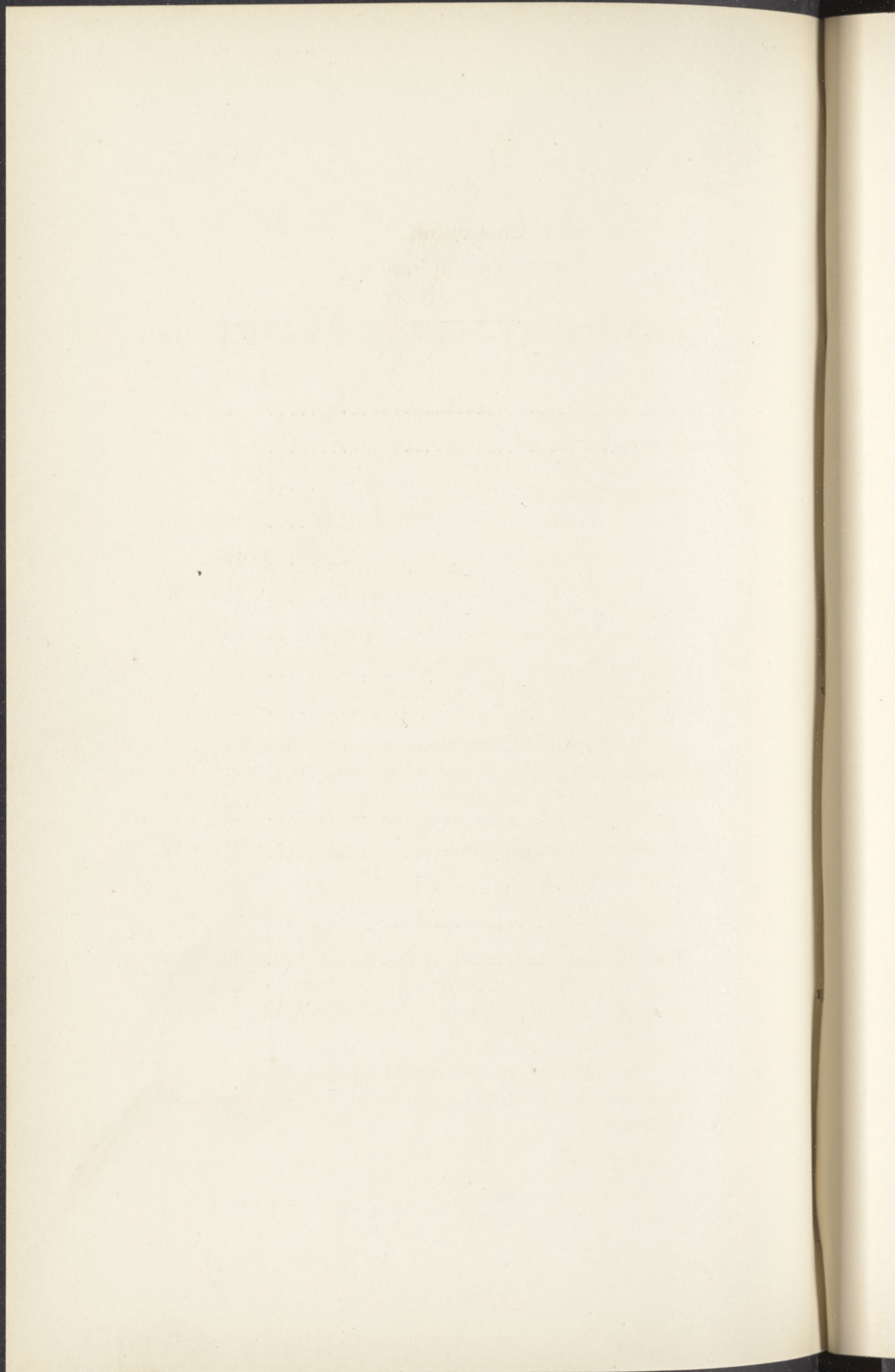


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Complaint.

(Filed Dec. 14, 1929.)

New Jersey Supreme Court 10

PASSAIC COUNTY.

GERTRUDE LEVINE doing business
as SILK CITY TRUCKING &
RIGGING Co.,

Plaintiff,

v.

AETNA CASUALTY & SURETY Co.
a corporation,

Defendant.

Action at Law.

20

Aetna Casualty & Surety Co. a corporation the
defendant in this cause was summoned to answer
unto Gertrude Levine, doing business as Silk City
Trucking & Rigging Co., the plaintiff therein in an
action at law upon the following complaint:

30

(Summons issued December 4, 1929.)

FIRST COUNT.

The plaintiff residing in the City of Paterson,
County of Passaic and State of New Jersey, com-
plaining of the defendant respectfully shows to
this court:

1. The defendant is a corporation duly author-
ized to transact a surety business in the State of
New Jersey.

40

Complaint.

10 2. On or about the 11th day of October, 1927,
the defendant did enter into a joint and several
bond together with Benjamin F. Butler and Ed-
mond V. Reisdorff trading as Butler Reisdorff Co.
in the penal sum of \$457,505.00, the condition of
said bond among other things requiring the said
Benjamin F. Butler and Edmond V. Reisdorff trad-
ing as Butler Reisdorff Co. and the defendant to
pay all lawful claims of sub-contractors, material-
men and laborers for labor performed and mate-
rials furnished in the carrying forward, performing
or completing of a certain contract entered into be-
tween Benjamin F. Butler and Edmond V. Reis-
dorff trading as Butler Reisdorff Co. and the State
20 Board of Control of the Department of Institutions
and Agencies of the State of New Jersey on the 11th
day of October, 1927, for the building of the State
Training Home at Totowa, New Jersey.

3. A true copy of said bond is hereto annexed
and made a part hereof as schedule A.

30 4. By the express provision of said bond the lia-
bility thereon is for the benefit of any laborer or
materialman having a just claim, as well as the
obligee therein named.

5. On or about and between January 4th, 1929,
and March 4th, 1929, the plaintiff did perform cer-
tain trucking work, labor and services for the But-
ler Reisdorff Co. in carrying forward and complet-
ing their contract to build the aforesaid State
Training Home at Totowa, New Jersey, the agreed
value and reasonable price of which is \$490.00 no
part of which has been paid.

40 6. On September 16, 1929, the State did accept
the work on said State Training Home.

Complaint.

7. On September 30th, 1929, the plaintiff did furnish the defendant, the surety on the aforementioned bond, a statement of the amount due to plaintiff, within eighty days after the acceptance of said work, in compliance with the statute in such cases made and provided.

10

8. At the time of starting this action sixty days have elapsed since the furnishing of said statement to defendant.

9. A true copy of the said statement is hereto annexed and made a part hereof as schedule B.

10. The defendant has failed to pay to plaintiff the sum due her, to wit, \$490.00 in accordance with said bond.

20

Wherefore plaintiff demands damages in the sum of \$490.00 besides interest and costs of suit on this count.

SECOND COUNT.

The plaintiff complaining of the defendant, respectfully shows to this court that:

1. Repeats as though at this point fully set out at length all the allegations contained in paragraphs 1 to 10 inclusive of the first count.

30

2. There is due plaintiff for the aforesaid trucking work, labor and services the sum of \$490.00 on a book account, a true copy of which is hereto annexed and made a part hereof as schedule B.

Wherefore plaintiff demands damages in the sum of \$490.00 besides interest and costs of suit on this count.

KIMMEL & KIMMEL,
Attorneys of Plaintiff.

40

Complaint.

SCHEDULE A.

10 KNOW ALL MEN BY THESE PRESENTS, that we, the
undersigned, Benjamin F. Butler and Edmond V.
Reisdorff, copartners trading as Butler Reisdorff
Company of New York in the County of New York
and State of New York as principal and the Aetna
Casualty and Surety Company a corporation duly
authorized to transact a surety business in the
State of New Jersey, as surety, are held and firmly
bound unto the State of New Jersey in the penal
sum of Four hundred and fifty seven thousand
five hundred and sixty five dollars (\$457,565.00)
for the payment of which well and truly to be
made, we hereby jointly and severally bind our-
selves, our and each of our heirs, executors, ad-
ministrators, successors and assigns.

20 Signed this 11th day of October, 1927.

The condition of the above obligation is such
that whereas, the above named principal did on
the 11th day of October, 1927, enter into a contract
with the State Board of Control of the Department
of Institutions and Agencies of the State of New
Jersey which said contract is made a part of this
the bond the same as though set forth herein;

30 Now, if the said Benjamin F. Butler and Edmond
V. Reisdorff, co-partners trading as Butler Reis-
dorff Company shall well and faithfully do and
perform the things agreed with the State Board of
Control of the Department of Institutions and
Agencies of the State of New Jersey to be done and
performed according to the terms of said contract,
and shall pay all lawful claims of subcontractors,
materialmen and laborers, for labor performed
and materials furnished in the carrying forward,
40 performing or completing of said contract, we

Complaint.

agreeing and assenting that this undertaking shall be for the benefit of any materialman or laborer having a just claim, as well as for the obligee herein; then this obligation shall be void; otherwise the same shall remain in full force and effect; it being expressly understood and agreed that the liability of the surety for any and all claims thereunder shall in no event exceed the penal amount of this obligation as herein stated.

10

The said surety hereby stipulates and agrees that no modifications, omissions or additions in or to the terms of said contract, or in or to the plans or specifications shall in any wise effect the obligation of said surety on its bond.

EDMUND V. REISDORFF
 BENJAMIN F. BUTLER trading as
 Butler Reisdorff Company
 THE AETNA CASUALTY AND
 SURETY Co.

20

Signed, sealed and delivered
 in the presence of

WILLIAM HECKMANN
 Witness

30

40

Answer.

3. It denies Paragraph 3.
4. It denies Paragraph 4.
5. It denies Paragraph 5.
6. It has no knowledge or information sufficient
to form a belief as to Paragraph 6. 10
7. It denies Paragraph 7.
8. It denies Paragraph 8.
9. It denies Paragraph 9.
10. It denies that there is any money due to
the plaintiff by the defendant on the claim set forth
in the complaint.

FIRST DEFENSE TO SECOND COUNT.

20

1. Defendant repeats and makes a part hereof
its answers to the allegations contained in Para-
graphs 1 to 10 of the First Count of the Complaint.
2. It denies Paragraph 2.

SECOND DEFENSE TO BOTH COUNTS.

The claims of the plaintiff as set forth in the
complaint are not lawful claims of subcontractors,
materialmen or laborers, for labor performed and
material furnished in the carrying forward, per-
forming or completing of the contract entered into
between Benjamin F. Butler and Edmund V. Reis-
dorff, co-partners trading as Butler Reisdorff Com-
pany and the State Board of Control of the Depart-
ment of Institutions and Agencies of the State of
New Jersey and the plaintiff therefore cannot re-
cover.

30

COLLINS & CORBIN,
Attorneys for Defendant.

40

Notice of Motion to Strike Out Answer.

(Filed March 15, 1930.)

*To Collins and Corbin, attorneys of defendant or to
whom it may concern:*

SIRS:

10

Please take Notice, that we, the undersigned, shall apply to the Honorable Newton H. Porter or the Honorable William B. Mackay in the alternative, Supreme Court Commissioners occupying the position of Circuit Court Judges in and for the County of Passaic at the Court House in the City of Paterson on the 1st day of February, 1930, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order to strike out the answer filed by you in the above matter on the ground that the allegations contained in the same are untrue in fact and sham and shall support our application by the accompanying affidavits of Gertrude Levine, the plaintiff herein, F. P. Gerry and Phillip Levine.

