lien law can find favor with me at this time since the decision of the Court of Errors and Appeals in the case of Campbell, Morrell & Company vs. Lehockey, a case where the Court of

Errors and Appeals, speaking by Mr. Justice Trenchard, said that "the amendment of 1895 therefore under the maxim inclusio unius est exclusio alterius indicates conclusively that while the written specifications must be filed in every case, the plans or drawings need not be" seems to me to express what would be the indubitable conclusion that must be reached in the light of the history of this legislation, starting as it did with the mere word "contract" used, then the decision that the contract was quite sufficient without filing specifications even though the specifications were made a part of the contract; then having the Legislature add the word "specifications"; then having the courts engraft on it the word "plans"; then having the Legislature strike out that apparent construction of "Plans" and leave it standing "contract and specifications." Now, I do not think without judicial legislation I can whistle that section of the contract down the wind and I think I simply have got to stand by the clear wording of the statute and say that when the Legislature said "when" and then put in parenthesis the word "ever" indicating the universality of the statute, they meant just what they said. Prior to the inclusion of the parenthetical section "together with the specifications accompanying the same or a copy or copies thereof" the statute simply read "when any building shall be erected" and the Legislature did not want to leave any doubt or ambiguity about the word "when" so they put in parenthesis, "whenever," meaning at every time and in every case the building should be erected in whole or in part, then the contract should be filed together with the specifications or a copy or copies thereof, so it seems to me that the Legisla-

ture clearly intended and signified their meaning by that in every case that a building should be thus erected, the contract together with the specifications must be filed. Now, for these reasons, therefore, I think I must direct a verdict as I have indicated generally for the plaintiffs against the Sonntag Company, a corporation, for $1860.56 and direct the jury to declare by their verdict that that amount shall be a lien upon the premises described in the lien claim for the sum of $1860.56.

Exhibit P-3.

THIS AGREEMENT, made the Fifth day of July in the year one thousand nine hundred and twelve by and between Sonntag Company a corporation organized and doing business under the laws of the State of New Jersey party of the first part (hereinafter designated the Contractor), and Kate A. Mial of Morristown, N. J. party of the second part (hereinafter designated the Owner),

WITNESSETH, that the Contractor, in consideration of the agreements herein made by the Owner, agree with the said Owner as follows:

ARTICLE I. The Contractor shall and will provide all the materials and perform all the work for the Erection and completion of a two story and cellar Motion Picture Theatre, stores and Hall biulding, at the North-east corner of Washington and Sixth Streets, known as Nos. 601-603-605 Washington Street, Hoboken, N. J. as shown on the drawings and described in the specifications pre-

pared by F. H. Koenigsberger Architect, which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract.

ART. II. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said Architect, and that his decision as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as set forth in specifications may be necessary to detail and illustrate the work to be done are to be furnished by said Architect, and they agree to conform to and abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in Art. I.

It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the purposes of this contract by the said Architect are and remain his property, and that all charges for the use of the same, and for the services of said Architect, are to be paid by the said Owners.

ART. III. No alterations shall be made in the work except upon written order of the Architect; the amount to be paid by the Owners or allowed by the Contractor by virtue of such alterations to be stated in said order. Should the Owners and Contractor not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree, the

determination of said amount shall be referred to arbitration, as provided for in Art. XII of this contract.

ART. IV. The Contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Architect or his authorized representatives; shall, within twenty-four hours after receiving written notice from the Architect to that effect, proceed to remove from the grounds or buildings all materials condemned by him, whether worked or unworked, and to take down all portions of the work which the Architect shall by like written notice condemn as unsound or improper or as in any way failng to conform to the drawings and specifications, and shall make good all work damaged or destroyed thereby.

ART. V. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect, the Owners shall be at liberty, after three days written notice to the Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owners shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for

the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractor they shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owners in finishing the work, such excess shall be paid by the Owners to the Contractor; but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owners. The expense incurred by the Owners as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architect, whose certificate thereof shall be conclusive upon the parties ready for occupancy.

ART. VI. The Contractor shall complete the several portions, and the whole of the work comprehended in this Agreement by and at the time or times hereinafter stated, to wit: not later than Seventy-five (75) working days, beginning July 10th, 1912. In case the Contractor shall fail to complete the work hereunder in accordance with the specifications and drawings, and to the satisfaction of the Architect, within the time aforesaid, the Contractor shall and will pay to the Owners, the sum of Twenty-five ($25.00) Dollars for each and every day the time consumed in said performance and completion may exceed the time herein before allowed, which said sum is hereby agreed

upon, fixed and determined by the parties hereto, as "liquidated damages," and not as penalty; and the Owners shall and may deduct and retain the amount of such liquidated damages out of the final payment, which may be due or become due to the Contractor under this agreement.

ART. VII. Should the Contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the Owners, of the Architect, or of any other contractor employed by the Owner upon the work, or by any damage caused by fire or other casualty for which the Contractor are not responsible, or by combined action of workmen in no wise caused by or resulting from default or collusion on the part of the Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined and fixed by the Architect; but no such allowance shall be made unless a claim therefor is presented in writing to the Architect within forty-eight hours of the occurrence of such delay.

ART. VIII. The Owners agree to provide all labor and materials essential to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the Contractor, agree that they will reimburse the Contractor for such loss; the Contractor agree that if they shall delay the progress of the work so as to cause loss for which the Owner shall become liable, then they shall reimburse the Owner for such loss. Should the Owners and Contractor fail to agree

as to the amount of loss comprehended in this Article, the determination of the amount shall be referred to arbitration as provided in Art. XII of this contract.

ART. IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be Twenty-six Thousand Four Hundred Two ($26,402.00) Dollars subject to additions and deductions as hereinbefore provided and that such sum shall be paid by the Owner to the Contractor, in current funds, and only upon certificates of the Architect, as follows:

ADDENDA

to form part of the Contract.

I. Entire to reinforced contract work must be executed strictly according to the specification furnished by the Trussed Concrete Steel Co. of N. Y., in conjunction with the Architect's specification and any part not contained in one but appearing in the other shall be construed as fully set forth in either of them.

