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New Jersey Supreme Court.

On Appeal to New Jersey Court of Errors and Appeals.

Ferdinand H. Koenigsberger,
Plaintiff-Respondent,

vs.

Kate A. Mial, individually and as Executrix of the last will and testament of Henry H. Hankins, deceased, Builders and Owners,
Defendant-Appellant.

Notice of Appeal.

To Messrs. Runyon & Autenrieth,
Attorneys for Plaintiff-Respondent.

Gentlemen:

Take notice that the defendant, Kate A. Mial, both individually and as executrix of the last will and testament of Henry H. Hankins, deceased, Builders and Owners, appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. Because the Supreme Court affirmed the judgment of the Hudson County Circuit Court, when the same should have been reversed.

2. Because the judgment interlocutory and judgment final entered by default in this case in the Hudson County Circuit Court were both prematurely and improvidently entered.

3. Because the judgment interlocutory and the judgment final entered by default in the Hudson County Circuit Court in this cause were nullities.

4. Because judgment by default was entered in the Hudson County Circuit Court erroneously and unlawfully when the regular order of pleading in the cause had been interrupted by the striking out of the original complaint and by the filing of an amended complaint to which the defendants had not been ruled to plead.

5. Because judgment by default was entered unlawfully and erroneously in the Hudson County Circuit Court when there was a motion pending before said Court at the time of the entry of said judgment interlocutory and judgment final, which said motion had not been disposed of.

6. Because the entry of the judgment in the Hudson County Circuit Court both interlocutory and final by default under the circumstances of the case amounted to a taking of property without due process of law and contrary to the provisions of the Fifth Amendment of the Constitution of the United States.

Respectfully submitted,

SAMUEL A. BESSON,
Attorney for Kate A. Mial,
individually and as Executrix
of the last will and testament
of Henry H. Hankins, deceased.

A true copy.
WM. C. GEBHARDT, Clerk.

Notice of Appeal.

[Endorsed:]—New Jersey Supreme Court—Ferdinand H. Koenigsberger, Plaintiff-Respondent, *v.* Kate A. Mial, individually and as Executrix of the last will and testament of Henry H. Hankins, deceased, Builders and Owners, Def't-Applt.—On Appeal to N. J. Court of Errors & Appeals—Notice of Appeal—Samuel A. Besson, Atty. of Def't-Appelt., 84 Washington St., Hoboken, N. J. —Service of a copy of the within Notice is hereby acknowledged—Dated Dec. 8, 1916—Runyon & Autenrieth, Attys. of Pltf.-Respdt. —Filed Dec. 11, 1916, Wm. C. Gebhardt, Clerk.

Remittitur.

NEW JERSEY SUPREME COURT.

FERDINAND H. KOENIGSBERGER, Plaintiff-Appellee, vs. KATE A. MIAL, individually and as Executrix of the last will and testament of HENRY H. HANKINS, deceased, Builder and Owner, Defendant-Appellant.	On Appeal.

This cause having been duly argued at the June Term of this court by Samuel A. Besson, of counsel for the defendant-appellant, and Runyon & Autenrieth, of counsel with the plaintiff-appellee, and the court having considered the same and finding no error in the record or proceedings in the Hudson County Circuit Court;

It is thereupon ORDERED and ADJUDGED that the judgment of the Hudson County Circuit Court removed by the appeal in this cause be affirmed with costs, and that the record be remitted to the Hudson County Circuit Court to be proceeded with in accordance with this judgment and the practice of said court.

Entered Nov. 24, 1916, on motion of

RUNYON & AUTENRIETH,
Attorneys of Plaintiff-Appellee.

A true copy.

WM. C. GEBHARDT, Clerk.

I, WILLIAM C. GEBHARDT, Clerk of the Supreme Court of the State of New Jersey, do certify that

the foregoing is a true copy of the notice of appeal filed and also of a rule entered in the minutes of the Court in the above stated cause.

IN TESTIMONY WHEREOF, I have set my hand and the seal of said
[SEAL] Court, at Trenton, this sixteenth day of December, A. D. nineteen hundred and sixteen.

WM. C. GEBHARDT,
Clerk.

[Endorsed:]—"Filed Dec. 27, 1916—Thomas F. Martin, Clerk.

NEW JERSEY SUPREME COURT.

JUNE TERM, 1916.

APPEAL FROM HUDSON CIRCUIT COURT.

FERDINAND H. KOENIGSBERGER

v.

KATE A. MIAL.

Argued before GUMMERE, Chief Justice, and Justices TRENCHARD and BLACK.

For the Appellant, SAMUEL A. BESSON.

For the Respondent, RUNYON & AUTENRIETH.

Per Curiam:

This is an appeal from a judgment entered by default against the defendant in an action brought by the plaintiff to recover for architect's fees alleged to be due him on a building operation. Originally the suit was brought against Kate A. Mial individually, and Leonidas L. Mial as executor of Henry H. Hankins, deceased. The complaint was filed in September, 1913. Subsequently, and in March, 1914, application was made on behalf of the defendants to compel the amendment of the complaint by striking therefrom the name of Leonidas A. Mial, and substituting that of Kate A. Mial as executrix. The rule directing the amendment required a copy thereof to be served upon Kate Mial within twenty days after its date, and allowed her twenty days after such service within which to file her answer. The date of this rule was March 30, 1914. The amended complaint was filed on the 15th of April of that year. On the 15th of May following the defend-

ant moved to strike out certain portions of the amended complaint, for reasons set forth in a notice of the motion which was served upon the plaintiff's attorney on the 5th day of that month. The Court took time to consider the motion, and on the 19th of June filed a memorandum stating that the defendant was entitled to have struck from the complaint the provisions referred to in her notice of motion. No rule was entered pursuant to this finding of the Court, and on the 17th of November, 1914, the plaintiff entered judgment by default. The defendant, Kate Mial, thereupon applied for and obtained a rule to show cause why the judgment should not be opened as having been prematurely and improvidently entered. Testimony was taken in support of, and in opposition to, the making of this rule absolute, and in January, 1916, the matter coming on to be heard before the Circuit Court, the rule to show cause was discharged.

The defendant thereupon appealed to this court.

We think the judgment under review should be affirmed. On its face it is regular. The defendant is presumed to have had notice of the filing of the amended complaint, because within twenty days after its filing she moved to strike out certain portions thereof. Her failure to enter a rule in accordance with the decision of the Circuit Court in her favor on the motion to strike out certain parts of the amended complaint, was, we think, an abandonment of the motion. Having abandoned the motion, and having failed to plead to the amended complaint within the time specified by the order of the Court, the plaintiff was entitled to take judgment against her by default. According to the theory of the defense, a suit

might be perpetually stayed by a defendant by following the course pursued in the present case by Kate A. Mial, the appellant. Without stopping to consider whether, on an appeal from the judgment now under review, the appellant can attack the action of the lower court in discharging the rule to show cause, we are of opinion that the action complained of was proper. If it be true, as counsel suggests, that the failure of the defendant to pursue her defense as required by law was due to the neglect of her attorney, that fact, alone, did not entitle her to the relief she sought under the rule. She was required, in addition, to show that she had a meritorious defense, and this the Circuit Court considered she had failed to do. Our examination of the testimony submitted under the rule to show cause leads us to the same conclusion.

The judgment under review will be affirmed.

A true copy.

WM. C. GEBHARDT,
Clerk.

[Endorsed:]—New Jersey Supreme Court.—June T., 1916.—Ferdinand H. Koenigsberger *v.* Kate A. Mial.—*Per Curiam.*—Filed No. 22, 1916.—Wm. C. Gebhardt, Clerk.

Complaint.

Filed Sept. 6, 1913.

HUDSON COUNTY CIRCUIT COURT.

FERDINAND H. KOENIGSBERGER,
Plaintiff,

vs.

KATE A. MIAL, Builder and Owner; ROBERT D. FOOTE, Mortgagee, and LEONIDAS L. MIAL, Individually and as Executor of Henry H. Hankins, Deceased.

The plaintiff, Ferdinand H. Koenigsberger of the City of Newark, County of Essex and State of New Jersey, says that:

FIRST: At the time hereinafter stated the defendant, Kate A. Mial, was the owner of a plot of land upon which she was then constructing a certain building, which land is described as follows:

All that certain lot of land or messuage lying and being in the City of Hoboken in the County of Hudson and State of New Jersey and described as follows:

BEGINNING at a point in the Northeasterly corner of Washington and Sixth Streets and running thence Northerly along the Easterly line of Washington Street seventy-five feet more or less; thence Easterly parallel with Sixth Street one hundred feet to an alley; thence Southerly along said alley seventy-five feet more or less to the

Northerly line of Sixth Street; and thence Westerly along the Northerly line of Sixth Street one hundred feet to the place of BEGINNING.

BEING the same premises conveyed to Harry H. Hankins by Patience T. Hankins *et als.* by deed dated May 17, 1876, and recorded in Register's Office in Book 297 at page 417.

SECOND: On May 25, 1912, this plaintiff and Theodore A. Meyer, partners in business, were engaged by a contract in writing to prepare plans and specifications and to supervise the construction of said building by Leonidas L. Mial, for the Estate of Henry H. Hankins, which said contract is as follows:

"For the plans, specifications and supervision of construction of two-story building at Sixth & Washington Streets, Hoboken.

This agreement entered into between F. H. Koenigsberger and Theodore A. Meyer, Architects, and L. L. Mial, representing H. H. Hankins Estate, May 14, 1912, to the effect that the total Architect's Fee is Two thousand and seventy ($2,070) Dollars, less $290 previously paid to Mr. Koenigsberger for sketches, &c., less $402 paid to Mr. Koenigsberger for drawings and specifications &c. to date whether contract is let in general or sublet.

(Signed) F. H. Koenigsberger &
Theodore A. Meyer.
per F. H. Koenigsberger.

L. L. Mial
for Estate H. H. Hankins
New York, May 25, 1912."

THIRD: On May 28, 1912, the said Theodore A. Meyer assigned unto the said Ferdinand H. Koenigsberger, plaintiff herein, all his right, title and interest in and to said agreement and that therefore the plaintiff herein became the sole owner thereof and entitled to receive the monies due thereunder.

FOURTH: That plans and specifications for the erection and construction of said building were prepared by said plaintiff herein and accepted by the defendants Kate A. Mial and Leonidas L. Mial, and that supervision of the construction of said building was made by the said plaintiff from the date of said contract, May 25, 1912, to and including July 17, 1913, when said building was entirely erected and completed and the said defendants Kate A. Mial and Leonidas L. Mial, individually and as Executor of Henry H. Hankins, deceased, in consideration thereof promised and agreed to pay the plaintiff for said services performed by him as aforesaid at the price stated in said contract, in paragraph 2, hereinabove set out.

FIFTH: That between November 4, 1912, to and including July 17, 1913, the said plaintiff performed extra services in and above the construction of said building as stated in Schedule A, hereto annexed, at the request of the said defendants Kate A. Mial and Leonidas L. Mial, individually and as Executor of the estate of Henry H. Hankins, deceased, and in consideration said defendants thereof undertook to pay the plaintiff what the same were reasonably worth.

SIXTH: The said services were reasonably worth the sum set opposite the same on Schedule A, hereto annexed, to wit: the sum of Five hundred and twenty-nine dollars.

SEVENTH: That there is due and owing to this plaintiff by the said defendants the sum of One thousand three hundred and seventy-eight ($1,378) Dollars on the contract hereinabove in paragraph 2 set forth, and the sum of Five hundred and twenty-nine ($529) Dollars, for extra services performed as set forth in Schedule A, hereto annexed, making a total due and owing to the plaintiff by the said defendants the sum of One thousand nine hundred and two ($1,902) Dollars, and that said defendants have not paid the said sum or any part thereof, except the sum of Seven hundred and seventy-five ($775) Dollars, and that the balance of said amount, namely, One thousand one hundred and twenty-seven ($1,127) Dollars, is still due and unpaid.

EIGHTH: The said debt is a lien upon the defendants and lands by virtue of the provisions of the act entitled "An act to secure the mechanics and others payment of their labor and materials in erecting any buildings."

Robert D. Foote is made a party defendant because he holds a mortgage of record upon said land bearing date July 16, 1912, given to secure $25,000 and duly recorded in the office of the Register of the County of Hudson in book 778 of Mortgages on page 30, which said mortgage will be cut off by sale under plaintiff's said claim.

Plaintiff demands as damages the sum of One thousand one hundred and twenty-seven ($1,127) Dollars with interest therein from July 17, 1913.

WM. THEO VON DER LIPPE,
Attorney of Plaintiff,
671 Broad Street,
Newark, N. J.

Schedule "A."

To extra work performed on Building on Northeast corner of Washington & Sixth Sts., Hoboken, N. J., as follows:

Nov. 4, 1912	Consultations in Mr. Besson's office in regard to arranging matters pertaining to legal steps to be taken against and by Sonntag Company, etc.	$50.00
Nov. 4, 1912	To making list of defects in work performed by Sonntag Company for Mr. Besson's use	25.00
Nov. 30, 1912	To making itemized list of work and material required to complete building with exception of sub-contracts	50.00
Dec. 9, 1912	To making list of work performed by Sonntag Company	100.00
Dec. 19, 1912	To joint report regarding testing and safety of reinforced concrete work including Engineer's fee	100.00
	Various other extra work as making out of itemized list of sub-contractors and consultations in connection with Hilke and Kittredge matters	30.00
Dec. 23, 1912	Three copies of reinforced concrete specifications delivered to Mr. Besson	2.25
Dec. 27, 1912	Four sets of blue prints of drawings delivered to Bishop Co. as per Dr. Mial's request	6.75

Schedule "A."

Jan. 24, 1913	To itemized report of the work performed by Mr. Read (contractor) up to this date	35.00
Feb. 5, 1913	To list of Plumbing Fixtures	5.00
Apr. 12, 1913	To consultations and suggestions for recommendation of sound proofing of bowling alleys including sketch of same	10.00
June 14, 1913	Preparing list of variations, etc., in Wm. Read's (contractor) work from plans and specifications	25.00
June 24, 1913	To making report of consultations and history of work with Wm. Read (contractor)	25.00
July 12, 1913	To report on work done by J. W. Bishop Co.	50.00
July 17, 1913	To consultations with owner concerning new water proofing, etc.	10.00
		$529.00

Affidavit of Merits.

Filed September 10, 1913.

STATE OF NEW JERSEY, }
County of Morris, } ss.:

Kate A. Mial, being duly sworn according to law says; that she is one of the defendants in the above named action; and that she believes she has a just and legal defense to said action on the merits of the case.

KATE A. MIAL.

Subscribed and sworn to before me this }
sixth day of September, A. D. 1913. }

C. FRANKLIN WILSON,
Master in Chancery of New Jersey.

Notice of Motion to have Judge Settle and Sign Order, Striking Out, etc.

Filed March 30, 1914.

To William Theodore Von der Lippe,
671 Broad Street,
Newark, N. J.,
Attorney for Plaintiff.

Sir:

Take notice, that on Monday the thirtieth day of March instant before the Honorable William H. Speer, Judge of the Hudson County Circuit Court, at the Court House in Jersey City at ten o'clock in the forenoon or as soon thereafter as Counsel can be heard, I shall move said Judge to settle and sign the order, striking out the name of Leonidas L. Mial, individually and as executor of Henry H. Hankins, deceased from the summons and also from the complaint.

Dated, March 27, 1914.

Respectfully yours,
Samuel A. Besson,
Attorney for Defendants.

Filed, Clerk's Office, March 30, 1914, Hudson County, N. J.

John F. Crosby,
Clerk

Rule to Amend Complaint.

Filed March 30, 1914.

Having heard the parties, it is ordered that:

1. SUMMONS:—Summons be amended by striking out the name of Leonidas L. Mial, individually and as executor of Henry H. Hankins, deceased, and adding the name of Kate A. Mial as Executrix of the Last Will and Testament of Henry H. Hankins, deceased, builders and owners.

2. PLEADINGS:—Complaint be amended by striking out the name of Leonidas L. Mial, individually and as Executor of Henry H. Hankins, deceased, and adding the name of Kate A. Mial as Executrix of the Last Will and Testament of Henry H. Hankins, deceased, builders and owners. That plaintiff file his amended complaint and serve a true copy thereof on the Attorney of the defendant, Kate A. Mial, builder and owner, within twenty days after the date of this order and that the defendant have twenty days after the date of such service within which to file their respective answers.

3. That the plaintiff pay the costs of this motion to be taxed, including a counsel fee of ten Dollars.

Dated, March 30, 1914.

WM. H. SPEER,
Judge.

Rule actually entered the 30th day of March, 1914, on motion of S. A. Besson, attorney for defendants, Kate A. Mial and Leonidas L. Mial.

Filed, Clerk's Office, March 30, 1914, Hudson County, N. J.

JOHN F. CROSBY,
Clerk.

Amended Complaint.

Filed April 15, 1914.

The plaintiff, Ferdinand H. Koenigsberger, of the City of Newark, County of Essex and State of New Jersey, says that:

FIRST: At the time hereinafter stated the defendant, Kate A. Mial, and the Estate of Henry H. Hankins, deceased, were the owners of a plot of land upon which she was then constructing a certain building, which land is described as follows:

All that certain lot of land or messuage lying and being in the City of Hoboken in the County of Hudson and State of New Jersey and described as follows:

BEGINNING at a point in the Northeasterly corner of Washington and Sixth Streets and running thence Northerly along the Easterly line of Washington Street seventy-five feet more or less; thence Easterly parallel with Sixth Street one hundred feet to an alley; thence Southerly along said alley seventy-five feet more or less to the Northerly line of Sixth Street; thence Westerly along the Northerly line of Sixth Street one hundred feet to the place of BEGINNING.

BEING the same premises conveyed to Harry H. Hankins by Patience T. Hankins *et als.* by deed dated May 17, 1876, and recorded in Register's office in Book 297 at page 417.

SECOND: On May 25, 1912, this plaintiff and Theodore A. Meyer, partners in business, were

engaged by a contract in writing to prepare plans and specifications and to supervise the construction of said building by Leonidas L. Mial, for the Estate of Henry H. Hankins, which said contract is as follows:

"For the plans, specifications and supervision of construction of two-story building at Sixth and Washington Streets, Hoboken.

This agreement entered into between F. H. Koenigsberger and Theodore A. Meyer, Architects, and L. L. Mial, representing H. H. Hankins Estate, May 14th, 1912, to the effect that the total Architect's Fee is Two thousand and seventy Dollars ($2,070), less $290 previously paid to Mr. Koenigsberger for sketches, &c., less $402 paid to Mr. Koenigsberger for drawings and specifications, &c., to date whether contract is let in general or sub-let.

(Signed) F. H. Koenigsberger &
Theodore A. Meyer,
per F. H. Koenigsberger.

L. L. Mial,
for Estate H. H. Hankins,
New York, May 25, 1912."

Third: On May 28, 1912, the said Theodore A. Meyer assigned unto the said Ferdinand H. Koenigsberger, plaintiff herein, all his right, title and interest in and to said agreement and that therefore the plaintiff herein became the sole owner thereof and entitled to receive the moneys due thereunder.

Fourth: That plans and specifications for the erection and construction of said building were

prepared by said plaintiff herein and accepted by the defendants Kate A. Mial (and Estate of Henry H. Hankins, deceased), and that supervision of the construction of said building was made by the said plaintiff from the date of said contract, May 25, 1912, to and including July 17, 1913, when said building was entirely erected and completed and the said defendant Kate A. Mial (individually and as Executrix of Henry H. Hankins, deceased), in consideration thereof promised and agreed to pay the plaintiff for said services performed by him as aforesaid at the price stated in said contract, in paragraph 2, hereinabove set out.

FIFTH: That between November 4, 1912, to and including July 17, 1913, the said plaintiff performed extra services in and about the construction of said building as stated in Schedule A. hereto annexed, at the request of the said defendant Kate A. Mial (individually and as Executrix of the Estate of Henry H. Hankins, deceased), and in consideration thereof said defendant undertook to pay the plaintiff what the same were reasonably worth.

SIXTH: The said services were reasonably worth the sum set opposite the same on Schedule A, hereto annexed, to wit: The sums of Five hundred and twenty-nine Dollars.

SEVENTH: That there is due and owing to this plaintiff by the said defendants the sum of One Thousand Three Hundred and Seventy-eight Dollars ($1,378) on the contract hereinabove in paragraph 2 set forth, and the sum of Five hundred

and Twenty-nine Dollars ($529) for extra services performed as set forth in Schedule A, hereto annexed, making a total due and owing to the plaintiff by the said defendants the sum of One thousand nine hundred and two Dollars ($1,902), and that said defendants have not paid the said sum or any part thereof, except the sum of Seven hundred and seventy-five Dollars ($775), and that the balance of said amount, namely, One thousand one hundred and twenty-seven Dollars ($1,127) is still due and unpaid.

EIGHTH: The said debt is a lien upon the defendants and lands by virtue of the provisions of the act entitled "An Act to secure to mechanics and others payment of their labor and materials in erecting any building."

Robert D. Foote is made a party defendant because he holds a mortgage of record upon said land bearing date July 16, 1912, given to secure $25,000 and duly recorded in the office of the Register of the County of Hudson in Book 778 of Mortgages on page 30, which said mortgage will be cut off by sale under plaintiff's said claim.

Plaintiff demands as damages the sum of One thousand one hundred and twenty-seven Dollars ($1,127) with interest thereon from July 17, 1913.

WM. THEO. VON DER LIPPE,
Attorney of Plaintiff,
671 Broad Street,
Newark, N. J.

Schedule "A."

To extra work performed on Building on Northeast corner of Washington & Sixth Sts., Hoboken, N. J., as follows:

Nov. 4, 1912 Consultations in Mr. Besson's office in regard to arranging matters pertaining to legal steps to be taken against and by Sonntag Company	$50.00
No. 4, 1912 To making list of defects in work performed by Sonntag Company for Mr. Besson's use	25.00
Nov. 30, 1912 To making itemized list of work and material required to complete building with exception of sub-contractors	50.00
Dec. 9, 1912 To making list of work performed by Sonntag Company	100.00
Dec. 19, 1912 To joint report regarding testing and safety of reinforced concrete work including Engineer's fee	100.00
Various other extra work as making out of itemized list of sub-contractors and consultations in connection with Hilke and Kittredge matters	30.00
Dec. 23, 1912 To three copies of reinforced concrete specifications delivered to Mr. Besson ...	2.25
Dec. 27, 1912 To four sets of blue prints of drawings delivered to Bishop Co. as per Dr. Mial's request	6.75

Schedule "A."

Jan. 24, 1913	To itemized report of the work performed by Mr. Read (contractor) up to this date	35.00
Feb. 5, 1913	To list of Plumbing Fixtures	5.00
Apr. 12, 1913	To consultations and suggestions for recommendations of sound proofing of bowling alleys including sketch of same	10.00
June 14, 1913	Preparing list of variations, etc., in Wm. Read's (contractor) work from plans and specifications ...	25.00
June 24, 1913	To making report of consultations and history of work with Mr. Read (contractor)	25.00
July 12, 1913	To report on work done by J. W. Bishop Co.	50.00
July 17, 1913	To consultations with owner concerning new water proofing, etc.	10.00
		$529.00

Assessment of Damages.

Filed Nov. 19, 1914.

This action is founded on a contract, a copy of which is annexed hereto, made a part hereof, and marked "Schedule A," providing for certain work to be done for the defendants, for which defendants agreed to pay the sum of Thirteen hundred and Seventy-eight ($1,378) Dollars; that the said work was performed, as was certain extra work hereinafter set forth, the reasonable value of which amounted to the sum of Five hundred and Twenty-nine ($529) Dollars, of which sum the plaintiff has received the sum of Seven hundred and seventy-five ($775) Dollars, with interest due from April 4, 1913.

The following is an itemized statement of the money due from the defendants to the plaintiff:

	To professional services in preparing plans, detail drawings, specifications and supervision of construction of the building above mentioned at the agreed price of	$1,378.00
	To extra work performed on building on northeast corner of Washington & Sixth Streets, Hoboken, N. J., as follows:	
Nov. 4, 1912	Consultations in Mr. Besson's office in regard to arranging matters pertaining to legal steps to be taken against and by Sonntag Company, etc.	50.00
Nov. 4, 1912	Defects in work performed by Sonntag Company for Mr. Besson's use	25.00

Assessment of Damages.

Nov. 30, 1912 Itemized list of work and labor required to complete the building with exception of sub-contracts	50.00	
Dec. 9, 1912 List of work performed by Sonntag Co.	100.00	
Dec. 19, 1912 Joint report regarding testing and safety of reinforced concrete work including Engineer's fee	100.00	
Various other extra work as making out of itemized list of sub-contractors and consultations in connection with Hilke and Kittredge matters	30.00	
Dec. 23, 1912 Three copies of reinforced concrete specification delivered to Mr. Besson ...	2.25	
Dec. 27, 1912 Four sets of blue prints of drawings delivered to Bishop Co., as per Dr. Mail's request	6.75	
Jan. 24, 1913 Itemized report of the work performed by Mr. Read (contractor) up to this date	35.00	
Feb. 5, 1913 List of plumbing fixtures .	5.00	
Apr. 12, 1913 Consultations and suggestions for recommendation of sound proofing of bowling alleys including sketch of same	10.00	
June 14, 1913 Preparing list of variations, etc., in Wm. Read's (contractor) work from plans and specifications ...	25.00	

June 24, 1913	Making report of consultations and history of work with Wm. Read (contractor)		25.00
July 12, 1913	Report on work done by J. W. Bishop Co.		50.00
July 18, 1913	Consultations with owner concerning new water proofing, etc.		10.00
			$1,902.00
	Credit.		
July 1, 1912	By cash.....	$500.00	
July 25, 1912	By cash.....	225.00	
April 4, 1913	By cash paid to Elwyn Seeley for account of cliamant	50.00	775.00
	Balance justly due claimant		$1,127.00
	Interest on that amount from July 18, 1913, to November 18, 1914, one (1) year four months...		90.16
	Total due claimant		$1,217.16

Upon the above statement and calculation, it is ascertained that there is a debt of Twelve hundred and seventeen dollars and sixteen ($1,217.16) cents due from the defendants to the plaintiff, and the damages of the plaintiff are hereby assessed at the sum of $1,217.16, besides costs to be taxed.

Dated, November 18, 1914.

LUTHER A. CAMPBELL,
Judge.

Assessment of Damages.

STATE OF NEW JERSEY, } ss.:
County of Hudson, }

Ferdinand H. Koenigsberger, of full age, being duly sworn according to law on his oath deposes and says:

That he is the plaintiff in the foregoing mentioned action. That on May 25th, 1912, deponent and Theodore A. Meyer were partners and practising the profession of architect, and that on the said day they entered into a contract, with L. L. Mial, for the estate of H. H. Hankins, a true copy of which contract is annexed hereto and made a part hereof, and marked "Schedule A."

DEPONENT FURTHER SAYS that on the 28th day of May, 1912, said Theodore A. Meyer assigned unto deponent all of the said Meyer's right, title and interest in and to said agreement. And that thereafter plaintiff became the sole owner thereof and entitled to receive the moneys due or to grow due thereunder.

DEPONENT FURTHER SAYS that after said assignment he did all of the work under the said contract and received moneys from the defendant. That the amount of the contract price was Thirteen hundred and seventy-eight ($1,378) Dollars. That deponent has performed extra work as follows:

Four consultations, Mr. Besson's office, consuming altogether about seven hours, and consultations pertaining to legal steps to be taken against and by Sonntag Company, at a reasonable charge for such services to the sum of Fifty ($50) Dollars.

Assessment of Damages.

DEPONENT FURTHER SAYS that he did extra work in making list of defects in work performed by Sonntag Company, said work including work in deponent's office for four hours, work on the building for one hour and work in Mr. Besson's office for one hour, at a reasonable charge for said work in the sum of Twenty-five ($25) Dollars.