20

KIMMEL & KIMMEL,
Attorneys for Plaintiff.

Dated January 22nd, 1930.

30

[Served January 23, 1930.]

40

Supporting Affidavit.

(Filed March 15, 1930.)

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

GERTRUDE LEVINE, of full age, being duly sworn, 10
 according to law, upon her oath, deposes and says:

1. That I am the plaintiff in the above entitled
 action and reside at 96 Water Street, Paterson, New
 Jersey.

2. I am engaged in the general trucking busi-
 ness and my husband, Phillip Levine manages the
 said business for me.

3. That on January 3rd, 1929, Mr. Benjamin F. 20
 Butler partner in the firm of Butler Reisdorff Com-
 pany called me on the telephone from Totowa at
 the site where the State Training Home was being
 erected at my office at #96 Water Street, Paterson,
 New Jersey, and he asked me to send my husband
 over to him since he wanted to talk to him about
 moving the tools and machinery from the site of
 the State Training Home at Totowa.

4. I sent my husband to the State Training 30
 Home site at Totowa to see Mr. Butler about remov-
 ing the tool sheds and other miscellaneous articles
 from the buildings and about the buildings at the
 State Training Home site and they talked the mat-
 ter over and agreed upon the price of \$475.00 for
 the job.

5. The tools, tool sheds, machinery and other 40
 articles were trucked by my trucks and men start-
 ing on January 4th, 1929, and at various times
 thereafter until all the articles were trucked away
 from Totowa Borough, the site of the State Train-
 ing Home to Grand Concourse, New York, and in

Supporting Affidavit of Gertrude Levine.

10 addition nineteen barrels of brick was trucked on January 17, 1929, at the agreed price of \$5.00 and steel doors were trucked on March 4, 1929, from the Railroad Station at an agreed price of \$10.00; all of this having been arranged for in advance with Mr. Butler.

6. There is a total still due and owing to me of \$490.00 together with interest amounting to \$29.44 making a total of \$519.44 owing to me, no part of which has been paid.

20 7. On September 30, 1929, I caused to be furnished to the Aetna Casualty and Surety Co. the surety on the bond on which this suit is brought, a statement of the amount due me within eighty days after the acceptance of the work on the State Training Home which was accepted on September 18, 1929, in compliance with the statute in such cases made and provided.

8. I knew when this work was undertaken that a bond had been given by the Butler Reisdorff Company to the State which said bond required payment of claims of laborers.

30 9. At the time this action was started sixty days had elapsed since the furnishing of said statement to defendant.

A copy of the said statement is hereto annexed and made a part hereof as schedule "a."

10. It is my belief that there is no defense to this action.

GERTRUDE LEVINE.

40 Sworn and subscribed to before me }
this 13th day of January, 1930. }

MAX ROSENFELD,
A Notary Public of N. J.

Supporting Affidavit of F. P. Gerry.

SCHEDULE A.

Paterson, N. J. Sept. 30, 1929

Butler Reisdorff Co.
New York, N. Y.

SILK CITY TRUCKING & RIGGING CO.
General Trucking
96-98 Water St.

10

1/4/29	For trucking tools and equipment and machinery from Towata Borough New Jersey to Grand Concourse, New York....	475.00	
1/17/29	For trucking 19 barrels of brick..	5.00	
3/4/29	For trucking steel doors from Railroad Station	10.00	20
TOTAL		\$490.00	

Supporting Affidavit.

(Filed March 15, 1930.)

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

30

F. P. GERRY, of full age, being duly sworn, according to law, upon his oath, deposes and says:

1. That I am the business manager of the Division of Architecture and Construction of the Department of Institutions and Agencies of the State of New Jersey.

2. That on October 11th, 1927, the Butler Reisdorff Company entered into a contract with the State Board of Control of Institutions and Agen-

40

Supporting Affidavit of F. P. Gerry.

cies of the State of New Jersey to erect the State Training Home at Totowa, New Jersey; this contract is within my custody and annexed hereto is a true copy thereof which is marked schedule A.

10 3. At the same time as the contract was executed the Butler Reisdorff Company as principal and the Aetna Casualty & Surety Co. as surety entered into a bond in accordance with the statute in such cases made and provided to complete the work under said contract and to pay all lawful claims of sub-contractors, material men and laborers for labor performed and materials furnished on said State Training Home at Totowa, New Jersey; a copy of said bond is hereto annexed as
20 schedule "B."

4. The work on the said State Training Home was formally accepted by the State on September 18, 1929.

F. P. GERRY.

Sworn and subscribed to before me }
this 18th day of January, 1930. }

(Notarial ETHEL C. LOCKE,
30 Seal) Notary Public of N. J.

SCHEDULE "A."

THIS AGREEMENT, made and entered into this 11th day of October in the year of Our Lord, one thousand nine hundred and twenty seven between Benjamin F. Butler and Edmund V. Reisdorff co-partners trading as Butler Reisdorff Company of New York in the County of New York and State
40 of New York of the first part and the State Board

Supporting Affidavit of F. P. Gerry.

of Control of the Department of Institutions and Agencies of the State of New Jersey acting for and in the name and behalf of the State of New Jersey, of the second part,

WITNESSETH :

10

WHEREAS; the party of the second part duly invited, by advertisement, sealed proposals for Four Dormitories, One Hospital Building and One Employees' Building at the Training School for Feeble Minded Females at Totowa, New Jersey according to the plans and specifications as prepared by the Division of Architecture and Construction of the Department of Institutions and Agencies of the State of New Jersey, and

20

WHEREAS, the party of the first part proposes to furnish labor and materials required for the erection of Four Dormitories, One Hospital Building and One Employees Building at the Training School for Feeble Minded Females at Totowa, New Jersey as shown on the plans and described in the specifications (and addenda thereto, if any) as prepared by the Division of Architecture and Construction of the Department of Institutions and Agencies of the State of New Jersey for the sum of Four Hundred and Fifty seven Thousand Five Hundred Sixty five Dollars (\$457,565.00) and being the lowest bidder; the contract therefor was awarded to said party of the first part;

30

Now Therefore, in consideration of the premises and of the payment by the State of New Jersey to the said party of the first part of the said sum of Four Hundred Fifty seven thousand Five hundred sixty five dollars (\$457,565.00) at the times and in the manner hereinafter provided, the parties hereto have covenanted and agreed as follows:

40

Supporting Affidavit of F. P. Gerry.

10 FIRST.—The party of the first part will furnish labor and material required for Four Dormitories, One Hospital Building and one Employees Building at the Training School for Feeble Minded Females at Totowa, New Jersey, in accordance with proposal of the party of the first part hereto attached and

20 It is hereby agreed and understood that this contract is to cover three dormitories in accordance with plans 505-19-A and one (1) Dormitory in accordance with plans 505-19-B, as shown on the plans and described in the specifications (and addenda thereto, if any) as prepared by the Division of Architecture and Construction of the Department of Institutions and Agencies of the State of New Jersey, a copy of which specifications is hereto annexed, and is, together with the plans herein mentioned, made a part of this contract; provided, however, that where the specifications are inconsistent with this contract, this contract shall control.

30 The party of the first part shall perform the work shown on plans and described in the specifications (and addenda thereto if any) within two hundred and fifty (250) actual working days from the date of filing of the contract in the office of the Comptroller of the State of New Jersey.

 SECOND.—The time above mentioned for the completion of this work under this contract is of the essence of the contract.

40 THIRD.—The State of New Jersey will pay, or cause to be paid, to said party of the first part, once each month, during the progress of said work, eighty five percentum of the value of material delivered and work completed during the preceding

Supporting Affidavit of F. P. Gerry.

month, and the remaining fifteen percentum within the month following the final acceptance of the work. Said payments to be made upon the production to the State of New Jersey of monthly certificates, signed by the Commissioner of Institutions and Agencies of the State of New Jersey and by the State Board of Control of the Department of Institutions and Agencies of the State of New Jersey showing the amount of work done up to the date of said certificates, and certifying that said work has been done in strict conformity with the aforementioned plans and specifications and that the said party of the first part is entitled, under the terms of this contract, to the payment of the amount mentioned in said certificates; the remaining fifteen percentum aforesaid to be paid upon the production of a certificate, signed by the Commissioner of Institutions and Agencies when properly endorsed by the State Board of Control of Institutions and Agencies showing that said entire work has been fully completed in strict conformity with the aforementioned plans and specifications.

FOURTH.—The party of the second part, through the Commissioner of Institutions and Agencies of the State of New Jersey, may, from time to time, by written instructions or plans issued to the party of the first part, subject to all other provisions of this agreement relevant thereto, make changes in the plans and specifications above referred to, as provided for in said specifications with the same force and effect as if they were embodied in the original plans and specifications.

FIFTH.—The party of the first part covenants with the party of the second part to cooperate with the Commissioner of Institutions and Agencies of

Supporting Affidavit of F. P. Gerry.

10 the State of New Jersey in forwarding the interests of the party of the second part. The party of the first part agrees to furnish efficient business administration and superintendence and to use every reasonable effort to keep upon the work at all times an adequate supply of workmen and materials, and to secure its execution in the best and soundest way and in the most expeditious and most economical manner consistent with the interests of the party of the second part.

20 SIXTH.—The party of the first part shall, in all cases, obtain the approval in writing, of the Commissioner of Institutions and Agencies of the State of New Jersey before subletting any portion of the work.

30 SEVENTH.—In the event of the failure of the party of the first part to complete the said work within the time herein mentioned, the State of New Jersey shall be entitled to deduct from the amount to become due to said party of the first part upon the completion of the work the sum of twenty five dollars (\$25.00) for each and every day that said work shall be and remain incomplete, which said sum shall be credited to the State of New Jersey on account of the contract price aforesaid, and shall be treated as liquidated damages and not a penalty.

40 EIGHTH.—Should the contractor be obstructed or delayed in the prosecution or completion of their work by the act, negligence or default of the State of New Jersey or by any damage which may happen by fire, lightning, earthquake or cyclone or by reason of any cause which, in the judgment of the Commissioner of Institutions and Agencies of the State of New Jersey shall be deemed justifiable,

Supporting Affidavit of F. P. Gerry.

then the time herein filed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid, but no such allowances shall be made unless a claim therefor is presented to the Commissioner of Institutions and Agencies of the State of New Jersey, in writing, within twenty four hours after occurrence of such delay. The duration of such extension shall be certified to by the Commissioner of Institutions and Agencies of the State of New Jersey. 10

NINTH.—The party of the first part will make payment of all proper charges for labor and materials required in the aforementioned work, and indemnify and save harmless the State of New Jersey, its officers, agents and servants, and each and every of them, against and from all suits and costs of every name and description and from all damages to which the said State or any of its officers, agents or servants may be put, by reason of injury to the person or property of others resulting from carelessness in the performance of said work, or through the negligence of said party of the first part, or through any improper or defective machinery, implements or appliances used by the said party of the first part in the aforesaid work, or through any act or omission on the part of the said Benjamin F. Butler and Edmund V. Reisdorff, co-partners trading as Butler Reisdorff Company or their agent or agents. 20 30

TENTH.—All material of any kind or character belonging to the party of the first part, which shall remain upon the premises of the Training School for Feeble Minded Females at Totowa, New Jersey after the expiration of sixty days from the delivery 40

Supporting Affidavit of F. P. Gerry.

of the certificate by the party of the second part to the party of the first part for the amount of money due to said party of the first part upon the completion of the work to be done under this contract, shall become absolutely the property of the State of New Jersey, subject to be used and disposed of by said party of the second part as said party of the second part may deem proper.