II. Main stairs from Basement to 2nd story to be constructed in its entirety as specified in reinforced concrete.

III. All sidewalk work, as specified, to be included in this Contract.

IV. All floors in stores, halls and toilets to be covered with the Sanitary Composition Flooring,

including 6″ high base with Sanitary Cove, as specified for floor of Billiard Room.

V. Billiard Room, passage, between Billiard Room and Available Space, as well as all stores, to have a 6″ high Sanitary Composition base with cove instead of wood specified.

VI. If Architect should desire damp proofing specified for inside of all walls, to be applied on outside, using "Lapadas" or other approved damp resisting material, instead of as specified.

VII. Tile, Exterior panels below 2nd story window sills shall be formed of a small stucco frame or band, with glazed tile panel inside, as per detail.

VIII. Roofing. Contractor to install complete, as per specification, the "Asbestos Built Up Roof," in place of Slag Roof which his estimate was based upon.

IX. The Contractor must allow $45.00 for painting of walls asd ceilings in main staircase hall, toilet hall in 1st floor and all toilets, in case Owners should decide to omit this work.

X. Metal Work. All soffits of store entrances which are specified to be covered with ceiling boards, must be covered, in place of boards, with galvanized iron, forming plain sunk panels.

XI. All the stamped stell wall and ceiling coverings to be of materials as manufactured by Canton Steel Ceiling Co. All this work to receive 1

good coat of oil paint on both sides before erection. The side walls of Moving Pictures Theatre covered with stamped steel to be boarded up 6″ from finish floor with ½″ sheathing boards and furring strips above sheathing boards before metal is applied.

XII. Omit plaster work of walls and ceilings and finished cement floor in room beneath (Platform) stage.

XIII. Omit finish floor of (Platform) stage.

XIV. An extra shall be granted for substituting of 2″ solid plaster built up on channels, as specified, in place of wooden railing between Billiard Room and Bowling Alleys to the amount of $22 per square foot, including wooden casings around openings and brackets of wood or composition material, if so ordered by Owners.

XV. Galvanized Metal for fronts entering this work shall be 24 gage, instead of 22 gage as specified.

XVI. The trap doors for cellar entrances must be all galvanized steel plain flush doors as manufactured by American 3-Way Prism Co.

XVII. The Contractor must allow the sum of $35.00 in case the 4 Fireproof Sashes in 2nd Story wall enclosing the skylight shaft are omitted.

XVIII. The partition dividing Picture Theatre from Stores must be built up in frame, as specified, and filled in with brick or hollow tile, laid up in

cement mortar and side facing stores to be plastered on expanded metal lath. Side facing Theatre to be sheathed from floor to ceiling before stamped steel covering is applied. In case of the building inspector, or other authorities having jurisdiction, require a fireproof partition same shall be built of hollow tile blocks, laid in cement mortar, plastered on store side, sheathed on Theatre side 6″ high and furred above.

XIX. In case architect decides to use "Marble Stucco" in place of "Asbestos Stucco" same shall be done by Contractor without additional cost to Owners. The Marble Stucco shall be composed of approved fineness, mixed in proportion and applied as will be directed.

XX. The store front at Washington Street and 6th Street exclusive of Stores Nos. 4-5-6-7 and 8 and workroom must be constructed of Bronze "Kawneer" casings and fittings as per specifications submitted by the "Kawneer Co."

XXI. All transoms to all store fronts to be glazed with "3-Way Prism Glass" set in heavy bronze metens as per design shown on plans.

XXII. Windows in 2nd story above Theatre entrance to be glazed with 3-Way Prism Glass lights instead of double thick American. Every second window and transom to be pivoted as will be directed.

XXIII. All glass of show fronts of all stores to be glazed with American plate glass as mentioned in specifications.

XXIV. Contractor shall allow $.17 per foot for all store partition work which might be omitted by Owners.

XXV. Skylights must be "Puttyless Skylights" of approved make.

XXVI. All interior trim throughout, specified to be North Carolina or Cypress, to be best quality, well seasoned, kiln dried, clear Chestnut, free of any defects.

XXVII. All walls, etc., specified to be of "brick or concrete," to be built of Brick, as specified.

XXVIII. Front on Court Street to be stuccoed with Portland Cement Stucco of a finish as will be directed and white washed if desired by Owners.

XXIX. In case Owners desire to change location of Ladies Toilet 2nd story and place same adjoining to steps leading to Available Space, the Contractor shall receive the additional sum of $95.00. This price includes 3-Way Prism glass in windows, additional line of soil and vent pipes, extra door, extra electric and gas outlet and all other work required in connection with this change. Toilet room to be about the same square area and arrangement as Toilet room shown at present in rear of this story.

XXX. Plumbing. No vent pipes for connection for future sinks in stores are included in this contract and provisions for only 10 gas outlets, located, as directed, are to be made in Billiard Room

and Bowling Alley in place of gas outlets as shown on plans.

XXXI. In case the Steam Heating system is installed at the price of $811.00 as per bid obtained by the Architect the Contractor shall allow the sum of $198.00

XXXII. Radiators to be used throughout in place of coils.

XXXIII. All roofing tiles to be used must be Ludowici-Celandon Co. Glazes Spanish Tiles of approved color, or others, approved by Architect.

XXXIV. All addendas to specifications or parts of specifications (which call for separate estimates) to be included in this contract unless otherwise mentioned in this addenda.

XXXV. All orders must be given in writing by Architect or Owners, and verbal orders not to be considered binding to either party.

XXXVI. Only Union Labor must be employed in all work connected with the erection of this building.

XXXVII. The Contractor must award the different parts of the work to the Contractor or firms, whose estimates have been turned over by the Architect to this Contractor to be used in his General Estimate.

XXXVIII. In case the Owner should decide to omit portions of the composition floor covering in Stores, this Contractor must make an allowance

for same at the rate of $.13 per sq. ft. including base, and lay in place of such portions, the concrete floor and wooden base, as specified in the "Specifications" without any extra charge to the Owners.

(Seal) SONNTAG COMPANY,
EDWARD M. SONNTAG, Pres.
WALTER P. WARMBOLD, Sec'y.

HANKINS ESTATE,
Kate A. Mial, Extx.