DEPONENT FURTHER SAYS that he did extra work in making itemized list of work and material required to complete building, with exception of sub-contracts. That said work entailed work in deponent's office for six hours, in the building two and one-half hours, in Mr. Besson's office for one hour, at a reasonable charge for said work in the sum of Fifty ($50) Dollars.

DEPONENT FURTHER SAYS that as extra work he made a list of work performed by Sonntag Company; said extra work entailed labor in deponent's office for twelve hours, in Mr. Besson's office for one and one-half hours, and on the building for five hours, at a reasonable charge for said work in the sum of One hundred ($100) Dollars.

DEPONENT FURTHER SAYS that as extra work he made a joint report regarding testing and safety of reinforced concrete work, consisting of work in deponent's office for three hours, on building for two hours, and in Mr. Besson's office for three and one-half hours; that a reasonable charge for said work, including the engineer's fees, is One hundred ($100) Dollars.

Assessment of Damages.

DEPONENT FURTHER SAYS that as extra work he made out itemized list of sub-contractors, consulted and engaged in consultations in connection with Hilke and Kittredge matters, and said work consumed about twelve hours, being done in deponent's office and the broker's office and Mr. Besson's office, at a reasonable charge for said work in the sum of thirty ($30) Dollars.

DEPONENT FURTHER SAYS that as extra work he made three copies of reinforced concrete specifications, and that said work, including the cost of typewriting and time involved, was reasonably worth the sum of $2.25.

DEPONENT FURTHER SAYS that as extra work he furnished four sets of blue prints of drawings to Bishop Company. That said blue prints and the time spent, was worth $6.75.

DEPONENT FURTHER SAYS that as extra work he furnished an itemized report of work performed by Mr. Reed, the Contractor, which took three and one-half hours work in deponent's office, two hours on the building, and in Mr. Besson's office one hour. That said work was reasonably worth the sum of Thirty-five ($35) Dollars.

That as extra work deponent furnished list of plumbing fixtures, which said work was reasonably worth the sum of five ($5) Dollars.

DEPONENT FURTHER SAYS that as extra work he engaged in consultations and made suggestions for the sound proofing of the bowling alleys and made sketch of the same. Said work took about two hours and was reasonably worth the sum of Ten ($10) Dollars.

Assessment of Damages.

DEPONENT FURTHER SAYS that as extra work he he made list of variations in Mr. Reed's work from plans and specifications; that said work took two hours of deponent's time in his office, and two one-half hours on the building, and that said work was reasonably worth the sum of Twenty-five ($25) Dollars.

DEPONENT FURTHER SAYS that as extra work be made report of consultations and history of work with Contractor Reed; said work took three and one-half hours of deponent's time in his office, one and one-half hours on the building. Said work was reasonably worth the sum of Twenty-five ($25) Dollars.

DEPONENT FURTHER SAYS that as extra work he made a report on work done by J. W. Bishop Company. Said work took seven hours of deponent's time in his office and two and one-half hours on the building. Said work was reasonably worth the sum of Fifty ($50) Dollars.

DEPONENT FURTHER SAYS that as extra work he consulted with owner concerning new water proofing, etc., and said work consumed about one hour's work in deponent's office and one hour on the building, and said work was reasonably worth the sum of Ten ($10) Dollars.

DEPONENT FURTHER SAYS that all of the labor done and material supplied was done and supplied for the erection of a building on the northeast corner of Washington and Sixth Streets, in the City of Hoboken, on a plot seventy-five feet wide, fronting on Washington Street, and one hundred feet deep.

Assessment of Damages.

DEPONENT FURTHER SAYS that the total amount due for the said work, including the amount of the contract and extra work, is the sum of Nineteen hundred and two ($1,902) Dollars, of which he has received the sum of Seven hundred and seventy-five ($775) Dollars, and that there is a balance still due for labor done and materials furnished in the erection of the said building, of Eleven hundred and twenty-seven ($1,127) Dollars, which is still unpaid.

DEPONENT FURTHER SAYS that he has completed all of his work under the contract and all of the extra work, and that the sum of eleven hundred and twenty-seven ($1,127) Dollars, with interest is still due and unpaid.

FERDINAND H. KOENIGSBERGER.

Sworn and subscribed to before me, this third day of October, Nineteen hundred and fourteen,

FREDERICK C. HENN,
Attorney at Law,
of New Jersey.

STATE OF NEW JERSEY, County of Hudson, } ss.:

Leo Feinen, of full age, being duly sworn according to law, on his oath deposes and says: That he is an architect, engaged in the practice of his profession in the City of Jersey City, County of Hudson and State of New Jersey; that he has been engaged in such profession in Jersey City and the vicinity, for the space of sixteen years. That he has read the affidavit of Ferdinand H. Koenigsberger in the foregoing

assessment of damages, and says that the charges of said Ferdinand H. Koenigsberger for the extra work done, which is set forth in the affidavit of the said Koenigsberger, are reasonable and not in excess of the value of the work performed. That a reasonable charge for four consultations in Mr. Besson's office, consuming altogether about seven hours, and consultations in Mr. Koenigsberger's office lasting about two hours, which consultations pertained to legal steps to be taken against and by Sonntag Company, would be Fifty ($50) Dollars.

That a reasonable charge for making list of defects in work performed by Sonntag Company, which work included work in Mr. Koenigsberger's office for four hours, work on the building for one hour, and work in Mr. Besson's office for one hour, would be Twenty-five ($25) Dollars.

That a reasonable charge for making an itemized list of work and material required to complete building, with exception of sub-contracts, which work entailed work in Mr. Koenigsberger's office for six hours, in the building two and one-half hours, in Mr. Besson's office one hour, would be Fifty ($50) Dollars.

That a reasonable charge for making a list of work performed by Sonntag Company, which work entailed labor in Mr. Koenigsberger's office for twelve hours, in Mr. Besson's office for one and one-half hours, and on the building for five hours would be One hundred ($100) Dollars.

That a reasonable charge for making a joint report regarding testing and safety of reinforced concrete work, consisting of work in Mr. Koenigsberger's office for three hours, on building for

two hours, and in Mr. Besson's office for three and one-half hours, and the engineer's fees, would be One hundred ($100) Dollars.

That a reasonable charge for making out an itemized list of sub-contractors, consulting and engaging in consultations in connection with Hilke and Kittredge matters, which work consumed about twelve hours, and was done in Mr. Koenigsberger's office, the broker's office and Mr. Besson's office, would be Thirty ($30) Dollars.

That a reasonable charge for making three copies of reinforced concrete specifications, including the cost of typewriting and time involved, would be Two dollars and twenty-five ($2.25) Cents.

That a reasonable charge for furnishing four sets of blue prints of drawings to Bishop Company, would be Six dollars and seventy-five ($6.75) Cents.

That a reasonable charge for furnishing an itemized report of work performed by Mr. Reed, the contractor, which took three and one-half hours' work in Mr. Koenigsberger's office, two hours on the building and one hour in Mr. Besson's office, would be Thirty-five ($35) Dollars.

That a reasonable charge for furnishing a list of plumbing fixtures, would be Five ($5) Dollars.

That a reasonable charge for the two hours' time consumed in consultations and making suggestions for the sound proofing of the bowling alleys, and making sketch of same, would be Ten ($10) Dollars.

That a reasonable charge for making list of variations in Mr. Reed's work from plans and specifications which work took two hours of Mr.

Koenigsberger's time in his office, and two and one-half hours on the building, would be Twenty-five ($25) Dollars.

That a reasonable charge for making report of consultations and history of work with Contractor Reed, which work took three and one-half hours of Mr. Koenigsberger's time in his office, and one and one-half hours on the building, would be Twenty-five ($25) Dollars.

That a reasonable charge for making a report on work done by J. W. Bishop Company, which work took seven hours of Mr. Koenigsberger's time in his office, and two and one-half hours on the building, would be Fifty ($50) Dollars.

That a reasonable charge for consultation with owner concerning new water proofing, etc., which consultation consumed about one hour's work in Mr. Koenigsberger's office and one hour on the building, would be Ten ($10) Dollars.

LEO. FEINEN.

Sworn and Subscribed to this
5th day of November, at
Jersey City, N. J., before me
EDWARD R. WESTERBURG,
[L. S.] Notary Public.

"SCHEDULE A."

"For the plans, specifications and supervision of construction of two-story building at Sixth & Washington Streets, Hoboken.

This agreement entered into between F. H. Koenigsberger and Theodore A. Meyer, Architects, and L. L. Mial representing H. H. Hankins Estate, May 14th, 1912, to the effect that the total Architect's Fee is Two thousand and seventy ($2,070) Dollars, less $290 previously paid to Mr. Koenigsberger for sketches, &c., less $402 paid to Mr. Koenigsberger for drawings and specifications &c., to date whether contract is let in general or sub-let.

(Signed) F. H. KOENIGSBERGER
& THEODORE A. MEYER,
per F. H. Koenigsberger.

L. L. MIAL,
for Estate of H. H. Hankins,
New York, May 25, 1912."

Judgment on Default.

Filed Nov. 18, 1914.

Judgment in this cause was entered by default; the Clerk of this Court having assessed the damages in favor of the plaintiff and against the defendant at the sum of One thousand two hundred and seventeen Dollars, sixteen cents.

WHEREUPON it is adjudged that the plaintiff recover of the defendant the sum of One thousand two hundred and seventeen Dollars, sixteen cents and his costs which are taxed at Forty-seven Dollars, eighty-eight cents making in the whole the sum of One thousand two hundred sixty-five Dollars, four cents.

Judgment entered November 18, 1914.

LUTHER A. CAMPBELL,
Judge.

Attest:
JOHN J. McGOVERN,
[L. S.] Clerk.

Affidavits for Rule to Show Cause Why Judgment by Default Should Not be Set Aside.

Filed March 30, 1915.

STATE OF NEW JERSEY, }
County of Hudson, } ss.:

Samuel A. Besson, being duly sworn according to law on his oath says: That he is the attorney of the defendants, Kate A. Mial and Robert D. Foote, in the above entitled cause and has been their attorney from the beginning of said action until the present time; that on the eighteenth day of November, in the year Nineteen hundred and fourteen, judgment by default was entered in the above entitled cause by William Theodore Von der Lippe, attorney for the plaintiff in the said cause, for the sum of Twelve hundred and seventeen Dollars and sixteen cents ($1,217.16), damages and Forty-seven Dollars and eighty-eight cents ($47.88) costs as appears by the record of said Hudson County Circuit Court and an execution thereon was issued on the twenty-seventh day of November, in the year Nineteen hundred and fourteen, returnable on the eighth day of December, Nineteen hundred and fourteen, by John Warren, attorney for the plaintiff in said cause, and was delivered to the Sheriff of Hudson County New Jersey on the said last mentioned day and year at two forty (2:40) o'clock in the afternoon and was recorded in Liber 22 of Executions on Contract, in the office of the Clerk of the County of Hudson, on page 336 and by virtue of said writ of Execution, the said Sheriff, of the County of Hudson, Eugene F. Kinkead, has levied upon certain lands and premises, situate on the northeast corner of Sixth and Washington Streets, in the City of Hoboken, in

said County and State, fronting seventy-five (75) feet on said Washington Street, and one hundred (100) feet on said Sixth Street, and seventy-five (75) feet on Court Street or Alley, a street or Alley running parallel with said Washington Street, including the buildings thereon erected, which are of the value of about Forty thousand ($40,000) Dollars.

Deponent further says that the said judgment be default was entered and said Execution was issued without his knowledge and was and is a complete surprise to this deponent.

Deponent further says that the said Kate A. Mial defendant in the above entitled cause, now has an action pending in the United States District Court of New Jersey against the Fidelity & Deposit Co. of Maryland, which case was begun in the fall of the year Nineteen hundred and thirteen, and has been pending ever since; that on the seventh day of February, Nineteen hundred and fourteen, this deponent was conducting negotiations with the said Ferdinand Koenigsberger, the plaintiff herein for the purpose of procuring from him a certificate as architect concerning the work done on the building erected on the said lands and premises mentioned above and that said negotiations have continued without interruptions up to the twenty-second day of March, instant; that this deponent had made a motion herein on notice duly given to be heard before Hon. Luther A. Campbell, Judge of the Hudson County Circuit Court, at the Court House in Jersey City, at ten o'clock in the forenoon on the eighth day of May, Nineteen hundred and fourteen, or as soon thereafter as counsel could be heard to strike out of the summons and out of the complaint in the above entitled action, the

words, "individually and as executrix of Henry H. Hankins, deceased," in the twenty-sixth and twenty-seventh lines of the second page of said complaint, and the words, "and the estate of Henry H. Hankins, deceased," in the twenty-fourth and twenty-fifth lines of the third page of said complaint, the words, "individually and as executrix of Henry H. Hankins, deceased," in the twenty-ninth and thirtieth lines of the third page of said complaint, the words, "individually and as executrix of the estate of Henry H. Hankins, deceased," in the fourth and fifth lines of the fourth page of said complaint and said motion was argued by this deponent as counsel for the defendants and by William Theodore Von der Lippe, as counsel for the plaintiff, either on the eighth day of May, Nineteen hundred and fourteen, or on some other motion day thereafter, deponent does not now remember which, and on the twentieth day of June, Nineteen hundred and fourteen, this deponent received a letter from the Hon. Luther A. Campbell, Judge of the Hudson County Circuit Court, informing this deponent that the motion to strike out had been granted in the manner and to the extent set forth in the notice to strike out and for the reasons therein urged, which letter this deponent now has in his possession, ready to be produced before the said Hudson County Circuit Court; that about this time, that is to say, about the twentieth day of June, Nineteen hundred and fourteen, the Hoboken Bank for Savings in the City of Hoboken, a corporation, owner of the office building in which this deponent then had and ever since then has had his offices, began to build an addition to said building and to renovate and make alterations in the rooms throughout the building, among other things

began to move and make alterations in the office rooms of this deponent, and during this deponent's absence from his office, on business, his table was suddenly moved and the papers lying on his table taken off to enable the workmen to enter and renovate the said rooms, and on deponent's return to his office, he was unable to find many of his papers which had been mislaid and covered up in other rooms under piles of books and furniture.

Deponent had an answer in the above entitled cause drawn and ready to file and was under the impression that he had filed said answer, but is unable to find said answer on the files of the Court and could not find any record of it in the Register of the Clerk of said Court. This deponent labored under the belief at the time that he had filed the said answer, and resting securely in that belief, let the matter go and did not discover that there was no answer on file for the defendants, until the eighteenth day of December, Nineteen hundred and fourteen, when deponent was in the office of Burnett & Cornish, in the City of Newark, conferring with them as associate counsel in the said United States District Court Action and was then and there informed by H. Theodore Sorg, attorney at law of this State and an employee in the office of said Burnett & Cornish, that said William Theodore Von der Lippe had informed him a day or two previous, that he was the attorney for the plaintiff herein, had entered judgment by default in said above entitled cause and that he, Von der Lippe, was under the impression that this deponent did not know that said judgment had been entered; that this deponent and said Burnett & Cornish were then engaged in negotiating with the said Von der Lippe for said Ferdinand Koenigsberger,

plaintiff herein, to serve as a witness in the said United States District Court Action, and continued to negotiate after the said eighteenth day of December, Nineteen hundred and fourteen, concerning the said last mentioned matter, and also concerning the opening and vacating of said judgment, or making a settlement of the cause, between the plaintiff and defendants herein, by making certain payments by the said defendant, Kate A. Mial, to the said plaintiff, and said negotiations continued up to the twenty-second day of March, instant, when this deponent discovered that another attorney, namely, John Warren, has issued execution of said judgment on the twenty-seventh day of November, Nineteen hundred and fourteen, and had caused the Sheriff of Hudson County, Eugene F. Kinkead, to make the levy above stated.

Deponent further says that no substitution of any other attorney for the said Von der Lippe has ever been made with this deponent's knowledge and this deponent finds no substitution of attorneys on record in the above entitled cause, and upon making the discovery that said J. Warren has issued execution as attorney of the plaintiff, this deponent immediately doubted the good faith of said Von der Lippe and stopped all further negotiations with him, and the said plaintiff, Ferdinand Koenigsberger, and this deponent now says that the said judgment was entered by default in the manner above stated by said Von der Lippe through the neglect, fault, error and mistake of this deponent, as the attorney of the said defendants, and that this deponent mistakingly believing that he had already filed an answer for the said defendants, failed to file any answer and by reason

thereof, the said judgment by default has been entered against the said defendants and injury and wrong has resulted to them therefrom.

Deponent further says that he knows that the said defendant has a good defense on the merits of the case to the plaintiff's alleged cause of action, and that her defense is that the said Ferdinand H. Koenigsberger was grossly incompetent and negligent in the performance of his duties as architect in the erection of said building mentioned in the said plaintiff's complaint, and did not properly supervise the construction of said building and did not prepare proper plans and specifications with sufficient minuteness of detail to protect the said defendant and delayed the construction of said building and the completion thereof for many months and was discharged by the said defendant from the further performance of his duties as architect in the construction of said building on the twentieth day of February, Nineteen hundred and thirteen; that in only one instance alone the negligence of said plaintiff cost the said defendant more than fifty-five hundred ($5,500) Dollars, and that altogether in this deponent's opinion, the incompetence, lack of skill and technical knowledge of the said plaintiff, together with his negligence, caused the defendant to suffer a loss of at least Thirty thousand ($30,000) Dollars, in and about the erection and construction of the said building, which constitutes a good and sufficient defense to the said plaintiff's alleged action.

This deponent therefore prays that the said judgment by default having been obtained in the manner above stated, by reason of the mistake of this deponent as an attorney at law, in believing that

deponent had filed the defendant's answer, when he had not done so, and by this deponent acting upon said belief, this deponent therefore prays that the said judgment by default may be opened and vacated, pursuant to Section One hundred and twelve (112), of the Practice Act, Compiled Statutes of New Jersey, page 4087.

SAMUEL A. BESSON.

Sworn and subscribed before me this
30th day of March, A. D., 1915.

MORTEN R. MORTENSEN,
Commissioner of Deeds of N. J.

STATE OF NEW JERSEY, }
County of Hudson, } ss.:

George A. Conklin, being duly sworn, according to law, on his oath, says: That he is employed in the office of Harlan Besson, a practising attorney at law of this State, and who occupies the same suite of offices that Samuel A. Besson occupies; that the said Harlan Besson and Samuel A. Besson have occupied said suite of offices for many years past; that deponent has been in the employ of said Harlan Besson for more than three (3) years past; that about the first day of June, Nineteen hundred and fourteen, the Hoboken Bank for Savings in the City of Hoboken, a corporation of this State, and owner of said building in which the offices of said Harlan Besson and Samuel A. Besson are situated, began to build a large addition on the southerly side of their said building, and tore open the walls on the south side of the offices of said Harlan Besson and Samuel A. Besson, and necessitated the moving of the desks,

office tables, furniture and books from one room to another, not less than three or four times, during the months of June, July and August, Nineteen hundred and fourteen, and that during said removals of said tables, desks and books, many of the papers and case envelopes containing the cases of the said Samuel A. Besson, then being litigated in the various courts of this State, were mislaid and had books and furniture piled upon them, and said Samuel A. Besson was unable to find them, and that the case of Ferdinand H. Koenigsberger against Kate A. Mial was thus lost from sight for a long time and was only recently during this month discovered and placed in the hands of said Samuel A. Besson; that this deponent frequently assisted said Samuel A. Besson in searching for different cases, among others, the said case of Koenigsberger against Mial, and that said Samuel A. Besson was very much delayed and impeded in the handling of his business during the past nine (9) months, by reason of said building operations, repairing and renovating, being carried on by said Hoboken Bank for Savings in the City of Hoboken, during the past nine (9) months.

GEORGE A. CONKLIN.

Sworn and subscribed before me this
thirtieth day of March, A. D. 1915.

MORTEN R. MORTENSEN,
Commissioner of Deeds of New Jersey.

Affidavit of Clifford Stephenson.

STATE OF NEW JERSEY, }
County of Hudson, } ss.:

Clifford Stephenson, being duly sworn, according to law, on his oath, says: That he is an attorney at law of the Supreme Court, of this State, and has been in the employ of the said Samuel A. Besson as a clerk in his office for more than five (5) years past, and that during the latter part of April, Nineteen hundred and fourteen, this deponent was assisting said Samuel A. Besson in the defense of the cause of Ferdinand H. Koenigsberger against Kate A. Mial; that deponent drew up an answer in said cause and afterwards assisted the said Samuel A. Besson in drawing up a counterclaim for the defendant in said cause; that deponent then suggested to said Samuel A. Besson that he hold said answer and counterclaim and not file them until after the argument of the motion to strike out the complaint; that said Samuel A. Besson was undecided whether to follow deponent's suggestion or not and laid said answer and counterclaim on his table with the other papers in the cause, until he should decide what to do in the matter; that the next day after said counterclaim had been finished, the desk of said Samuel A. Besson was suddenly moved, and also the table of said Samuel A. Besson, upon which said papers in the case of Koenigsberger against Mial were resting, into another room; that the removal was done in the absence of the said Samuel A. Besson from his office; that the papers were piled under furniture and books and in places where said Samuel A. Besson could not get access to, and did not even know where they were located; that this confusion continued during

the year from June, Nineteen hundred and fourteen, until the beginning of March, Nineteen hundred and fifteen, during all of which time many of the papers were lost and mislaid and could not be found for use, among them the papers in the case of Koenigsberger against Mial; that said papers have only recently, about the first of the month of March, been discovered and placed in the hands of the said Samuel A. Besson.

CLIFFORD STEPHENSON.

Sworn and subscribed before me this
thirtieth day of March, A. D. 1915.
MORTEN R. MORTENSEN,
Commissioner of Deeds of New Jersey.

STATE OF NEW JERSEY, } ss.:
County of Hudson, }

Leonidas L. Mial, being duly sworn, according to law, on his oath, says: That he is the husband of Kate A. Mial, the defendant in the above-entitled cause; that he has been the agent of the said Kate A. Mial from the time said building mentioned in the plaintiff's complaint began to be erected, and her attorney in fact since October 30th, 1913, and is familiar with all the facts concerning the erection of said building; that he acted for and represented the said defendant in all matters concerning the erection of said building, and that said plaintiff prepared the plans and specifications for the erection and construction of said building, but did not properly supervise the construction of said building, but, on the contrary thereof, was guilty of gross negligence and incompetence in performing his duties as architect, in and about the construction of said building, and by reason of said gross negligence and incompe-

tence, said defendant suffered and sustained great loss of money and damage and was delayed for many months in the construction and completion of said building, and by reason of said negligence and incompetence, this deponent, acting as the agent of said defendant in her behalf, and under her instructions, on the twentieth day of February, Nineteen hundred and thirteen, discharged the said plaintiff from the further performance of his duties as architect in the construction of said building.

Deponent further says that the said plaintiff did not perform any extra services in and about the construction of said building, and whatever assistance and information may have been given by the said plaintiff after the twentieth day of February, Nineteen hundred and thirteen, was given to assist the defendant in mitigating the damages which had been caused by the incompetence and negligence of the said plaintiff, and that it was expressly understood and agreed between the said plaintiff and said defendant that said plaintiff should receive no compensation whatever for such services, and that any services which may have been performed by plaintiff prior to the twentieth day of February, Nineteen hundred and thirteen, were services performed in, pursuant to and included in the agreement set forth in paragraph two (2) of the plaintiff's complaint.

Deponent further says that said defendant does not owe any sum of money whatever to said plaintiff; that there has been paid to said plaintiff the sum of Fourteen hundred and fifty-five ($1,455) Dollars for services supposed to have been rendered in the construction of said building, and that the last payment for said services was made on the sixth day of September, Nineteen hundred

and twelve, and that the said plaintiff did not deserve to receive said money for any work which he may have done in and about the construction of the said building, erected on the said lands and premises, and that his incompetence and negligence has cost the defendant so much more than said amount; that said plaintiff should be made to repay said money and much greater sum, to the said defendant; that the incompetence and negligence of the said plaintiff in and about the construction of the said building and attending to the business of the said defendant, connected therewith, and coming within the scope of the employment of the said plaintiff, has amounted to more than the sum of Thirty thousand ($30,000) Dollars, and that the said defendant is entitled to recover from said plaintiff, more than Thirty thousand ($30,000) Dollars damages, by way of counterclaim.

Deponent further says that the matters above stated constitute good and sufficient defense of the said defendant to the claim or claims of said plaintiff, as the said defendant has been advised, and she therefore prays that said judgment by default may be opened, vacated and set aside, and that said defendant may be permitted to file an answer in counterclaim in the above-entitled cause and proceed to trial thereof, inasmuch as the said judgment by default was obtained and entered without the knowledge of the said defendant and that without any fault on her part, and without her having had any day in court to present her defense to the plaintiff's alleged cause of action.

LEONIDAS L. MIAL.

Sworn and subscribed before me this
thirtieth day of March, A. D., 1915.

CLIFFORD STEPHENSON,
Attorney at Law
of New Jersey.

Endorsement.

HUDSON COUNTY CIRCUIT COURT.

FERDINAND H. KOENIGSBERGER,
Plaintiff,

vs.

KATE A. MIAL and ROBERT D. FOOTE,
Defendants.

ON CONTRACT.

AFFIDAVITS SUPPORTING MOTION TO OPEN JUDGMENT.

S. A. BESSON,
Attorney.

Filed, March 30, 1915.

LUTHER A. CAMPBELL,
Judge.

Rule to Show Cause Why Judgment by Default Should Not Be Set Aside.

Filed March 31, 1915.

It appearing that judgment by default in the above entitled cause was entered in favor of the plaintiff against the defendants in vacation and prior to the December term of this Court, next ensuing after the defendant's default in pleading, and it further appearing to the Court by the affidavits read that the defendants have a just and legal defense to the said action on the merits of the case upon filing the said affidavits with the Clerk of this Court.

It is ordered that the said plaintiff Ferdinand H. Koenigsberger show cause before this Court on the tenth day of April next, at ten o'clock in the forenoon, at the Court House in the City of Jersey City, why the judgment by default which has been entered in this cause should not be opened, vacated and set aside and the said defendants allowed to file their answers and counterclaims and defend the said action; and why the execution in this cause on the 27th day of November, 1914, recorded in Liber 22 of Executions on Contract in the office of the Clerk of the County of Hudson on page 336, should not be stayed until the further order of this Court.

And it is further ordered that either party have leave to take affidavits to be used on the argument of this rule on four days' notice.

And it is further ordered that in the meantime all proceedings of advertisement and sale on the execution issued and directed to the Sheriff of the County of Hudson be stayed, until further order of this Court.

Dated, March 30, A. D. 1915.

LUTHER A. CAMPBELL,
Judge.

On motion of
SAMUEL A. BESSON,
Attorney for Defendants.

Notice of Motion to Vacate Interlocutory Judgment by Default and Judgment Final by Default.

Filed July 17, 1915.

To John Warren,
1 Exchange Place.
Jersey City, N. J.
and to
William Theodore Von der Lippe,
Attorney for Plaintiff,
790 Broad Street,
Newark, N. J.

Sir:

Take notice that on the thirtieth day of July, nineteen hundred and fifteen, at the court house in the City of Jersey City, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, I shall move before the Honorable Luther A. Campbell, Circuit Court Judge, for an order to vacate the interlocutory judgment by default heretofore entered in the above entitled cause and judgment final by default in said cause for the following named reasons:

(1) Because the judgment interlocutory and the judgment final entered by default in this cause were both prematurely and improvidently entered.

(2) Because the judgment interlocutory and the judgment final entered by default in this cause are nullities.

(3) Because the regular order of pleading in this cause had been interrupted by the striking out of the original complaint by the filing of the

amended complaint and the defendants had not been ruled to plead.