IN WITNESS WHEREOF, the parties of the first part have hereunto set their hands and seals and the party of the second part has likewise caused this agreement to be signed and sealed by its president and attested by its secretary the day and year first above written.

20

(Sgd) EDMUND V. REISDORFF

(Sgd) BENJAMIN F. BUTLER
Trading as Butler Reisdoff
Company(Sgd) E. P. EARLE
President, State Board of
Control, Department of In-
stitutions and Agencies,
State of New Jersey.

30

Signed, sealed and delivered
in the presence of(Sgd) WILLIAM HECKMANN
Witness(Sgd) AGNES M. RYAN
Secretary

40

Supporting Affidavit of F. P. Gerry.

SCHEDULE "B."

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned, Benjamin F. Butler and Edmund V. Reisdorff, copartners trading as Butler Reisdorff Company of New York in the County of New York and State of New York as principal and the Aetna Casualty and Surety Company a corporation duly authorized to transact a surety business in the State of New Jersey as surety are held and firmly bound unto the State of New Jersey in the penal sum of Four hundred and fifty seven thousand five hundred and sixty five dollars (\$457,565.00) for the payment of which well and truly to be made we hereby jointly and severally bind ourselves, our and each of our heirs, executors, administrators, successors and assigns. 10
20

Signed this 11th day of October 1927

The condition of the above obligation is such that whereas, the above named principal did on the 11th day of October 1927 enter into a contract with the State Board of Control of the Department of Institutions and Agencies of the State of New Jersey which said contract is made a part of this the bond the same as though set forth herein, 30

Now, if the said Benjamin F. Butler and Edmund V. Reisdorff co-partners trading as Butler Reisdorff Company shall well and faithfully do and perform the things agreed with the Board of Control of the Department of Institutions and Agencies of the State of New Jersey to be done and performed according to the terms of said contract, and shall pay all lawful claims of subcontractors, materialmen and laborers, for labor performed and materials furnished in the carrying forward, performing or completing of said con- 40

Supporting Affidavit of F. P. Gerry.

10 tract, we agreeing and assenting that this undertaking shall be for the benefit of any materialman or laborer having a just claim as well as for the obligee herein; then this obligation shall be void; otherwise the same shall remain in full force and effect; it being expressly understood and agreed that the liability of the surety for any and all claims hereunder shall in no event exceed the penal amount of this obligation as herein stated.

The said surety hereby stipulates and agrees that no modifications, omissions or additions in or to the terms of said contract, or in or to the plans or specifications shall in any wise effect the obligation of said surety on its bond.

20 (Sgd) EDMUND V. REISDORFF
 " BENJAMIN F. BUTLER
 Trading as Butler Reisdorff Company
 THE AETNA CASUALTY AND SURETY CO
 By (Sgd)

Attest (Sgd)

Countersigned at
 Newark, N.J. 10/11/27

30 (Sgd) P. R. WILLS, Resident
 agent

Signed, sealed and delivered
 in the presence of

WILLIAM HECKMANN (Sgd)
 Witness

Supporting Affidavit.

(Filed March 15, 1930.)

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

PHILLIP LEVINE, of full age, being duly sworn, according to law, upon his oath, deposes and says: 10

1. That I reside at #96 Water Street, Paterson, New Jersey and manage the trucking business which my wife conducts.

2. On January 3rd, 1929, by wife told me that Mr. Benjamin F. Butler had called me with reference to removing all the equipment including tools, planks and machinery from the State Training Home at Totowa, New Jersey and wanted to see me at Totowa with reference to same. 20

3. Accordingly I went to the State Training Home at Totowa and spoke to Mr. Butler and agreed to remove all the tools, planks and machinery from the State Training Home to Grand Concourse, New York for the sum of \$475.00 and in confirmation of said agreement I wrote as per request the following letter:

SILK CITY TRUCKING & RIGGING Co. 30
 96-8 Water Street,

Paterson, N. J. Jan. 3rd, 1929

Butler Reisdorf Co.
 134 East 44th St.
 New York, N. Y.

Gentlemen:

Confirming conversation of this date with Mr. Butler, I agree to remove the tools, planks and machinery from Totowa, N. J. 40

Supporting Affidavit of Phillip Levine.

to Mc.Clellan Place, Grand Concourse Bronx,
N. Y. for the sum of \$475.00 to be paid as
work progresses. Any carting to Brooklyn
or other places to be paid for extra.

10 Trusting that this will meet with your ap-
proval, I remain,

Respectfully yours,

SILK CITY TRUCKING AND RIGGING CO
Per

(Sgd) Phil. Levine

20 4. On January 4, 1929 under my supervision the
work of removing these articles started and con-
tinued until all the equipment including tools,
planks, machinery mortar tubs, etc. were removed.

5. On January 7th, 1929 the following letter was
received from Mr. Butler:

BUTLER REISDORFF COMPANY
134 East 44th Street,
New York

January 7th, 1929

30 Silk City Trucking Company
96 Water Street,
Paterson, N. J.

Gentlemen:

40 We are in receipt of your estimate of
January 3rd in the sum of \$475.00 for re-
moving equipment to New York, but you
merely state that you will remove tools,
planks and machinery, whereas the estimate
should read "all the equipment including
tools, planks, machinery, mortar tubs, etc. so
that all the equipment, etc. that we require
to be removed from the job is included in
your estimate.

Supporting Affidavit of Phillip Levine.

Will you kindly send us a revised estimate
as above stated.

Very truly yours,

BUTLER REISDORFF COMPANY
per BENJAMIN F. BUTLER

10

BFB/MKC

6. On February 5th, 1929 I wrote the following
letter in response thereto to Mr. Butler of the But-
ler Reisdorff Company:

SILK CITY TRUCKING & RIGGING CO.
96-8 Water Street,

Paterson, N. J. Feb. 5th, 1929

Butler Reisdorf Co.
134 East 44th St.
New York, N. Y.

20

Gentlemen:

In reply to yours of the 7th of Jan. last,
I wish to state that I will remove all the
equipment including tools, planks, ma-
chinery and mortar tubs, as per your re-
quest.

Since I have carted away more than half
of the things and owing to the fact that it
will take a considerable length of time until
the rest of the things will be ready for cart-
ing away, I respectfully request that you
favor me with a check for \$200.00 on ac-
count.

30

Awaiting an early and favorable reply, we
are

Respectfully yours,

SILK CITY TRUCKING & RIGGING CO.
Per PHIL LEVINE

40

P.L./H.B.

Supporting Affidavit of Phillip Levine.

7. All the equipment including tools, planks, machinery, mortar tubs, etc. has been removed in compliance with the agreement had with Mr. Butler.

10 8. On January 17, 1929 nineteen barrels of brick were removed from the Railroad to the State Training Home at an agreed price of \$5.00 and on March 4, 1929 steel doors were trucked from the Railroad Station to the State Training Home at an agreed price of \$10.00 making a total due and owing in the sum of \$490.00 on which there is due the sum of \$29.44 for interest making a total of \$519.44 due and owing, no part of which has been paid.

20 9. The articles trucked consist of mason planks, cement mixers, shanties, wheelbarrows, mortar tubs, tools and other articles.

10. At the time these articles were trucked the work on the State Training Home was not as yet finished, some plumbing, painting, mason work and other interior work remaining to be done.

30 11. This work could not be completed while these articles were there as part of the articles were inside of the buildings and part were outside and the men could not finish the remaining work while these articles were on the inside and about the premises; these articles also had to be removed because otherwise the State would not accept the work until the job was completed.

12. While these articles were in the buildings and about the buildings, the buildings were not fit

Answering Affidavit of William H. Jenkins.

to be occupied for the purpose for which they were erected, they being dormitories.

PHILIP LEVINE.

Sworn and subscribed to before me }
this 13th day of January, 1930. }

10

SAMUEL ROSENFELD,
A Master in Chancery of N. J.

Answering Affidavit.

(Filed March 15, 1930.)

State of New York, }
County of New York, } ss.:

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

1. I am the superintendent of the Bond Claim Department of the New York Office of the defendant, Aetna Casualty & Surety Company.

2. The Butler Reisdorff Co. defaulted in the completion of the contract referred to in the second paragraph of the complaint in this cause, and on April 15, 1929, the completion of the work was taken over by the firm of Schack & Metz. The work was not completed by Schack & Metz until some time in September, 1929. The tools, toolsheds, machinery, mason planks, cement mixers, shanties, wheelbarrows, mortar tubs and other articles referred to in the affidavits of Phillip Levine and Gertrude Levine were according to their affidavits removed on January 3, 1929. When Schack & Metz took over the work they had to use their

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Answering Affidavit of William H. Jenkins.

own machinery and equipment. The machinery and equipment, referred to in the Levine affidavits, were not removed for the purpose of having the work accepted as they were removed over eight months before the work was completed. Further-
 10 more it was not required by the contract that the machinery and equipment be removed before acceptance as the contract (a copy of which is annexed to one of the plaintiff's affidavits) expressly provides in Paragraph 10:

20 "TENTH.—All material of any kind or character belonging to the party of the first part, which shall remain upon the premises of the Training School for Feeble Minded Females at Totowa, New Jersey, after the expiration of sixty days from the delivery of the certificate by the party of the second part to the party of the first part for the amount of money due to said party of the first part upon the completion of the work to be done under this contract, shall become absolutely the property of the State of New Jersey, subject to be used and disposed of by said party of the second part as said
 30 party of the second part may deem proper."

3. Section 3 of Chapter 75 of the Laws of 1918 (the Act on which this suit is based) provides:

40 "Any person, firm or corporation to whom any money shall be due on account of having performed any labor, or furnished any material in the construction, erection, alteration or repair of any such building, work or improvement, within eighty (80) days after the acceptance thereof by the duly au-

Answering Affidavit of William H. Jenkins.

thorized board or officer, shall furnish the sureties on said bond *a statement of the amount due to any such person, firm, or corporation.* No suit shall be brought against said sureties on said bond until the expiration of sixty (60) days after the furnishing of said statement. If said indebtedness shall not be paid in full at the expiration of said sixty days, said person, firm or corporation may bring an action in his own name upon such bond, said action to be commenced within one year from the date of the acceptance of said building, work or improvement.” 10

What purports to be such a statement is annexed to the plaintiff's complaint as Schedule B. This statement does not give my Company adequate information as to the nature of the work for which claim is made and on its face does not state a claim under the bond furnished by my Company on this contract. 20

4. The affidavits filed by the plaintiff in this suit are likewise vague and indefinite as to the specific nature of the trucking work done in this case, for example: the affidavit of Gertrude Levine says (Paragraph 5): “The tools, tool sheds, machinery and other articles were trucked by my trucks and men starting on January 4, 1929, and *at various times thereafter until all the articles were trucked away from Totowa Borough, the site of the State Training Home to Grand Concourse, New York.*” There is nothing in the affidavits to show that this trucking was necessary in the carrying forward, performing or completing of the contract. 30 40

WILLIAM H. JENKINS.

Supplemental Notice of Motion.

Sworn to and subscribed at New York, N. Y. this 3rd day of February, 1930, before me, the subscriber, a Notary Public in and for said County and State duly commissioned and sworn, as witness my hand and official seal.