85% of the work done during each proceeding two weeks to be paid about two days after the Contractor has filed with the Architect, an application for payment stating in same, in detail, all work completed during the aforesaid two weeks.

15% to be retained sixty (60) days after completion, when said 15% is to be paid. The sixty (60) days after completion, to commence the day the Architect gives written notice to the Contractor, that in his opinion the building can be considered ready for occupancy, and after all written guarantees called for in the specifications are in the Architect's possession.

The final payment shall be made within sixty (60) days after the completion of the work included in this contract as set forth above, and all payments shall be due when certificates for the same are issued.

If at any time there shall be evidence of any lien or claim for which, if established, the Owners of the said premises might become liable, and which is chargeable to the Contractor, the Owner shall have the right to retain out of any payment then

due or thereafter to become due an amount sufficient to completely indemnify them against such lien or claim. Should there prove to be any such claim after all payments are made, the Contractor shall refund to the Owners all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contractor's default.

ART. X. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

ART. XI. The Owners shall during the progress of the work maintain insurance on the same against loss or damage by fire to the amount of work completed, the policies to cover all work incorporated in the building, and all materials for the same in or about the premises, and to be made payable to the parties hereto, as their interest may appear.

ART. XII. In case the Owners and Contractor fail to agree in relation to matters of payment, allowance or loss referred to in Arts. III or VIII of this contract, or should either of them dissent from the decision of the Architect referred to in Art. VII of this contract, which dissent shall have been filed in writing with the Architect within ten days of the announcement of such decision, then the matter shall be referred to a Board of

Arbitration to consist of one person selected by the Owners, and one person selected by the Contractor, these two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. Each party hereto shall pay one-half of the expense of such reference.

ART. XIII. The Contractor must within three days after signing the contract deliver to the Owners, a qualified bond from an approved Surety Company, in the sum of the amount of this contract, for the strict fulfillment of the contract and freedom from Mechanic's liens. Failure to furnish such bond shall render the contract void at option of the owners.

ART. XIV. The Contractor must be solely responsible as far as the Safety and construction of the building is concerned.

The said parties for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals, the day and year first written.

SONNTAG COMPANY,
EDWARD M. SONNTAG, Pres.
WALTER P. WARMBOLD, Secy.
(Seal) KATE MIAL.
L. L. MIAL.

In presence of:

F. H. KOEIGSBERGER.

Exhibit P-3.

Endorsed:

The
UNIFORM CONTRACT
Form of Contract
Adopted and recommended for general use by the
American Institute of Architects
and the
National Association of Builders.
Revised 1905 and 1907.
AGREEMENT
Between

.....

Contractor
and
Owner
For

.....

Filed
Clerk's Office Jul. 12, 1912.
Hudson County, N. J...19
ARCHITECT
Amount of Contract
$.....

Exhibit P-4.

HUDSON COUNTY CLERK'S OFFICE.

CHARLES S. SHULTZ and WALTER C. SHULTZ, co-partners trading as CHARLES S. SHULTZ & SON, Claimants, vs. SONNTAG COMPANY, a corporation, builder, and KATE A. MIA[illegible], owner.	Lien Claim.

Be it known that Charles S. Shultz and Walter C. Shultz co-partners trading as Charles S. Shultz and Son, doing business in the City of Hoboken, County of Hudson and State of New Jersey, claims a lien upon the building and lands hereinafter described, pursuant to the statute in such case made and provided, for a debt contracted and owing to them for materials furnished for the erection and construction of said building and therefore show:

1. The said building is a two story reinforced concrete and brick building on the lots or curtilage upon which this lien is claimed, and which is situate in the City of Hoboken in the County of Hudson and State of New Jersey, which is known on a map of Hoboken made by Charles Loss, duly filed in the Clerk's office of the County of Bergen, as lots number one hundred and sixty-one (161) one hundred sixty-two (162) and one hundred sixty-three (163). Beginning at a point in the northeasterly corner of Washington and Sixth Streets, running thence northerly along the easterly line of

Washington Street Seventy-five (75) feet more or less, thence easterly and parallel with Sixth Street one hundred feet to an alley, thence southerly along said alley seventy-five (75) more or less to the northerly line of Sixth Street and thence westerly along one hundred (100) feet to place of beginning. Being the same premises conveyed to Henry R. Hankins by Patience F. Hankins, et als. by deed dated May seventeenth Eighteen hundred and seventy-six, and recorded in Hudson County Register's office in Book 297 of Deed at page 417.

2. The name of the owner of the land and of the estate therein on which the lien is claimed is Kate A. Mial.

3. The name of the person who contracted the debt and at whose request the materials were furnished for which said lien is claimed is the said Sonntag Company a corporation.

4. The following is a bill of particulars exhibiting the amount and kind of materials furnished and the price at which and times when the same was furnished and giving credit for all the payments made thereupon and deductions that ought to be made therefrom and exhibiting the balance justly due to the said Charles S. Shultz and Walter C. Shultz from the said Sonntag Company, viz.:

The Sonntag Company.
Bought of Chas. S. Shultz & Son.

(Here follows the same bill of particulars set out in the Complaint and heretofore printed as part of the Complaint).

Balance justly due claimant $1808.13 Eighteen Hundred Eight Dollars and Thirteen Cents, with interest from October thirtieth, Nineteen Hundred and Twelve.

All the above materials were furnished between the first day of August, Nineteen Hundred and Twelve, and the Thirtieth day of October, Nineteen Hundred and Twelve which said last mentioned date is the date of the last materials furnished for which such debt is due.

CHARLES S. SHULTZ,
WALTER C. SHULTZ,
Claimants,
by Smith, Mabon and Herr,
their attorneys and agents.

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

Walter C. Shultz, of full age, being duly sworn on his oath doth depose and say that he is a partner of Charles S. Shultz doing business under the firm name and designation of Charles S. Shultz and Son, and that he and said Charles S. Shultz are the claimants named in the foregoing claim; that the bill of particulars and statements therein set forth, shown in said claim are true; that the same is for materials furnished in the erection of the building in such claim described, at the times therein specified and that the amount as claimed therein is justly due and owing from the said Sonntag Company to said claimants.

WALTER C. SHULTZ.