(4) Because there was a motion pending before the Court at the time of the entry of the judgment interlocutory and the judgment final, and said motion had not been disposed of.

Respectfully yours,

SAMUEL A. BESSON,
Attorney for Kate A. Mial, individually and as Executrix of the Last Will and Testament of Henry H. Hankins, deceased, Builders and Owners, and Leonidas L. Mial, defendants.

Conclusions.

Filed Jan. 25, 1916.

WM. THEO. VON DER LIPPE, ESQ., Attorney for Plaintiff. Messrs. Roe, Runyon & Autenrieth, of Counsel, and

HARLAN BESSON, ESQ., Attorney of Defendants.

CAMPBELL, *J.:*

Finding no irregularity in the proceedings prior to and upon the entry of the judgment in question, as far as the same may have been challenged by the notice of this motion, the motion to vacate the judgments interlocutory and final is denied with costs.

Dated, January 21, 1916.

LUTHER A. CAMPBELL,
Judge.

Judgment.

Order Denying Motion to Vacate Judgments, Interlocutory and Final.

Filed Feb. 1, 1916.

This matter coming on to be heard on motion of Harlan Besson, attorney for defendant, to set aside the judgments interlocutory and final in this cause, and the argument of counsel for the respective parties hereto being heard, and it appearing that the defendant has not shown good cause for the opening of said judgment, it is on this 28th day of January, 1916,

ORDERED, that the motion to vacate the judgments interlocutory and final heretofore entered in this cause, be and the same is denied with costs of the plaintiff to be taxed, at ($10) dollars.

LUTHER A. CAMPBELL,
Judge.

Notice of Appeal.

Filed February 4th, 1916.

HUDSON COUNTY CIRCUIT COURT.

FERDINAND H. KOENIGSBERGER, Plaintiff-Respondent, vs. KATE A. MIAL, individually and as Executrix of the Last Will and Testament of Henry H. Hankins, deceased, Builders and Owners; and ROBERT D. FOOTE, Mortgagee, Defendant-Appellant.	On Appeal to Supreme Court.

To:

WILLIAM THEODORE VON DER LIPPE,
Attorney for Plaintiff.

Sir:

TAKE NOTICE that the defendant Kate A. Mial, both individually and as executrix of the last will and testament of Henry H. Hankins, deceased, builders and owners, appeals to the New Jersey Supreme Court from the whole of the judgment entered in this cause on the following grounds:

1. Because the judgment interlocutory and the judgment final entered by default in this cause were both prematurely and improvidently entered.

2. Because the judgment interlocutory and the judgment final entered by default in this cause are nullities.

3. Because the regular order of pleading in this cause had been interrupted by the striking out of the original complaint by the filing of the amended complaint and the defendants had not been ruled to plead.

4. Because there was a motion pending before the Court at the time of the entry of the judgment interlocutory and the judgment final, and said motion had not been disposed of.

SAMUEL A. BESSON,
Attorney for Kate A. Mial, individually and as Executrix of the Last Will and Testament of Henry H. Hankins, deceased.

Indorsement on Notice of Appeal.

HUDSON COUNTY CIRCUIT COURT.

FERDINAND H. KOENIGSBERGER,
Plaintiff-Respondent,

vs.

KATE MIAL, individually and as Executrix of the Last Will and Testament of Henry H. Hankins, deceased, Builders and Owners; and ROBERT D. FOOTE, Mortgagee,
Defendant-Appellant.

ON APPEAL TO SUPREME COURT.

NOTICE OF APPEAL.

SAMUEL A. BESSON,
Attorney for Defendant-Appellant,
84 Washington Street,
Hoboken, N. J.

Service of the within notice of appeal is hereby admitted this first day of Feburary, A. D., 1916.

WM. THEO. VON DER LIPPE,
Attorney for Plaintiff.

Filed Clerk's Office, Feb. 4th, 1916.
Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

Return.

The answer of Luther A. Campbell, 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 Justices of our Supreme Court of Judicature at Trenton, N. J., at the day and year within contained, in a certain schedule to this appeal annexed as within I am commanded.

LUTHER A. CAMPBELL,
Judge.

Affidavit to Obtain Certification of Facts.

Filed Feb. 24, 1916.

NEW JERSEY SUPREME COURT.

FERDINAND H. KOENIGSBERGER, Plaintiff-Respondent, vs. KATE A. MIAL, individually and as Executrix of the Last Will and Testament of Henry H. Hankins, deceased, Builders and Owners, Defendant-Appellant.	On Appeal. Affidavit.

STATE OF NEW JERSEY, County of Hudson, } ss.:

Samuel A. Besson, of full age, being duly sworn according to law upon his oath deposes and says:

Affidavit of Samuel A. Besson.

1. That he is an attorney and counsellor at law of the State of New Jersey, and is the attorney of the defendant-appellant in the above named cause.

2. That on April 15th, 1914, an amended summons and complaint in said cause was served on deponent as the attorney of the said Kate A. Mial and that thereafter a notice of motion to strike out said summons and complaint, a copy of which is annexed hereto and marked "Appendix A" was served upon William Theodore von der Lippe, the attorney of the plaintiff herein, on May 5, 1914, which said motion was returnable on the 8th day of May, 1914, before the Hon. Luther A. Campbell, Judge of the Hudson County Circuit Court, at the Court House in Jersey City as therein more fully appears.

3. That the hearing of the questions of law arising upon the said motion was contained from May 8, 1914, until May 15, the next following, when, according to the best of deponent's memory and belief, the said motion was actually argued.

4. That the notice of motion was never filed and deponent has the original notice with proof of service thereon in his possession.

5. That on June 19, 1914, the Hon. Luther A. Campbell, Judge of the Hudson County Circuit Court determined the questions of law arising on said motion which had been argued previously by the said William Theodore von der Lippe,

attorney for plaintiff and the said deponent, as attorney for the said Kate A. Mial, and an opinion was sent to the deponent signed by the said Hon. Luther A. Campbell, as Judge as aforesaid, granting the said motion, a copy of this opinion being annexed hereto and made part hereof and for better identification marked "Appendix B."

6. That no order was ever filed or entered in conformity with the conclusions of the Court and there were no further steps ever taken in said cause by the deponent and his adversary until November 17th, 1914, when a judgment interlocutory by default was entered on behalf of the plaintiff.

7. That the record as returned into this Court by the Hudson County Circuit Court on the appeal in this matter fails to show that any motion was argued to strike out the amended summons and complaint, or that any opinion was filed by Hon. Luther A. Campbell, as aforesaid, and that it is important that the return of the Hudson County Circuit Court, should show that such a motion was actually argued before the said Court and by the respective counsel for the plaintiff and defendant, and that said motion was actually determined by an opinion of the said Hon. Luther A. Campbell, as Judge as aforesaid.

8. That deponent therefore respectfully prays that an order issue of this Honorable Court requiring the said Hon. Luther A. Campbell, as Judge of the Hudson County Circuit Court to

certify and return to this Court, whether or not such motion as has been described in this affidavit was actually argued before him, and whether or not said motion was determined by him as set forth in the opinion marked "Appendix B" and whether or not any order pursuant to the said notice was ever filed in the said Court, and whether or not the said motion was not still pending before the Hudson County Circuit Court at the time the plaintiff's attorney, or some one acting on his behalf, entered interlocutory judgment and judgment final for the plaintiff.

SAMUEL A. BESSON.

Subscribed and sworn to before me this
23rd day of February, A. D. 1916.

JOHN B. ROSSER,
Notary Public
of New Jersey.

"Appendix A."

HUDSON COUNTY CIRCUIT COURT.

FREDERICK H. KOENIGSBERGER, Plaintiff, vs. KATE A. MIAL, individually and as Executrix of the Last Will and Testament of Henry H. Hankins, deceased, Builders and Owners; and ROBERT D. FOOTE, Mortgagee, Defendants.	Action on Mechanic's Lien. Notice of Motion to Strike Out, etc.

To:

WILLIAM THEODORE VON DER LIPPE, Esq.,
671 Broad Street,
Newark, N. J.

Sir:

TAKE NOTICE, that on the eighth day of May, A. D. Nineteen hundred and fourteen, before the Honorable Luther A. Campbell, Judge of the Hudson County Circuit Court, at the Court House in Jersey City at ten o'clock in the forenoon or as soon thereafter as counsel can be heard I shall move to strike out of the summons heretofore issued by you in the above entitled action and out of the complaint heretofore filed by you in the above entitled action the words "Individually and as Executrix of Henry H. Hankins, deceased," in the twenty-sixth and twenty-seventh lines of the second page of said complaint, and the words "and estate of Henry H. Hankins, deceased," in the twenty-fourth and twenty-fifth lines of the third page of said complaint, and the words "Individually and as Exec-

utrix of Henry H. Hankins, deceased," in the twenty-ninth and thirtieth lines of the third page of said complaint, and the words "Individually and as Executrix of the estate of Henry H. Hankins, deceased," in the fourth and fifth lines of the fourth page of said complaint for the following reasons:

1. Because said complaint does not contain any allegation showing that said Leonidas L. Mial had any legal authority to contract for and bind the estate of Henry H. Hankins, deceased.

2. Because the complaint does not contain any allegation showing that the Executrix has authority to create debts against the estate of Henry H. Hankins, deceased.

3. Because said complaint does not contain any allegation showing any authority of the Executrix to bind the estate by her contracts.

4. Because said complaint does not contain any allegation showing that said Executrix has any authority to create a lien on the lands of the estate.

5. Because said complaint does not contain any allegation showing that the alleged contract or agreement upon which the action is brought or some memorandum or note thereof is in writing signed by the party to be charged therewith, that is, by the said Executrix or some other person thereunto by her lawfully authorized.

6. Because the copy of the agreement sued on, set forth in the said complaint does not show that the said Leonidas L. Mial was authorized to sign the contract for the estate of Henry H. Hankins, deceased, and because the said com-

plaint contains no allegation which shows that the said Leonidas L. Mial was authorized to sign said contract for the estate of Henry H. Hankins, deceased.

Respectfully yours,

S. A. Besson,
Attorney for Defendant,

Kate A. Mial,
Executrix of Henry H. Hankins,
deceased.

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

John L. Kershaw, being duly sworn according to law, on his oath says that on Tuesday, the fifth day of May in the year nineteen hundred and fourteen, between the hours of nine o'clock in the forenoon and four o'clock in the afternoon he served the within notice of motion upon William Theodore Von Der Lippe, the attorney for the plaintiff in the above entitled cause by delivering a duplicate original copy thereof to Frederick H. Koenigsberger, the plaintiff in said cause, at the office of said Theodore Von Der Lippe at No. 671 Broad Street, in the City of Newark, New Jersey, said Frederick H. Koenigsberger, being the person in charge of said office and said Theodore Von Der Lippe being then absent from his said office and deponent left said notice with said Frederick H. Koenigsberger.

John L. Kershaw.

Sworn and subscribed to before
me this 5th day of May, 1914.

Clifford Stephenson,
Attorney at Law
of New Jersey.

(Endorsed.)

HUDSON COUNTY CIRCUIT COURT.

FREDERICK H. KOENIGSBERGER,
Plaintiff,

vs.

KATE A. MIAL, individually and as Executrix of the Last Will and Testament of Henry A. Hankins, deceased, Builders and Owners; and ROBERT D. FOOTE, Mortgagee,
Defendants.

ACTION ON MECHANIC'S LIEN NOTICE OF MOTION TO STRIKE OUT, &C.

S. A. BESSON,
Atty. for Defendant,
Kate A. Mial, Executrix of
Henry H. Hankins, dec'd.

Service of the within notice of motion is hereby acknowledged this 5th day of May, A. D. 1914.

"Appendix B."

HUDSON COUNTY CIRCUIT COURT.

FERDINAND H. KOENIGSBERGER, vs. KATE A. MIAL, *et als.*, Defendants.	On Lien Claim. Motion to Strike Out.

WM. T. VON DER LIPPE, Esq., for plaintiff.
S. A. BESSON, Esq., for defendant.

The motion to strike out is granted in the manner and to the extent set forth in the notice to strike out and for the reasons therein urged.

LUTHER A. CAMPBELL,
Judge

Dated June 19, 1914.

Rule for Certification of Facts.

Filed Feb. 24, 1916.

NEW JERSEY SUPREME COURT.

FERDINAND H. KOENIGSBERGER, Plaintiff-Respondent vs. KATE A. MIAL, individually and as Executrix of the Last Will and Testament of Henry H. Hankins deceased, Builders and Owners Defendant-Appellant	On Appeal.

To the HON. LUTHER A. CAMPBELL,

As Judge of the Hudson County Circuit Court:

It appearing from the affidavit of Samuel A. Besson, that a motion was argued to strike out the amended summons and complaint heretofore filed in this cause before you sitting as a judge of the Hudson County Circuit Court on May 15, 1914, and that said motion was determined by you by an opinion in writing, a copy of which was annexed to said affidavit and that no order was ever entered or filed, pursuant to the terms of the opinion filed by you determining said motion, and that said motion remained undisposed of on November 17, 1914, when, as by the record returned in this cause it appears, that judgment interlocutory by default was entered by the plaintiff, and on November 19, 1914, when judgment final by default was entered on behalf of plaintiff.

Rule for Certification of Facts.

You are hereby commanded to certify and send to our Supreme Court at Trenton, together with this order, on Tuesday, March 14, 1916, the following matters and things:

1. Whether or not a motion was argued before you on May 15, 1914, to strike out the amended summons and complaint filed in said cause.

2. Whether or not the copy of a notice of motion annexed to the affidavit of the said Samuel A. Besson, heretofore mentioned is a true copy of the notice of motion to strike out said amended summons and complaint in manner and form as said motion was argued before you.

3. Whether or not the opinion annexed to the affidavit of the said Samuel A. Besson, and marked "Appendix B" is a true copy of the opinion rendered by you determining the questions arising on the said motion.

4. Whether or not any order was ever filed in the Hudson County Circuit Court disposing of the said motion to strike out the said amended summons and complaint.

5. Whether or not the said motion to strike out the said amended summons and complaint was pending and undisposed of on November 17, 1914, when, as by the record returned in this cause it appears, that judgment interlocutory by default was entered against the defendants.

6. Whether or not the said motion to strike out the said amended summons and complaint was pending and undisposed of on November 19,

1914, when, as by the record returned in this cause it appears, that judgment final by default was entered against the defendants.

Let this rule be entered February 23, 1916.

F. J. SWAYZE,
J.

On motion of
SAMUEL A. BESSON,
Attorney for Defendant-Appellant.

Supplemental Return.

Filed March 13, 1916.

NEW JERSEY SUPREME COURT.

FERDINAND H. KOENIGSBERGER, Plaintiff-Respondent, vs. KATE A. MIAL, individually and as Executrix of the Last Will and Testament of Henry H. Hankins, deceased, Builders and Owners, Defendant-Appellant.	On Appeal. Certification of Facts Pursuant to a Rule.

I, LUTHER A. CAMPBELL, a Judge of the Hudson County Circuit Court, in obedience to and in conformity with an order of the Supreme Court of Judicature of the State of New Jersey, dated February 23, 1916, a true copy of which is hereto annexed, do hereby certify and send

together with the order hereto annexed, the following matters and things:

1. That a motion was argued before me as Judge of the Hudson County Circuit Court on May 15, 1914, to strike out the amended summons and complaint filed in this cause.

2. That the following is a true copy of the notice of motion to strike out the said amended summons and complaint in manner and form as said motion was argued before me, the same being the copy of a notice of motion annexed to the affidavit of Samuel A. Besson, a true copy of which is annexed to this return:

HUDSON COUNTY CIRCUIT COURT.

FREDERICK H. KOENIGSBERGER, Plaintiff, vs. KATE MIAL, individually and as Executrix of the Last Will and Testament of Henry H. Hankins, deceased, Builders and Owners; and ROBERT D. FOOTE, Mortgagee, Defendants.	Action on Mechanic's Lien. Notice of Motion to Strike Out, &c.

To:

WILLIAM THEODORE VON DER LIPPE, Esq.,
671 Broad Street,
Newark, N. J.

Sir:

Take notice, that on the eighth day of May, A. D. Nineteen hundred and fourteen, before

the Honorable Luther A. Campbell, Judge of the Hudson County Circuit Court, at the Court House, in Jersey City, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard I shall move to strike out of the summons heretofore issued by you in the above-entitled action and out of the complaint heretofore filed by you in the above-entitled action the words "Individually and as Executrix of Henry H. Hankins, deceased," in the twenty-sixth and twenty-seventh lines of the second page of said complaint, and the words "and estate of Henry H. Hankins, deceased," in the twenty-fourth and twenty-fifth lines of the third page of said complaint, and the words "Individually and as Executrix of Henry H. Hankins, deceased," in the twenty-ninth and thirtieth lines of the third page of said complaint, and the words "Individually and as Executrix of the estate of Henry H. Hankins, deceased," in the forth and fifth lines of the fourth page of said complaint for the following reasons:

1. Because said complaint does not contain any allegation showing that said Leonidas L. Mial had any legal authority to contract for and bind the estate of Henry H. Hankins, deceased.

2. Because the complaint does not contain any allegation showing that the Executrix has authority to create debts against the estate of Henry H. Hankins, deceased.

3. Because said complaint does not contain any allegation showing any authority of the Executrix to bind the estate by her contracts.

Supplemental Return.

4. Because said complaint does not contain any allegation showing that said Executrix has any authority to create a lien on the lands of the estate.

5. Because said complaint does not contain any allegation showing that the alleged contract or agreement upon which the action is brought or some memorandum or note thereof is in writing signed by the party to be charged therewith, that is, by the said Executrix or some other person thereunto by her lawfully authorized.

6. Because the copy of the agreement sued on, set forth in the said complaint does not show that the said Leonidas L. Mial was authorized to sign the contract for the estate of Henry H. Hankins, deceased, and because the said complaint contains no allegation which shows that the said Leonidas L. Mial was authorized to sign said contract for the estate of Henry H. Hankins, deceased.

Respectfully yours,

S. A. Besson,
Attorney for Defendant
Kate A. Mial, Executrix of
Henry H. Hankins, deceased.

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

John L. Kershaw, being duly sworn, according to law, on his oath, says: That on Tuesday, the fifth day of May, in the year Nineteen hundred and fourteen, between the hours of nine

o'clock in the forenoon and four o'clock in the afternoon, he served the within notice of motion upon William Theodore Von Der Lippe, the atttorney for the plaintiff in the above-entitled cause by delivering a duplicate original copy thereof to Frederick H. Koenigsberger, the plaintiff in said cause, at the office of said Theodore Von Der Lippe, at No. 671 Broad Street, in the City of Newark, New Jersey, said Frederick H. Koenigsberger, being the person in charge of said office and said Theodore Von Der Lippe being then absent from his said office, and deponent left said notice with said Frederick H. Koenigsberger.

JOHN L. KERSHAW.

Sworn and subscribed to before me
this 5th day of May, 1914.

CLIFFORD STEPHENSON,
Attorney at law of
New Jersey.

[Endorsed:]—Hudson County Circuit Court—Frederick H. Koenigsberger, Plaintiff, vs. Kate A. Mial, individually and as Executrix of the last will and testament of Henry H. Hankins, deceased, Builders and Owners, and Robert D. Foote, Mortgagee, Defendants.—Action on Mechanic's Lien, Notice of Motion to Strike Out, &c.

S. A. BESSON,
Atty. for Defendant,
Kate A. Mial, Executrix of
Henry H. Hankins, dec'd.

Service of the within notice of Motion is hereby acknowledged this 5th day of May, A. D. 1914.

Supplemental Return.

3. That the following is a true copy of the finding made or conclusion reached by me determining the questions arising on the motion to strike out said amended summons and complaint, and said finding or conclusion is the same as the copy of the finding or conclusion annexed to the affidavit of the said affidavit of Samuel A. Besson.

HUDSON COUNTY CIRCUIT COURT.

FERDINAND H. KOENIGSBERGER, vs. KATE A. MIAL, *et als.*, Defendants.	On Lien Claim. Motion to Strike Out.

WM. T. VON DER LIPPE, Esq., for Plaintiff.
S. A. BESSON, Esq., for Defendant.

The motion to strike out is granted, in the manner and to the extent set forth in the notice to strike out and for the reasons therein urged.

LUTHER A. CAMPBELL,
Judge.

Dated June 19, 1914.

4. No order was ever filed in the Hudson County Circuit Court disposing of said motion to strike out the said amended summons and complaint filed in this cause, so far as the records in said office show or disclose.

Supplemental Return.

5. That said motion to strike out the said amended summons and complaint was pending and undisposed of on November 17, 1914, when, as by the record returned in this cause it appears that judgment interlocutory by default was entered against the defendants, except as the same was disposed of by the finding or conclusion of June 19, 1914, aforesaid, which in duplicate was signed by me and forwarded to Wm. T. von der Lippe, attorney for the plaintiff, and Samuel A. Besson, Esq., attorney for defendant, Kate A. Mial, Executrix.

6. That said motion to strike out the said amended summons and complaint was pending and undisposed of on November 19, 1914, when, as by the record returned in this cause, it appeared that judgment final by default was entered against the defendants, except as set forth in paragraphs 3 and 5 hereof.

LUTHER A. CAMPBELL,
Judge of the Hudson
County Circuit Court.

Depositions.

HUDSON COUNTY CIRCUIT COURT.

FERDINAND H. KOENIGSBERGER, Plaintiff, vs. KATE A. MIAL and ROBERT D. FOOTE, Defendants.	On Contract

Depositions and examination of witnesses taken before Joseph S. Parry, Esquire, Supreme Court Commissioner, at his office, No. 84 Washington Street, Hoboken, New Jersey, on Tuesday the thirteenth day of April, A. D. one thousand nine hundred and fifteen, at ten o'clock in the forenoon of said day, in the presence of John Warren, Esquire, attorney for Ferdinand H. Koenigsberger, plaintiff, and Samuel A. Besson, Esquire, attorney for defendants; and further depositions taken on Thursday, the 15th day of April, 1915, in the presence of William Theodore von der Lippe, attorney for Ferdinand H. Koenigsberger, plaintiff, and Samuel A. Besson, attorney for defendants.

I hereby certify that the following is a true transcript of said depositions and examination of witnesses taken before me and exhibits offered in evidence.

JOSEPH S. PARRY,
Supreme Court Commissioner.

HUDSON COUNTY CIRCUIT COURT.

FERDINAND H. KOENIGSBERGER, Plaintiff, vs. KATE A. MIAL and ROBERT D. FOOTE, Defendants.	On Contract Depositions.

Depositions and examination of witnesses taken before Joseph S. Parry, Esquire, Supreme Court Commissioner, at his office, No. 84 Washington Street, Hoboken, New Jersey, on Tuesday the thirteenth day of April, A. D. one thousand nine hundred and fifteen, at ten o'clock in the forenoon of said day, in the presence of John Warren, Esquire, attorney for Ferdinand H. Koenigsberger, plaintiff, and Samuel A. Besson, Esquire, attorney for defendants.

I hereby certify that the foregoing is a true transcript of said depositions and examination of witnesses taken before me and exhibits offered in evidence.

JOSEPH S. PARRY,
Supreme Court Commissioner.

LEONIDAS L. MIAL, a witness produced on the part of the defendants, being duly sworn according to law and being examined by Mr. Besson, deposes and says:

Q. Do you know Kate A. Mial, the defendant? A. I do.

Q. What relation is she to you? A. She is my wife.

Q. Have you acted as her agent? A. Yes.

Q. During what period of time and in what matter did you act as her agent? A. From about July 1st, somewhere along there, in 1912, until the 30th of October, I think it was 1912, when I was appointed attorney-in-fact to look after the completion of this building.

Q. That was 1913? A. No, it was 1912.

Q. Then the year stated in your affidavit was a mistake of the typewriter or somebody? A. Yes.

Q. Concerning what matter did you ast as your wife's attorney-in-fact and agent? A. In the matter of erecting the building on the northwest corner of Sixth and Washington Streets, Hoboken.

Q. In that matter, did you meet the plaintiff, Ferdinand H. Koenigsberger? A. Yes.

Q. What did you employ Mr. Koenigsberger to do? A. Draw plans and make specifications and supervise the actual work and the construction of the building.

Q. How did he perform this work? A. In the first place he was instructed to file our plans and specifications. He filed the plans and did not file the specifications. He always told me that he had filed the specifications and when Sonntag Company were put off the job we found in going to the Court House that the specifications had not been filed. In the above, I mean contract and specifications, not plans.

Q. Were any plans filed by him? A. Plans were not filed and the specifications were not filed. Only the contract.

Q. How did he perform the work of preparing the plans and specifications, if you know? How did he perform the work of preparing the plans? A. So far as I know, at first the plans and specifications seemed to be all right, but as we got along doing the work we found so many discrepancies and contradictions in the specifications that it resulted in the loss of a great deal of money.

Q. Do you remember any particular mistake that developed after the building had been pretty well gotten up toward the point where the roof was to go on? A. He discovered that the building was 13 inches lower than the plans called for. As architect, he should have known at the time that that work was being done, that it might be corrected. When he discovered it, it was too late. That necessitated digging out the theatre part that had been rented before the building was put up, as under a lease calling for certain space, certain height and the tenant discovered that this was too low and that he was not going to get the space we had agreed to give him and it was necessary then to dig out all the floor and remove all the work that the Sonntag Company had put in there in order to give the man the room we had agreed to give him.

Q. Had you made a lease to some person of that part of the building before the construction of the building was commenced or about that time? A. We had. We made this lease from Mr. Koenigsberger's plans.

Q. What use was that part of the building to be put to by the tenant? A. Moving picture place.

Q. What have you to say about his arrangement for sewerage and drainage of the building in connection with his plans and specifications?

(Objected to by Mr. Warren as he is not qualified as an expert.)

A. He allowed the plumber to change the plans completely from the plumbing system in the plans. He did not force the plumber to supply separate set of plans showing, as the Board of Health Regulations of the City of Hoboken call for, just how that plumbing was put in and the specifications were so indefinite as to the connection from the building to the street that it allowed the sewer to connect with a private drain in Sixth Street instead of going to Washington Street. The Sixth Street sewer was entirely incompetent to carry off the drainage and the plumber knew about this and so did Mr. Koenigsberger. It necessitated our going there after any rain and the toilets were all flooded and it necessitated our changing the sewer to Washington Street at a great expense of $700 to $800.

(Judge Warrent wishes such part of the answer as refers to the ordinance of the City of Hoboken struck out.)

Q. Did the contractor Sonntag Company finish this building? A. No.

Q. Why not? A. On account of their poor workmanship, absolute incompetence and failure to pay their bills and trouble within their own company, they separated. Secretary had one office and president had another and it was practically impossible to do any business with them.

Q. The president and secretary were quarreling, is that what you mean? A. Superficially, outwards towards me they were quarreling.

Q. What time did they quit work on the building? A. I think it was November 5, 1912. They were actually notified.

Q. Did they quit voluntarily or otherwise? A. No. They were notified to stop, by the owner.

Q. Did the architect, the plaintiff in this case, have anything to do with the selection of this contractor?

(Objected to by Mr. Warren as irrelevant, incompetent and immaterial as the selection of a contractor is not within the building of a contract.)

A. He did. He recommended this contractor.

Q. Did you or your wife have any trouble with the manner in which the building had been constructed up to that point where the contractor quit? A. The contractor was very slow in the first place and showed almost from the beginning that they were amateurish at least in handling such work. Mr. Koenigsberger thought that they could get along at it by doing the mason work and letting out all the other work under separate contracts. The main defects were shown after they took down the forms for the concrete. It showed that the mixture was very defective and it was a question whether the building was safe enough.

Q. And you had to employ other architects and engineers to test it?

(Objected to by Mr. Warren as incompetent, irrelevant and immaterial and as leading. Also calls for a conclusion.)