10

(Seal)

THOMAS J. O'KEEFE.

Supplemental Notice of Motion.

(Filed March 15, 1930.)

To Collins and Corbin, attorneys of defendant or to whom it may concern:

SIRS:

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Please take Notice, that we, the undersigned, shall apply to the Honorable Newton H. Porter or the Honorable William B. Mackay in the alternative, Supreme Court Commissioners occupying the position of Circuit Judge Judges in and for the County of Passaic at the Court House in the City of Paterson on the 1st day of February, 1930, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, as supplemental to the Notice of Motion previously served upon you and dated January 22nd, 1930 to strike out the second defense to both counts of the complaint on the grounds that:

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1. Said second defense does not state facts sufficient to constitute a defense in point of law.

2. Said second defense is frivolous.

KIMMEL & KIMMEL,
Attorneys of Plaintiff.

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Dated Jan. 23, 1930.

Served Jan. 25, 1930.

Opinion of Judge Mackay.

(Filed March 10, 1930.)

MACKAY, C. C. J., sitting as Supreme Court Commissioner.

Plaintiff seeks to recover from the defendant the amount due from the contractor for services rendered for trucking tools, equipment and machinery from Totowa, Passaic County, New Jersey, to Grand Concourse, New York; also for trucking 19 barrels of brick and trucking steel doors from Railroad station, amounting in all to \$490.00. The contractor was employed to construct a building at Totowa, New Jersey, for the Department of Institutions and Agencies of the State of New Jersey. The defendant gave a bond which provided, *inter alia*, "Perform the things * * * to be done and performed according to the terms of said contract, and shall pay all lawful claims of subcontractors, materialmen and laborers, for labor performed and materials furnished in the carrying forward, performing or completing of said contract, we agreeing and assenting that this undertaking shall be for the benefit of any materialman or laborer having a just claim, etc." 10 20

In the case of *Skillman v. U. S. Fidelity & Guaranty Co.*, 130 Atl. Rep. 564, the court held for reversal by a vote of eight to seven that, "As plaintiff was not named as an obligee in the bond sued on, and as it was not by express terms nor impliedly made for his benefit, the defendant being only surety on the instrument, is not liable for the debt due from contractor to the plaintiff, and therefore, the judgment in the latter's favor must be reversed." 30

Skillman v. U. S. Fidelity & Guaranty Co., 130 Atl. Rep. 564. 40

Opinion of Judge Mackay.

The instant case differs from the foregoing in that the proviso was inserted in this bond: "We agreeing and assenting that this undertaking shall be for the benefit of any materialman or laborer having a just claim."

10 The plaintiffs in this case moved to strike out the answer. There were two motions, the first to strike out the answer as sham and a second motion was made to strike out the second defense on the ground that the same is frivolous. The answer itself denies the allegations of the complaint. The defense to both counts is to the effect that the claim of the plaintiff is not a lawful claim.

20 As to the second and third items amounting to \$5.00 and \$10.00 respectively, there is no question in my mind regarding the same, but I have had some difficulty regarding the claim for \$475.00, which is for trucking the contractor's equipment from Totowa to New York. The theory of the defendant's defense seems to be that the equipment of the contractor was on the job, that the purpose for which it was intended had been accomplished and that the mere removal of it from Totowa to a place outside of the state was not material furnished or labor performed in and about the
30 completion of the contract in question.

The defendant further contends that Section 10 of the bond provides that "All material of any kind or character belonging to the party of the first part (meaning the contractor) which shall remain upon the premises of the Training School for Feeble Minded Females at Totowa, New Jersey, after the expiration of sixty days from the delivery of the certificate by the party of the second part (State of New Jersey) to the party of the first part (contractor) for the amount of money due to said party
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Opinion of Judge Mackay.

of the first part upon the completion of the work to be done under this contract, shall become absolutely the property of the State of New Jersey, subject to be used and disposed of by the said party of the second part (State of New Jersey) as the party of the second part (State of New Jersey) may deem proper." 10

Personally, I have no difficulty regarding this clause because it apparently only relates to materials whereas the plaintiff's claim to the extent of \$475.00 is for the removal of equipment.

To say that the plaintiff should not recover in this case because the labor performed consisted in removing equipment from the job to New York which had been used in the performance of the contract work, but which was not being used at the time because it was being removed, when in fact it had to be removed some time or other, in placing a rather narrow construction upon the provision in the bond relative to the meaning of "labor performed" and the meaning of the words "a just claim." Especially does this seem to me to be so when it appears that the United States Supreme Court has held that "Trucks hired and used to deliver materials are entitled to recover from the bondsman, although the trucks so hired were not actually used in the building, but were used in delivering material to and returning from the premises." (Illinois Surety Co. v. Davis, 244 U. S. 376-383. 20 30

As to the charge that the claim as itemized by the plaintiff is indefinite, I cannot agree. I am inclined to believe a layman could tell by reading the correspondence and by reading the itemized bill just what was done. 40

In the case of Shannon v. Continental & Co.,

Opinion of Judge Mackay.

8 N. J. Adv. Rep. Vol. 6, p. 52, Justice Case in speaking of the effect of the statute in question said at page 56: "The protection is accomplished by causing the contractor to bring in a third party as surety to stand sponsor for him. The defendant
10 came in and assumed that liability, not necessarily or as a matter of legal sequence but voluntarily and, as we may assume from the fact that such is the defendant's business, for a consideration." Shannon *v.* Continental & Co., 8 N. J. Adv. Rep. Vol. 6, pp. 52-56.

The foregoing reasoning seems to me to cover any claim connected with the contract work for which an action would lie against the contractor. There is no dispute that plaintiff could legally hold
20 the contractor for his claim in the instant case, ergo, he can hold the defendant surety company. This case also disposes of the question of interest as follows: "Held, also chargeable with interest on the amount of the claim from and after the beginning of the statutory date for bringing suit."
Ibid.

I will recommend that the answer and special
30 pleas be struck out and also recommend that judgment be entered in favor of the plaintiff for the sum of \$490.00 with interest from the beginning of the statutory date for bringing suit.

Rule Striking Out Answer and Entering Summary Judgment by Hon. W. B. Mackay, C. C. J.

(Entered March 15, 1930.)

This matter coming on to be heard on motion to strike out the answer filed herein by the above named defendant as sham and on supplemental motion to strike out the second defense to both counts of the complaint of said answer on the grounds that said second defense is frivolous and does not state facts sufficient to constitute a defense in point of law and due consideration having been given to the affidavits filed by the respective parties herein and the briefs submitted by the respective parties having been duly considered and the defendant after due notice having failed to show such facts as entitle it to defend;

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It is on this 12th day of March 1930 Ordered that the answer filed by the defendant be struck out as sham, that the second defense to both counts of the complaint be struck out on the further ground that same does not state facts sufficient to constitute a defense in point of law and is frivolous and that final judgment be entered for plaintiff for the sum of \$490.00 with interest from the beginning of the statutory date for bringing suit, to wit, the 1st day of December 1929 making a total of \$498.17 together with costs.

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W. B. MACKAY,
Supreme Court Commissioner
occupying the position of
Circuit Court Judge in and
for the County of Passaic.

Entered March 15, 1930.

On motion of

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KIMMEL & KIMMEL,

Attorneys of Plaintiff.

Rule Reserving Exceptions.

(Filed April 7, 1930.)

10 It appearing that the attorneys for the plaintiff served on the attorneys for the defendant a notice that it would apply to the Honorable William B. Mackay, a Supreme Court Commissioner occupying the position of Circuit Court Judge in and for the County of Passaic, for an order to strike out the answer filed by the defendant in the above matter on the ground that the allegations contained in the same are untrue in fact and sham; and it further appearing that the attorneys for the plaintiff served a supplemental notice on the attorneys for the defendant that they would apply to the Honorable William B. Mackay, a Supreme Court
20 Commissioner, occupying the position of Circuit Court Judge in and for the County of Passaic, for an order to strike out the second defense to both counts of the complaint on the ground that (1) said second defense does not state facts sufficient to constitute a defense in point of law and (2) said second defense is frivolous;

30 And it further appearing that affidavits were filed by both parties and the matter was submitted on briefs and that the said William B. Mackay, a Circuit Court Judge, sitting as Supreme Court Commissioner, filed an opinion in which he announced that he would recommend that the answer and special pleas be struck out, and that he would further recommend that judgment be entered in favor of the plaintiff for the sum of \$490.00, with interest from the beginning of the statutory date for bringing suit;

40 And it further appearing that an order for summary judgment in favor of the plaintiff and against the defendant was entered;

Rule for Summary Judgment.

It is, on this fourth day of April 1930, ORDERED that the defendant be allowed an exception to the order striking out the answer and to the order for summary judgment.

W. B. MACKAY,
Circuit Court Judge Sitting 10
as Supreme Court Commissioner.

**Rule for Summary Judgment by Hon. Chas.
C. Black.**

(Entered April 4, 1930.)

The answer in the above entitled cause having been struck out by the Honorable William B. Mackay, Supreme Court Commissioner occupying the position of Circuit Court Judge in and for the County of Passaic as sham and the second defense in said answer having been struck out on the ground that the same does not set out facts sufficient to constitute a defense in point of law, it is 20

On this 2nd day of April 1930 ORDERED that final judgment be entered for the plaintiff for the sum of \$498.17 together with costs and it is further

Ordered that this rule for judgment be entered as of March 15, 1930, *nunc pro tunc*, to comply with the entry of judgment heretofore made by the Clerk of the Court. 30

CHAS. C. BLACK,
Justice of the New Jersey
Supreme Court.

Entered Apr. 4, 1930,
as of Mar. 15, 1930.

On motion of 40
KIMMEL & KIMMEL, Attys.

Judgment.

(Entered April 4, 1930.)

10 Afterwards, upon proceedings duly had according to the statute, William B. Mackay, Supreme Court Commissioner occupying the position of Circuit Court Judge in and for the County of Passaic, ordered the said answer to be struck out as sham and that the second defense to both counts of the complaint be struck out on the further ground that same does not state facts sufficient to constitute a defense in point of law and is frivolous and Justice Charles C. Black having on the 2nd day of April, 1930, ORDERED that final judgment be entered for the plaintiff as of March 15, 1930.

20 Whereupon it is adjudged that the plaintiff Gertrude Levine doing business as Silk City Trucking & Rigging Co., do recover of the said defendant Aetna Casualty & Surety Co., a corp., the sum of four hundred ninety eight dollars and seventeen cents damages together with her costs which have been taxed at the sum of fifty six dollars and fifty-two cents, making in the whole the sum of five hundred fifty four dollars and sixty nine cents.

Damages	\$498.17	
Costs	56.52	
	—————	
	\$554.69	

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Judgment signed and entered Apr. 4, 1930, as of Mar. 15, 1930.

WM. S. GUMMERE,
C. J.

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Notice and Grounds of Appeal.

(Filed April 17, 1930.)

To

Messrs. KIMMEL & KIMMEL,
Attorneys of Plaintiff.

SIRS:

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TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. The Supreme Court erred in striking out the answer of the defendant as sham.

2. The Supreme Court should have refused to strike out the answer of the defendant and should have submitted the issues therein involved to the jury for decision on the trial of the case.

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3. The Honorable William B. Mackay, Circuit Court Judge sitting as Supreme Court Commissioner for the purpose of hearing the motion to strike out defendant's answer, had no authority to make that part of the order of March 12, 1930, wherein he adjudged for the Supreme Court that final judgment be entered for the plaintiff.