Sworn to and subscribed before me
this twenty-sixth day of December, A. D.,
Nineteen Hundred and Twelve.

H. HENRY F. PLATE,
Attorney at Law of New Jersey.

(Endorsed).

Received in the Hudson County, N. J. Clerk's office December 27th, A. D. 1912, and filed and Recorded in Lien Docket No. 11 on Page 193.

JOHN F. CROSBY,
Clerk.

Summons hereon was issued this 8th day of January 1913 in favor of Chas. S. Shultz and Walter C. Shultz co-partners Claimants against Sonntag Company (A corp) builder and against Kate A. Mial, Owner. Robert D. Foote Mtgee.

JOHN F. CROSBY,
Clerk.

Summons endorsed for Morris Co., Jan. 8/13.

JOHN F. CROSBY,
Clerk.

Exhibit P-5.

Exhibit P-5. Fourth and Fifth paragraphs of the Last Will and Testament of Henry H. Hankins, deceased.

4th paragraph:

> "The income of my estate real and personal I give and bequeath unto my wife Isabel Hankins for and during the time of her natural life."

5th paragraph:

> "After the death of my wife Isabel Hankins I give, devise and bequeath unto my niece Kate A. Ebbetts and to her heirs and assigns

forever all the rest, residue and remainder of my estate real and personal."

It is admitted that Kate A. Ebbetts afterwards married Dr. Mial and that she is now Mrs. Kate A. Mial.

Mrs. Isabel Hankins afterwards married a man by the name of George W. Chandler, who has since died and she is living.

Exhibit P-6.

Agreement dated November 24, 1906, between Isabel Chandler, formerly Isabel Hankins of the first part and Katharine A. Mial of the second part. The Court directed that the fifth paragraph only of this agreement should be read to the jury, which reads as follows:

> "Said party of the first part shall and will upon the execution and delivery of this agreement immediately resign as executrix and trustee of the last will and testament of the said Henry H. Hankins, deceased, and hereby agrees to accept the said sum of $4,000, payable in quarter yearly payments of $1,000 each, every three months in each year from the date hereof during her life, in full payment of any interest which she has in the estate of the said Henry H. Hankins, deceased, under and by virtue of the last will and testament of said Henry H. Haskins, deceased, and will execute such release or releases or such other instrument as may be necessary to effectually carry out said agreement."

Titles of five cases tried later, involving same questions as those of Shultz vs. Mial:

NEW JERSEY COURT OF ERRORS AND APPEALS.

NATIONAL FIRE PROOFING COMPANY, a corporation (claimant), Plaintiff-Respondent, vs. KATE A. MIAL, owner, et als., Defendant-Appellant.	On Appeal.
LAWSON & McMURRAY, a corporation, Plaintiff Respondent, vs. KATE A. MIAL, owner, et als., Defendants-Appellant.	On Appeal.
EDMUND D. VANDERBILT and FREDERICK SCHILL, partners trading as VANDERBILT & SCHILL, Plaintiff-Respondents, vs. KATE A. MIAL, owner, Defendant-Appellant.	On Appeal.

EDMUND D. VANDERBILT, trading as E. D. VANDERBILT & COMPANY,
Plaintiff-Respondent,
vs.
KATE A. MIAL, owner,
Defendant-Appellant.
On Appeal.

HARRIET DAVIS,
Plaintiff-Respondent,
vs.
JAMES A. GORDON, Receiver of Sonntag Company, a corporation, builder; KATE A. MIAL, owner, and ROBERT D. FOOTE, mortgagee,
Defendants-Appellants.
On Appeal.

The above five cases were tried in succession immediately after the case of Charles S. Shultz & Son and the questions of appeal arising in each of them are exactly the same as the questions arising in the case of Charles S. Shultz & Son and the same judgment will be given in each of them with the exception of the case of Harriet Davis. In that case the plaintiff's witness, William H. Davis, testified as follows: I am a truckman, the proprietor and owner of the business is my mother, Harriet Davis; I did all the labor mentioned, consisting of carting terra cotta bricks from the dock and ashes and delivered them at the place where the building was being erected; I carted four loads of crushed stone and I carted one iron bar from the Delaware, Lackawanna & Western Railroad,

eleven bundles of steel pieces and thirty-five pieces; I paid $1.25 of freight charges and a quantity of cinders as specified in the bill annexed to the complaint; the total bill is $119.25. I did the carting for Sonntag Company, the contractors on the building; there is an item of $2 which should not be in the bill for carting three iron girders. The Court ordered said item taken out and at the conclusion of the case counsel of defendant made the same motions on the same grounds as in the preceding cases and also on the further ground that the labor sued for in this case is not of a kind that is lienable; that this service was a mere matter of labor between Sonntag Company and the plaintiff; it had no particular conection with this building or construction of the building and is not lienable. By consent of counsel the Jury was dismissed and counsel for plaintiff and defendant afterwards submitted briefs to the Court and the Court decided in favor of the plaintiff.

Judge's Decision and Opinion.

HUDSON COUNTY CIRCUIT COURT.

HARRIET DAVIS

vs.

JAMES A. GORDON, Receiver, et al.

On Mechanic's Lien. Decision.

APPEARANCES:

RUDOLPH SCHROEDER and JOHN D. PIERSON, Esqs., for Plaintiff.

S. A. BESSON, Esq., for Defendant.

WILLIAM H. SPEER, Circuit Judge.

The questions in this case are two in number:

1. Whether a lien is allowed in New Jersey in behalf of a claimant for transporting materials delivering them on the job for use in the building where the carting is done by the claimant for the builder?

2. If such a claim will not lie, whether the claimant in a lien suit will be entirely defeated because he has put in his claim both for items for delivery and for items for materials sold, said items being severable?

The answer at which I have arrived in this first question makes the decision of the second unnecessary, but I have no hesitation in saying that it is my opinion that the second question should be answered in the affirmative. I take it to be well settled in New Jersey that a claim is not necessarily bad, for including illegitimate as well as legitimate items; for it may stand *quo ad* the good items; but if the good items and the bad are inseparably blended, the claim will be bad.