A. I did.

Q. What was the result of the failure of the plaintiff to file the specifications with the contract? A. It turned out in the end, after we put Sonntag Company off the job, we discovered that they had not paid one cent for any material that had been furnished to that building and, of course, when these men found that the specifications had not been filed they immediately put liens on it. After trials in court, the cases were decided against us, and we had to pay this extra money after having paid Sonntag Company.

Q. How much altogether did that cost you, how much loss did that occasion your wife? A. The original contract for the building was $26,402, I think, and the total cost was something over $50,000.

Q. So that that occasioned a loss to your wife of the difference between $50,000 and $26,402?

(Objected to by Mr. Warren on the ground that it is leading.)

A. Well, then I'll answer the original question between $25,000 and $30,000.

Q. Did you discharge the plaintiff?

(Objected to by Mr. Warren on the ground that it is leading.)

A. I did.

Q. Do you remember when? A. I think it was February 20, 1913.

Q. Did he perform any extra services about the construction of the building? A. No.

Q. Was he to receive any pay for what he did after February 20, 1913? A. I told him on that

date that I did not intend to pay him any further. We had a contract, a little slip of paper in which a definite sum was agreed upon for Mr. Koenigsberger's total services in connection with the erection of that building.

(Mr. Besson shows witness paper.)

Q. I show you a paper. Do you recognize that paper? A. Yes, sir.

Q. That is the copy of the summons and complaint that was served on your wife and you? A. It is.

Q. Just look over that second paragraph in the paper marked second, does that second paragraph which I showed you contain a true copy of the agreement for the compensation of the plaintiff in this case? A. It does.

(Defendant offers in evidence a copy of the summons and complaint filed in the above entitled cause of action. Same is admitted in evidence and marked Exhibit D-1 on part of the defendants.)

Q. Does the defendant Mrs. Mial owe the plaintiff Mr. Koenigsberger anything to-day?

(Objected to by Mr. Warren on the ground that it calls for a conclusion of law and fact.)

A. There is a difference in the amount paid and the amount agreed to be paid under contract of $653 I think, something like that.

Q. Just explain that? A. Well, we have paid him—(witness refers to memorandum book).

(Mr. Warren objects to witness testifying from any memorandum that he has

unless he is first privileged to cross-examine him as to the memorandum and the time it was made.)

A. We have paid Mr. Koenigsberger $1455 and we agreed to pay him $2070 should he faithfully carry out his contract but he didn't and therefore we refused to pay him and put him off the job. All he can possibly claim is the difference between those two figures because he did absolutely no extra work.

Q. You have already stated about the damage he did? A. Yes.

Q. Does your wife owe him anything today?

(Objected to by Mr. Warren because it calls for a conclusion of law and fact.)

A. No.

Q. Do those matters that you have stated constitute your wife's defense to this action of Mr. Koenigsberger? A. They do, that is, in the main.

MR. LEONIDAS L. MIAL, being cross examined by Mr. Warren, deposes and says:

Q. In the matter of the erection of the building at Washington and Sixth Streets, you had complete authority to represent your wife, did you not? A. I was acting as her agent, taking charge of whatever there was to be done.

Q. Whatever you did you had authority to do as her agent? A. Not in every instance, little things that I did and I did not ask her authority.

Q. Have the things which you did where you were not authorized to do been subsequently

ratified by your wife? A. Some have and some have not.

Q. What ones have not? A. I do not know. You have to specify.

Q. You cannot answer? A. I cannot answer.

Q. Has your wife any knowledge of the situation in respect to the claim of Mr. Koenigsberger other than what she has obtained from you? A. She may have, I don't know.

Q. As to your knowledge, do you know whether she has or not? A. No, I don't.

Q. Have you the original contract between Mr. Koenigsberger and your wife in your possession? A. Not at present. Mr. Besson has it among his papers.

Q. Will you produce it, Mr. Besson?

Mr. Besson: It is in Newark.

Q. Where is it? A. I delivered it to Mr. Besson. I don't know what he has done with it.

Q. Do you know whether it is in the office of Burnett & Cornish? A. I don't know.

Q. Burnett & Cornish represent your wife, do they not? A. My wife hasn't had anything to do with Burnett & Cornish.

Q. You as her agent have? A. My wife doesn't know what has taken place between Burnett & Cornish and myself.

Q. As agent for your wife you engaged Burnett & Cornish to represent your wife? A. I say that I engaged Burnett & Cornish myself.

Q. To do legal work for your wife? A. To do legal work on this case, yes.

Q. You acted as the agent for your wife? A. I did not consider that I was acting as her agent when I engaged Burnett & Cornish.

Q. For whom were you acting? A. For myself.

Q. Are you personally interested in that building, are you going to pay that bill? A. I will not answer that unless the judge makes me answer. I refuse to answer.

Q. Was the $250 that you gave Burnett & Cornish your own money or your wife's money? A. I refuse to answer that.

Q. When you sent $250 to Burnett & Cornish of Newark were you acting as agent for your wife or for yourself?

(Objected to by Mr. Besson as there is no testimony that he has paid Burnett & Cornish anything.)

A. I refuse to answer.

Q. You did pay Burnett & Cornish $250, did you not?

(Objected to by Mr. Besson as it is not part of the cross-examination.)

A. I refuse to answer under advice of counsel.

Q. Burnett & Cornish were engaged to represent your wife in the matter of the Sonntag claim, were they not? A. Yes.

(Objected to by Mr. Besson as no cross-examination.)

Counsel advises witness not to answer. Witness refuses to answer.

Q. Why did you pay Burnett & Cornish $250 if you did.

(Objected to by Mr. Besson, not cross-examination.)

Witness refuses to answer under advice of counsel.

Q. Have you any letters from Burnett & Cornish in reference to the claim of Mr. Koenigsberger against your wife? A. I do not think that Burnett & Cornish have ever written any letters to me.

Q. Did you ever see any letters written by them whether it was written to you, your wife or Mr. Besson? A. I haven't testified to anything of that sort. What shall I do, Mr. Besson?

Mr. Besson: Don't answer, it is not cross-examination.

Witness refuses to answer under advice of counsel.

Q. What is your profession? A. Physician.

Q. Ever study architecture? A. No.

Q. Ever study— A. I remember a little course in college now.

Q. How long did you study architecture in college? A. The ordinary course in college education.

Q. How long did you study architecture in college? A. I don't know.

Q. So long back that you cannot remember? A. Before 1881, pretty long time. That is when I graduated.

Q. Did you take a regular course in architecture? A. No. I don't remember what it was. I had books and made a few drawings. Was sent out to make a sketch of a few houses.

Q. Was that a course in architecture? A. Course in surveying.

Q. Was that a course in styles of architecture or course in practical buildings? A. Roofs, sections, elevations and a lot of things, it is all coming back to me now.

Q. Were you ever engaged in a contracting business? A. No.

Q. How many buildings have you built in the course of your life time? A. I didn't build any buildings. None.

Q. Does the contract set forth on page 2 and 3 of Exhibit D-1 the entire contract between the plaintiff, Ferdinand H. Koenigsberger, and the defendant in this suit? A. That was all the contract we had in writing.

Q. I ask you for an answer to my question? A. That was all the written contract that we had with Mr. Koenigsberger.

Q. Answer yes or no? A. I cannot answer it that way because there were certain understandings between Koenigsberger and myself that were just as much part of the contract as that written contract.

Q. Before or after the contract was signed? A. Before.

Q. When was work commenced upon the building? A. I think about July 10th, 1912. I am not sure.

Q. Were you there every day, doctor? A. Nearly every day. Some days I wasn't there.

Q. Did you have authority on behalf of the estate of H. H. Henkins to sign that contract?

A. I was acting as agent to my wife and that was all the authority I had.

Q. Your wife is the Executrix of the estate of H. H. Henkins? A. That was a mistake because we did not know any better. She had no right to make such contract and we changed it then to her own name.

Q. Was your wife Executrix of the Estate of H. H. Henkins at that time? A. Yes.

Q. You acted for her and also for her as Executrix? A. I acted for her. I made a mistake in putting it down as Executrix.

Q. Is your testimony as to any negligence, incompetence of Mr. Koenigsberger based upon your own knowledge or from what others have told you? A. Based upon my own knowledge to a certain extent and also upon certain expert opinions and examinations I had made of that structure when the Sonntag people had been put off the job.

Q. From whom did you obtain the expert opinions? A. I don't know.

Q. What portion of your testimony, doctor, is based upon the opinions which was received from others and what portion is based upon your own information? A. My own testimony is I know that Mr. Koenigsberger did not file the specifications.

Q. Did you personally examine the records of the court? A. Yes.

Q. Are you an experienced searcher? A. I went there with Mr. Besson and examined them there. I am not an experienced seacher or filer that is why I employed Mr. Koenigsberger to file them for me.

Q. Were there any witnesses to these conversations where he told you that he had filed the specifications? A. Mr. Besson heard him tell me.

Q. When and where? A. In his own office downstairs here, Mr. Besson's office.

Q. What other part of your testimony is based upon your own knowledge? A. I did not actually measure the height of that first story up there but I saw it measured by the contractor who finished the job and I saw the concrete floor removed and I saw the wooden floor over

that concrete floor removed. It had been put there by the Sonntag Company and I see no use of my going into all these details because I have to refresh my memory from my notes.

Q. Has your knowledge as to the cause of the removal of the concrete and wooden floors and the lowering of the stage come from others? A. I saw the rule or measure put up to the ceiling. When I see a tape measure I can read the figures.

Q. Does your knowledge as to the cause of the removal come from others partially? A. I said that as knowing it absolutely myself.

Q. All you know is as to the measurement of the height of that first floor? A. No. I stated that the floor had to come out on account of it.

Q. Is that from your own knowledge or information furnished by others? A. From my own knowledge and information from others.

Q. Where did you obtain your own knowledge? A. I saw it. If a man is holding a tape measure at the ceiling and I see the tape measure down at the floor I can see the figures.

Q. And that is the only knowledge that you have as to the actual measurement of that room? A. No. I actually measured the width of that room.

Q. You know as to the actual measurements of the height and width of that room. Is there anything else of your own knowledge that you know? A. There are lots but I cannot recall it just now. I don't see any use in it.

Q. You never studied plumbing, did you, doctor? A. No, except as I say physics and drafting of fireplaces and heat, ventilations, sewerage, etc., in college, just a little bit.

Q. Who completed the work? A. J. W. Bishop

Company were the general contractors of New York.

Q. Have you the Sonntag Company contract in your possession? A. No.

Q. Where is that? A. Mr. Besson has it somewhere.

Mr. Besson: It is in Newark.

Q. Will you produce it?

Q. Where was Sonntag & Co. from, where was their office at the time of this contract? A. At the Terminal Building, Hoboken.

Q. Do you know anything about the mixing of concrete? A. I have forgotten. I knew a lot about it.

Q. In 1912 and 1913 did you know? A. I learned a lot about it at that time.

Q. From others? A. From Sonntag & Co. about improperly mixing it. I can tell from the forms, walls and columns whether it was properly mixed or not.

Q. Without being informed by others? A. Yes. I think anybody could tell.

Q. What was the difference in the appearance of the concrete when the forms were removed and the difference of the concrete as it should have appeared? A. I don't suppose that I ought to attempt to answer such questions as that. When a form comes off a column and shows the loose stones that you can pick off with your knife or finger you can tell it is pretty bad.

Q. At the time the forms were removed, not referring to anything that you have learned since that time from others, can you testify what was wrong with the mixture? A. I can positively testify as to what was wrong with the mixture, some things at least.

Q. Referring to your own knowledge at the time the forms were removed? A. And knowledge obtained since. At the time that they were filling the forms with the concrete I knew that it was going to be bad.

Q. What did you see? A. I was there and saw them loading up partially set concrete and anybody knows that concrete cannot be set. I called Mr. Koenigsberger's attention to it several times.

Q. And what did Mr. Koenigsberger do? A. He swore and waved his arms about and what he said did not amount to anything.

Q. What did he say? A. That is as near as I can say. I told him he was not accomplishing anything with them.

Q. Was he swearing and raving at the Sonntag people? A. Yes, intended to be.

Q. And did he tell them that they were doing their work wrong? A. Yes, I think he did.

Q. And told them to do it properly? A. No, I doubt if he knew.

Q. You were there all the time that he was there? A. No. I visited the job sometimes twice a day and sometimes once a day and sometimes not at all.

Q. From whom did you obtain your information about the plumbing? A. Partially from my own observation there and partially from others.

Q. What did you yourself observe in reference to it? A. I thought at first that Mr. Reed, the plumber was very negligent not carrying out his contract because he did not come and get there when he was ordered to.

Q. Is that the only objection you have as to

the plumbing? A. Mr. Koenigsberger advised me to guarantee Mr. Reed's payments.

Q. Is that the only objection you have to the work of the plumber, Mr. Reed? A. No. I can amplify that in a great many ways. In the first place Mr. Reed did not connect the sewer according to the plans and specifications.

Q. From your own knowledge? A. Yes.

Q. Ever have any previous experience? Have had you any previous knowledge as to sewer connections? A. No.

Q. Did you ever see a sewer connection outside of this one? A. Yes, many, two or three, four or five or six, I don't know.

Q. Did you see this particular connection? A. No.

Q. Your information as to the manner of that connection was obtained from some one else? A. Obtained from Reed, the plumber, as to what he said he did.

Q. And of course if Mr. Reed misinformed you of course your testimony that the plumbing work was not properly done is not correct? A. If the specifications call for a properly drained building draining certain fixtures, that a sewer shall go in a certain direction and if it does not do that and it goes in some other direction and after it is put in does not properly drain you know it is not according to specifications. I see where the sewer goes because it does not drain. Now, it does drain because we have had it changed.

Q. Have you a copy of the specifications? A. Mr. Besson has them. Mr. Besson has practically all the papers.

Q. Can you get them? A. Not to-day. I could get them some time later.

Mr. Besson: They are in Newark.

Q. Have you ever had any conversation with Mr. Burnett or Mr. Cornish or any one from their office? A. Has that anything to do with this, Mr. Besson?

(Mr. Besson objects, not being cross examination.)

A. I refuse to answer on advice of counsel.

Q. Were you ever out to the office of Burnett & Cornish?

(Objected to by Mr. Besson on same grounds.)

Witness refuses to answer.

Q. Isn't it a fact that this judgment and claim of Mr. Koenigsberger has already been settled and that you have made the first payment on account? A. No.

Q. Then why did you send the $250 to Mr. Burnett?

(Objected to by Mr. Besson on the ground that it is not cross-examination.)

Witness refuses to answer.

Q. Did you and Mr. Besson ever talk concerning the settlement of Koenigsberger's claim? A. A conversation between a lawyer and myself —I don't see why I should answer that. I refuse to answer it.

Q. Did you ever arrange through Mr. Besson for the settlement of the Koenigsberger claim?

(Objected to by Mr. Besson on the ground that it is not cross-examination.)

Witness refuses to answer.

Q. Did you make any arrangement with any body in reference to the settlement of the Koenigsberger claim after the judgment was entered? A. I did not make arrangements about settling the Koenigsberger claim.

Q. Then why did you send the $250 to Burnett & Cornish?

(Objected to by Mr. Besson on grounds that it is not cross-examination.)

A. I refuse to answer that question.

Q. Didn't you and your attorneys desire to have Mr. Koenigsberger testify for the defendants in this case in the suit in which Sonntag & Co. was a party? A. I refuse to answer that question.

Q. In order to further desire to have Mr. Koenigsberger testify for the defendants in this case against Sonntag & Co., wasn't a meeting between Mr. Koenigsberger and his counsel and yourself or your representative or representative of your wife held? A. I refuse to answer.

Q. And wasn't an agreement reached by which it was agreed that Mr. Koenigsberger would testify in the Sonntag suit without additional compensation in consideration of the immediate settlement of the judgment in this suit?

(Objected to by Mr. Besson on the grounds that it is not cross-examination.)

A. I refuse to answer.

Q. And to your knowledge wasn't it stated by the legal representatives of your wife that it would be necessary to consult with Mr. Koenigsberger before drawing an amended complaint

against Sonntag Company? A. I refuse to answer.

Q. And in order to procure the services of Mr. Koenigsberger to consult with the legal representatives of the defendant in this case to enable them to prepare an amended complaint against Sonntag & Co., was an agreement reached whereby it was agreed that in the event of the successful suit by these defendants against Sonntag & Co. that the whole judgment obtained by Koenigsberger against these defendants would be paid in full and that if the suit was unsuccessful that the $900 or some such amount would be paid?

(Objected to by Mr. Besson, not cross-examination.)

Witness refuses to answer.

Q. Wasn't it in the same agreement agreed that before Mr. Koenigsberger consult with the legal representatives of the defendants in this case to enable them to prepare an amended complaint that the sum of $250 would be paid to him?

(Objected to by Mr. Besson on same grounds.)

Witness refuses to answer.

Q. And in pursuance to your agreement, in order to carry it out, did you acting for the defendants or one of the defendants in this case send to Burnett & Cornish in Newark the first payment of $250 to be paid to Mr. Koenigsberger?

(Objected to by Mr. Besson on same grounds as before.)

Witness refuses to answer.

Q. Burnett & Cornish were the legal representatives of the defendants in this case in association with Mr. Besson in reference to this claim of Mr. Koenigsberger, were they not?

(Objected to by Mr. Besson on the same ground as before.)

Witness refuses to answer.

Q. As a matter of fact, Doctor, at the time of the dealings between Burnett & Cornish, Mr. Koenigsberger and his attorney, Mr. Von der Lippe, it was agreed that there was something coming to Mr. Koenigsberger, was there not?

(Objected to by Mr. Besson on the same grounds as before.)

Witness refuses to answer.

Q. If your testimony here is true, why did you make arrangements to pay Mr. Koenigsberger nine hundred odd dollars regardless of the outcome of the Sonntag Company claim and the full amount of the judgment in the event of a successful outcome of the suit?

(Objected to by Mr. Besson on same grounds as before.)

Witness refuses to answer.

Q. Doctor, why do you refuse to answer these questions that I have asked you concerning the settlement of the claim of Mr. Koenigsberger against these defendants? A. On advice of counsel.

Q. That is the only answer and the best answer that you can give? A. The only answer.

Q. Doctor, haven't you stated to your counsel that there was money due Koenigsberger and haven't you so stated after this judgment was entered?

(Objected to by Mr. Besson on the ground of privilege communication.)

Witness refuses to answer.

Q. Do you refuse to answer, doctor, merely because you made that statement and it was privileged?

(Objected to on the ground that it is not cross-examination by Mr. Besson.)

Witness refuses to answer.

Q. Who signed the check for $250 which was sent to Burnett & Cornish?

(Objected to by Mr. Besson on the ground that it is not cross-examination.)

A. I refuse to answer.

Q. Will you produce the check book at this hearing, the stub of the check book from which that check was taken

(Objected to by Mr. Besson on the ground that it is not cross-examination.)

A. I refuse to answer.

Q. Did you make the entries in the stub of that check book

(Objected to by Mr. Besson because it is not cross-examination.)

Witness refuses to answer.

Q. Did you draw the check, did you sign the check?

(Objected to by Mr. Besson on same grounds.)

Witness refuses to answer.

Q. Did you send the check to Burnett & Cornish?

(Objected to by Mr. Besson on same grounds.)

A. I refuse to answer.

Q. Doctor, when did you first learn that there was a judgment against the defendant in this case? A. I cannot remember now. I think I have a note of it in my diary but I cannot now recall.

Q. When did you make the note of that diary? A. On the day I learned it.

Q. Got your diary with you? A. Yes.

Q. Will you produce it?

Witness produces diary and looks through same.

A. This diary begins this year. The other one is at home.

Q. It was some time last year? A. I believe so.

Q. And from whom did you receive that information? A. Mr. Besson I think.

Q. In the form of a letter or personal conversation? A. Personal conversation I guess.

Q. What then did you do about it? A. I left it all to Mr. Besson I think, I did not do anything.

Q. You did have conversations about the legitimacy of the claim, did you not? A. I don't think it is necessary for me to tell you what I said to my lawyer.

Q. You did between the time you first learned that judgment had been entered and the time that motion was made to open up this judgment?

(Objected to by Mr. Besson on same grounds as before.)

Witness refuses to answer.

Q. Isn't it a fact that you informed Burnett & Cornish that they must not pay this $250 to Mr. Koenigsberger that Mr. Besson had decided to try to re-open this judgment?

(Objected to by Mr. Besson on the grounds that it is not cross-examination.)
Witness refuses to answer.

Q. Why, doctor, was nothing done about the re-opening of this judgment if the defendants have a just and legal defense to this action or if the judgment was entered through the neglect of counsel, why was nothing done until this present application?

(Objected to by Mr. Besson on the grounds that it is not cross-examination.)
Witness refuses to answer.

Q. You knew that until this application was made that there was no talk about re-opening this judgment, do you not? A. I refuse to answer.

Q. Whatever the counsel for the defendants have done, that is, Mr. Besson here and Burnett & Cornish, was done with your knowledge, was it not ?

(Objected to by Mr. Besson on the grounds that it is not cross-examination.)
Witness refuses to answer.

Q. Isn't it a fact, doctor, when you testified today that there was nothing due Mr. Koenigsberger that you were not telling the truth? A. I am not in the habit of testifying that I lie and I don't propose to do it.

Q. Do you refuse to answer? A. That is my answer.

Judge Warren: I reserve the right to continue my cross-examination of Doctor Mial at a later date under these proceedings.

Mr. Besson: I dispute his right to make such reservation, dispute the right of the counsel for the plaintiff to make any such a reservation.

LEONIDAS L. MIAL on re-direct examination by Mr. Besson deposes and says:

Q. Doctor, did you ever agree with Ferdinand H. Koenigsberger, the plaintiff in this case, or with his attorney Mr. Von der Lippe to pay the judgment that has been entered by default or to settle it? A. No.

Q. Do you recall how many lien-claims and lien-claim suits were brought in consequence of the failure to file the specifications?

(Objected to by Mr. Warren on grounds that it is not best evidence and not proper re-direct examination.)

Mr. Besson: I omitted to ask the question on direct examination and ask it now.

A. I don't remember just how many.

Q. Do you recall about the total amount of money that you paid out on account of the judgments on these lien-claims?

(Objected to by Mr. Warren on the grounds that it is not re-direct examination.)

A. That is a matter that I don't remember.

Mr. Warren: I want to ask every one of those questions on the ground that on re-direct examination you have opened the doors.

Mr. Besson: I shall object, because I don't think this has opened the doors.

It is stipulated that all of the questions asked of Doctor Mial on cross-examination which he refused to answer are now repeated and he again refuses to answer by advice of counsel on the same grounds and for the same reasons expressed in answers in his cross-examination with the same objections as were entered on cross-examination. The purpose of this stipulation being to have repeated in detail on re-cross-examination the same questions, objections and answers of refusal to answer questions which were had on cross-examination.

It is further stipulated and agreed between the attorney for the defendants and the counsel for the plaintiff that notice of motion for an order directing Leonidas L. Mial to answer the questions which he refused to answer and of an application to hold him in contempt is hereby waived, said motion or application or both to be made on Saturday morning, the 17th inst., before Luther A. Campbell, Judge of the Hudson County Circuit Court, at the Court House in Jersey City.

Doctor Mial, being recalled, on re-direct examination by Mr. Besson, deposes and says:

Mr. Warren: I object to his giving any testimony at this time unless I am permitted to have him recalled for cross-examination at a later hearing.

Q. When did your wife first learn of the entry of this judgment by default?

(Objected to by Mr. Warren on the ground that it is not proper re-direct examination and on the ground that it calls for conclusion of fact which might not be his own knowledge.)

A. She heard of it when I told her after I had found out from you, I don't remember the exact date. I found out from you, as I told you this morning.

Q. Was that the first she knew of it?

(Same objection by Mr. Warren.)

A. Yes.

GEORGE A. CONKLIN, witness produced on the part of the defendant, being duly sworn according to law and being examined by Mr. Besson, deposes and says:

Q. Where are you employed, Mr. Conklin? A. In the office of Harlan Besson, Savings Bank Building.

Q. Where is his office located in regard to the office of Samuel A. Besson the attorney for the defendants? A. Adjoining rooms, practically the same suite of offices.

Q. How long have you been in the employ of Harlan Besson? A. A little over three years.

Q. What took place in those offices during the summer of 1914? A. From the first of June until the first of March this year the bank building was being altered, that is, an addition being built to it which upset the offices, and that the walls were torn away and necessitated moving furniture from one room to another, in fact piling some of the chairs, old cases and things into the room occupied by Samuel A. Besson. Later on, on account of partitions in the room of Samuel A. Besson, furniture and chairs, together with papers that were on the table of Samuel A. Besson, were moved into an adjoining room, and on account of the lack of space they were piled up, and later on, when the alterations were about completed in Samuel A. Besson's rooms, the tables and chairs were returned again. Then later on they were removed into a new part of the building so that the room of Samuel A. Besson could be painted and renovated. At that time there were partitions, closets, several boxes of old cases and perhaps two or three wagonloads of papers that were piled in the same room and were so piled in that Samuel Besson's table was partly covered in and could not be reached unless the bundles or packages and cases were removed from the front of the table. These cases were taken from the old closets and brought in while in that room. After Mr. Samuel A. Besson's room was renovated his tables and chairs were returned and that was the first that he was able to get at his cases that were on his table, where a great many of his cases are kept, and it was at that time or shortly thereafter that he discovered this case of Koenigsberger against Mial was lost.

Q. Do you recollect about what time that case containing the papers of that case disappeared? A. No; I could not say that, because I did not have charge of any of the cases of Samuel A. Besson, that is, any particular case, or had anything to do with any of the particular cases, and I could not tell just when it disappeared.

Q. Do you recollect about when it was found again? A. I recollect when it was found, but just now I cannot state the exact time; it was only recently.

Q. About the beginning of March? A. Around March. It was when the room of Samuel A. Besson was completed, the renovations were completed.

Q. Do you remember my asking you to help me look for it? A. I do.

Q. On more than one occasion? A. Yes, several occasions.

Q. And did we find it? A. No. The reason was because everything was upset and the old cases that were piled in the room were so filthy from dust and dirt on account of lying in an old closet that it wasn't pleasant to remove things and handle them. We removed things and searched for them in certain places where we thought they might be.

Mr. Conklin, being cross-examined by Mr. Warren, deposes and says:

Q. You have got charge of the filing system, have you? A. No.

Q. Who has? A. Mr. Besson has. He has his own method. He takes care of that.

Q. You have nothing to do with that? A. No.

Q. Are his cases indexed by number? A. I am quite sure they are indexed by number.

Q. Is there a name index? A. The name is generally put on the large envelope.

Q. Do you remember the date that these papers were found? A. I cannot. It was some time in the month of March, 1915.

Q. When was it they were through moving? A. That was the time that we were through moving, when Mr. Besson's tables and chairs were returned to the office.

Q. You did not open the envelope at the time it was found? A. No; I did not.

Q. You don't know what the contents of the envelope were? A. No, I don't. I might add, I being in the employ of Harlan Besson, attended to his business mainly and it is only at different times that I assist Mr. Besson there—small matters, as looking for something and accommodating him now and then.

Re-direct Examination by Mr. Besson:

Q. Is there some one else in the office who does assist me? A. Yes, Mr. Stevenson.

Sworn and subscribed to this day of A. D. 1915, before me.