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4. The Supreme Court erred in striking out the answer of the defendant and entering summary judgment for the plaintiff, because under the bond of the defendant upon which the said action was based, the obligation of the defendant was limited to the payment of lawful claims for labor performed and material furnished in the carrying forward, performing or completing of the contract entered into between Benjamin M. Butler and Edmund V. Reisdorff, co-

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Notice and Grounds of Appeal.

partners trading as Butler-Reisdorff Company and State Board of Control of the Department of Institutions and Agencies of the State of New Jersey, and the claim of the plaintiff was not such a claim.

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5. The Supreme Court erred in striking out the answer of the defendant and entering summary judgment in favor of the plaintiff, because whether or not the claim of the plaintiff was one coming under the bond of the defendant, was, to say the least, a question of fact for the jury to pass upon.

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6. The Supreme Court erred in making the rule dated April 2, 1930, and signed by Honorable Charles C. Black, Justice of the Supreme Court, because said rule was applied for and obtained without notice to the defendant.

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7. The Supreme Court erred in making the rule dated April 2, 1930, signed by Honorable Charles C. Black, Justice of the Supreme Court, in so far as said rule provides for the entry of judgment *nunc pro tunc* as of March 15, 1930, because such rule shall only take effect from the time of the entry of such rule.

8. The said rule for summary judgment dated April 2, 1930, ordering entry *nunc pro tunc* as of March 15, 1930, is null and void because not entered in the minutes within ten days from the granting of same.

Dated April 10, 1930.

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Served Apr. 11, 1930.

Respectfully,

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

New Jersey Court of Errors and Appeals

GERTRUDE LEVINE, doing business
as SILK CITY TRUCKING & RIG-
GING COMPANY,
Plaintiff-Respondent,

v.

AETNA CASUALTY & SURETY COM-
PANY, a corporation,
Defendant-Appellant.

Action at Law.

On Appeal from
Supreme Court.

BRIEF IN BEHALF OF DEFENDANT- APPELLANT.

(1)

Statement of the Case.

This appeal brings before this Court for review a judgment of the Supreme Court (p. 26) entered summarily after Circuit Judge MACKAY, sitting as Supreme Court Commissioner for the Supreme Court, struck out the answer of the defendant as sham and frivolous and made an order directing judgment to be entered against the defendant (p. 33). After the order by Judge MACKAY ordering judgment to be entered was made on March 12, 1930, and entered on March 15, 1930 (p. 33) the plaintiff, *without notice* to the defendant, had another rule for judgment signed by Supreme

Court Justice BLACK on April 2, 1930, which provided that Justice BLACK's rule for judgment was to be entered *nunc pro tunc* as of March 15, 1930.

The action was brought on a bond of the defendant given as surety for Butler-Reisdorff Company, which company had a contract with the State Board of Control of the Department of Institutions and Agencies of the State of New Jersey for the construction of buildings (pp. 4 and 12).

The bond was required by that Department by virtue of Chapter 75 of the Laws of 1918 which is known as the Municipal Bond Act (P. L. 1918, Chap. 75, p. 203). The condition of the bond is in accordance with the form of condition contained in that statute (P. L. 1918, p. 205). The condition of the bond was two-fold, that the principal would faithfully perform the contract according to its terms "and pay all lawful claims of sub-contractors, materialmen and laborers for labor performed and materials furnished in the carrying forward, performing or completing of said contract" (p. 4, lines 30-40).

The plaintiff claimed that her claim came within the terms of said bond and should therefore be paid by the defendant. The defendant denied that contention. Suit was brought, answer was filed and motion to strike out the answer and enter summary judgment was argued before Judge MACKAY. Affidavits were submitted by both sides. After reserving decision, Judge MACKAY granted the motion and signed the rule for the entry of judgment (p. 29) and thereafter, as stated above, Justice BLACK also signed a rule for judgment which was also entered. It is from the judgment entered on those rules that the present appeal is taken.

(2)

Grounds of Appeal.

The grounds of appeal, eight in number (p. 37) will be argued under two heads, first that Judge MACKAY erred in striking out the answer of the defendant because the issues involved should have been decided in favor of the defendant, or at least should have been submitted to the jury for decision; and second, the rule for judgment by Judge MACKAY was null and void because he had no right to sign a rule for judgment not being a Supreme Court Justice, and also, the rule for judgment signed by Justice BLACK was null and void because it was without notice to the defendant and the provision therein that it should be entered *nunc pro tunc* as of a date twenty days prior to the date of its actual entry, was contrary to law and the rules of this Court.

(3)

BRIEF OF THE ARGUMENT.**I.**

The Court below erred in striking out the answer of the defendant and entering summary judgment thereon for the plaintiff.

Preliminary.

The original notice of motion was to strike out the answer of the defendant on the ground that it was untrue in fact and sham (p. 8). Thereafter a supplemental notice of motion was served to strike out the second defense contained in the answer on the ground that it was frivolous (p. 28).

In *Milberg v. Keuthe*, 98 N. J. L. 779, 781, this Court points out the distinction between sham and frivolous as follows:

“It may, however, be worth while to point out that the terms ‘frivolous’ and ‘sham’ as used in section 15 do not mean precisely the same thing. A sham answer is one good on its face, but false in fact; a frivolous answer is one which on its face sets up no defence, although it may be true in fact. A frivolous answer is always assumed to be true, while a sham answer must be admittedly false or conclusively proved to be so; the character of the former is determined by mere inspection, while that of the latter is usually determined by proof *aliunde*. See *In re Beam*, 93 N. J. Eq. 593, and *Fidelity Mutual Life Insurance Co. v. Wilkesbarre, &c. Ry. Co.*, *ante* p. 507.”

As the defendant’s answer was not sham or frivolous then it was error for the Court below to strike it out and render summary judgment for the plaintiff. *Smith v. Hopping*, 88 N. J. L. 195.

Under Section 15 of the Practice Act of 1912, a defendant may appeal from an order striking out an alleged frivolous or shammed answer after final judgment is entered (P. L. 1912, 380, Sec. 15). In the leading case of *Coykendall v. Robinson*, 39 N. J. L. 98, at page 101, this Court in considering the right of a trial court to strike out an answer as sham or frivolous lays down the rule which is to be applied in exercising that power as follows:

“While this power can be clearly maintained, it should be exercised with care, and not extended beyond its just limits.

“The inquiry is simply whether there is, in truth, any question of fact to try, and if not, if the defense is a mere pretence, it should be summarily swept away.

“When a defendant, on a rule to show cause why his plea be not stricken out, or, on application by him to set aside a judgment

entered over his plea, shows, by his own affidavit, or by other testimony, that he has a defence, stating, specifically, the grounds of it, a question of fact is presented to be passed upon, and he cannot be deprived of the benefit of a trial in the ordinary mode. In that event, a case for striking out does not exist, and, if he is denied a trial by jury, he will be entitled to review the action of the court by which his legal rights are impaired."

(a)

The claim of the plaintiff was not a proper one under the bond of the defendant or at least that question was one of fact for the jury.

On October 11, 1927, Butler Reisdorff Co. entered into a written agreement with the State Board of Control of the Department of Institutions and Agencies of the State of New Jersey, acting for the State of New Jersey, to furnish labor and material required for the construction of certain buildings (p. 12, line 30, *et seq.*). Under Chap. 75 of the Laws of 1918 (P. L. 1918, 203) it is provided that when any such board enters into such an agreement it shall be the duty of such board

"to require the usual bond, as provided for in the statute, with good and sufficient sureties, with an additional obligation for the payment by the contractor, and by all subcontractors, for all labor performed or materials furnished in the construction, erection, alteration or repair of such building, works or improvements."

In pursuance of that statutory requirement the bond of this defendant was given in exact accord with the printed condition for such bonds contained in the statute (p. 4).

According to the affidavit (which is undisputed) for the defendant (p. 25) filed in opposition to the motion to strike out its answer and enter sum-

mary judgment for the plaintiff, the Butler-Reisdorff Company defaulted on the performance of its agreement with the State Board, with the result that on *April 15, 1929*, the completion of the work was taken over by Schack & Metz. That firm completed performance of the agreement with the State Board in *September, 1929*, five months later.

Keeping in mind that under the bond of the defendant upon which this suit is based as well as under the statute under which it was written, the only liability of this defendant was "for labor performed and materials furnished in the carrying forward, performing or completing of said contract," with the State Board of Butler-Reisdorff Company, we now refer to the claim set forth in the complaint and the affidavits filed in support thereof. Schedule B of the complaint sets forth the alleged claim of the plaintiff as against Butler-Reisdorff Company for which it sought a recovery in this suit. Said schedule is as follows (p. 6, lines 1-20):

SCHEDULE B.

Paterson, N. J. Sept. 30, 1929

Butler Reisdorff Co.
New York, N. Y.

SILK CITY TRUCKING & RIGGING Co.
General Trucking
96-98 Water St.

1/ 4/29	For trucking tools and equipment and machinery from Totowa Borough New Jersey to Grand Concourse, New York	\$475.00
1/17/29	For trucking 19 barrels of brick	5.00
3/ 4/29	Trucking steel doors from Railroad station	10.00
	Total	<hr/> \$490.00

It will be noted that the main item of this claim amounting to \$475 is for trucking tools, equipment and machinery of Butler Reisdorff Company from the point where the construction work was to be done in Totowa Borough, New Jersey, to the Grand Concourse, New York, which is a distance of approximately fifty miles. *This trucking became necessary when Butler Reisdorff defaulted on the performance of its agreement with the State Board and this was one of the acts of the Butler Reisdorff Company which terminated its connection with the performance of that contract.*

Turning to the affidavit of the plaintiff (p. 9) she says that there was a specific agreement with Butler Reisdorff Company to transport the tools, equipment and machinery for the sum of \$475 and that she, with her men and trucks "started (the removal of that equipment) on January 4, 1929 and (continued said removal) at various times thereafter until all the articles were trucked away from Totowa Borough, the sight of the State Training Home to Grand Concourse, New York."

The affidavit of Philip Levine, the plaintiff's husband, shows that he personally made the verbal agreement for the trucking in question from Totowa to Grand Concourse, New York, for \$475 and that there was confirmatory correspondence (p. 21). According to letter from the plaintiff to Butler Reisdorff dated January 3, 1929, the plaintiff agreed "to remove the tools, planks and machinery from Totowa, New Jersey, to McClellan Place, Grand Concourse, Bronx, New York, for the sum of \$475 to be paid as work progresses. Any carting to Brooklyn or other places to be paid for extra." The removal of the equipment started on January 4, 1929, under the supervision of Philip Levine and continued at various times until all of the equipment including the tools, planks, machinery, mortar tubs, etc., were removed.

On January 7, 1929, there was a letter from Butler Reisdorff Co. to the plaintiff which demonstrates that the plaintiff was to remove "all" of the property of the Butler Reisdorff Co. from the job at Totowa, which proves conclusively and corroborates what is contained in the affidavit of the defendant quoted *supra*, namely, that Butler Reisdorff had defaulted in the performance of its job with the State Board and had quit the job and was removing all of its property from the job. *In short, it had ceased to perform its contract which provided for the construction of the buildings in question.* That letter is as follows (p. 22, line 25 to p. 23, line 10):

BUTLER REISDORFF COMPANY
134 East 44th Street,
New York

January 7th, 1929

Silk City Trucking Company
96 Water Street,
Paterson, N. J.