Associates, etc. vs. Davison, 5 Dutch, 415; Edwards vs. Derrickson, 28 N. J. L., 39; Whiteneck vs. Nos. 11, N. J., E., 312. The first question is one of the novel impressions in New Jersey. After a careful consideration of the text books, the cases decided elsewhere than in New Jersey, and the arguments of counsel, I have come to the conclusion that a lien should be allowed for the charge for transportation of the material to be used in the construction of the building.

Section 1, of the statute, under which this claim falls, provides "for the payment of any debt con-

tracted and owing to any person for labor performed or materials furnished for the erection and construction" of a building? It is perfectly manifest that this claim is *not* for "materials furnished for the erection and construction of a building," and that if sustainable at all it must be "for *labor* performed *for* the erection and construction of the building."

The statute is remedial in its nature and must by its terms receive a liberal construction. It is designed for the protection of a needy and most meritorious class of persons and should receive such construction as will further the benign purposes which the Legislature had in view in its passage. Looking first to the language itself employed by the Legislature, we observe that the lien will lie "for labor performed *for* the erection and construction of a building." The labor need not necessarily enter *into* the erection or construction, it is sufficient if it be for the erection and construction. The construction contended for by defendant would oust the hod-carrier from the protection of the act, for ordinarily, he merely carries the material from the street where it is mixed to the scaffold where the masons are employed. It would also exclude the architect, and yet Mutual Benefit & Co. vs. Roland, 11 C. E. Green, 189, decides that he is entitled to a lien under our statute. When a man furnishes materials he is nominally being paid for the materials as materials and not for the labor that went into them as labor. He charges so much for materials and if unpaid, his lien claim in not nominally for labor performed in the erection and construction of the building, but for materials fur-

nished for the erection and construction of the building. Can anyone doubt, however, that, in substance, the lien is being maintained for labor. When the manufacturer fixes his price at so much "delivered at the building" does anyone doubt that the price includes an allowance for cartage. In the case at bar it is sought to subject the building to a lien for labor performed in the erection and construction of the building because had the transportation charges been included in the price of the goods there could have been no doubt of the right to a lien. I am clear that such service constitutes labor performed for the erection and construction of a building.

This is the view enunciated in Cyc. Vol. 27, page 44, where the following language is used:

> "A lien is usually allowed for transportation of the material to be used in the construction of a building."

This is the view supported by the following cases:

McClain vs. Hutton, 131 Cal., 132; 61 Pac., 213; 63 Pac. 182, 622.
Fowler vs. Pompelli, 76 S. W., 173.
McKeen vs. Haseltine, 46 Minn., 426.
Hill vs. Newman, 38 Penn. St., 151; and many others.

The only openly antagonistic decision that I have found is Webster vs. Real Estate Imp. Co., 140 Mass., 526. I cannot adopt the reasoning used in that case. It is against the great weight of authority. The reasons upon which it rests

would oust a hod-carrier and an architect of a lien.

No other Court has followed it, and there were circumstances which would seem to vindicate the decision upon the ground that the real *ratio decidendi* was that the materials carted were not furnished *for* the building, or not to be used in its erection and construction.

The other two cases cited on defendant's brief have no application to the case at bar. The idea underlying them is that if the labor in building materials is for the material man, no lien can be had therefore, because the contractor owes such a laborer no liability.

Under these circumstances I must find for the plaintiff on the questions reserved.

Defendant's counsel objected to the ruling of the trial judge on the two questions stated in the beginning of said judge's decision, and has appealed from said judgment.

This action was tried before Judge William H. Speer, with a jury at the Hudson Circuit, on August 5, 1913.

The cause having been heard and submitted to the jury, they return their verdict as follows: They say they find the defendant guilty as in the plaintiff's complaint is charged upon it, and they assess the damages of the plaintiff on occasion of the premises at the sum of One Hundred Twenty-Two Dollars and Ninety-six Cents.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of One Hundred and Twenty-Two Dollars and Ninety-six Cents ($122.96) and their costs which are taxed at the sum of Sixty One Dollars and Ninety-three Cents

($61.93), making in the whole, the sum of One Hundred and Eighty-Four Dollars and Eighty-nine Cents ($184.89).

Judgment entered this August 5, 1913.

WILLIAM H. SPEER,
Judge.

Attest:
JOHN F. CROSBY,
Clerk.

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

HARRIET DAVIS (claimant), Plaintiff, vs. JAMES A. GORDON, Receiver of Sonntag Company, a corporation (builder); KATE A. MIAL (owner), and ROBERT D. FOOTE (mortgagee), Defendants.	Actions at Law. On Mechanic's Lien claim. Grounds of Appeal.

The appellant, Kate A. Mial, states the following grounds of appeal:

1. The contract, together with the specifications accompanying the same, were filed in the office of

the Clerk of the County in which the building lien is situated, before the work was done or materials furnished for which the lien was filed; and the said building and the lands whereon it stands are liable to the contractor alone for whatever work was done or materials furnished in pursuance of such contract.

2. The contract provides that the contractors shall and will provide all the materials and perform all the work for the erection and completion of the building and in such case it is not necessary to file all the specifications, but the filing of the contract will be sufficient to protect the building and lands from liens by all persons, except the contractor, notwithstanding the language of Section 2 of the Mechanic's Lien Law.

3. The interest of the defendant, Kate A. Mial, in the lands liened is not lienable.

4. The plaintiff performed no labor and furnished no materials on said building which would render said building and the lands whereon the same is situated liable to a lien.

SAMUEL A. BESSON,
Attorney of Appellant.

Notice of Appeal.

HUDSON COUNTY CIRCUIT COURT.

HARRIET DAVIS (claimant), Plaintiff, vs. JAMES A. GORDON, Receiver of Sonntag Company, a corporation (builder); KATE A. MIAL (owner), and ROBERT D. FOOTE (mortgagee), Defendants.	Action at Law. On Mechanic's Lien claim. Notice of Appeal.

To

RUDOLPH SCHROEDER,
Attorney of Plaintiff.

TAKE NOTICE that the defendant, Kate A. Mial (owner), appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

SAMUEL A. BESSON,
Attorney of Appellant.

ENDORSED:

Service of the within grounds of appeal is acknowledged this 14th day of August, A. D. 1913.