CLIFFORD STEVENSON, a witness produced on the part of the defendants, being sworn according to law and being examined by Mr. Besson, deposes and says:

Q. What is your occupation? A. I am in the employ of Samuel A. Besson, a clerk in his office.

Q. Are you admitted to the bar? A. Yes, I am an attorney at law of the State of New Jersey.

Q. How long have you been in my employment? A. Just a little over five years.

Q. Do you recollect anything taking place in connection with this case of Koenigsberger against Mial during the latter part of April, 1914? A. Why, I recollect about that time I prepared an answer in the case and shortly after that I assisted you to prepare the counterclaim. At that time there was a motion pending to strike out the complaint and I suggested to you that you hold those papers in your office until that motion had been determined, and you put the completed papers on your desk. That was the last time I saw them until a few days ago.

Q. Soon after that what happened to my desk? A. Within a day or so after that, because of the alterations to the building here, your desk and table were moved into another room while you were absent, and——

Q. And what was done with the papers, a great many of them that were piled on the top of my table? A. A number of them, most of them were taken and put on the floor and covered up with other papers and books, chairs and all the furniture that was removed.

Q. Were there a great many old cases in filed envelopes and not in my office? A. There were a great number of them.

Q. What was done with them? A. They were all taken—you mean at that time?

Q. Yes. A. At that time they were all taken into one of the other rooms down the hall and

they were all stored in there until the alterations were completed.

Q. And what happened to the closets in the entrance room of my offices and in the hall as you came into my office? A. They were all taken down, the closets and all the stuff that was in the closets was taken and stored in this room I spoke of.

Q. And the lumber of the closets? A. The lumber of the closets was put in there too, all piled on top of these things.

Q. Was it possible to find any papers that had disappeared at that time? A. It was almost impossible. It would take a good long time to find anything in this room.

Q. Was there any certainty about finding it then? A. It was very uncertain.

Q. How long did that condition of affairs in the office continue? A. That continued right down to a few weeks ago, some time in February or the early part of March, when we got straightened out again.

Q. About the first of March? A. About then, yes.

Q. Do you remember my looking for this envelope with these papers in this case? A. Yes.

Q. Did you help me look for them? A. Yes.

Q. Did we either of us find them? A. No.

Q. We did, didn't we remove a lot of things in all three rooms and did our best to locate them? A. But we weren't successful.

Q. When did we find them? A. Back in March.

Q. Do you recollect who found them? A. No. I don't recollect that at all.

Q. Was it you? A. No. It wasn't me.

Q. I show you these papers.

Mr. Besson shows witness papers. Just look them over and see if you identify them?

A. Yes. That is the answer that I drew in this case.

Q. And the counterclaim? A. The counterclaim is a separate sheet.

Mr. Warren: I have the answer here that is the counterclaim.

Q. Do you recognize the other paper? A. Let me see. That is the counterclaim that I assisted you in drawing.

Attorney for defendants offers draft of answer and counterclaim prepared in the above-entitled cause of action.

Same is admitted in evidence and marked Exhibit D-2 on part of the defendants.

Q. You recollect about when you drew that, do you? A. It was about a year ago, possibly around the middle of May or latter part of May, some time along there.

Cross-Examination by Mr. Warren:

Q. You were familiar with the case at the time you drew the answer? A. Of course, I was familiar with the complaint.

Q. You were familiar with the motion to strike out the complaint? A. Yes.

Q. At the time you drew the answer and counterclaim, was the motion to strike out a portion of the complaint then awaiting determination? A. I have really forgotten whether that motion had already been argued or whether it was to be argued.

Q. The notice had been given? A. Yes.

Q. You remember who the parties were? Leonidas L. Mial was not a party, was he? A. I believe as I recall his name, he was one of the defendants in the summons. I recall several of the summons and complaints.

Q. Was this answer prepared at the time of the notice of motion to strike out the original complaint or the notice to strike out a portion of the amended complaint? A. At the time to strike out the amended complaint.

Q. And you drew the complaint? A. I prepared the answer and I assisted Mr. Besson with the counterclaim.

Q. You style the defendants Kate A. Mial, builder and owner, Robert D. Foote, mortgagee and Leonidas L. Mial individually and as executor of Henry H. Hankins, deceased, both in the heading to the answer and heading to the counterclaim. Was that because that was the way they were originally summoned? A. That is probably my mistake. I had the original complaint in my mind, but the counterclaim shows that it was drawn on behalf of Kate A. Mial individually.

Q. Why was the counterclaim drawn on behalf of Kate A. Mial, individually, prior to the decision of the motion to strike out Kate A. Mial individually and as executrix of Henry H. Hankins, deceased? A. I don't know.

Q. Was it because you were so positive that Mr. Besson was right? A. The actual drawing of the counterclaim, I had nothing to do with it. Mr. Besson attended to that himself.

Q. You have no knowledge as to why the counterclaim was prepared on behalf of her only as an individual prior to the decision of that motion? A. No. I haven't.

Q. But you are positive it was before that motion was decided? A. Yes.

Q. There is no question that those papers which you have prepared are the answer and counterclaim which were prepared in March or May, 1914? A. Yes. They are the ones.

Re-direct Examination by Mr. Besson:

Q. Do you recollect you and I having some discussion over the wording of the counterclaim as to whether it should be made more specific than it is there in setting out acts of Ferdinand H. Koenigsberger?

(Objected to by Mr. Warren on the ground that it is not re-direct examination.)

A. Yes.

Sworn and subscribed to this
day of , 1915, before me.

The taking of further testimony is adjourned to Thursday, the fifteenth instant at three P. M. same place.

H. Theodore Sorg, a witness produced on the part of the defendants, being duly sworn according to law and being examined by Mr. Besson, deposes and says:

Q. What is your occupation? A. I am a lawyer.

Q. Where are you employed? A. I am a member of the law firm of Burnett & Cornish at Newark.

Q. Is that firm in any way connected with the case of Kate A. Mial against the Fidelity Deposit

Co. of Maryland? A. Yes. We are associate counsel.

Q. With what other lawyer? A. Samuel A. Besson of Hoboken and myself.

Q. Are you acquainted with Ferdinand H. Koenigsberger, the plaintiff in this case? A. Yes.

Q. Are you also acquainted with Theodore Von der Lippe? A. Yes.

Q. Do you remember anything going on in your office at Newark last Fall, where mention was made of Koenigsberger? A. Yes.

Q. In this case of Mial against the Surety Company? A. In our office we have a system of time cards where we make a memorandum each day of what is done and I looked up these cards to-day to refresh my mind and find that on December 11, my partner, Mr. Burnett and you and myself, we had a conference in reference to the Mial against Surety Co. case and we concluded it was necessary to have Koenigsberger as a witness. He was the architect in the case for Mrs. Kate A. Mial under the contract for which the suit is now brought against the Surety Company. They were the sureties on the bond of the contractors in that case and it was arranged that I should telephone or get in touch with Mr. Koenigsberger to arrange with him to come down to the office to arrange about his testifying; also as to giving certain certificates showing what work had been done at the time the Sonntag Co. defaulted in the performance of their contract and also what work was necessary to be done by reason of such default by the owner. I telephoned Mr. Koenigsberger on Dec. 12, I find from looking up my time cards, and I was told he would not be in until later in the day. I telephoned him again, on the 14th and asked

him to call and talk over the Mial against the Fidelity & Deposit Co. case and he said he would not do so without getting the consent of his lawyer Theodore Von der Lippe. He said that he himself then had a suit pending against Mrs. Mial, arising out of the same contract, which we were suing on for some alleged services which he claimed he had not been paid for. I accordingly got in touch with his lawyer Mr. Von der Lippe over the telephone and he wasn't in either, so I left word for him to call us. I tried several times to get him on the telephone and could not. On the 16th of December last year, Mr. Von der Lippe called in our office about 9:30 in the morning and he said he received the telephone messages and came in response to my message. I asked him as to the architect preparing the certificates showing what expense was necessarily incurred by the owner in completing the contract after the default by the Sonntag Co. He said it would take about a week for Koenigsberger to go over this and ascertain how much expense was really incurred and that Koenigsberger would want $10 or $15 a day for his services. He also said that Koenigsberger had a suit then pending against Mrs. Mial for some balance which he claimed was due him for his services and extra work and that this would have to be settled at the same time. He said as a matter of fact that he had entered judgment by default against Mrs. Mial in this case of Koenigsberger against her, which he stated was pending in the Hudson County Circuit Court I believe. I told him I wasn't familiar with the details of the case but I knew Mr. Besson was defending it. I expressed surprise that he secured the judgment by default. He then told me and here I am not positive which of two things he told me, because

I wasn't particularly interested in that case and didn't pay particular attention to it. In any event, I am sure he said this, that Mrs. Mial had been sued by Koenigsberger in the capacity as individual and also as executrix of the estate of somebody or other I don't know who. He said then that either Mr. Besson had filed an answer in one capacity and had neglected to file it in the other capacity and he had gotten judgment by default in the case where no answer had been filed or he said that the suit against Mrs. Mial had been struck out by the Court and had been entered against Mrs. Mial as executrix, &c., but it is either one of those. We talked it over in general. I know then that I asked him whether Mr. Besson knew about this judgment having been entered and he said he had an execution against the property and that would cause Mr. Besson to find out when the Sheriff levied against the property.

I arranged then with Mr. Von de Lippe to come in the following Friday, I think this was on a Wednesday—December 16th, if I am not mistaken. On December 18th, I believe that was on a Friday, Mr. Besson called at our office and Mr. Von der Lippe and Mr. Koenigsberger and conferred with Mr. Burnett and myself relative to Mr. Koenigsberger testifying and also as to making up the certificate which the contract with the Sonntag Company provided for, that is, in the case of Mrs. Mial against the Surety Company. At that conference I explained to Mr. Besson that Mr. Von der Lippe had told me the day before or two days before that he had secured judgment by default against Mrs. Mial and I told him that in the presence of Mr. Von der Lippe. I know Mr. Besson expressed surprise at the fact, as there was some

talk between myself and Mr. Besson and Mr. Von der Lippe. Mr. Besson said he would have to get busy and move to open up the judgment, because he did not know anything about it and then about Mr. Koenigsberger testifying. Our idea, among us all as we sat in the library of our office, was to make some disposition of the two cases at the same time because Mr. Koenigsberger under the contract with the Sonntag Company was the architect. The contract provided that the architect was to give certificate as to what work had been done or had to be done after default in contract by the contractor. Koenigsberger claimed he was under no obligation to do any work as to giving such certificate, that it was entirely voluntarily whether he gave it or not. He said he would not give such a certificate or give the time to look into the matter first, unless we would also dispose of the judgment he had against Mrs. Mial. He said in our case the case depended upon his giving the certificate and he said he would not give such a certificate. Mr. Burnett dictated a tentative plan on which we were negotiating to get both of these cases disposed of, namely the compensation of Koenigsberger for the time which he required to get up the certificates and also for testifying at the trial against the Surety Company and also for making some disposition of his own case against Mrs. Mial. This is a copy of what was dictated.

"1. After Mr. Koenigsberger has given us necessary certificates and gone over the case with us and gotten ready for trial, he is to receive the sum of $250.00.

2. Immediately after he has testified he shall receive the difference between what he has already received and 50% of his judgment against Mrs. Mial, with interest and costs.

3. Upon the rendering of a verdict of the jury in favor of Mrs. Mial, he is to get the balance of his judgment, interest and costs without further question.

4. If the judgment is against Mrs. Mial, Mr. Koenigsberger is to receive the difference between what he has already received and the sum of $900.00.

5. That upon Mrs. Mial depositing this money in the hands of Burnett & Cornish, subject to this agreement, Koenigsberger is to cancel his judgment of record against Mrs. Mial.''

That was the basis on which we commenced negotiations for a settlement in the case against Mrs. Mial. Mr. Burnett did practically all the negotiating with Mr. Von der Lippe whom he knows quite well and neither Mr. Burnett nor myself was familiar with the case of Koenigsberger against Mrs. Mial but we were interested in getting Mr. Koenigsberger as our witness and we wanted him to tell what the true situation was as to the certificate named by the Sonntag Company so that we agreed that if he would testify in that case why we would help him out in getting a settlement of the other case against Mrs. Mial irrespective of whether his claim was just or unjust against her. Also pending these negotiations no action was to be taken by Mr. Von der Lippe as to issuing execution on the judgment which he had gotten against Mrs. Mial and also Mr. Besson was not to take any proceedings to open up the judgment which Mr. Koenigsberger had gotten against Mrs. Mial. The matter was to be left in *statu quo* so far as the matter rested against Mrs. Mial until

we found whether it would be disposed of amicably. Since that time I understand Mr. Von der Lippe has been in conference a number of times with Mr. Burnett but so far as I know the contract was never consummated.

Q. No agreement was ever made? A. No. Not so far as I know, in fact, I know that there was none made because I was always in attendance with Mr. Burnett when the conference came up.

Q. Do you know anything about my breaking off all further attempts to agree after learning of the issuing of this execution by another attorney than Mr. Von der Lippe? A. No. I don't. Recently I have not had anything to do with it, since about a month ago at least. Mr. Burnett told me that the negotiations had been broken off but that was later.

Q. At the conference? A. That was after that he told me that.

SAMUEL A. BESSON, a witness produced on the part of the defendants being duly sworn according to law.

I am the attorney of the defendant Kate A. Mial and Robert D. Foote in this cause and have been their attorney from the time the suit was begun until the present time. When the suit was commenced William Theodore Von der Lippe the attorney of the plaintiff besides making Mrs. Mial and Mr. Foote defendants made Mrs. Mial's husband a defendant and I gave notice and made a motion to strike Doctor Mial out as a defendant. That motion was heard and the Court made an order striking him out. Then Mr. Von der Lippe

filed an amended summons and complaint and made Mrs. Mial a defendant individually and as executrix of Henry H. Henkins, deceased. I made a motion to strike out and have the original notice of the motion heard. It was noticed to be heard on the 8th of May, 1914, and I offer the notice in evidence.

Admitted in evidence and marked Exhibit D-3 on part of the defendants.

That motion was heard, whether it was on the 8th of May, 1914, or after that day and on some other motion day I do not remember but it was subsequently argued, and on the 20th day of June, 1914, I received a letter from Judge Luther A. Campbell informing me that the motion to strike out was granted in the manner and to the extent set forth in the notice to strike out and for the reasons therein urged. His letter was dated June 19th, 1914, and entitled in the cause. This is the letter and I offer it in evidence.

Admitted in evidence and marked Exhibit D-4 on part of the defendants.

About the last week in May, 1914, I was considering the drawing of an answer and counterclaim in the case and placed the matter in the hands of Clifford Stevenson, an attorney at law employed in my office with instructions to draw up the answer. He did so and handed it to me and a day or two after that I drew a counterclaim and I put the papers in my large envelope which contained all the papers in the case intending to file them and laid the envelope containing the papers on my table and about the first week or second in June the bank people began to make improvements

in the bank building where my office is located, Hoboken Savings Bank Building, and tore out the walls on the south side of the building and one day when I was out attending court somewhere in Jersey City, at the Court House, they came in and moved my table out into another room, threw all the papers on it off on the floor and the chairs in another room, put furniture and books and the boards that had been torn off my closets on them and I never was able to find the papers again until about the 1st of March this year, after we cleaned up and got everything moved back again into my room and hunted things up.

At this time I had a great many other cases to handle and I got the impression some how or other that I had filed that answer and counterclaim and I rested on that belief and never knew that it had not been filed until, I think it was the 18th day of December, 1914. I had previously, about the last of October, requested the permission of Doctor Mial, as his wife's agent, to employ Burnett & Cornish of Newark as associate counsel in the case in the United States District Court, in which Mrs. Mial is the plaintiff and the Fidelity & Deposit Company of Maryland is the defendant, by reason of having been surety on the bond of Sonntag & Co., contractors for the performance of their contract in building this building on the corner of Sixth and Washington Streets, in Hoboken, out of which all of these cases have grown. Doctor Mial gave me his permission and I had a number of conferences with Burnett & Cornish, and prior to the 18th of December we had had discussions over the advisability of getting Koenigsberger as a witness in the case and Mr. Burnett thought it was very necessary. My own personal judgment was against

it because I had no faith in the character of Koenigsberger, and believed that I could not rely on his veracity and I also believed that he would not keep faith if we made any agreement with him, but Mr. Burnett seemed to be so impressed with the necessity of having him as a witness that I finally yielded my opposition and consented, leaving it to him to negotiate for employing him, having previously explained to him that this case of Koenigsberger was pending against Mrs. Mial in the Hudson County Circuit Court, and we had proceeded with the negotiations against Koenigsberger through Von der Lippe, his attorney, in the manner stated by Mr. Sorg in his testimony until the 18th of December last, Mr. Sorg informed me that Von der Lippe had told him that Von der Lippe had entered judgment by default in this case against Mrs. Mial. I thought it could not be possible because I fully believed I had filed the answer and counterclaim. I could not believe otherwise until I went to the Hudson County Court House and looked over the files of the cause and looked in the Clerk's Register of the record of what papers had been filed in the case and discovered, much to my astonishment, that the answer and counterclaim had not been filed. We were still continuing with the negotiations, I out of respect for Mr. Burnett's opinion solely, which included the arranging in some way a settlement of the amount which Koenigsberger claimed on this judgment by default, when I decided, out of precaution, to inquire of the Sheriff if any execution had been issued. I went up to the Sheriff's office and asked him and he looked and showed me that execution had been issued about the 27th of November, and by another attorney, namely, John Warren, of Jersey City,

and that a levy had been made on Sixth and Washington Streets. I then went back to Mr. Burnett and told him that Von der Lippe's conduct in not mentioning the issuing of the execution and that it had been done by another attorney had destroyed all my confidence in him, Von der Lippe as well as Koenigsberger, and that I would call all further negotiations off at once and take immediate proceedings to open the judgment. The judgment was entered entirely without my knowledge and was a complete surprise to me, the moment I found it out, and I would have taken immediate steps to open the judgment if it had not been for the advice of Mr. Burnett and his insistence upon my continuing the negotiations. As he was also acting for Mrs. Mial I submitted to his wishes in the matter until I found out the duplicity of Von der Lippe and Koenigsberger in securing the execution and employment of another attorney, who would not probably have been bound at all by the agreement if we had entered into it with Koenigsberger and Von der Lippe.

The judgment by default was obtained entirely through my own neglect, fault, errors and mistake as the attorney of the defendants, through my having mistaken or formed the belief that I had already filed the answer and counterclaim when I had not, and the defendants had been utterly without any fault and are entirely innocent in every respect of having allowed the judgment to be entered. The defendant, Kate A. Mial, has an absolutely good defense, in my opinion, to the action on account of the negligence, incompetency and default of skill and knowledge and professional capacity of Ferdinand H. Koenigsberger as architect in drawing the plans and specifications and super-

vising the building. I know of my own knowledge that he did not file the specifications with the contract. I went up to the Court House with Doctor Mial and we took Koenigsberger with us and went to the County Clerk's office and looked in the record and in the file and found the contract but no specifications with it. On the way up, while we were going to the Court House, Koenigsberger said he had filed it. When we got there and found it wasn't filed he said he had sent it up with the boy and could not understand why it wasn't there. Afterwards he admitted that he had never filed the specifications while we were coming back. His failure to file the specifications resulted in six lien-claim suits against Mrs. Mial and judgments and costs were recovered in each of the cases, and this statement shows the amount that I paid to the Sheriff of Hudson County in paying five of the judgments and costs. I offer it in evidence.

Mr. Von der Lippe appears on behalf of the plaintiff, Mr. Koenigsberger, at 4:05:

(Mr. Von der Lippe objects on the ground that they are not relevant to the suit between Koenigsberger and Mrs. Mial; they are litigated cases in which Mrs. Mial is involved and not binding on the plaintiff in any respect.)

Admitted in evidence and marked Exhibit D-5 on part of the defendants.

And this is in satisfaction of the 6th judgment and shows what I paid the plaintiff's attorney in settlement of that. I offer that in evidence, too.

(Same objection by Mr. Von der Lippe.)

Admitted in evidence and marked Exhibit D-6 on part of the defendants.

The further losses sustained by Mrs. Mial on completing the building amounted to over $30,000, all of which might have been avoided if Mr. Koenigsberger had been a competent architect and attended to his business properly.

This is the answer and counterclaim which I had drawn and have mentioned in my evidence here to-day and which were laid away in the case containing the papers of this cause and were not found until March and which I honestly believed I had filed in the latter part of May or beginning of June.

MR. BESSON, being cross-examined by Mr. Von der Lippe, deposes and says:

Q. Mr. Besson, you have been the attorney for Mrs. Mial from the beginning of this action? A. Yes, sir.

Q. You are the attorney for her now? A. I am.

Q. You say your memory is good on what has transpired in that time? A. I never said that it was.

Q. Do you say it is? A. Fairly good. I don't claim to have an excellent memory.

Q. If anything happened within the last week or so you would remember it? A. I think so.

Q. Do you remember the first notice to strike out that you gave? A. I remember giving such a notice.

Q. Do you remember on whose behalf it was given? A. I could not say from memory. I suppose it was given on behalf of Doctor Mial and Mrs. Mial.

Q. It was given to strike Doctor Mial out of the summons, wasn't it? A. Yes.

Q. So it was on his behalf that the motion was—Do you remember how you signed that notice? A. I signed as attorney for him.

Q. Do you remember that there was nothing said in it about being attorney for Mrs. Mial? A. I don't recollect; it is possible.

Q. Have you got the notice here? I think you offered it? A. Not that one.

Q. You signed it as attorney for Doctor Mial, did you not? A. I did.

Q. Is there anything in that notice or the order that followed it, which was based upon the motion made under that notice affecting Mrs. Mial's individual status in this suit?

(Mr. Besson objects to the question on the ground that it is entirely better proved by the notice and order.)

Q. I ask you once more whether there is anything in that order affecting or on behalf of Mrs. Mial individually?

(Mr. Besson: I object to your question on the ground that the whole matter is better proved by the notice and order.)

Q. Do you decline to answer? A. I decline to answer the question.

Q. Was not Mrs. Mial's time to answer, had it not expired before the order on this motion was entered? A. I had a stipulation that it should not expire until the 8th of October, 1913. I had the stipulation with you and I think we continued that understanding until after you had amended your summons and complaint, as I recollect it.

Q. Is that in writing? A. The original stipulation was.

Q. Has that ever been filed? A. No.

Q. Was there anything in the order that you obtained on that motion involving Mrs. Mial individually? A. I don't remember, now; I haven't got the order before me. I haven't got a copy of that order.

Q. Don't you remember that Judge Spear struck out Doctor Mial from the summons and complaint? A. Yes. I remember that.

Q. Don't you remember that he admitted Mrs. Mial as executrix of the Henkins estate as a defendant? A. I know he struck out Doctor Mial, that is all.

Q. Don't you remember in the order that you entered on this motion signed by Judge Spear that Mrs. Mial was entered by the order of the Court as executrix of the estate of Henkins, deceased? A. I don't remember.

Q. You filed a second motion? A. I guess it is in evidence.

Q. May I see that?

(Mr. Von der Lippe reads motion.)

Q. I show you that and ask you whether that wasn't direct to an objection to the summons and complaint on the ground that Mrs. Mial was included therein as executrix of the Henkins estate?

(Mr. Besson: I object to the question because the notice speaks for itself. It is in force and shows what was to be done.)

Q. Do you remember how you signed this notice, Mr. Besson?

(Mr. Besson: I object to the question because the notice shows how I signed.)

Q. Do you remember that you signed as attorney for Kate A. Mial, executrix of Henry H. Henkins, deceased? A. I don't remember because the notice speaks for itself.

Q. Referring to the notice, I ask you whether that is not a fact? A. Yes.

Q. In the proceedings under this motion everything was directed to the fact that Kate A. Mial, as executrix, was an improper party, is that right? A. That is my recollection.

Q. And there was nothing in the notice or in the argument with reference to Kate A. Mial individually?

(Mr. Besson: I object to the question because the notice shows for itself, and notice is in evidence.)

Q. Do you remember the order you obtained on that notice? A. No.

Q. May I see the letter of the Court that was offered in evidence.

(Mr. Von der Lippe reads letter.)

Q. Was an order ever obtained on this? A. No.

Q. None was ever filed? A. My order has it on before I ever drew it.

Q. None was ever filed? A. I believe not.

Q. And this letter of Judge Campbell has never been filed in the suit? A. I don't know. That was sent to me and I presume you got a duplicate of it.

Q. Mr. Besson, at the time that you made this motion as attorney for defendant Kate A. Mial, executrix of Henry H. Henkins, you knew that no answer had been filed, didn't you? A. Certainly, because you and I had an understanding about that.

Q. That I need not file one? A. That was my understanding.

Q. Do you remember when this argument took place? A. It was noticed for the 8th of May, but I don't know whether it was argued that day or at a later day.

Q. You don't remember that you did not show up that day and said you had not had it in your diary? A. No. I don't remember.

Q. So it took place on a later day? A. I am under that impression.

Q. And at that time you were relying on a stipulation you had with me that her time was extended? A. Yes.

Q. What do you mean by that, that you were under the impression that the answer was filed in May, 1914? A. I said I was under the impression that I had filed it in May.

Q. Do you now say your testimony is not correct? A. I said I drew it in May and put it in my paper case. Some time after that I thought I had filed it.

Q. Mr. Besson, this stipulation you speak of was given at the time of the first motion, was it not? A. I think it was.

Q. We had no understanding on the second motion, did we? A. Well, I understood so myself. I thought we were friendly and it would be extended.

Q. Did you ever speak to me after that first motion about extending Mrs. Mial's time? A. I don't suppose I did, but I thought possibly you might want to remodel your complaint.

Q. Was it necessary, under the order which you obtained, to remodel the complaint? A. I don't know.

Q. Wasn't it the advice of the Court to strike out? A. Yes.

Q. Was there anything further for me to do as an attorney? A. No. But I didn't know what you might want to do.

Q. Were we on friendly terms before Judge Campbell when I criticized you about delaying the case? A. I thought so.

Q. Didn't I say that you were a year on the case? A. You were speaking for your client, but I thought we were on friendly terms.

Q. Didn't I speak to you about dragging on of the case? A. I think so, but that was because of the skirmishing for the papers. You wanted a long continuance and I granted it.

Q. When did you say you found those papers, this answer? A. About the first of March, this spring.

Q. When did you go to the County Clerk's office to look this matter up? A. As soon as I got an opportunity after Mr. Sorg told me.

Q. How soon was that? A. I guess a couple of weeks after.

Q. Wasn't it in March? A. No.

Q. Do you remember going to the court house to look over the judgment that had been entered? A. Yes.

Q. Wasn't that in March? A. I have been there two or three times.

Q. Didn't you telephone? A. I was there in March looking at the execution.

Q. Didn't you telephone Mr. Burnett from there? A. No.

Q. You telephoned them in March that you had been there that day? A. I think not.

Q. Didn't you telephone Mr. Burnett that you

had just learned that judgment was entered by Mr. Warren? A. I don't think so. I didn't telephone that.

Q. That the execution was in his name? A. I may have telephoned that.

Q. Wasn't that in March? A. It may have been.

Q. And you first learned about this in December? A. 18th of December.

Q. And you really did nothing about it until the 18th of March? A. Because Mr. Burnett did not wish me to. He thought it best to see if we could not make some settlement in order to get Mr. Koenigsberger as witness in the United States District Court.

Q. You stated that you first heard from Mr. Sorg that judgment had been entered. Do you remember Mr. Higgins in Mr. Burnett's office? A. Yes.

Q. Do you remember being told there that day by me that it had been entered? A. Yes.

Q. That was the first day anybody heard about it on your side of the case? A. Yes.

Q. You didn't know it before that meeting, did you? A. No.

Q. Then I told you, not Mr. Sorg? A. Maybe you did, I am not sure.

Q. And I told you we had an execution in the hands of the Sheriff? A. I don't remember that.

Q. Didn't I tell you the Sheriff wanted money to advertise? A. I don't remember.

Q. Do you remember what took place that day? A. Some of it.

Q. Do you remember Mr. Burnett stating that Mr. Koenigsberger had some information that was material to Mrs. Mial's suit? A. I think so.