Gentlemen:

We are in receipt of your estimate of January 3rd in the sum of \$475.00 for removing equipment to New York, but you merely state that you will remove tools, planks and machinery, whereas the estimate should read "*all the equipment including tools, planks, machinery, mortar tubs, etc. so that all the equipment, etc. that we require to be removed from the job is included in your estimate.*"

Will you kindly send us a revised estimate as above stated.

Very truly yours,

BUTLER REISDORFF COMPANY
per BENJAMIN F. BUTLER

BFB/MKC

On February 5, 1929, the plaintiff replied as follows (p. 23, lines 15-40):

SILK CITY TRUCKING & RIGGING Co.
96-8 Water Street,

Paterson, N. J. Feb. 5th, 1929

Butler Reisdorf Co.
134 East 44th St.
New York, N. Y.

Gentlemen:

In reply to yours of the 7th of Jan. last, I wish to state that I will remove all the equipment including tools, planks, machinery and mortar tubs, as per your request.

Since I have carted away more than half of the things and owing to the fact that it will take a considerable length of time until the rest of the things will be ready for carting away, I respectfully request that you favor me with a check for \$200.00 on account.

Awaiting an early and favorable reply, we are

Respectfully yours,

SILK CITY TRUCKING & RIGGING Co.
Per PHIL LEVINE

P.L./H.B.

It will therefore be noted that as late as February 5, 1929, the removal of the equipment and property of the Butler Reisdorff Co. was continuing, and on that date, viz., February 5, 1929, *only half* of the equipment and property of the Butler Reisdorff Co. had been removed. Payment was then being demanded by the plaintiff of \$200 on account. The plaintiff's husband, Philip Levine, in his affidavit does not say when that work was completed. The equipment, according to his affidavit, consisted of mason planks, cement mixers, shanties, wheelbarrows, mortar tubs, tools and other articles (p. 24, line 20), which proves again the complete

exodus that was being made by Butler Reisdorff Co. during January and February which brought about the necessity of having the work completed by another contractor who began on April 15, 1929 (p. 25, line 30).

Also according to the sworn affidavit of the defendant which is not disputed, when the completion contractor Schack and Metz took on the work on April 15, 1929, "they had to use their own machinery and equipment" (p. 25, line 40, to p. 26, line 5).

Also according to the sworn affidavit for the defendant (p. 26, lines 1-20) "*the machinery and equipment referred in the Levine affidavits, were not removed for the purpose of having the work accepted, as they were removed over eight months before the work was completed.*" According to the complaint (p. 2, line 40), the State Board did not accept the work as completed until September 16, 1929, which was eight months after Butler Reisdorff made the contract with the plaintiff to remove all of its property from the job.

It therefore appears without dispute that the plaintiff did nothing in connection with the contract between the State Board and Butler Reisdorff Co. in the way of performing labor or furnishing materials "in the carrying forward, performing or completing of said contract."

We therefore contend that the claim of the plaintiff was not a proper one under the bond, or to say the least, if it is possible for reasonable men to draw conflicting inferences from the facts presented, then it was for the jury to determine as a question of fact, and not for the trial court to decide as a matter of law that this defendant was liable.

The rule is well stated that where fair-minded men might honestly differ as to the conclusions

to be drawn from the facts whether controverted or uncontroverted, the question at issue should go to the jury.

Hummer v. L. V. R. R. Co., 74 N. J. L. 196, 199.

The trial court seemingly fell into the error of assuming that if this claim was a just claim against Butler Reisdorff Co. it followed as a matter of course that it was a just claim as against the defendant as surety on the bond of that company. This is a *non sequitur*. When the bond and the statute used the words "shall pay all lawful claims" those words were used in both places in connection with the sentence "shall pay all lawful claims of subcontractors, materialmen and laborers, for labor performed and materials furnished, in the carrying forward, performing or completing of said contract" and *not otherwise* (p. 4, lines 30-40) for the bond (P. L. 1918, Chap. 75, p. 203) for the statute.

The opinion of the trial judge striking out the answer emphasizes the error into which he fell. In that opinion he says (p. 31, lines 15-30):

"To say that the plaintiff should not recover in this case because the labor performed consisted in removing equipment from the job to New York which had been used in the performance of the contract work, but which was not being used at the time because it was being removed, when in fact it had to be removed some time or other, is placing a rather narrow construction upon the provision in the bond relative to the meaning of 'labor performed' and the meaning of the words 'a just claim.'"

It will be noted that in the foregoing quotation the trial court felt that because the claim was a just claim against Butler-Reisdorff Company, it must of necessity be a just claim under the bond;

also, that because the supplying of the trucks and truckmen under the contract to remove all of the equipment might be regarded as "labor performed," that necessarily it was labor performed by a subcontractor "in the carrying forward, performing or completing" of the contract with the State Board. We submit that it is clear that the contract of Butler-Reisdorff with the plaintiff calling for the removal of all of the former's property, in no way helped to carry forward the work of constructing the buildings, but on the contrary prevented the contract of the State Board from being performed so that another contractor had to be employed to complete the construction of the buildings. This new contractor had to provide equipment, tools, etc., in order to complete the job. The trial court again emphasizes the error into which it fell by that part of his opinion immediately following that quoted *supra*, where he says (p. 31, lines 25-35):

"Especially does this seem to me to be so when it appears that the United States Supreme Court has held that 'Trucks hired and used to deliver materials are entitled to recover from the bondsman, although the trucks so hired were not actually used in the building, but were used in delivering material to and returning from the premises' (*Illinois Surety Co. v. Davis*, 244 U. S. 376, 383)."

In the case at bar no trucks were hired or used to deliver materials to the job for the completion of the buildings in so far as the item of \$475 is concerned. In fact, no trucks were hired or used by the contractor, Butler-Reisdorff Company. What Butler-Reisdorff Company did was to make a contract with an independent contractor, the plaintiff, to truck and cart away all of its property to its place of business in the Bronx, New York,

fifty miles distant, for its own convenience. That is quite different from the situation presented in the case cited in the United States Supreme Court in the quotation, *supra*.

Assume that Butler-Reisdorff Company had made a contract with the plaintiff to transport all of its property from Totowa, New Jersey, across the continent to San Francisco, California, it is perfectly plain that that contract would not call for the performance of labor or the providing of material in accordance with the provision of the bond of the defendant which requires the subcontractor, materialmen or laborers to perform labor or furnish materials "in the carrying forward, performing, or completing of said contract" with the State Board.

In the case of *Cramer v. Board of Chosen Freeholders of Salem County*, 147 Atl. 639 (not yet officially reported) this Court held that the furnishing of automobile trucks and drivers to a road contractor does not give a claim for labor within the Municipal Mechanics' Lien Law.

In the case of *Mandel v. United States*, 4 Fed. Rep. (2nd Series) 629 at 930, the Circuit Court of Appeals for this Circuit held that a claim by a railroad company for freight charges is not embraced by the words "labor and material" and therefore is not properly allowed in a suit under a bond furnished on a United States Government job. In that case certiorari to the United States Supreme Court was denied in 268 U. S. 698.

In the memorandum filed by Judge MACKAY he relied on the case of *Illinois Surety Company v. John Davis & Company*, 244 U. S. 376. That case arose under a bond furnished to the United States Government on a federal job. It is based on the case of *Title Guarantee & Trust Co. v. Crane Co.*, 219 U. S. 24, at 34. The *Title Guarantee & Trust*

Company decision is in turn based on the decision of Circuit Court Judge PUTNAM in the case of *American Surety Company v. Lawrenceville Cement Company*, 110 Fed. Rep. 717. The following pertinent remarks are found in the opinion of the Court in that case at page 721:

“Therefore, in cases of transportation by a carrier from distant points, or, indeed, from another port than the port at which the contractor’s work is being done, the carrier would not ordinarily be protected by the statutory bond, for two reasons: First, transportation for considerable distances in the regular course, by the ordinary lines of either steam, sail, or rail, cannot easily be brought within the words of the statute, ‘supplying labor or materials’; and, second, inasmuch as carriage of that character, especially under an ordinary bill of lading, or its equivalent, creates a well-recognized lien for freight, the equitable rule would apply that a carrier, under such circumstances, cannot give up his cargo, and enforce his claim against a mere surety, after he has so placed himself that the surety cannot be subrogated.”

In *W. Jersey, etc. R. Co. v. Cape May County*, 148 Atl. 401 (not yet officially reported), it was held by the Court of Chancery (INGERSOLL, V. C.) that “furnishing of instrumentalities to contractors used by him in performance of contract does not constitute ‘labor’ within the terms of the Municipal Mechanics’ Lien Law.” In that case the claim was for the rental of a barge used by the contractor with the County of Cape May in performing a contract with the county; also there was provided with the barge a hawser used thereon which the contractor purchased from the plaintiff.

In *Delaware River, etc. Co. v. Mercer Freeholders*, 88 N. J. Eq. 506, the Court of Chancery

(BACKES, V. C.) held on the authority of numerous cases as follows:

"1. The furnishing of automobile trucks and drivers to a contractor does not give a claim for 'labor' within the terms of the Municipal Mechanics' Lien Law. They are mere instrumentalities.

"2. The act gives a lien only to subcontractors and persons who labor for, or furnish material to, the contractor or subcontractor."

Under the foregoing authorities it also would seem clear that for the remaining two items of the plaintiff's claim amounting to \$15 there would be no right under the bond. These two items represent trucking charges, one for \$5 for trucking nineteen barrels of brick and the other for \$10 for trucking steel bars (p. 11, lines 10-20).

In any event, so far as the main item of \$475 is concerned, we submit there can be no question that that does not come within the bond, or to say the least, the affidavit filed by the defendant raises a jury question which could not be decided against it on a motion to strike out the answer.

The power to strike out must be exercised with care and not extended beyond its just limits. *Coykendall v. Robinson*, 39 N. J. L. 98, 101, *supra*.

The inquiry on the motion was whether there was any truth in the affidavits submitted by the defendant. If there was, then there could be no rule striking out the answer. The defendant cannot be deprived of the benefit of a trial in the ordinary mode. If a fact question is presented to be passed upon, the defendant cannot be deprived of the benefit of a trial by jury (*idem*). Therefore it is apparent that the answer is not sham. It is also quite apparent that it is not frivolous because it clearly appears that the claim in question does not come within the bond.

(b)

The claim of the plaintiff was not presented in accordance with the provisions of the statute because a statement was not furnished by the plaintiff as required thereby and therefore the suit is premature.

Under Chapter 75 of the Laws of 1918 under which this bond was written, Section 3 provides as follows:

“3. Any person, firm or corporation to whom any money shall be due on account of having performed any labor, or furnished any material in the construction, erection, alteration or repair of any such building, work or improvement, within eighty (80) days after the acceptance thereof by the duly authorized board or officer, shall furnish the sureties on said bond a statement of the amount due to any such person, firm or corporation. No suit shall be brought against said sureties on said bond until the expiration of sixty (60) days after the furnishing of said statement. * * *”

We do not dispute that the plaintiff presented a so-called statement within eighty days as required by the statute, but we urge the statement is not in accordance with the statute. The statement is Schedule B of the complaint (p. 6; p. 3, lines 1-20). If the statement is examined, it will be found that it makes no assertion as required by Section 3 that there is any money due for any labor performed or material furnished in the construction, erection, alteration or repair of the buildings in question. Until such statement is rendered, no suit can be brought by the express wording of the statute, *supra*. If the statement in question proves anything under the authorities cited in

subdivision (a) of this point, it proves that it presents a claim not within the statute.