RUDOLPH SCHROEDER,
Attorney of Plaintiff.

Filed Clerk's Office, Aug. 28, 1913, 10:40 A. M., Hudson County, N. J.

13219.

New Jersey Court of Errors and Appeals

CHARLES S. SHULTZ, et al., co-partners, trading as CHARLES S. SHULTZ & SON (Claimants), Plaintiffs-Respondents, vs. KATE A. MIAL, et als. (Owner), Defendant-Appellant, and four similar cases by different plaintiffs against the same defendant.	On Appeal from Hudson County Circuit Court. Judgment on Mechanic's Lien Claim.

BRIEF FOR KATE A. MIAL, DEFENDANT-APPELLANT.

I.

Facts.

On July twelfth, Nineteen hundred and twelve, Kate A. Mial filed in the office of the Clerk of Hudson County, New Jersey, a building contract which is set out in full on page 21 of the printed case as Exhibit P-3. This contract had annexed to it and forming part of it certain specifications

which are set out in full on pages 26 to 32 inclusive of the printed case and constitute a part of said Exhibit P-3. The contract was made between Sonntag Company, a corporation organized and doing business under the laws of the State of New Jersey, designated as Contractor in the contract, Kate A. Mial designated as Owner in the contract. And the said Contractor agreed to provide all the materials and perform all the work for the erection and completion of a two-story and cellar motion picture theatre, stores and hall building at the northeast corner of Washington and Sixth Streets, known as Numbers 601-603-605 Washington Street, Hoboken, N. J., as shown on the drawings and described in the specifications prepared by F. H. Koenigsberger, Architect, which drawings and specifications are identified by the signatures of the parties thereto and became thereby a part of this contract. See printed case, page 21, lines 30 to 40, and page 22, lines 1 to 8 inclusive. Work was begun on the said building on the first day of August, Nineteen hundred and twelve and the plaintiffs-respondents furnished materials of the amount and kind and at the prices set out on page 5 of the printed case, from pages 5 to 7 inclusive. Sonntag Company, the Builder and Contractor, became insolvent and was unable to finish the building. The plaintiffs-respondents filed a lien claim which is set out on page 36 of the printed case as Exhibit P-4. On the eighth day of January, Nineteen hundred and thirteen summons was issued with complaint annexed; the defendant-appellant filed an answer; the cause was tried on the twenty-fifth day of April, Nineteen hundred and thirteen before the Hudson County Circuit Court and a Jury and the Jury by direction of the Trial Judge, Honorable William H. Speer,

found a verdict in favor of the plaintiffs-respondents for One thousand eight hundred and sixty dollars and fifty-six cents. The costs of the suit were afterwards taxed at Sixty-three dollars and fifty-four cents and judgment in favor of the plaintiffs-respondents was entered against Sonntag Company generally for One thousand nine hundred and twenty-four dollars and ten cents and specially against the lands described in the said lien claim for said last mentioned sum. The defendant-appellant has appealed to this Court. On motion of the plaintiffs-respondents to dismiss the appeal made in this cause on December third, Nineteen hundred and thirteen, it was stipulated in open Court that the facts stated in the charge of Judge Speer, pages 16 to 21 inclusive, of the printed case to the Jury should be taken as true, and that the four similar cases by different plaintiffs against the same defendant should be decided in the same manner as this case.

II.

Argument.

The first ground of appeal is set out on page 3 of the printed case and reads as follows:

> "1. The contract together with the specifications accompanying the same were filed in the office of the Clerk of the County in which the building liened is situate before the work was done or materials furnished for which the lien was filed, and the said building and the lands whereon it stands are liable to the Contractor alone for whatever work was done or materials furnished in pursuance of said contract."

First Point.

If the contract or a duplicate thereof, together with the specifications accompanying the same, or a copy or copies thereof be filed in the office of the Clerk of the County in which the building is situate before any work is done or materials furnished, the building and the land whereon it stands cannot be liened except by the Contractor alone. See Section 2 of "An Act to secure to Mechanics and others payment for their labor and materials in erecting any building (Revision of 1898)," as amended by Chapter 271 of the Laws of 1910. See P. L., 1910, pages 472 and 473. Note the peculiar phraseology in the amended section "together with the specifications accompanying the same." The contract, Exhibit P-3, page 21 of the printed case, was filed July twelfth, Nineteen hundred and twelve, in the office of the Clerk of Hudson County, New Jersey. See printed case, page 35, lines 20 to 30. There was a set of specifications accompanying the same and filed together with it in the office of said Clerk. See printed case, pages 26 to 32 inclusive and signed by Sonntag Company, with its corporate seal and also by Kate A. Mial, the supposed owner. Was this such a compliance with amended Section 2 of the Mechanics' Lien Law that it made the building immune from all liens except that of the Contractor? Here was a building erected in whole by contract in writing. The contract together with the specifications accompanying the same was filed in the office of the Clerk of the County in which said building is situate, before any work was done or materials furnished to or for said building. It seems to be a literal compliance with the requirements of the Statute. So far as concerns the owner of the lands and building, this Statute is a Penal Statute and

according to the established rules of construction Penal Statutes must be construed strictly and confined to the legitimate import of the terms used therein. If an act of the Legislature is clearly and unequivocally expressed, it is neither void in its direct or collateral consequences, however absurd and unreasonable they may appear. Where the signification of a Statute is manifest, no authority less than that of the Legislature can restrain its operation. The learned Trial Judge erred in refusing to grant a non-suit on motion of defendant's counsel, see printed case, page 15, lines 25 to 30 inclusive.

The judgment of the Hudson County Circuit Court should be reversed and judgment in favor of the defendant-appellant should be given by this Court.

III.

Second Ground of Appeal.

(See Printed Case, page 3.)

> "2. The contract provides that the Contractor shall and will provide all the material and perform all the work for the erection and completion of the building and in such case it is not necessary to file the specifications, but the filing of the contract will be sufficient to protect the building and lands from liens by all persons excepting the Contractor, notwithstanding the language of Section 2 of the Mechanics' Lien Law."