Q. And do you remember his saying he could

not draw his papers without that information? A. I think so.

Q. Do you remember him telling me on behalf of Mrs. Mial that he would like to have this information? A. Yes.

Q. Do you remember making a proposition of settlement on that day? A. Yes.

Q. And do you remember that a proposition of settlement was made that day? A. Yes.

Q. And Mr. Sorg took notes of it in shorthand? A. Yes.

Q. And we had agreed upon a settlement, hadn't we? A. I think he called the stenographer in and dictated the points of that settlement.

Q. Didn't Mr. Sorg take it? A. He took it down in shorthand, but he afterwards got the typewriter to write it out.

Q. And a settlement was afterwards agreed upon? A. Not agreed upon; only to the drawing of the papers. Nobody had accepted it.

Q. You thought you were, but after you went away and a short time afterwards you send back the paper and said that you would not agree to it. Didn't I tell Mr. Burnett that we would agree upon this proposition by Mr. Sorg and that we no doubt both would be able to do that. You said you thought so. Didn't Mr. Koenigsberger accept the settlement proposed there? A. He left it to you.

Q. Wasn't it accepted? A. No.

Q. Didn't I for Mr. Koenigsberger? A. No.

Q. Mr. Sorg took notes that day? A. I think you took him out by yourself.

Q. Will you say that I didn't come back and accept the proposition made by Mr. Burnett? A. I understood you to say that everything was

arranged satisfactorily and as soon as the papers were ready you would sign them.

Q. Do you remember Doctor Mial depositing $250 with Burnett & Cornish that day? A. Not on that day. He left $250 with Burnett & Cornish to be held in their hands and not to be used untl further instructed from him.

Q. Do you remember the amount? A. $250.

Q. Wasn't that the amount that Koenigsberger was to receive when he furnished Burnett & Cornish with certain information? A. That was part of that proposed agreement.

Q. And that money was left with Burnett & Cornish for that purpose? A. It was left there by Doctor Mial not to be used for any purposes until further ordered by him.

Q. It was expected that it would be paid to Koenigsberger? A. No.

Q. Was it deposited as any portion of their fee? A. It wasn't to be used until further directions from Doctor Mial.

Q. Don't you know that Burnett & Cornish have it entered on their books as a part of this payment? A. I don't know.

Q. Were you there when the Doctor made the payment? A. I am not positive.

Q. Mr. Koenigsberger didn't come to you to settle this, did he? A. No, he didn't.

Q. He was sent for, wasn't he? A. I don't know.

Q. Didn't you consent that Burnett & Cornish should call him in? A. Yes.

Q. And they did it? A. They did it.

Q. And we went to his office at their request, didn't we? A. I suppose so. I don't know anything about that.

Q. What do you mean when you speak of duplicity of Mr. Von der Lippe, I would like you to explain. A. I mean you never said anything about Warren issuing execution.

Q. Didn't I say that day that there was an execution in the hands of the Sheriff? A. I never heard it.

Q. It might have been said, however? A. It might have, I don't know, I didn't hear it. I don't remember hearing anything about an execution except that no execution would be issued.

Q. Do you remember that Mr. Burnett said it wasn't possible to settle our differences and you remember I said we had a judgment and execution? A. I don't remember about the execution.

Q. And you found the execution was issued long before that meeting? A. I afterwards did, yes.

Q. Will you say that I didn't tell Mr. Burnett that the Sheriff had the execution? A. I don't know. I didn't hear you tell him.

Q. It is not in my name, is it? A. Whether it is or not, I don't remember looking at the judgment. I simply took your word.

Q. You don't know how the execution came to be issued in the name of Mr. Warren? A. No.

Q. And you had really rejected this settlement before you learned that, didn't you? A. No.

Q. You swear to that? A. Yes. I was considering it very seriously before, I had not fully made up my mind.

Q. Mr. Besson, why was this contract never signed, do you know? A. This proposed settlement, because the parties never agreed.

Q. That is your idea of it, is it? A. Yes.

Q. How often had these papers been in your

hands for passing this proposed contract? A. I don't know that I can say by number, every time they were sent to you and sent back they were sent to me.

Q. Why was it that it took from December 18 to March 22 to make up your mind you weren't going to settle? A. You had changed the contract and presented a new one. You changed it twice.

Q. Did I change the essential settlement that was made at Mr. Burnett's office? A. Yes. Very much.

Q. Have you got those contracts? A. I think Mr. Burnett has them.

Q. When did you mail them to him? A. I don't know whether I ever mailed them. He and I met in his office.

Q. Have you ever met him since the day you telephoned him it was all off? A. Oh, yes.

Q. And you handed them to him then? A. I don't remember.

Q. Was it not in your hands for acceptance when you called it off? A. I don't remember that either, not distinctly, no.

Q. Don't you remember that Mr. Burnett wrote you a letter and in it stated that it was dictated in my presence and enclosing a form of contract and asking you to have it signed? A. I don't remember that.

Q. Have you got your correspondence here? A. No.

Q. Isn't it a fact, Mr. Besson, that on the day that you called up Mr. Burnett that you were not going to let Mrs. Mial sign that agreement that you had in your possession then a copy or draft that was satisfactory to me as attorney for

Mr. Koenigsberger? A. The draft that was satisfactory to you was a very great change from the one made up the day we met.

Q. Isn't it a fact that you had such a draft in hand, one that was satisfactory to me? A. A draft of an agreement satisfactory to you, but it wasn't satisfactory to Doctor Mial.

Q. Did you ever tell Mr. Koenigsberger so and say where it wasn't so? A. I never saw Koenigsberger.

Q. Did you ever write to Mr. Burnett or myself up to the time you called it off that it wasn't satisfactory? Did you write to Mr. Burnett wherein that agreement wasn't satisfactory up to the day you called it off? A. Didn't write to him.

Q. Did you see him between the time you received that contract from him and the day you called it off? A. I think I did.

Q. Will you say you did? A. That is my recollection.

Q. Did you or didn't you? A. That is the way I remember it. I went to his office and he and I talked it over and I called it off.

Q. You didn't call him on the phone? A. I am not sure, because I was doing so many things that I might have called him on the phone to save time. I usually make it a point to go and talk with him.

Q. Mr. Besson, this was not accord and satisfaction that we were fixing up? A. I don't know; it was an agreement in writing.

Q. Mr. Koenigsberger was to sign it? A. Yes. That is my understanding.

Q. No matter what your confidence in Mr. Koenigsberger was, if he had signed it, he would have been bound by it? A. By law.

Q. If it had been signed it would have been accord and satisfaction? A. It was a written agreement. I don't know what I would have been.

Q. What do you mean when you testify that you called it off because you had no confidence in Mr. Koenigsberger and in his signed agreement? A. Because I did not believe he would keep it.

Q. Didn't believe he would keep a signed agreement? A. No.

Q. Did Mrs. Mial keep the proposal that was made to Mr. Koenigsberger in Burnett's office on December 18th? A. She would have kept it if Mr. Koenigsberger had not sent word that he would not stand for it through you. I understand he had sent another agreement and would not sign the other.

Q. They were not vitally different? A. I don't know. I know it was different than the agreement first agreed upon.

Q. These agreements are now with Burnett & Cornish? A. I presume so.

Q. You gave them to them? A. Whether I gave them to them or put them in the valise, I don't remember.

Q. Mr. Besson, are you an architect? A. No. I am not a professional architect.

Q. You feel competent of saying that Mr. Koenigsberger is not a capable architect? A. I do.

Q. You, of course, don't know what passed between Doctor Mial and Koenigsberger before you were called in the case? A. Not everything, no.

Q. Do you know of Koenigsberger having advised Doctor Mial to fire his contractors within a few days after they started work? A. I don't know anything about that.

Q. You say Mr. Koenigsberger was very deficient? A. Certainly do.

Q. The building wasn't very far along when you came into Mrs. Mial's matters with reference to this building? A. It was up within about a foot or two of putting the roof on.

Q. And Mr. Koenigsberger finished the building as architect? A. Not as I understand.

Q. Was he ever discharged? A. So I understand.

Q. Did you ever hear him discharged? A. No.

Q. And don't you know that he was on the job every day until it was completed? A. No.

Q. Don't you know that Doctor Mial came to him and asked him for a report on the building when you came into it and he made a long report with an engineer in New York? A. No.

Q. Do you remember the engineer in New York that made a report on the condition of this building when you came into it when Sonntag Company failed? A. I don't remember any other engineer.

Q. You don't remember the New York engineer? A. No. Koenigsberger made a list of errors and defects as I remember.

Q. And that was made in conjunction with an engineer in New York? A. I never knew that.

Q. You mean to say that that wasn't so? A. I don't know. All I knew is the list Koenigsberger handed us.

Q. You don't remember that this engineer in New York got paid his fee? A. No. Never heard of it before as I recollect.

Q. Was Vanderbilt the second contractor? A. No. Bishop.

Q. Mr. Koenigsberger was on the job while

Bishop was the contractor? A. I never understood so.

Q. Didn't he go there and draw details for the iron stairway for Doctor Mial? A. I don't know.

Q. Were you ever on the job on the building? A. I think I was up in it once or twice.

Q. Mr. Koenigsberger might have been there a great many times without your knowing it? A. Oh, yes. I only passed the building three times a day, passed there as I went home and came to my office.

Q. Mr. Besson you have an—office copy of the affidavits filed to show cause? A. I have.

Q. Now? A. Yes.

Q. Did you have that at the time when Judge Warren asked you? A. Not at that time.

Q. Where was it? A. Somebody else had it.

Q. Will you say who? A. Doctor Mial had one set and I think Mr. Conklin had the other set, he and Mr. Stephenson. Judge Warren and I are great friends. If I had a copy I would have given it to him.

Q. Mr. Besson all these losses of which you have testified, were sub-contractors of the Sonntag Co., were they not? A. Mechanics' liens.

Q. And losses in completing the building amount to more than $30,000. The lien-claim suits came to between $5,000 and $6,000. Weren't they from sub-contractors of the Sonntag Co.? A. I suppose so.

Q. Don't you know? A. I didn't see any sub-contractors, except one or two.

Q. You tried the cases. Were any of them direct contractors with Mrs. Mial or Doctor Mial? A. We didn't try them on contract, on lien-claims.

Q. Don't you know they were sub-contractors of Sonntag Co.? A. Nothing was said of that.

Q. Have you got the complaint in those cases here? A. No.

Q. Weren't they against Sonntag Co. and Kate A. Mial? A. I think they were. I presume they were.

Q. You know they were? A. It didn't make any feature in the case.

Q. They were sub-contractors of Sonntag Co.? A. I suppose they were.

Q. You mean to say you defended Mrs. Mial? A. The main fight was whether the material went into the building or not.

Q. Wouldn't they have a lien-claim if they were contractors of Mrs. Mial? A. It would not make any difference.

Q. Would they have a lien-claim if they were contractors of Mrs. Mial? A. If they had filed the contract.

Q. If these parties who sued Mrs. Mial had filed contract, they could not bring suits individually so that you know whether they were contractors of Mrs. Mial? A. The question was whether the materials furnished went into the building.

Q. Didn't it make any difference whether they were furnished to her order or not? A. The specifications had not been filed.

Q. If they were direct contractors with Mrs. Mial, would the Sonntag Co. have anything to do with it? A. No.

Q. So that all those suits were sub-contractors of the Sonntag Company, were they not? A. I believe so.

Q. You say you don't know that Koenigsberger

told Doctor Mial to fire his contractor right after they started work? A. I don't know. As soon as it came to me I advised him to fire both of them, contractor and Koenigsberger.

Q. Nevertheless, he kept Koenigsberger on until the building was completed, didn't he? A. I don't know.

Q. Didn't you have Koenigsberger's papers long after this meeting at which he was fired, as you say? A. Did I have Koenigsberger's papers?

Q. Didn't you have his files, didn't he bring them over there? A. I might have had them.

Q. Didn't he repeatedly come to you and tell you he needed those files in helping to superintend the building? A. I am sure he did not. He came and asked for his letters and I gave them to him a few days after, as soon as I found them.

Q. Mr. Besson, your statement that the losses sustained by Mrs. Mial amounted to $5,000 in judgments obtained against her, is predicated upon the fact that the specifications were not filed, is that so? A. Yes.

Q. And you don't know what happened between Doctor Mial and Mr. Koenigsberger before that was discovered, do you? A. I don't know what took place. It wasn't in my presence.

Q. So that your testimony is based entirely on the fact that the specifications were not filed? A. That part of it.

Q. Where is this other $25,000 loss on? A. On the completion of the building after Sonntag Company were put off.

Q. Weren't there a great many changes in the building? A. Not many, those were necessary on account of the defective plans and specifications.

Q. What do you mean, defective plans? A. It

could have been made so it was possible to complete it.

Q. Weren't there a lot of changes made by Doctor Mial that were not in the original plans and specifications after you became his attorney? A. Only where they were absolutely necessary I guess to complete the building.

Q. Who made those changes, do you remember? A. I suppose J. W. Bishop & Co.

Q. Who changed the plans and specifications, do you remember that? A. I don't know.

Q. You won't say that Mr. Koenigsberger didn't? A. I don't know.

Q. You will not say he didn't? A. I say I don't know.

Q. How do you estimate this $25,000, can you specify? A. What difference in price it cost the Doctor to finish it, the whole price and what he was to pay.

Q. And your statement is predicated upon the difference that the building finally cost Doctor and the amount of the Sonntag Co. contract, is that right? A. Yes.

Q. And if there were any extras in there, the loss would be less? A. That much less, yes.

Q. Do you know what the building cost Doctor Mial finally of your own knowledge? A. About $50,000. I know from J. W. Bishop.

Q. And the Doctor, what he told you? A. Yes.

Q. You didn't handle the payments of the money and you did not pass on the checks, did you? A. On some of them. I drew the contract between the Doctor and J. W. Bishop.

Q. Has an engineer ever gone over the building to determine what the Doctor's contract is, as provided in his contract? A. I think so.

Q. Who was he, have you got his report? A. I haven't.

Q. Has a report been made? A. I think so.

Q. Did you see it? A. No.

Q. So that his report might be entirely different from what you say now? A. I don't think so.

Q. Does Mrs. Mial's contract with the Sonntag Co. contain a provision that in the event of the completing the building that the architect shall certify as to the cost over and above the contract price? A. I think it says that.

Q. Remember a meeting with Mr. Lichtenstein, Mr. Koenigsberger, yourself and myself? A. I do.

Q. Remember what that was for? A. Same purpose.

Q. To get that certificate? A. Yes.

Q. Did Mr. Koenigsberger ever make that certificate? A. Not that I remember.

Q. Do you remember why he didn't make it? A. I think he didn't feel very friendly toward the Doctor and didn't want to.

Q. Remember any correspondence from me on that subject? A. Yes.

Q. Remember Mr. Koenigsberger stating that that was outside of his contract and that he would not do it unless he was paid? A. Yes.

Q. And that certificate has never been made by Mr. Koenigsberger? A. No.

Q. And that loss was never calculated according to the contract? A. No.

Q. Never did it for you? A. No.

Sworn and subscribed to this
day of April, 1915, before me.

The attorney for the defendant declares the taking of testimony on his part closed.

Dr. Mial—Recalled—Cross.

The attorney for the plaintiff desires to submit testimony at a subsequent date of which notice will be given to the attorney of the defendants.

The taking of further testimony in the above entitled cause of action is resumed this eleventh day of May, one thousand nine hundred and fifteen at the office of Joseph S. Parry, Supreme Court Commissioner, No. 84 Washington Street, Hoboken, in the presence of John Warren, Esquire, attorney for plaintiff and Samuel A. Besson, Esquire, attorney of defendants.

Dr. Mial, being recalled and being further cross-examined by Judge Warren, testifies:

(It is agreed that the further examination of witnesses recalled to answer questions which they had refused to answer at previous examination shall be by giving the number of page and number of question and that question shall not be repeated in the record but only the answers taken down as given by the witnesses.)

Page 9, Q1. A. What bill do you mean?

Q. Burnett & Cornish's bill? A. I am not interested in the building. No, I don't expect to pay Burnett & Cornish's bill.

Page 9, Q2. A. My own.

Page 9, Q3. A. I did that on my own responsibility. My wife knew nothing about it whatever. Agent for myself.

Page 9, Q4. A. I did.

Page 9, Q5. A. Yes.

Page 9, Q6. A. I paid Burnett & Cornish $250 on advice of Mr. Burnett and on the advice of Mr. Besson.

Q. For what purpose?

(Objected to by Mr. Besson on the ground that it is not cross-examination and secondly it is not relevant to this matter.)

A. The purpose was simply to pay Koenigsberger for certain services that he had a right to give us under the contract that we had with Sonntag Company, and other information; that whatever they thought was necessary to give, I left it to the lawyers.

Q. It was in settlement of Mr. Koenigsberger's claim? A. Absolutely not.

Q. As a matter of fact, that money was paid as a first payment to settle the claim of Mr. Koenigsberger, was it not, as a first payment? A. I don't know anything about any first payment, the money as I told you was left with Mr. Burnett to pay Koenigsberger after giving us information which we had a perfect right to ask, not on my part admitting that I owed Mr. Koenigsberger one cent or Mrs. Mial either. I was opposed to that and never for one minute did I agree to admit that I owed Koenigsberger one cent. What I did was to pay him for the information he was to give us.

Q. Didn't you agree. Doctor, to pay Mr. Koenigsberger a certain sum of money in settlement of his claim against Mrs. Mial? A. No.

Page 9, Q7. A. I did.

Page 17, Q8. A. Yes. I had conversations with them.

Page 17, Q9. A. Yes.

Page 17, Q10. A. I answered that question.

Q. Answer it again. A. As I stated before that I left it with Mr. Burnett to pay Mr. Koenigsberger to furnish certain certificates and information which was requred under the Sonntag Company Contract.

Q. Will you kindly state what certificates he was to furnish for the $250? A. I don't know.

Q. Was he to be paid anything more than $250? A. I never agreed to pay him anything more than $250. What more he was to receive was a matter to be agreed upon and there was never any agreement.

Page 17, Q11. A. No.

Page 18, Q12. Is waived.

Page 18, Q13. A. Not that I know of. I don't know anything about that.

Page 18, Q14. A. There was some talk about such an agreement, but there never was an agreement.

Q. Who talked about it? A. I talked with Mr. Besson about it. I never talked to Mr. Koenigsberger about it.

Q. Talk with Mr. Burnett, Mr. Cornish or Mr. Sorg about it? A. At that one meeting when I agreed to leave the $250, that is the only time.

Q. At that time that you agreed to leave the $250 it was the understanding Mr. Koenigsberger would testtify in the suit without additional compensation in consideration of the immediate settlement of the judgment? A. There was some talk.

Q. That was the understanding? A. There was a lot of talk back and forth. I wasn't there at all the meetings.

Q. And at that meeting that was your understanding? A. That was not my understanding.

Q. Haven't you so testified to? A. No. I have not testified to it.

Page 18, Q15. A. The lawyers, as I understood it, considered Mr. Koenigsberger's testimony very vital to our case.

Q. And wasn't it stated by them that it was necessary to consult with him before drawing an amended complaint against Sonntag Company? A. I don't know what took place then, I don't know about that.

Page 18, Q16. A. There was no such agreement.

Page 19, Q17. A. $250 was to be paid to him when he furnished the information that Mr. Burnett and Mr. Besson thought was necessary to furnish for this suit, certificates and information.

Q. What certificates? A. You got me guessing now. That question is beyond my knowledge. They are legal things that I don't know anything about.

Page 19, Q18. A. I was not acting when I sent that $250 to Burnett, for anybody but myself.

Q. Were you ever reimbursed for that $250? A. Never.

Page 19, Q19. A. They were not in reference to Mr. Koenigsberger's claim, but the claim against the Bond Company, not against Sonntag Company or Koenigsberger either, no.

Page 19, Q20. A. No, sir. I never did agree that there was one cent coming to Koenigsberger.

Page 20, Q21. A. I did not make any ar-

rangements to pay Mr. Koenigsberger that amount.

Page 20, Q22. A. Because my counsel advised me to.

Page 20, Q23. A. No.

Page 20, Q24. Is waived.

Page 20, Q25. A. I did.

Page 20, Q26. A. I can produce the stub, yes. I haven't got it here now.

Q. The question is, will you? A. Sure, if you want me to.

Page 21, Q27. A. I did.

Page 21, Q28. A. I did.

Page 21, Q29. A. I did.

Page 22, Q30. A. I did not have any particular discussions about the legitimacy of the claim of Mr. Koenigsberger. I have ever denied that, ever since November, 1913. No. I don't think I ever did.

Page 22, Q31. A. When I left the $250 or I told them I would send it to them I told them it was not to be given to Mr. Koenigsberger until he gave them all the information that they thought was necessary. That is absolutely all I know about that part of it.

Q31. Repeated. A. That is not a fact.

Page 22, Q32. A. I don't know.

Page 22, Q33. A. Which application?

Q. Application to reopen the judgment? A. I don't know just exactly when the application was made and don't know just when the judgment was taken. That was all entirely in the hands of the lawyer and I don't know anything about it.

Page 22, Q34. A. Not all of it by any means.

Q. Was the $250 returned to you by Burnett & Cornish? A. No.

Mr. Besson—Recalled—Cross.

Mr. Besson, being recalled and being cross-examined by Judge Warren, testifies as follows:

Mr. Warren: I ask that the testimony of Mr. Besson shown on page 43 as follows:

"My own personal judgment was against it because I had no faith in the character of Koenigsberger, and believed that I could not rely on his varacity and I also believed that he would not keep faith if we made any agreement with him" be stricken out as the personal judgment of Mr. Besson being absolutely immaterial and has no power on the issues of this rule.

I ask that the Court strike out the testimony of Mr. Besson as shown on page 44 as to his having lost confidence in Mr. von der Lippe and Mr. Koenigsberger.

I also ask that he strike out his characterization of Mr. von der Lippe and Mr. Koenigsberger as being those of duplicity, on the ground that they are incompetent, irrelevant and immaterial and have no bearing upon the issues raised on this rule.

Page 47 of Mr. Besson's testimony, Q35, is waived.

Page 47, questions 36 and 37 are also waived.

Mr. von der Lippe: The object of those questions was to show Mr. Besson's personal knowledge of Mr. von der Lippe.

Page 47, Q35. A. I cannot remember it. I can only tell by looking at the papers. I never

burdened my mind with carrying the contents of eithere a notice or order.

Page 47, Q36. A. I don't remember that. I could not tell you unless I was to look at the order.

Q. Have you got it, got the order? A. Which one was that?

Q. The first notice to strike out that you gave? A. Is that the one made on the 19th? There doesn't seem to be anything in the notice concerning Mrs. Mial individually.

Q. Mr. Besson, when this money was paid by Doctor Mial it was entered on the books of Burnett & Cornish and I would like to put you on cross-examination on that entry taken from their books. He said he did not want to lug the books over here and being he is your witness, I guess you will believe him. A. I object to putting in that entry of their book. Doctor Mial ought not to be held down by an entry a bookkeeper made. He testified on direct examination as to this. Whatever purpose he gave a check for, he could not be bound by it.

I shall let it go in, subject to my objection.

Q. You won't object to it being that way in their books? A. I object that that is not a copy of their books whether it is or not, but I will object to it on the ground that it has no force whatever.

Mr. Sorg, being recalled and further cross-examined by Mr. von der Lippe, testifies:

Q. Did you bring over that memorandum from the books, Mr. Sorg? A. Yes.

Q. Will you let me have it? (Page 37) Mr. Sorg, I wish you would explain here what you

mean by this "I expressed surprise that he secured the judgment by default" in your testimony? Why should you be surprised that he secured a judgment by default? A. I knew that Mr. Besson had told me that he had been fighting you right along on this case and although I did not know the details of the case I could not understand how you could have gotten judgment by default.

Q. Then your surprise was predicated entirely on what Mr. Besson had told you? A. Yes.

Q. Was Mr. Besson present, Mr. Sorg, when this memorandum of settlement was dictated in your office? A. You mean at the precise moment or on the day?

Q. On the day? A. Yes. We were all in the library of our office.

Q. And that was after he had been informed that Koenigsberger had a judgment and execution? A. Yes.

Q. Had anything been said there in the presence of myself or Mr. Koenigsberger by Mr. Mial that this judgment would have to be opened up? A. I know this was said by Mr. Besson, I asked him whether he knew that the judgment had been entered and he said "Well, I guess I will have to get busy and open it up."

Q. When was that, on Friday? A. The day you came over with Mr. Koenigsberger.

Q. Was this before we came in? A. No.

Q. Was I present? A. So far as I recollect, yes.

Q. The first time you saw me Mr. Besson was not present? A. No.

Q. And then did you see Mr. Besson again before you saw me again? A. No.

Q. Wasn't Mr. Besson in your office when I came in this Friday? I want to know whether between the time I saw you and told him about this judgment, you had not seen me before you saw Mr. Besson the next time, at any time before you saw me again? A. I don't remember who came in first and I did not see him before that day you came over.

Q. Don't you remember that Mr. Besson, yourself and Mr. Mial sat around the library table when I came in? A. No.

Q. You had a talk with Mr. Besson between the time you saw me and the time I came in the second time? A. Not that I recall.

Q. On page 37 of your testimony, speaking of a conference on Friday, December 18th, you say "at that conference I explained to Mr. Besson that Mr. Von der Lippe had told me the day before or two days before that he had secured judgment by default against Mrs. Mial and I told him that in the presence of Mr. Von der Lippe." Do I understand your testimony that at that point Mr. Besson said he would have to get busy and open up this judgment? A. Yes.

Q. And that was said in my presence? A. Yes.

Q. And Koenigsberger? A. So far as I know Koenigsberger was also there.

Q. And that notwithstanding that statement by Mr. Besson, did we or did we not proceed to an adjustment of our differences after that statement? A. Then we talked over this other matter about Mr. Koenigsberger testifying and then, of course, that conversation was substituted by the other proposition. It was talked over between us, no one suggested any particular point, I believe.

Q. When Mr. Besson learned of this and declared he was going to open up, did he continue or call off the proposition? Did he call everything off or enter into arrangements to settle at that point? A. Mr. Burnett spoke of and said that was what we were there for, to arrange about Mr. Koenigsberger testifying and perhaps this other question came up incidentally. We did not speak about one thing, both were spoken of at the same time.

Q. At the time this settlement was proposed and dictated and agreed upon, Doctor Mial was present? A. It wasn't agreed upon.

Q. Was Dr. Mial there? A. I don't want you to say agreed upon.

Q. I am talking about these five propositions weren't they agreed upon as a basis of this settlement? A. As the tentative basis.

Q. We had a great deal of differences? A. Yes.

Q. And I was out of the room sometimes with Mr. Koenigsberger and sometimes with Mr. Burnett? A. Yes.

Q. And finally we got to a point where we both agreed, didn't we? A. Agreed upon what?

Q. A basis of what the settlement should be? A. Yes.

Q. And didn't or did Mr. Burnett say to you that we had agreed and now that we were present he said it would be better to take it down and asked you to take the dictation, didn't he? A. Yes.

Q. And that is this paper right here? A. Yes.

Q. Who was present then? A. I didn't understand at the time the agreement was consumated that it was simply a question of ratification, I understood it was simply a proposition which

was being made and that was the proposition, you were willing to go ahead at that time. Mr. Mial was present, Mr. Besson—I think Doctor Mial was present.

Q. Koenigsberger there? A. Yes.

Q. Was I there? A. Yes.

Q. Mr. Burnett? A. Yes, I am not sure about Doctor Mial, whether he was there or not.

Q. Wasn't it agreed, then, that a fuller agreement should be drawn up based upon these propositions and signed by the parties? A. I understood this was the basis of the agreement.