The statement is not directed to the defendant. It does not identify the contract under which it is being made; neither does it identify the bond.

There is nothing in the alleged statement to indicate to the defendant whether the defendant is being held as surety on a bond or whether the schedule in question is a mere presentation of a bill. There is nothing on the face of the alleged statement to advise any reasonable person as to its purport or what was intended by the sender. If the plaintiff thereby intended to present a statement against the defendant, there should have been something in the alleged statement indicating that. That Schedule B is the only alleged statement served to comply with the statute is clear from Paragraph 9 of the complaint (p. 3) which says, "A true copy of said statement (that required by the statute) is hereby annexed and made a part hereof as Schedule B."

If this alleged statement is a compliance with the statute then almost anything would be. The trial judge in his memorandum seemed to think that by reason of the correspondence contained in the affidavits of the plaintiffs and by reading this alleged statement, "a layman" could tell what it was all about (p. 31, lines 30-40). However, the correspondence contained in the plaintiffs' affidavits with respect to the character of their agreement with the Butler Reisdorff Company, was not served on this defendant as a part of the alleged statement or proof of claim and there is no contention that the correspondence was a part of the original statement (see the complaint, p. 3). Surely the reference to correspondence in affidavits in support of a motion to strike out an answer is not a compliance with the statute. The

statement must precede the suit. The suit cannot be brought until sixty days after a proper statement has been served. We therefore respectfully submit that for this reason the trial court erred in striking out the answer of the defendant which denied that a proper statement had been served.

II.

The Circuit Court Judge sitting as Supreme Court Commissioner erred in ordering summary judgment to be entered.

Rule 84 of this Court completely covers this point and is as follows:

“84. No summary judgment shall be entered except by virtue of an order of the court or a justice at chambers, and the application for such judgment may be made on *ex parte* affidavits, and shall be made on four days' notice, unless the court or the justice, for special reasons, shall order shorter notice. (Rule 79, 1905, modified.)”

Rule 84 has been passed upon by this Court in *Milberg v. Keuthe*, 98 N. J. L. 779, 781, where in a unanimous reversal this Court held (italics ours):

“But we think that the second point is well taken. A Supreme Court commissioner has no power to make an order for summary judgment in an action in the Supreme Court.”

“Rule 84 of the Supreme Court declares that: ‘No summary judgment shall be entered except by virtue of an order of the court or a justice at chambers, and the application for such judgment may be made on *ex parte* affidavits, and shall be made on four days' notice, unless the court or the justice, for special reasons, shall order shorter notice.’”

“Doubtless the learned and careful judge, who, as Supreme Court commissioner, dealt with this matter, considered that power to do so was conferred by virtue of his designation by the Supreme Court as Supreme Court Commissioner to hear and determine motions preliminary to trial.

“But that is not so. Such designation was made pursuant to section 17 of the Practice Act of 1912. Pamph. L. p. 380. That section provides that ‘the court may, under such conditions as it may fix, require any or all motions preliminary to trial to be heard and determined by Supreme Court commissioners designated by the court.’ &c. * * *

“Since the motion in question was to strike out the answer upon the ground that it was sham and frivolous and disclosed no defence to the action, it follows that the Supreme Court commissioner had no power to deal with it, and consequently no power to make the order for summary judgment under review.”

We respectfully submit therefore that the rule for judgment by Judge MACKAY in so far as it ordered summary judgment be entered was erroneous and therefore null and void.

III.

The rule for summary judgment signed by Justice Charles C. Black of the Supreme Court is void because no notice was given to the defendant of said application as required by Rule 84 and said rule is further erroneous because it provided that it was to be entered *nunc pro tunc*.

Rule 84 has been quoted at length in the previous point. It not only specifically provides that no

summary judgment shall be entered except by virtue of an order of the Supreme Court or a Justice thereof but it further specifically provides that the application therefor "shall be made on four days' notice."

No notice of any kind was given in this case of the application to Justice BLACK for summary judgment. Therefore the *ex parte* application and the resulting order or rule is invalid and cannot bind this defendant.

Furthermore, the rule signed by Justice BLACK was applied for to him on April 2, 1930, and thereafter the Justice's signature was attached thereto, it was not *actually* entered until April 4, 1930 (p. 35, lines 15-40). Notwithstanding that those were the actual dates of granting and entering the rule, the rule within itself orders that it is to be entered as of March 15, 1930 *nunc pro tunc*.

In short, it is to be entered 20 days prior to the time when it was actually entered. This is clearly bad and cannot be sustained under the settled practice and rules of the Supreme Court. Rule 214 of the Supreme Court provides:

"214. Every rule taken in open court or allowed by a justice shall be entered in the minutes of the court, and shall take effect only from the time of such entry, and the true date of such entry shall be stated at the foot of such rule; *provided, however*, that the justice allowing such rule may nevertheless order in the said rule that the same shall take effect forthwith, in which case such rule shall take effect from the time of the signing the same; and all rules, whether granted by the court or a justice, shall be entered in the minutes within ten days from the granting of the same, and in default thereof shall be of no effect. (Rule 40, 1905.)"

It will be noted that Rule 214 specifically provides that every rule allowed by a justice shall be entered in the minutes and shall take effect *only* from the time of such entry and the true date of such entry shall be stated at the foot of the rule. Both of these mandatory provisions are violated by the rule in question. It did not take effect as of the date of *actual entry* and at the foot of the rule instead of naming the true date of entry it is provided that it is to be entered as of March 15, 1930 (p. 35). The proviso in Rule 214 gives the justice allowing the rule discretion to the extent of permitting him to make the rule effective as of the date of signing rather than as of the date of actual entry but that is the limit of the discretion allowed by the rule. The reasons in back of Rule 214 are obvious. If a rule for judgment can be made effective as of any date irrespective of the date when it is granted or entered, endless confusion and a great complication of priorities of rights by various creditors would result, to say nothing of the right of the defendant to know when he is to first be charged with the entry of a valid judgment.

Also the very last provision of Rule 214 is involved. If the rule signed by Justice BLACK is to be regarded as granted on March 15, 1930, the date fixed in the rule as of the date of granting *nunc pro tunc*, then the rule is null and void because it was not actually entered within ten days and therefore is null and void under Rule 214 which says "all rules shall be entered in the minutes within ten days from the granting of the same, and in default thereof shall be of no effect."

We therefore respectfully submit that for these reasons there is no valid rule for judgment and therefore the judgment below (p. 36) should be set aside and for nothing holden.

IV.

For these reasons we respectfully submit that the judgment below should be reversed and the answer of the defendant should be upheld as neither sham nor frivolous.

Submitted: May Term, 1930.

EDWARD A. MARKLEY,
Of Counsel.

COLLINS & CORBIN,
Attorneys for Defendant-Appellant.

New Jersey Court of Errors and Appeals

GERTRUDE LEVINE, doing business
as SILK CITY TRUCKING & RIG-
GING COMPANY,

Plaintiff-Respondent,

vs.

AETNA CASUALTY & SURETY COM-
PANY, a corporation,
Defendant-Appellant.

Action at Law.

On Appeal
from
Supreme
Court.

BRIEF FOR PLAINTIFF-RESPONDENT.

Statement of the Case.

This appeal brings up for review a judgment of the Supreme Court striking out the answer of the defendant as sham and the second defense thereof as insufficient in point of law (p. 33) and entering summary judgment (p. 35, l. 12 to bottom of page and p. 36). Due service of notice of motion to strike out the answer as sham and for summary judgment (p. 8) and of supplemental notice of motion to strike out the second defense to both counts of the complaint as not stating facts sufficient to constitute a defense in point of law (p. 28) was made upon the attorneys of defendant. Both plaintiff and defendant submitted affidavits on the motions (pp. 9-28). The motions were submitted to Circuit Judge Mackay sitting as Supreme Court Commissioner before whom they were returnable pursuant to the statute (P. L. 1926, Chapter 61, p. 103) on briefs (See Judge Mackay's order, p. 33, ll. 18-19) in which all that could

be said for or against the motions was thoroughly stated and considered, Circuit Judge Mackay having deliberated on the motions for some time, on March 10, 1930 filed an opinion (pp. 29-32) in which he concluded:

“I will recommend that the answer and special pleas be struck out and also recommend that judgment be entered in favor of the plaintiff * * * ”

(p. 32, ll. 27-30). In precise conformity with the opinion, an order was drawn and entered on March 15, 1930, said order being signed by Circuit Judge Mackay as Supreme Court Commissioner, on March 12, 1930 (p. 33). To comply with the rule of the Supreme Court requiring a summary judgment to be entered by virtue of an order of the court or a justice at chambers (Rule 84, Supreme Court Rules 1926) an order was signed by Mr. Justice Black on April 2nd, 1930, which, after reciting the fact that Circuit Judge Mackay as Supreme Court Commissioner had ordered the answer struck out as sham and the second defense in the answer struck out on the further ground that it did not state facts sufficient to constitute a defense in point of law ordered that final judgment be entered for the plaintiff, (p. 35, l. 12 to bottom of page). This order by Mr. Justice Black was entered on April 4, 1930 (p. 35, l. 17). To comply with the previous entry by the clerk of the court in entering Judge Mackay's order on March 15, 1930 (p. 33) Mr. Justice Black ordered that the judgment be entered *nunc pro tunc* as of March 15, 1930 (p. 35, ll. 30-34). Since due notice of the application to strike out the answer as sham, etc. and for the entering of summary judgment had been given to the attorneys of defendant (p. 8 and p. 28), and duly considered upon

argument of both sides and finally determined by Circuit Judge Mackay as Supreme Court Commissioner no notice was given of the presentation for signature to Mr. Justice Black of the order for summary judgment, this being a ministerial act carrying into effect what had already been argued and decided upon once for all. The judgment itself recites the decision and order of Circuit Judge Mackay as Supreme Court Commissioner and the order of Mr. Justice Black for final judgment and thereupon in the usual form adjudges that the plaintiff do recover of the defendant her damages and costs of suit. It is signed by Chief Justice Gummere (p. 36).

The present action was brought against the defendant as surety on joint and several bond given by it and the Butler Reisdorff Company which had on October 11th, 1927, entered into a contract with the State Board of Control of Institutions and Agencies of the State of New Jersey to erect a State Training Home at Totowa, New Jersey a public work (pp. 12-18). At the same time as the contract was executed the Butler Reisdorff Company and the defendant Aetna Casualty & Surety Co., as surety, entered into a bond as required by the statute, Laws of 1918, Chapter 75, page 203, 1 Com. Supp. to Comp. Stats, page 1765, sections 107-149 C (1) to 107-149 C (4) inclusive; which said bond in compliance with the statute required among other things the payment of:

“ * * * all lawful claims of subcontractors, materialmen and laborers for labor performed and materials furnished in the carrying forward, performing or completing of the said contract, we agreeing and assenting that this undertaking shall be for the benefit of any materialman or laborer having a just claim as well as for the obligee herein * * *” (p. 19, l. 37 to p. 20, l. 4).