In the case of Campbell, Morrell & Co. vs. Lehocky, 83 N. J. L., 505, this Court construed the

third section of the Mechanics' Lien Law, P. L., 1898, page 538. The second section of the Mechanics' Lien Law was amended in 1895, P. L., page 313, by inserting the words "together with the specifications accompanying the same." In giving the opinion of the Court in Campbell, Morrell & Co. vs. Lehocky, Justice Trenchard says:

> "Construing this section as it stood prior to the amendment of 1895, our Courts held that when the contract covered all the work to be done and all the material to be furnished, it was not necessary to file the plans and specifications."

Ayres vs. Revere, 1 Dutcher, 474.
Babbit vs. Condon, 3 ib., 154.
Budd vs. Lucky, 4 ib., 484.
Pimlott vs. Hall, 26 Vr., 192.
LaFoucherie vs. Knutzen, 24 ib., 234.
Freedman vs. Sandknop, 8 Dick. Ch. Rep., 243.

In the case of Babbitt vs. Condon, 3 Dutcher, 154, the contract being to do all the work and furnish all the material, Chief Justice Henry W. Green declared that the specifications formed no essential part of the contract and were not required to be filed.

In a concurrent opinion Justice Haines said:

> "Where all the labor and all the materials are to be done and furnished by the builder, then the contract alone will give the notice required by the Statute and that alone is sufficient to be filed, and although the contract may refer to the specifications and declare

them to be a part of it, yet for the purpose of such notice it is not an essential part nor necessary to be filed with it. If placed on file it could give no further notice than is given by the contract itself. In this case the contract refers to the specifications for the description of the work to be done and the materials to be found; but the builder was to perform all the work in the best and most workmanlike manner and to supply all the materials of the best quality of their several kinds. There was no allegation of any extra work for which the materials in question were found. On the contrary, by the proof it appeared that all were furnished for the building erected pursuant to the contract. As to such, the plaintiff had the statutory notice that the builder was to find all and that no other lien than that of the builder could be placed upon the building or land. The plea that the house and land described in the lien were not liable to the plaintiff's claim was fully sustained by the proof of such filing of the contract; and this also was a sufficient reason why the plaintiff was not entitled to a verdict."

The counsel who argued this cause were men of high standing in their profession, being F. T. Frelinghuysen for defendant and J. P. Bradley for plaintiff. Notwithstanding the amendments that have been made to the Mechanics' Lien Law since the decision of Babbitt vs. Condon, the reasoning of that case is as sound and as good to-day as it was in 1858, and is just as applicable to the language of Section 2 of the present Statute as it was to the language of the Statute of 1858.

Campbell, Morrell & Co. vs. Lehocky only applies to Section 3 of the present Mechanics' Lien Law, so that Section 2 is yet open to construction.

The contract (see printed case, page 21, line 31) reads:

> "The Contractor shall and will provide all the materials and perform all the work for the erection and completion of a two-story and cellar motion picture theatre, stores and hall building at the northeast corner of Washington and Sixth Streets, known as Nos. 601-603-605 Washington Street, Hoboken, N. J., as shown on the drawings and described in the specifications prepared by F. H. Koenigsberger, Architect, which drawings and specifications are identified by the signatures of the parties hereto and become hereby a part of this contract."

No claim for extra work was made in any of the complaints filed by the various plaintiffs in these suits. The plaintiffs-respondents had the statutory notice that the builder was to find all and do all and that no other lien than that of the builder could be placed upon the building or land. If there was not a sufficient filing of the specifications to comply literally with the requirements of the second section of the Mechanics' Lien Law, then the rational and logical decision in this case is that such a filing is not essential and it is not necessary that such specifications be filed with the contract, because if placed on file it could give no further notice than is given by the contract itself, therefore the judgment of the Circuit Court should be reversed and judgment in favor of the defendant-appellant should be ordered entered.

IV.

The Third Ground of Appeal

is that the interest of the defendant, Kate A. Mial, in the lands liened is not lienable.

Henry H. Hankins, deceased, died seized of the lands upon which the building in question was erected. By the fourth paragraph of his will he gave and bequeathed the income of his estate, real and personal, unto his wife, Isabel Hankins, for and during the time of her natural life. She afterwards married George W. Chandler, who has since died and she is now called Isabel Chandler. Henry H. Hankins by the fifth paragraph of his will said:

> "After the death of my wife, Isabel Hankins, I give, devise and bequeath unto my niece, Kate A. Ebbetts, and to her heirs and assigns forever all the rest, residue and remainder of my estate, real and personal."

This included the lands in question. Kate A. Ebbetts afterwards married Doctor Mial, and is now known as Mrs. Kate A. Mial (see printed case, page 39, lines 25 to 40 inclusive, and page 40, lines 1 to 12 inclusive). Mrs. Chandler afterwards made an agreement with Mrs. Mial, of which the fifth paragraph only concerns this case. It is found in printed case, page 40, lines 15 to 40. The questions for the Court to resolve are:

(1) Can Mrs. Chandler, the window and beneficiary of her deceased husband under his will, make an agreement with Mrs. Mial which destroys the will of the testator, during the lifetime of Mrs. Hankins?

(2) Can the materialman fasten a Mechanic's Lien on the land which Mrs Mial holds under such an agreement and deprive Mrs. Hankins of the provision which her deceased husband made for her by his will?

In Corcoran vs. Jones, 12 N. J. L. J., 38, Justice Scudder, at Circuit, held that a court of law in a suit on a lien claim cannot take cognizance of an equitable estate such as the right of a tenant to exercise an option of purchase on the expiration of his tenancy.

In Dalrymple vs. Ramsey, 18 Stew., 494, V. C. Van Fleet, with excellent reasoning, held that the Statute does not extend to equitable, but only to legal estates and that a claim could not be enforced as a lien against the estate of the beneficiary under a resulting trustee who was in possession of the land and caused the buildings to be erected thereon.

A lease or contract to convey the lands does not constitute the requisite written consent of the owner to subject his interest in the land to the lien.

Currier vs. Cummings, 13 Stew., 145.
Dalrymple vs. Ramsey, 18 Stew., 496.
Dey vs. Davis, 18 N. J. L. J., 301.