Q. And wasn't Doctor Mial to come in with the money? A. He was to pay $250 in escrow in our hands.

Q. There wasn't anything left undone at that time, there were no questions left open at that time? A. I am not sure because he drew another agreement right after that.

Q. What was the object of this agreement? A. To put down in writing what our tentative agreement was.

Q. At that time was there anything left open to be decided upon later? A. My impression is——

Q. Didn't we meet on every question that came up and settle our differences there? A. My impression is that this was a tentative draft that we were going to work on, what I have in the record there, that we were to prepare an agreement and submit it to you.

Q. Did that embody those points? A. And others.

Q. What were the others? A. I have a copy of the agreement which we mailed to you.

Q. At the time this agreement was dictated in your office, were there any other points pro-

posed or to be settled? A. There were none proposed.

Q. And there were no differences left between us to be settled? A. I am not sure. My opinion is that we were to submit a draft based on that and also any other ideas which were to go in and we were to submit it to you and you were to have it signed if it was satisfactory.

Q. And in confirmation, didn't Doctor and Mrs. Mial come into your office with $250? A. No, I believe Mr. Besson sent in a check for $250 to us.

Q. But you received a deposit of $250 under that agreement? A. We received $250.

Q. What was it for? A. It was to be used in connection with the settlement with Koenigsberger.

Q. That check was entered through your books, was it not? A. Yes.

Q. The entry shows from whom the check was received? A. That is the entry there.

Q. Will you just read it?

(Objected to by Mr. Besson as to the offering of that entry as to any proof of anything binding against Mrs. Mial on the ground that it was entered in the books of the firm of Burnett & Cornish without the knowledge of Mrs. Mial as to the language used and it is no binding force against her whatever. It is irrelevant and incompetent evidence against her.)

A. The entry in our books is as follows:

"Kate A. Mial, credit by check of Doctor L. L. Mial, dated December 26, 1914, on National Iron Bank, No. 720, on ac-

count of settlement with Koenigsberger made to order of our Mr. Burnett and endorsed over by him, $250."

Q. Mr. Sorg, this money was paid, so far as you know and as this statement says, in settlement of the suit of Koneigsberger against Mrs. Mial, wasn't it? A. In settlement? No.

Q. As one of the payments in the settlement? A. It was to be used in the proposed settlement.

Q. You mean the proposed settlement of the suit of Koenigsberger against Mrs. Mial? A. In proposed settlement whereby Koenigsberger was to testify and whereby he was also to cancel his judgment.

Q. And he was also to be paid his money? A. Yes, not in full.

Q. For what was he to be paid this money besides testifying? A. Simply because he would not make any arrangements.

Q. Wasn't it to get any money for the claim he had against Mrs. Mial? A. His claim against Mrs. Mial was to be settled. It wasn't recognized as a claim, but simply in order to get him to testify for them.

Q. What is the other matter? A. The claim which he stated he had against Mrs. Mial or the judgment which was of record, you stated you had a judgment.

Q. Don't this paper say he had a judgment? A. Upon Mrs. Mial depositing the money the judgment was to be cancelled.

Q. This money wasn't only for testifying, but also in consideration of his judgment? A. The whole matter was to be cleaned up at one time.

Q. Have you the agreement that you sent us, Mr. Sorg? A. I have a copy of it.

Q. Is this a copy of it? A. Yes, I understand that is the copy which was sent to you by Mr. Burnett.

Q. Have you with you the agreement that I returned with this or proposed agreement? A. No.

(Mr. Von der Lippe offers agreement in evidence to be marked for identification.)

(Objected to by Mr. Lesser on the ground that this whole matter, going into a settlement of the Koenigsberger judgment is utterly irrelevant and improper because there has not been any.)

Agreement marked Exhibit P-1 on part of the plaintiff.

Q. Didn't you tell Mr. Koenigsberger at the time of our conversation that you were preparing your case, your Company or Mr. Burnett, wasn't Mr. Koenigsberger told in your presence that you were preparing this case? A. We told him we were associated as counsel with Mr. Besson.

Q. And you were going to file an amended complaint? A. Yes.

Q. And you could not do that without certain information which he had? A. No. I don't recall that as to the amended complaint.

Q. Mr. Koenigsberger told you that he could be of great service to you with the books and information he had in the preparation of the case against the Surety Company? A. Yes.

Q. After this original meeting you had really nothing further to do with the papers? A. Personally, no.

Q. You are not familiar with why this did

not go through? A. Not, except what I heard from you or Mr. Burnett personally. I didn't handle the case any more.

Q. Mr. Sorg, who brought this check of $250 to your office? A. I believe it came through the mail.

Q. Through who? A. Mr. Besson.

Q. Was there a letter with it? A. Yes.

Q. Have you got the letter with you? A. Not with me. That is a letter between Mr. Besson and ourselves.

Q. Was anything said in the letter about this check? A. It simply said that it enclosed the check so far as I remember.

Q. You are not certain, however? A. Not positive. It also discussed the case from the question of going ahead with it and it also mentioned that "I enclose check," etc.

Q. But Mr. Besson sent it to you in connection with this agreement? A. He did not send it with the agreement.

Q. In connection? A. He sent it to be used in settling up with Koenigsberger.

Q. Did that check go into your account? A. Yes.

Q. Who received the check through the mail? Mr. Burnett or yourself? A. Mr. Burnett.

Q. Where is that money now? A. We have it so far as I know, unless Mr. Burnett has returned it since.

Q. Was the check deposited? A. Yes. I say yes, I am not certain about it. I understand it was.

Q. Who made this entry? A. Mr. Burnett dictated it.

Q. To whom? A. To one of the stenographers.

Q. And that stenographer put it in the book? A. The stenographer puts it on a slip and one of the office clerks puts it in the journal from the slip.

Q. And that is where this entry was taken from? A. From the journal.

Q. And this is Mr. Burnett's dictation? A. Yes.

Q. Do you know which of Mr. Burnett's stenographers? A. I don't know, we have three stenographers and we dictate to them interchangeably.

Q. What are their names? A. Miss Etta Groach, Miss Elizabeth O'Neil and the third one at that time was Miss De Grath.

Q. What was the name of the clerk who made the entry? A. Probably the office boy, Michael Hedrick. It might perhaps be made by one other clerk.

Q. What is his name? A. Joseph Carracino.

Q. Do you know whether or not this settlement fell through because of anything on the part of Koenigsberger? A. I do remember this, that you came to the office and said that it wasn't consummated.

Q. Did you see the entry in the book, this entry? A. Yes.

Q. Did you recognize the hand-writing you saw? A. Yes.

Q. Whose hand-writing was it? A. It was the office boy's hand-writing, Michael Hederick.

Mr. Sorg, on re-direct examination by Mr. Besson testifies:

Q. These entries, are they made for any other purpose than to aid Mr. Burnett in remember-

ing what money has been put in his hands and by whom?

(Objected to by Mr. Von der Lippe as being entirely leading question and not properly put.)

A. They are simply made like any other entry is made in any other business, simply to keep a record of our transactions. We post it from the journal to the ledger and it shows the credits against the particular accounts.

Q. Are they intended in any way to show or have any binding force on the person that pays the money beyond showing that he has paid that amount of money?

(Objected to by Mr. Von der Lippe for the reason that it is not material what it was intended to do; the question is what they really do do and not what was intended by them at all.)

A. My idea is that it was put there to keep a record of our financial transactions in our office like any other business would keep a bookkeeping system.

Q. The contract that has been offered here as having been drawn by Mr. Burnett and sent to Mr. Von der Lippe, what became of that contract? A. We still have a copy of it, the one I produced this afternoon. It was never signed.

Q. Did Mr. Von der Lippe keep it or return it? A. I don't remember whether he returned the particular copy we sent him or not. I do know that he sent back another proposed draft but what that contained I don't know.

Q. Drawn up by whom? A. I don't know.

Q. Anybody in your office? A. The one we got back in the mail? No. But I don't know what the terms of that were. I never read it and compared it with the one we had drafted.

Q. Did the parties to those drafts of contract ever reach the point where they signed up and made a definite agreement?

(Objected to by Mr. Von der Lippe because it calls for a conclusion and for another reason that it is not proper re-direct examination. There is nothing in the cross examination which speaks of any agreement except the one Mr. Burnett sent to my office.)

A. Not to my knowledge.

Q. Did the proposed settlement ever get any further than negotiations on each side?

(Objected to by Mr. Von der Lippe because it calls for a conclusion of law, also on the ground that he characterizes result of the acts of the parties, that is, the settlement.)

A. Not to my knowledge.

Q. Did Mr. Koenigsberger and Mrs. Mial ever sign any agreement of settlement?

(Objected to by Mr. Von der Lippe because the witness had already stated that that after the conference which we held the matter was no longer in his hands and said that it would be necessary to show that after that point he again had hold of the matter before he can answer the question as it is put, not showing that the

witness had the matter to a conclusion for he already testified that he did not, that some one else had it.)

A. Not to my knowledge.

Further Cross-Examination by Mr. Von der Lippe:

Q. Mr. Sorg, whether or not, do you know that I sent Mr. Burnett back the draft of agreement which he sent me with some memorandums on the side? A. No. Nothing about the memorandums on the side.

Q. Do you know I sent it back with memorandums on the side? A. No. I know you sent it back but not about the memorandums on the side.

It is stipulated between the attorneys of the respective parties that the signatures of the witnesses to the testimony shall be waived.

Mr. Besson, being recalled, on re-direct examination testifies:

Mr. Warren objects unless the examination be in question and answer form.

Q. Do you know whether or not any agreement of settlement has ever been made and signed in writing between Ferdinand Koenigsberger, plaintiff, and Kate A. Mial, defendant in this suit, for the settlement of the matters in difference between them, including this judgment?

(Objected to by Mr. Von der Lippe on the ground that it is not proper re-direct examination.)

A. Yes.

Q. Was any such agreement ever made and signed?

(Objected to by Mr. Von der Lippe on the ground that it is not proper re-direct examination; also that it is immaterial whether or not agreement was signed for the reason that it is unnecessary to have a binding agreement of settlement that the agreement be signed.)

A. No. No such agreement was ever made and signed.

Q. Why was it not made and signed?

(Objected to by Mr. Von der Lippe on the ground that it calls for a conclusion of fact and law and is not proper re-direct examination, and also the foundation is not laid to show that the reason, if any, is within witness's knowledge.)

A. Because Ferdinand Koenigsberger refused to sign the proposed agreement and returned another draft with additions and changes to Mr. Burnett's which changes and additions Mrs. Mial refused to accept and sign.

Mr. Besson, on cross-examination by Mr. Von der Lippe, testifies:

Q. Did Mrs. Mial know of this settlement? A. Not personally.

Q. When you say that Mrs. Mial refused to sign what do you mean? A. She was acting through her attorney-in-fact, Doctor Mial.

Q. And he knew all about it? A. I would not say knew all about it. He read the agreements.

Q. And to your knowledge he was acting as her authorized attorney-in-fact? A. In his dealings with Mr. Koenigsberger.

Q. During what period of time, do you mean during all his dealings with Mr. Koenigsberger? A. Not all, I think.

Q. In what instances of his dealings with Mr. Koenigsberger, did he not act as the authorized attorney-in-fact of Mrs. Mial? A. He didn't have any written power of attorney, I think, prior to November, 1912.

Q. Did he obtain a written power of attorney then? A. About that time.

Q. He had a written power of attorney ever since that time? A. Yes, so far as I know.

Q. At the time the written power of attorney was signed was all his prior acts authorized by Mrs. Mial? A. I suppose so.

Q. He was acting as her authorized attorney-in-fact in his dealings with Burnett & Cornish? A. I don't remember whether the power of attorney authorized him to employ lawyers and treat with them or not.

Q. Did you ever have any conversation with Mrs. Mial herself in reference to the Koenigsberger matter, not asking what the conversations were? A. The claim of Mr. Koenigsberger against Mrs. Mial? I cannot remember that I ever did, yet it is possible. I might have a long time ago.

Q. Did you, in any course of conversation or by way of letter to Mrs. Mial, communicate anything to her in reference to the settlement of the Koenigsberger claim? A. I don't remember that I ever wrote to her or spoke to her personally

about it. I always conducted my communications to her through the doctor.

Q. And did you ever receive any letters from her? A. Not that I remember of.

Q. All of your dealings with Mrs. Mial were through her husband, Doctor Mial, in regard to the Koenigsberger suit and in regard to the settlement of his claim against her? A. Yes.

Q. Did Mrs. Mial ever see either the Burnett or Von der Lippe draft of the agreement of settlement of the Koenigsberger claim? A. I have no personal knowledge of that. I infer she did, though, because the doctor took it home with him and kept it several days.

Q. Did she sign Burnett's draft of the agreement? A. No; not that I remember.

Q. Mr. Burnett sent you the draft, did he not? A. I think he did, after Koenigsberger had refused to sign it.

Q. Do you know the date that Mr. Burnett sent you the draft? A. I could not give you that now.

Q. Was it before or after you sent him the $250 check? A. After, so far as I recall.

Q. And Doctor Mial gave you that check to send to Mr. Burnett? A. Yes.

Conclusions.

HUDSON COUNTY CIRCUIT COURT.

FERDINAND H. KOENIGSBERGER vs. KATE A. MIAL, *et al.*	On Motion.

JOHN WARREN, Esq., Attorney for Plaintiff.
SAMUEL A. BESSON, Esq., Attorney for Defendant.

CAMPBELL, *J.*:

This is an application to open a judgment by default for want of answer, to permit defendants to answer and defend.

The reason for lack of answer within time is neglect and mistake of counsel.

This fact and circumstance is well established by the depositions taken and I am satisfied that failure to file an answer within time was an outright and honest mistake of counsel.

That is not sufficient, however, to warrant the opening of the judgment.

The defense proposed by the answer must have a substantial basis in fact and law.

The depositions taken, while quite voluminous, do not, upon the matters directly in issue before me, satisfy me with sufficient reasonableness that the defense proposed can be made out.

The motion to open the judgment and to defend is denied, with costs.

Dated, July 12th, 1915.

LUTHER A. CAMPBELL,
Judge.

Order.

NEW JERSEY SUPREME COURT.

FERDINAND KOENIGSBERGER, Plaintiff-Respondent, vs. KATE A. MIAL, Individually and as Executrix of the Last Will and Testament of Henry H. Hankins, deceased, Builder and Owner, Defendant-Appellant.	On Appeal. Order.

This matter being opened to the Court by Samuel A. Besson, attorney for the defendant-appellant, and it appearing to the Court that the printed case book which has been served upon the attorneys for the plaintiff-respondent does not contain the following matters and things which it is conceived by the attorneys for the plaintiff-respondent are necessary to the argument of the said appeal, viz.,

1. The testimony taken by the defendant-appellant in the Hudson County Circuit Court on the rule to show cause.

2. The order of the Hudson County Circuit Court disposing of the rule to show cause.

3. The conclusions and findings of Judge Campbell of the Hudson County Circuit Court on the argument of the rule to show cause.

Order.

It is, on this second day of June, A. D. 1916, ordered that the defendant-appellant prepare a supplemental case book which shall contain the following matters and things: this order and the three items which have been mentioned in the preamble of this order as not being contained in the orginal case book.

It is further ordered that this supplemental case book shall be printed and served upon the plaintiff-respondent's attorneys before the opening day of the June Term.

F. J. Swayze,
Justice of the Supreme Court.

On motion of
Samuel A. Besson,
Attorney for the Defendant-Appellant.

We consent to the making and entry of the foregoing order.

Wm. Theo. Von der Lippe,
Runyon & Autenrieth,
Attorneys for Plaintiff-Respondent.

Samuel A. Besson,
Attorney for Defendant-Appellant.

Stipulation.

NEW JERSEY SUPREME COURT.

FERDINAND KOENIGSBERGER,
Plaintiff-Respondent,

vs.

KATE A. MIAL, Individually and as Executrix of the Last Will and Testament of Henry H. Hankins, deceased, Builder and Owner,
Defendant-Appellant.

On Appeal.

It appearing to the attorneys for the respective parties in the above named cause that the only document in the nature of an order disposing of the rule to show cause in the above named cause is the conclusions and findings of Judge Campbell of the Hudson County Circuit Court, which is dispositive of the rule to show cause,

It is therefore stipulated and agreed by and between the attorneys for the respective parties hereto that no order of the Hudson County Circuit Court other than the conclusions and findings of Judge Campbell hereinbefore mentioned shall be printed in the supplemental case book.

June 2, 1916.

WM. THEO. VON DER LIPPE,
RUNYON & AUTENRIETH,
Attorneys for Plaintiff-Respondent.

SAMUEL A. BESSON,
Attorney for Defendant-Appellant.

New Jersey Court of Errors and Appeals

FERDINAND H. KOENIGSBERGER, Plaintiff-Respondent, vs. KATE A. MIAL, individually and as Executrix of the Last Will and Testament of Henry H. Hankins, deceased, Builders and Owners, Defendant-Appellant.	On Appeal from Supreme Court.

BRIEF FOR APPELLANT.

Statement.

This is an appeal from the judgment of the New Jersey Supreme Court affirming a judgment of the Hudson County Circuit Court entered in a suit to recover damages for architect's services. The opinion of the Supreme Court was per curiam (C. B., 6 to 8).

Introduction.

Defendant-appellant charges that the respondent, *arbitrarily and without right, entered judgment,*

for $1,217.16 damages and $47.88 costs against her, in the Hudson County Circuit Court, while a motion to strike out an amended complaint was pending and undisposed of before the Court and when the regular order of pleading had been interrupted by the striking out of the original complaint and the filing of an amended complaint.

The original complaint herein, filed Sept. 6, 1913 (C. B., page 9), set out a claim for architect's services. On September 10, 1913, defendant-appellant, Kate A. Mial, filed an affidavit of merits. On March 30, 1914, the complaint was ordered stricken out and leave given to amend (C. B., page 17). On April 15, 1914, the amended complaint was filed (C. B., page 18, etc.). The original record returned shows no further step in the cause until the filing of an assessment of damages and the entry of judgment (C. B., pages 24-34). A supplemental return, however, by Judge Campbell, made pursuant to an order of this Court, indicates that on May 15, 1914, a motion was argued before the Hon. Luther A. Campbell, as Judge of the Hudson County Circuit Court, to strike out the amended summons and complaint filed (C. B., page 69, lines 5-9). This return further sets out verbatim the notice of this motion (C. B., page 69, line 20; page 71, line 30), as well as the opinion of Judge Campbell determining said motion, as follows (C. B., page 73, line 20):

> "The motion to strike out is granted, in the manner and to the extent set forth in the notice to strike out and for the reasons therein urged. Dated June 19, 1914. Luther A. Campbell, Judge."

This supplemental return also shows that no order was filed in the Hudson County Circuit Court

disposing of the motion striking out the amended complaint (C. B., page 73, lines 34-40), and that *this motion was pending and undisposed of before the Court on November* 17, 1914, *the day when the interlocutory judgment by default was entered and on November* 19, 1914, *when judgment final by default was entered, except as far as it was disposed of by the opinion of Judge Campbell* above set forth, which opinion, it is certified, was sent to both attorneys (C. B., page 74, lines 1 to 15).

An opinion of the Court *per se* is not dispositive of a matter pending before it, for it is but a mere statement of the Court's conclusions and affords the basis and guide for the preparation of a rule, order or decree to be signed and filed with the court records in conformity with the prevailing practice.

The arbitrary act of plaintiff-respondent in entering judgment before a rule or order disposing of the motion to strike out the complaint was signed and filed was in gross derogation of defendant's rights.

After judgment had been entered, defendant's attorney, Samuel A. Besson, on March 30, 1915, obtained a rule to show cause with a stay of execution (C. B., page 50). Mr. S. A. Besson applied for this rule on the theory that it was a default judgment regularly entered as a result of his negligence (see his affidavit, C. B., page 42, line 37, to page 43, line 10). In this regard as the judgment was prematurely and unlawfully entered on a complaint, which in the opinion of the Court should have been amended.

Depositions were taken pursuant to this rule (C. B., pages 75 to 160).

After hearing counsel and reviewing the depositions, Judge Campbell rendered a written opin-

ion on July 12, 1915 (page 163) in which he decided to discharge this rule. This opinion was not filed and before an order was signed or filed in conformity with it, defendant's attorney moved to vacate the judgment entered for the following reasons:

(1) Because the judgment interlocutory and the judgment final entered in this cause were both prematurely and improvidently entered.

(2) Because the judgment interlocutory and the judgment final entered by default in this cause are nullities.

(3) Because the regular order of pleading in this cause had been interrupted by the striking out of the original complaint by the filing of the amended complaint and the defendants had not been ruled to plead.

(4) Because there was a motion pending before the Court at the time of the entry of the judgment interlocutory and the judgment final, by default (C. B., pages 51 and 52).

The motion was argued on July 31, 1915, before Judge Campbell, both sides being represented by counsel. About six months later, on January 21, 1916, Judge Campbell rendered an opinion in writing, as follows (C. B., page 52, lines 22-40):

"Campbell, J.:

Finding no irregularity in the proceedings prior to and upon the entry of the judgment in question, as far as the same may have been challenged by the notice of this motion, the

motion to vacate the judgments interlocutory and final is denied with costs.

Dated January 21, 1916.

LUTHER A. CAMPBELL,
Judge."

On February 1, 1916, an order in conformity with this opinion, signed by Judge Campbell, was filed (C. B., page 53). Defendant then filed notice of appeal assigning the same reasons for appeal as were assigned on the motion to vacate the judgment (C. B., pages 54-55).

POINT I.

The motion to dismiss the amended complaint was never adjudicated by the Trial Court by an order and is still undetermined.

The order of procedure in question is as follows:

An amended complaint was filed April 15, 1914 (C. B., page 18).

Notice to strike out this complaint was duly given (C. B., page 69, line 20).

Said motion was argued before the Trial Court on May 15, 1916 (C. B., page 69, line 3).

A memorandum was filed by the Trial Court as to its conclusions on the motion (C. B., page 73, line 12).

No order was ever filed by the Trial Court determining said motion (C. B., page 73, line 35).

Said motion to strike out was therefore undisposed of when judgment was entered (C. B., page 74).

The practice in our courts at the present time is that a motion addressed to a pleading suspends the time to plead in answer thereto until the motion is *finally* disposed of by the Court, otherwise it would be unsafe to make a motion.

It will be admitted that final disposition of a motion can *only* be accomplished by an *order* of the Court. And such an *order* must be made and signed by the Judge of the court either upon the Court's own motion or more frequently upon motion of a party in interest. But the *party* does not make the order. Of course it is usual for the successful party to apply for an order pursuant to the opinion of the Court, so as to determine the matter in his favor. But if such successful party neglects for any reason to apply for the order within a reasonable time the only way to have the matter determined is for the *other* party to apply for the order.

There is no statute or rule in this state which provides for a time limit for the application for such an order upon an opinion of a Court, nor is there any statute or rule which prescribes as a penalty for the failure to so apply that the motion shall be considered as abandoned, as was stated in the opinion of the Supreme Court (C. B., page 7, line 30).

In Smith vs. Spalding, 30 How. Prac., 339, the Court said:

> "An order is the only mode of judicially determining a special motion."

In 14 Encyc. Pl. & Pr., page 170, the text is as follows:

> "The express and formal determination of a motion is made by the entry of an order grant-

ing or denying a part or all of the relief sought."

Again, in Whitney vs. Belden, 4 Paige, 140, the Court said:

> "Neither party can have any benefit from a decision of a Court until the order thereon is drawn up and perfected."

And further in that opinion the New York Court held that the proper practice was that if a party entitled to an order upon a decision of a Court neglected to have it made, *then any party in interest might do so.*

To the same effect are 8 Hun, 34; 3 How. Prac., 276. See also 29 Cyc., 1516.

It is urged that in the case at bar that there never was a final determination of the motion to strike out because no order was made by the Court; that either party could have applied for such order; that until the order was made, the whole matter was in abeyance and neither party could be in default; that the motion to strike out could only be finally determined by an order; that no judgment could be entered until after an order adjudicating the motion had been made *by the Court* and there had been a default thereafter by either party.

POINT II.

Appellant's failure to enter a rule striking out the amended complaint was not an abandonment of her motion.

The Court's attention is directed to the opinion of the Supreme Court (C. B., 7, line 24). The opinion uses the following language:

"We think the judgment under review should be affirmed. On its face it is regular. The defendant is presumed to have had notice of the filing of the amended complaint, because within twenty days after its filing she moved to strike out certain portions thereof. *Her failure to enter a rule in accordance with the decision of the Circuit Court in her favor on the motion to strike out certain parts of the amended complaint, was, we think, an abandonment of the motion. Having abandoned the motion, and having failed to plead to the amended complaint within the time specified by the order of the Court, the plaintiff was entitled to take judgment against her by default.*" (The italics are those of the writers of this brief.)

It is contended that the failure to enter the rule by the appellant was not an abandonment of the motion. Under our new practice, it is customary to strike out complaints upon motion. General and special demurrers have been abolished. Under the old practice, when a general demurrer or a special demurrer had been filed to a declaration or to a plea or replication, entering judgment despite the fact that such a matter was before the Court, would have been unheard of. It is contended that the practice of the Court of King's Bench is the practice of the Supreme Court and of the Hudson County Circuit Court, except so far as the change by rules of the Court or by act of the legislature. Under the circumstances, if the plaintiff below, who is the respondent here, desired to speed the cause, he could have done so by applying to the Court to enter an order in conformity with its determination dispositive of the motion

to strike out the amended complaint by entering such order and by filing a second amended complaint in conformity with it.

Attention is also directed to the language of the Supreme Court in the same opinion in which it was said (C. B., 7, line 40):

> "According to the theory of the defense, a suit might be perpetually stayed by a defendant by following the course pursued in the present case by Kate A. Mial, the appellant."

This, it is contended, is not so because the respondent, the plaintiff below, could have applied to the Court and secured an order as above stated. The course which he took, it is contended, is a sort of practice not to be tolerated or encouraged. When a Court has determined a matter, either party can apply to it for the purpose of framing an order in conformity with the Court's sedition and thereupon entering it. We contend, respectfully, that the reasoning of the Supreme Court on this question was not correct and that the judgment of the Supreme Court should be set aside.

POINT III.

The regular order of pleading had been interrupted by the filing of the amended complaint and the striking out of the original complaint.

If plaintiff had any right to enter judgment by default, it arose from Section 14 of the new Practice Act, P. L. 1912, page 379, which is as follows:

> "Judgment of non-suit, or by default may be entered against plaintiff or defendant, re-

spectively, *for failure to plead according to the rules.*"

The rules prescribed by the Supreme Court under the authority of the Practice Act, *supra,* applicable to the situation at bar, are Rules 75, 76, and read as follows:

RULE 75.

"The complaint shall be annexed to the summons or capias ad respondendum and returned therewith; and a copy thereof shall be served with the summons or capias."

RULE 76.

"The answer or counterclaim shall be filed within twenty (20) days after the service of the summons (or capias) and complaint. If further pleadings be necessary, they shall be filed within twenty (20) days, each after the other."

As has been stated, the original course of pleading was interrupted by the rule striking out the plaintiff's original complaint and the filing in April, 1914, of the amended complaint. The latter portion of Rule 76 states:

"If further pleadings be necessary, they shall be filed within twenty (20) days, each after the other."

This is precisely the language of Section 98, P. L. 1903, page 566, 3 C. S., page 4081 (the old Practice Act). This section was originally adopted by the Legislature in 1799 and was primarily in-

terpreted by the courts in the case of Berry vs. Cahanan, 2 Halstead, 135, to mean that when the course of practice, as to filing pleadings, which is established by the Practice Act, is once broken in upon, the English practice, of ruling your adversary to plead, must be pursued.