Is Isabel Chandler trustee under said will? If so, can she divest herself of the trust? If she is not trustee, who holds the legal estate during her lifetime, Mrs. Kate A. Mial being the owner of the vested estate in remainder? Is not this title in the same condition as the title to the property in Babbitt vs. Condon, 3 Dutcher, 154? If so, should not judgment be reversed and judgment in favor of the defendant-appellant be ordered entered? Mrs. Chandler has not been made a party to

the suit. If she is a trustee and cannot divest herself of the trusteeship it prevents the lien from operation. Mrs. Mial's estate in remainder will remain as it is until the death of Mrs. Chandler.

Respectfully submitted,

SAMUEL A. BESSON,
Attorney for Defendant-Appellant,
Kate A. Mial.

New Jersey Court of Errors and Appeals

HARRIET DAVIS (Claimant), Plaintiff-Respondent, vs. KATE A. MIAL (Owner), et als., Defendant-Appellant.	On Appeal from Hudson County Circuit Court. Judgment on Mechanic's Lien Claim.

BRIEF FOR KATE A. MIAL (OWNER), DEFENDANT-APPELLANT.

I.

Facts.

The plaintiff-respondent in the above entitled cause is Harriet Davis, a woman carrying on the business of a truckman. Her claim is for carting materials and she was employed to do said work by the contractor. Included in her bill is also a claim for eighteen loads of ashes furnished for the building at twenty-five cents per load. Her total bill is One hundred and nineteen dollars and twenty-five cents, less two dollars which the Court ordered stricken out for the carting of three iron girders not connected in any manner with the building.

This leaves a total demand of One hundred and seventeen dollars and twenty-five cents besides the costs. The same questions were raised in this case that were raised in the case of Charles S. Shultz, et al., co-partners, trading as Charles S. Shultz & Son, plaintiffs-respondents, vs. Kate A. Mial, et als., defendant-appellant, and the same objections were made to the rulings of the Trial Court and the same decision given by the Circuit Court, and appeal has been taken. The same brief that has been filed in the Shultz case presents all the arguments on those points in this case and three copies thereof have been given to the attorney for the plaintiff-respondent in this case as required by the rules of Court for the purpose of avoiding reprinting the same brief, and this Court can use the Shultz brief filed by me on behalf of Mrs. Mial in the consideration of those questions. The additional grounds of appeal in this case are found in the printed case of Shultz vs. Mial, page 49, as the fourth ground of appeal, to wit, "The plaintiff performed no labor and furnished no materials on said building which would render said building and the lands whereon the same is situate, liable to a lien."

Facts Pertinent to this Particular Cause.

At the trial of the above cause it was shown by testimony of the plaintiff that the claims were all for cartage except that the plaintiff's witness testified that she had paid twenty-five cents each for eighteen loads of ashes.

Argument.

POINT I.

The claims (except that for twenty-five cents per load for eighteen loads of ashes) should not be allowed because they are for drayage. The section of the Statute under which this claim falls is Section 1 and provides "for the payment of any debt contracted and owing to any person for labor performed or materials furnished for the *erection* and *construction*" of a building. Omitting in argument the claim for eighteen loads of ashes at twenty-five cents per load, the entire claims are for carting exclusively. In analysing the statute, we find that the conditions under which such a claim must fall are:

1. For labor performed for the erection and construction of a building.

2. For materials furnished for the erection and construction of a building.

The plaintiff surely did not furnish any materials so (2) may be eliminated. As to labor performed it can be said in a general way that she did perform labor when she carted materials. But the Statute restricts and modifies the labor when it prescribes that the labor must be performed for the *erection* and *construction* of a building.

Did the plaintiff perform any labor in erecting the building? The definitions by Webster of the verb erect are, to raise, to found, to establish. Surely the plaintiff did not raise, establish or found any part of the building by carting materials. The definition by Webster of the verb construct are, to pile up, to form. The plaintiff did none of these.

She *drew* materials which might have never gone into the building. They might have been found useless or have been drawn wholly or partly for the benefit of someone else even under orders of the contractor. Even admitting that they all went into the building, it is not conceivable how a lien can be allowed for the carting of them *to* the building as the Statute prescribes that the labor must be performed for the construction and erection of the building. The Statute wishes to localize the effect of the labor to demand that it be used in erecting and constructing the building.

If the plaintiff had carted five times as much materials as she did, she would not have contributed one iota to the construction or erection of the building. She would only have made an immense pile of useless material. Because a contractor orders goods brought by parcel post or express or freight to be used in the construction of a building, is the Government or the Express Company or the Railroad Company entitled to a lien for labor performed in the *erection* and construction of a building? No, the Statute wishes to confine the labor to that which actually improves the realty and constructs and erects some things to that end.

The case of Evans vs. Lower, 67 N. J. Eq., 232, is the nearest approach in this State to a case in point. Here a lien was denied for tools furnished a contractor with which to work on the building and also one was denied for money lent the contractor to purchase materials to be used in the construction of the building. The materials in the plaintiff's lien claim were used in the construction of the building in question as were the above in the case cited, but neither of the claimants did any work on the materials furnished or performed any labor in the erection and construction of the building.

The other cases relied upon in this argument and of which the opinion of the several Courts were followed are:

Webster vs. Real Estate & Improvement Company, 140 Mass., 526.
Wilson vs. Whitcomb, 100 Pa. State, 547.
Wilson vs. Nugent, 125 Cal., 280, 284.

In the first of these cases, a lien was not allowed for carting sand and lumber to be used in the construction of a building and which were used to that end. In the second case cited, the Court refused to allow a lien for the carting of lumber used in the construction of a building. In the third case cited, it was held that a claim for hauling slate used in the construction of the roof of a building was not a lienable claim.

POINT II.

The judgment of the Trial Court was erroneous as it should have been in favor of the defendant. The judgment should be reversed and judgment ordered entered in favor of the defendants, unless this Court is of the opinion that judgment should have been given to the plaintiff-respondent for Four Dollars and Fifty cents for the eighteen loads of ashes at Twenty-five cents each, in which case the judgment would not carry costs and should be reversed for that reason and a judgment for the proper amount entered without costs.

Respectfully submitted,

SAMUEL A. BESSON,
Attorney for Defendant-Appellant.