> "Where the rules of practice or something exceptional in the case, such as an amendment of the complaint, the striking out of the plea or answer with leave to plead anew, or an arrangement of the parties, required defendant to be ruled to plead, he cannot be put in default without the taking of such a rule and its proper service upon him or due notice to him. But if he then fails to plead or answer within the appointed time, judgment may be taken against him as for want of a plea. It has been held, however, that a plea filed after the day fixed by the rule will not be too late, if before a default is asked for and ordered."
>
> 23 Cyc., 745.
> Halsey vs. Miller, 16 N. J. L., 63.

This same proposition was considered in the case of Hoey vs. Aspell, 62 N. J. L., page 200, which applies to the present situation. In that case, the plaintiff entered an interlocutory judgment and judgment final by default for want of a plea. This judgment was set aside as improvidently entered and later another judgment by default was entered. The Court, on writ of error, set aside these judgments because of the rule laid down in Berry vs. Cahanan, *supra,* that the defendant had not been ruled to plead. The same rule was further considered in the case of Point Pleasant Traction

Company vs. Vanderbilt, 79 Atl., 85. The situation there is very similar to the present case. There can be no doubt that under the old Practice Act in use prior to 1912, that the plaintiff was without any lawful right to enter judgment by default, and that the vacating of such a judgment was by no means a matter addressed to the discretion of the Court, but as shown in the case of Hoey vs. Aspell, *supra,* was a matter which the Court would consider on a writ of error, as grounds for reversal of the judgment. It is contended that the same rule of practice exists under the Practice Act of 1912. The Supreme Court prescribed under legislative authority, Rule 76, in the language of Section 98, P. L. 1903, page 566, 2 C. S., 4081, and it is quite evident that the Court intended not only to adopt this language, but also the construction which it had already placed upon it.

This conclusion is entirely in consonance with Section 32, Practice Act, P. L. 1912, page 383:

> "Such rules shall supersede (so far as they conflict with) statutory and common law regulations heretofore existing."

Rule 76 as adopted by the Supreme Court was a reiteration of the old practice as construed by the Court for over a century. It was the duty of the plaintiff to rule the defendant to plead after having filed his amended complaint, but having neglected to do so, he had no legal right to enter judgment either interlocutory or final by default. This situation was created entirely by his own neglect. Mere lapse of time could not confer the right upon him.

In this position, it was the duty of the Circuit Court, it is urged, to strike from the record both

the judgment interlocutory by default and the judgment final by default on the ground that they were improvidently and unlawfully entered. The Court's attention is further directed to the fact that while two motions were made to strike out the original complaint and the amended complaint, respectively, were served upon the counsel for the plaintiff, nevertheless the record does not show that either of these motions were filed and with the exception of the affidavits of merits the record is clean as to any pleading filed on behalf of the defendant, Kate A. Mial. This requires us to consider the provisions of Section 100 of the Practice Act, 3 Comp. Stat., 4082 (not repealed by Practice Act of 1912), which sets out the following:

> "If a party would take advantage of the failure of the adverse party to file any pleading within the time limited or granted, he shall do so before or at the term next after such failure; and if he fail to do so, it shall be considered as a waiver of his right and he shall not afterwards have such judgment, unless he shall rule the party to plead."

See Whitney vs. Bank, 40 N. J. L., 481.

The affidavit of merits is the only thing filed in the way of a pleading on behalf of Kate A. Mial. This was done on September 10th, 1913. The record shows that the rule for judgment interlocutory was entered on November 17th, 1914, and the judgment final on November 19th, 1914. Practically three terms of court had passed between the filing of the affidavit of merits and the rule for judgment. It is clear that this delay gave the plaintiff no right to enter judgment.

POINT IV.

Judgment was entered against the defendant when a motion was pending before the Court.

The situation discussed under Point I was further aggravated by the fact that a motion to strike out the amended complaint was pending before the Court, and the further fact that the Court, after argument, had determined that the amended complaint should be stricken out, although no order had actually been entered to this effect. In this posture of affairs, the defendant's attorney had a right to believe that the proceedings were stayed, because it is the rule of practice, as set forth in Cyc., that:

> "Generally it is erroneous and irregular to enter a judgment by default while a motion remains pending and undisposed of."
>
> 23 Cyc., 751.
>
> "Where a motion made by the defendant is pending undisposed of, a judgment by default against him cannot be taken, unless the determination of the motion, either way, could not affect the right of the plaintiff to proceed with the cause."
>
> 6 Encyc. Pl. & Pr., 93.

A motion is essentially an intangible thing. It is commonly defined as an application for a rule or order. 5 Words & Phrases, 4609, 4610. It is something separate and distinct from the *notice of motion* served by one party upon his adversary.

Under the old English practice, motions to strike out pleadings were unknown. General and special demurrers were used for this purpose. The Practice Act of 1903, Section 127, 3 Comp. Stat., 4093, abolishes special demurrers. Motions to strike out pleadings replaced special demurrers. See Section 110, 3 Comp. Stat., 4086. When a notice of motion was served under Section 110, *supra,* it was not necessary to file it. The language of this statute is as follows:

> "The court or a judge may, on four days' notice, strike out any pleading which is irregular or defective, or is so framed as to prejudice, embarrass or delay a fair trial of the action, and the order striking out shall be entered on the record, if required by the party against whom the same is made, and error may be assigned thereon."

Under that section a refusal to strike out a pleading could not be made a part of the record so as to be reviewable on a writ of error.

See

Cooper vs. Vanderveer, 47 N. J. L., 178.

It was only when the moving party prevailed that the order striking out was entered on the record and then only when the opposite party required it.

Under the practice act of 1912, now in force, there is no rule requiring the filing of the notice of motion to strike out. In fact, under Rule 215, prescribed by the Supreme Court, it is directed:

> "No rule shall be granted or entered in the minutes of this court for any appearance,

bail, complaint, answer or other pleading, or for any other matter or thing to be entered, filed or done by either of the parties in any suit pending, the time of the entering, filing or doing whereof is particularly specified and directed by any act of the Legislature for regulating the practice; nor shall any state of the case, or any affidavit touching the merits of any controversy, or any notice containing the substance thereof, or any other paper whatsoever, be filed in this court by any party in any suit therein pending, without leave first granted therefor by the court, except only writs and process with their returns, pleadings and other papers necessarily accompanying the same, and such other papers, matters and things as are specially directed to be filed, either by act of the Legislature or by rule of this court."

Under Rule 30, the order of pleadings is determined. This rule uses the expression, "Motion addressed to the pleading." The rules recognize the distinction between the notice of motion and the motion. See Rules 42 and 43 as follows:

RULE 42.

"Every motion addressed to a pleading must present every cause of objection then existing."

RULE 43.

"Every notice of any motion addressed to a pleading shall specify the grounds thereof."

In the case of Herrlich vs. McDonald, 22 Pac., 299; 80 Cal., 472, it was held:

> "A notice of motion is not a motion, and should not be so treated. The careful practitioner will either prepare and file his motion in writing, stating the grounds thereof, or have the same entered in the minutes. This is not necessary, however. The motion may be made orally. But in every case, whether made in writing, entered on the minutes, or stated orally, the same should be preserved by bill of exception, and brought to this court in that way on appeal, so that we can see from the record that a motion was made and the ground on which it was made."

Neither the practice prior to 1912, nor the subsequent practice requires the filing of a notice of motion. Rule 40 abolishes demurrers and provides as follows:

> "Any pleading may be struck out on motion on the ground that it discloses no cause of action, defense or counterclaim respectively. The order made upon such motion is appealable after final judgment. In lieu of a motion to strike out the same objection and any point of law (other than a question of pleading or practice) may be raised in the answering pleadings, and may be disposed of at or after the trial; but the court, on motion of either party, may determine the question so raised before trial, and if the decision be decisive of the whole case, the court may give judgment for the successful party or make such order as may be just."

This motion was properly before the Court and the Court not having granted an order, that is ac-

tually signed an order, these expressions being used interchangeably (see Rule 214), the plaintiff had no right to proceed to enter judgment until the motion was determined, and a rule expressing this determination entered.

POINT V.

The Circuit Court had no jurisdiction to determine on the merits of appellant's defense.

The Court's attention is directed to Section 112, 4 Comp. Stat., 4087, as follows:

> "If, in any action, judgment shall pass against either party by reason of the failure of the attorney of such party to file any proper pleading, the court or a judge shall, on application within one year after the entry of such judgment, open said judgment and permit a proper pleading to be filed upon terms, if in the opinion of the court or judge inquiry or wrong has resulted or may result from such failure."

The Circuit Court was without jurisdiction to act under this section, because plaintiff's judgment was not *regularly entered,* on the contrary, it was entered at a time when a motion was pending before the Court.

Nevertheless, the Supreme Court discussed the merits of the case in its opinion. Under such a statute or the common law, as it existed prior to this statute, the opening of a judgment *regularly entered* by default was addressed to the discretion of the Court, and was not reviewable.

Smith vs. Livesey, 69 N. J. L., 269.

Under the circumstances of the case at bar the judgment should have been vacated as a matter of right.

POINT VI.

The judgment of the Supreme Court affirming the judgment of the Hudson Circuit should be reversed.

Respectfully submitted,

HARLAN BESSON,
EGBERT ROSECRANS,
of Counsel with Appellant.

SAMUEL A. BESSON,
Attorney.

NEW JERSEY

Court of Errors and Appeals.

FERDINAND H. KOENIGSBERGER,
Plaintiff-Appellee,

vs.

KATE A. MIAL,
Defendant-Appellant.

On Appeal.

Brief of Appellee.

This case is before the Court on an appeal taken from the Supreme Court, the opinion being rendered by the Supreme Court, at the June Term, 1916, affirming the judgment of the Hudson County Circuit Court. The plaintiff below instituted his action in the Hudson County Circuit Court and filed his complaint therein on September 6th, 1913 (page 9), to recover the sum of $1,127, and to perfect a lien on the lands of the defendant under an act entitled "An Act to secure to me-"chanics and others payment of their labor and ma-"terials in erecting any building." The defendant gave notice to strike out the name of "Leonidas L. "Mial, individually and as executor of Henry H. "Hankins, deceased," from the summons and complaint (page 16). The Trial Court granted the motion and permitted plaintiff to amend his complaint and add the name of "Kate A. Mial as executrix of "the last will and testament of Henry H. Hankins, "deceased, builder and owner," and also ordered and directed that the said amended complaint be served upon the defendant or her attorneys within

twenty days after the date of said order; and further ordered the defendant to answer the said amended complaint within twenty days after service thereof upon the defendant or her attorney. This order of the Court was entered upon the motion of the defendant's attorney (page 17). The said amended complaint was duly served upon the defendant's attorney, and he failed to file his answer within twenty days thereafter, as provided by the order of the Court (page 18). The defendant, on May 5th, 1914, gave notice of a motion to strike out certain portions of the amended complaint, and the Court granted the motion on June 9th, 1914, but no order had ever been entered by the defendant's attorney on said motion, when the judgment was entered on November 18th, 1914 (page 69 and 73). The plaintiff thereupon entered judgment by default (page 36), and had the damages assessed. Sometime thereafter the defendant obtained a rule to show cause why the judgment should not be opened (page 50). The affidavits upon which the rule to show cause was granted based the application for said rule to show cause on the ground that the failure to file the answer was due to the neglect or mistake of the defendant's attorney, and that the defendant had a meritorious defense. Testimony was taken under this rule before a Supreme Court Commissioner (pages 76–162), and upon the return of the testimony to the Court the argument of the said rule to show cause was had, both parties being represented by counsel. The Court, after reserving decision, finally handed down its conclusions on July 12th, 1915 (page 163), in which the Court found that there had been an honest mistake of counsel in the failure to file the answer within the time prescribed by the rule of the Court, but that the testimony taken under the rule did not make out a defense to the merits of the case set forth and

contained in the complaint, and that there was, therefore, no meritorious defense. The Court thereupon denied the motion to open the judgment (page 163). Thereafter the defendant then gave notice of motion to have the judgment vacated and set aside upon the ground that the judgment by default had been prematurely entered and because defendant had not been ruled to plead; and on the further ground that there was a motion pending before the Court at the time of the entry of the judgments, interlocutory and final, which motion had not been disposed of (page 51). Upon the argument of that motion the Court, on January 25th, 1916, handed down the following conclusion:

> "Finding no irregularity in the proceeding prior to and upon the entry of judgment in in question, as far as the same may have been challenged by the notice of this motion, the motion to vacate the judgments, interlocutory and final, is denied with costs" (page 52).

An order was thereupon entered on February 1st, 1916, dismissing said motion (page 53).

The appeal in this Court presents the same grounds of appeal as were presented in the Court below, and as were also presented to the Trial Court on the motion to vacate the judgment, except paragraph 6 of the notice of appeal, which ground for appeal is raised for the first time in this Court; but even if that ground be good, it cannot be considered here and was not mentioned below.

I.

The judgments, interlocutory and final, were properly entered because of the default in the filing of the defendant's answer.

From the record it appears that on March 30th, 1914, the Circuit Court ordered that the plaintiff have leave to amend and file an amended complaint and that the said amended complaint be served upon the defendant within twenty days after the date of that order, and that within twenty days thereafter the defendant should file her answer. This amended complaint was served on defendant's attorney and filed April 15th, 1914. On May 5th, 1914, the defendant gave notice of a motion to strike out the amended complaint (p. 69). Said notice, however, affected the rights of Kate A. Mial only as executrix under the last will and testament of Henry H. Hankins, and did not in anywise constitute a motion on behalf of Kate A. Mial, individually, and with respect to the defendant, Kate A. Mial, individually, this record remained entirely open and without answer. As to this defendant, therefore, none of the reasons urged, either upon the notice of motion to vacate the judgment, or the rule to show cause (which was granted to set aside the judgment), are presented on this appeal, and as to this defendent the judgment must stand as entered. The motion to strike out the amended complaint was decided by the Court on June 19th, 1914, and the Court's memorandum was sent to each counsel. No action was ever taken thereon by the attorney for the defendant and no order was ever entered by the defendant's attorney striking out the complaint in accordance with the memorandum of the Court. Nor was there ever any answer filed by the defendant individually or in her capacity as executrix,

until November 18th, 1914, when the plaintiff entered judgment by default against both defendants (page 36). As far as the record is concerned the judgment was properly entered, as it appears from record that the defendant was properly ruled to plead to the amended complaint by the order of the Circuit Court filed March 30th, 1914 (page 17). The amended complaint was filed April 15, 1914, having been served on the defendant as required by the order of the Court, and no answer having been filed thereto. The notice of the motion to strike out a portion of the complaint certainly did not act as a stay as to that part of the complaint which refers to Kate A. Mial, individually, for as to her nothing was raised by the notice to strike out, and an answer was due from this defendant and should have been filed within twenty days after April 15th, 1914. With respect to the notice of motion it was urged by the defendant that the giving of a notice of motion to strike out the complaint acts as a stay. This is not the law, for if the defendant desired time within which to answer the complaint, pending the argument of his motion, the same should have been applied for and an order of the Court made extending the time to file until the disposal of the matters arising under the motion to strike out. The defendant certainly must have abandoned her motion to strike out the amended complaint because of the fact that she never entered a rule in accordance with the opinion of the Circuit Court, but instead permitted the matter to lay without action on her part from May to November, a period of six months; and having failed to file her answer within the time specified in the previous order of the Court, of which she had due notice, the plaintiff was entitled to enter a judgment against her. (See opinion of Supreme Court in this case printed in full at the end of this memorandum.)

II.

The merits of the case were presented to the Court upon rule to show cause why the judgment should not be opened, and the Court found the defense to be without merit.

On March 30th, 1915, almost a year after the serving of the amended complaint, the defendant presented affidavits (page 37) upon which a rule to show cause was granted by the Circuit Court requiring the plaintiff to show cause why the judgment should not be opened. Pursuant to that rule testimony was taken, which testimony is found in the state of case herein on pages 76 to 162. Upon the return of the testimony to Court argument was heard upon the reasons urged by the defendant, which were:

1. That the failure to file an answer was due to neglect and mistake of defendant's counsel.

2. That there was a meritorious defense to the matters alleged in the amended complaint.

This rule to show cause was taken on behalf of defendant, Kate A. Mial, individually, and also in her capacity as executrix of the estate of Henry H. Hankins, deceased. After hearing the argument the Court decided that there was an honest mistake of counsel, but with respect to the merits of the case the finding of the Court was as follows:

> "The depositions taken, while quite volumi nous, do not, upon the matters directly in issue before me, satisfy me, with sufficient reasonableness, that the defense can be made out" (page 163).

The Court thereupon ordered that the motion to

open the judgment be denied and the rule to show cause discharged. It is a well settled doctrine that a judgment entered by default cannot be set aside unless the defendant can show a meritorious defense.

In the case of *Lance vs. Fredericks, 21 N. J. L. Jour., 344, it was held:*

> "The act in question provides that the negligence or mistakes of attorneys in failing to file proper pleadings should not be visited upon their clients to their injury. A judgment in all respects regular is, in a legal sense, injurious to a defendant when it prevents him from interposing a defense that if successful would, in whole or in part, defeat the action. The remedy given by this act is that the judgment be opened to admit the filing of such a pleading. To be entitled to this remedy the defendant must show that he has a defense of this nature.

See also *Henderickson vs. Herbert, 38 N. J. L., 296; Boyd vs. Williams, 70 N. J. L., 185.*

In the case at bar there appeared, according to the Court's conclusions. that there had been a mistake or neglecton the part of defendant's counsel; but when the defendant had an opportunity to show a meritorious defense to the matters set forth in the complaint, she was unable, according to all of the testimony before the Court, to convince the Court, with sufficient resonableness, that she had any defense that could be successful, if proven at the trial. No other question was raised under the rule to show cause other than the mistake of counsel and the allegation that the defendant had a merit-

orous defense. The defendant having failed to establish a meritorious defense it would, of course, be a useless act to disturb the judgment upon any ground, for it is fundamental to all applications of this kind that there is a meritorious defense which, if proven, will be successful on the trial. The application to open the judgment upon the rule to show cause is within the discretion of the Court, and the Court's refusal to open the judgment is not appealable.

Smith vs. Libsey, 67 N. J. L., 269.

After the defendant was unsuccessful on this application to open the judgment, she then gave notice of a motion to vacate the judgment on the ground that she was irregularly entered. The Court below found that there was no irregularity in the proceedings prior to the entry of judgment, so far as the notice of the motion challenged the same. As to the defendant, Kate A. Mial, individually, she was clearly in default in failing to file an answer to the amended complaint. There was no interruption of the order of the pleadings, so far as she was concerned, nor was there any motion pending before the Court as to her individually after the order of March 30th, 1914, and the service upon her of the amended complaint on April 15th, 1914. An answer should have been filed by her, individually, within twenty days thereafter, pursuant to the terms of the order. As to the motion pending by Kate A. Mial, as executrix, the Court decided the same on June 19th, 1914. No order in accordance with the Court's decision was ever entered by the defendant, according to the record in the Clerk's office, and that record shows that Kate A. Mial, as executrix, was in default for the failure to file an answer. Certainly the motion to strike out the amended complaint in respect to Kate A. Mial, as

executrix, did not act as a stay of the entire proceedings; nor, in fact, did it act as a stay as to the filing of an answer by Kate A. Mial, as executrix. The Court never made any order, which appears of record, disposing of the amended complaint in any manner whatsoever. The defendant did not urge, on the return of the rule to show cause which was first obtained to open the judgment, any reason concerning the irregularity of the entry of the judgment, and it was only after the decision of the Court—that the judgment should not be opened because there was no defense—that the defendant then raised, by notice of motion, the matters that are now before this Court concerning the irregularity of the entry of the judgment. The proceedings below to open the judgment, on the ground that it was irregularly entered, were upon motion and not upon rule to show cause. The proper method of challenging a judgment in the Courts of this State, whether entered irregularly or not, is to proceed by rule to show cause. To challenge a judgment is not a matter of right, but a matter of grace, it being within the discretion of the Court to control its judgments in the matter of opening or vacating them. If the defendant desired to challenge the judgment on the ground set forth in the motion, the same should have been presented to the Court by affidavits, upon which the Court, as a matter of grace and in its discretion, would grant a rule to show cause. This is true because the record in the case shows that the judgment was irregularly entered. The matters raised by the notice are outside of the record and are subject to proof, and could only be properly raised by obtaining a rule to show cause, upon which depositions would be taken. An irregular "judgment will not be set aside on motion." *Reid vs. Bainbridge*, 4 *N. J. L.*, 351;

Black vs. Kirgan, 15 *N. J. L.*, 50. There does not appear to be any decision in this State which indicates that a judgment can be opened by notice of motion for that purpose. The proceedings, therefore, of the appellant in this respect, in the Court below, were irregular and improper.

III.

If the judgment be irregularly taken, proceedings to open it now would be futile because the Court has decided that there is no meritorious defense.

As has already been stated, there were two applications attacking this judgment. The first was by rule to show cause which went to the merits of the controversy, and with respect to which the Court held that there is no meritorious defense. It would, therefore, be a useless performance at this time, even if the Court were inclined to hear a second application to open the judgment, to have the judgment disturbed; for to open the judgment would be to open it for the filing of an answer, which cannot be supported by a meritorious defense. The first question which presents itself is whether the defendant has the right to apply the second time to open a judgment. It is contended on behalf of the respondent herein that there cannot be two applications to set aside the same judgment, but all reasons for setting aside a judgment must be raised upon the first rule to show cause, and if they are not so raised, the Court should consider that they are waived and the defendant concluded thereon.

In the case of *Scull vs. Daniels*, *3 N. J. L.*, *163*, the Court held, in a case where a second rule to

show cause had been applied for after the first had been denied, as follows:

> "We cannot hear the application. It would be contrary to the practice of the Court and tend to perpetuate litigation."

That this rule is sound is evident in the case at bar, for the suit was commenced September 6th, 1913, and the last application to disturb the judgment was made on July 17th, 1915, almost two years aftert he institution of the suit. It is apparent that this litigation would be endless if the defendant were allowed to repeatedly urge new grounds for the opening of the judgment. The reasons urged on the second application to open the case were present as fully and to the same extent on the first application as they were on the second. They were not stated or called to the attention of the Court in any manner, and it was not until the Court had discharged the rule to show cause that the defendant then raised these grounds in a new application to set aside the judgment. Even in a case where there is newly discovered evidence, the Court is reluctant to disturb the judgment where there has already been a rule to show cause issued and discharged. In the case of *Miller vs. Ross, 43 N. J. L., 552*, it was held:

> "It will require an extreme case to justify this Court in granting a second rule, after the right of a party to a re-trial has been deliberately considered and denied."

It is submitted therefore:

1. That the question of any irregularity in the entry of the judgment is not properly before this Court, because on the record there is no irregularity.

2. That the defendant brought the matter on in the Court below upon notice of motion and not by rule to show cause, and her proceeding is, therefore, erroneous.

3. That there is no irregularity in the entry of the judgment.

4. The error complained of is harmless. It is one of procedure and the substantial rights of the defendant are not affected.

It has heretofore been referred to that the opening of the judgment would be a useless performance, inasmuch as the Court, upon reading all of the testimony taken on the rule to show cause, decided that there was no meritorious defense. Therefore, even though this Court should find that the judgment was irregularly entered, the same should not be disturbed, because the rights of the parties are not affected, and the error, if any, is harmless. For, if the defendant has no meritorious defense, what advantage can be gained by setting aside the judgment? In matters of appeal, the rule of this Court, under the Practice Act of 1912, is as follows:

> "No judgment shall be reversed or a new trial granted on the ground of misdirection or improper admission or exclusion of evidence, or for error as to the matter of pleading or *procedure* unless, after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of the party."

Practice Act of 1912, Sec. 27. Prior to the Practice Act of 1912, the Supreme Court held, upon a rule to show cause, after trial, for the opening of the judgment, as follows:

> "A rule to show cause would be futile in a case where it is evident that on the return of the rule a second verdict would be set aside."
>
> *Christiansen vs. Lambert, 66 N. J. L., 531.*

It is not the policy of this Court, although there may be error in the proceedings to grant a new trial, or to correct an error when the granting of such rule would be a nugatory act. "It would be a vain and nugatory thing to award a *venire de* "*novo* in this case upon the pleadings as they now "stand."

Van Dyke vs. Van Dyke, 17 N. J. L., 478.

It is respectfully submitted, therefore, that the rights of the parties were concluded upon the order of the Circuit Court discharging the rule to show cause, and that the finding of the Circuit Court that there is no meritorious defense is conclusive, and cannot be disturbed by this second application to set aside the judgment, and that the appeal from that ruling of the Circuit Court and the affirmance thereof by the Supreme Court should be denied.

RUNYON & AUTENRIETH,

WILLIAM THEO. VON DER LIPPE,

Attorneys for and of Counsel
with Plaintiff-Appellee.

NEW JERSEY SUPREME COURT.

June Term, 1916.

FERDINAND H. KOENIGSBERGER,

v.

KATE A. MIAL.

Appeal from Hudson Circuit Court.

Argued before Gummere, Chief Justice, and Justices Trenchard and Black.

For the Appellant, SAMUEL A. BESSON.

For the Respondent, RUNYON & AUTENRIETH.

PER CURIAM.

This is an appeal from a judgment entered by default against the defendant in an action brought by the plaintiff to recover for architect's fees alleged to be due him on a building operation. Originally the suit was brought against Kate A. Mial, individually, and Leonidas L. Mial, as executor of Henry H. Hankins, deceased. The complaint was filed in September, 1913. Subsequently, and in March, 1914, application was made on behalf of the defendants to compel the amendment of the complaint by striking therefrom the name of Leonidas A. Mial and substituting that of Kate A. Mial as executrix. The rule directing the amendment required a copy thereof to be served upon Kate Mial within twenty days after its date, and allowed her twenty days after such service within which to file her answer. The date of this rule was March 30,

1914. The amended complaint was filed on the 15th of April of that year. On the 15th of May following the defendant moved to strike out certain portions of the amended complaint, for reasons set forth in a notice of the motion which was served upon the plaintiff's attorney on the 5th day of that month. The Court took time to consider the motion, and on the 19th of June filed a memorandum stating that the defendant was entitled to have struck from the complaint the provisions referred to in her notice of motion. No rule was entered pursuant to this finding of the Court, and on the 17th of November, 1914, the plaintiff entered judgment by default. The defendant, Kate Mial, thereupon applied for and obtained a rule to show cause why the judgment should not be opened as having been prematurely and improvidently entered. Testimony was taken in support of, and in opposition to, the making of this rule absolute, and in January, 1916, the matter coming on to be heard before the Circuit Court, the rule to show cause was discharged.

The defendant thereupon appealed to this Court.

We think the judgment under review should be affirmed.

On its face it is regular. The defendant is presumed to have had notice of filing of the amended complaint, because within twenty days after its filing she moved to strike out certain portions thereof. Her failure to enter a rule in accordance with the decision of the Circuit Court in her favor on the motion to strike out certain parts of the amended complaint, was, we think, an abandonment of the motion. Having abandoned the motion, and having failed to plead to the amended complaint within the time specified by the order of the Court,

the plaintiff was entitled to take judgment against her by default. According to the theory of the defense, a suit might be perpetually stayed by a defendant by following the course pursued in the present case by Kate A. Mial, the appellant. Without stopping to consider whether, on an appeal from the judgment now under review, the appellant can attack the action of the lower Court in the discharging the rule to show cause, we are of opinion that the action complained of was proper. If it be true, as counsel suggests, that the failure of the defendant to pursue her defense as required by law was due to the neglect of her attorney, that fact alone did not entitle her to the relief she sought under the rule. She was required, in addition, to show that she had a meritorious defense, and this the Circuit Court considered she had failed to do. Our examination of the testimony submitted under the rule to show cause leads us to the same conclusion.

The judgment under review will be affirmed.