The contract executed on the same day as the bond and in connection with which the bond was given provided in its tenth provision:

“Tenth—All material of any kind or character belonging to the party of the first part (Butler Reisdorff Co.) which shall remain upon the premises of the Training School for Feeble Minded Females at Totowa, New Jersey after the expiration of sixty days from the delivery of the certificate by the party of the second part to the party of the first part for the amount of money due to said party of the first part upon the completion of the work to be done under this contract shall become absolutely the property of the State of New Jersey, subject to be used and disposed of by said party of the second part (State of New Jersey) as said party of the second part may deem proper.” (p. 17, l. 36 to p. 18, l. 12).

The plaintiff at the express request of the Butler Reisdorff Co. carted tools, equipment and material used in the construction of the aforesaid State Training Home at Totowa at the expressly stipulated prices of \$475.00 and \$5.00 and \$10.00 respectively, totaling \$490.00 for which the Butler Reisdorff Co. did not pay her, and therefore the defendant, Aetna Casualty & Surety Co. as surety on the bond became liable to her in the sum of \$490.00 together with interest. See the affidavits of Gertrude and Phillip Levine (pp. 9-12 and 21-25). On September 18, 1929 the State accepted the work on the State Training Home at Totowa, New Jersey, and on September 30th, 1929, the plaintiff furnished the defendant surety company a statement of the amount due to plaintiff within eighty days after the acceptance of the work in compliance with the statute. See paragraph 4 of

F. P. Gerry's affidavit (p. 12, ll. 20-24), paragraph 7 of Gertrude Levine's affidavit (p. 10, ll. 16-24); also the statute, 1 Cum Supp. to Comp. Stats, page 1765; section 104-149 C (3). After 60 days had elapsed since the furnishing of the statement, this being the statutory waiting period, the present action was started to recover the sum due plaintiff. The defendant filed an answer which almost wholly consists of general denials. The plaintiff's affidavits submitted on the motion verify the plaintiff's cause of action in detail (pp. 9-25). The defendant's only affidavit, that of its superintendent of its Bond Claim Department of its New York Office consists entirely of statements of law and argumentative conclusions the materiality or relevancy of which does not appear, (pp. 25-27).

ARGUMENT.

POINT I.

The Court below properly struck out the answer of defendant and entered summary judgment for the plaintiff.

Rule 80 of the Supreme Court (Rules of 1926) that in actions, inter alia, upon contract express or implied, sealed or not sealed,

“the answer may be struck out on motion and affidavit as hereinafter provided, unless the defendant by affidavit or other proofs shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend. (Rule 57 Pr. Act. 1912)”

Courts have, from times immemorial, had and exercised the power to strike out an answer or plea either as sham or frivolous.

Anonymous 7 N. J. L. 60; North Brunswick v. Boowem, 10 N. J. L. 257; Richards v. Canal Co., 18 N. J. L. 250.

The power was exercised at common law independently of statute.

State Mutual B. & L. Assn. vs. Williams, 78 N. J. L. 720.

Has the defendant shown such facts as entitle it to defend? Defendant asserts in its brief that the trucking work which plaintiff did “became necessary when Butler-Reisdorff defaulted on the

performance of its agreement with the State Board and this was one of the acts of the Butler Reisdorff Company which terminated its connection with the performance of that contract." Defendant does not cite to any affidavit submitted on the motion to support this assertion and a careful search of the state of case fails to reveal any. Further on defendant asserts that by the letter from Butler Reisdorff Co. to the plaintiff dated January 7, 1929, the plaintiff was to remove "all of the property of the Butler Reisdorff Co." from the job at Totowa. But here again is a misstatement. What the letter said was:

" * * * the estimate should read "all the equipment including tools, planks, machinery, mortar tubs, etc. so that all the equipment, etc. that we require to be removed from the job is included in your estimate." (p. 22, ll. 38-42).

We challenge an inspection of the state of the case to reveal any affidavit on which can be founded any assertion that the plaintiff was under her contract with Butler Reisdorff Co. to remove all of the Butler Reisdorff Co.'s property from the site of the State Training Home at Totowa.

Under plaintiff's contract as evidenced by the correspondence she trucked certain rough equipment, namely, "tools, planks, machinery, mortar tubs, etc." (p. 22, ll. 39-41). The trucking commenced on January 4, 1929 (p. 22, ll. 16-20; and p. 9, l. 37 to p. 10, l. 10) and continued until completed (p. 22, ll. 16-20). On Feb. 5th, 1930 half the articles had been trucked away but the balance had to wait until ready for carting (p. 23, ll. 30-34). The last two items of trucking which together with the \$475.00 item comprise the total sued for were for removing nineteen barrels of

brick from the Railroad to the State Training Home on January 17, 1929, at an agreed price of \$5.00 and for trucking steel doors from the Railroad to the State Training Home at an agreed price of \$10.00 (p. 24, ll. 9-19). So that contrary to the defendant's assertion in its brief, the Butler Reisdorff Co. was working on the job and continued to work on it after the trucking was completed. Indeed it appears from defendant's own affidavit that of its superintendent of the Bond Claim Department of its New York Office that the Butler Reisdorff Co. did not default on the job until April 15, 1929, when the completion was taken over by the firm of Schack and Metz, (p. 25, ll. 28-32).

The articles trucked comprising the \$475.00 item of plaintiff's claim consisted of "mason planks, cement mixers, shanties, wheelbarrows, mortar tubs, tools and other articles" (p. 24, ll. 20-22), all articles used solely in the rough work of the construction. It uncontradictedly appears from Phillip Levine's affidavit that at the time the articles in question were trucked all the rough and heavy work which would require the use of articles such as had been trucked to wit, planks, cement, mixers, mortar tubs and machinery had been completed and only finishing and interior work remained to be done. See paragraph 10 of Phillip Levine's affidavit (p. 24, ll. 23-26); *in fact it is undisputed that the reason for removing these rough articles was to get them out of the way so that this finishing work could be done.*

"11. This work (i. e. finishing work) could not be completed while these articles were there as part of the articles were inside of the buildings and part were outside and the men could not finish the remaining work while these articles were on the inside and

about the premises, these articles also had to be removed because otherwise the State would not accept the work until the job was completed."

Paragraph 11 of Phillip Levine's affidavit (p. 24, ll. 28-36).

It will be observed from this that the buildings had then already been put up and since only finishing and interior work remained to be done the articles trucked, to wit, shanties, wheelbarrows, etc. were no longer of any use on the job, but in fact were a hindrance to the completion of the remaining work which as had been pointed out before was finishing and interior work.

A consideration of the affidavits submitted on the motion.

We invite the Court's attention to the affidavits of Phillip Levine, Gertrude Levine and F. P. Gerry (pp. 9-25). From them the facts showing plaintiff's claim against the defendant amply appear. The facts are uncontrovertible that plaintiff had express agreements to do the carting work in question with the Butler Reisdorff Company, that she did the work, that she wasn't paid for it, that the defendant entered into the bond to pay laborers, and that consequently in law and in justice she must have judgment therefor, against the defendant, the surety on the bond. Rarely is the performance of work as adequately demonstrated by proof as the correspondence between the Butler Reisdorff Company and the plaintiff evidences the work in question in this case. See paragraphs 3, 4, 5, 6, 7 and 8 of Phillip Levine's affidavit (p. 21, l. 22 to p. 24, l. 19). And these facts are no-

where contradicted in defendant's only affidavit, that of its New York superintendent.

William H. Jenkins, defendant's New York superintendent in paragraph two of his affidavit (p. 25, l. 28 to p. 26, l. 1) that the Butler Reisdorff Company defaulted on the contract to build the State Training Home and immediately thereafter on April 15, 1929, the completion of the work was taken over by Schack & Metz, that Schack and Metz had to use their own equipment. He also states that "the tools, tool sheds, machinery, mason planks, cement mixers, shanties, wheelbarrows, mortar tubs referred to in the affidavits of Phillip and Gertrude Levine were according to their affidavits removed on January 3rd, 1929." (p. 25, ll. 35-40). But plainly this is a misstatement of Phillip and Gertrude Levines' affidavits. On February 5, 1929, the work of removing the articles had as not yet been completed, and Phillip Levine in confirming the contract as stated in Butler Reisdorff Company's letter of January 7th, 1929, in his letter of February 5th, 1929 said:

"Since I have carted away more than half of the things and owing to the fact that it will take considerable length of time until the rest of the things will be ready for carting away, I respectfully request that you favor me with a check for \$200.00 on account." (p. 23, ll. 30-36).

Mr. Jenkins further states in paragraph 2 of his affidavit that Schack and Metz had to use their own tools in completing the job. Assuming for the sake of argument that this is true, the unaltered and uncontradicted fact remains that the tools; etc., which plaintiff carted were for almost two years used in the construction of the State Training Home; the work was started by the But-

ler Reisdorff Company in October, 1927. See the contract attached to F. P. Gerry's affidavit and dated October 11, 1927, the same date as the bond (p. 12 and p. 14, ll. 27-32). By Mr. Jenkins own assertion the Butler Reisdorff Co. defaulted about April 15, 1929. From Phillip Levine's affidavit it appears that the trucking started on January 4, 1929, was little more than half completed on February 5, 1929, and the balance of the articles had to await at that time until they were ready to be trucked (p. 22, l. 17 to p. 23, l. 42). Certainly we do not claim to have done any work for Schack and Metz and little good that would do us so far as the defendant is concerned. The defendant's bond only undertakes to pay laborers, giving service to the Butler Reisdorff Company in performance of their contract. Furthermore, it uncontradictedly appears from Phillip Levine's affidavit that at the time when the articles in question were trucked all the rough and heavy work which would require the use of articles such as had been trucked, to wit, planks, cement mixers, mortar tubs and machinery had been completed and only finishing and interior work remained to be done, (p. 24, ll. 23-26). Mr. Jenkins further on in paragraph 2 of his affidavit makes the argumentative statement of a conclusion which since it is not evidential in the trial of a cause, is not evidential in an affidavit, to the effect that the carting work in question was not required before the work under the contract could be completed or accepted. Certainly the articles in question had to be brought to the State Training Site before the work on it could be done. Without mortar tubs, cement mixers, tools, shanties, etc. modern buildings cannot be erected and equally certainly did these articles have to be removed. No better argument in answer to Mr. Jenkin's purely

mental and speculative conclusion is required than paragraphs 10, 11 and 12 of Mr. Phillip Levine's affidavit:

"10. At the time these articles were trucked the work on the State Training Home was not as yet finished, some plumbing, painting, mason work and other interior work remaining to be done.

"11. This work could not be completed while these articles were there as part of the articles were outside and the men could not finish the remaining work while these articles were on the inside and about the premises; these articles had to be removed because otherwise the State would not accept the work until the job was completed.

"12. While these articles were in the buildings and about the buildings, the buildings were not fit to be occupied for the purpose for which they were erected, they being dormitories." (p. 24, l. 23 to p. 25, l. 2).

Mr. Jenkins also refers to the tenth provision of the contract between Butler Reisdorff Company and the State (p. 17, l. 37 to p. 18, l. 12) heretofore set out at length, providing that all material of any kind belonging to Butler Reisdorff Company and not removed by it from the State Training Home after the expiration of sixty days from the receipt by it of a certificate for the balance of the money due it on the completion of the contract shall become the property of the State subject to be used and disposed of by the State as to the State might seem proper. How this aids the defendant we cannot by the wildest flight of imagination understand. It is a good illustration of how hard pressed the defendant surety company is to conjure up some imaginary defense. *Docs not this provision show in the clearest possible*

way that it was the intention of the parties to the contract that the Butler Reisdorff Co. was to remove the articles in question after their usefulness on the job had terminated and they had become a burden to the completion and enjoyment of the premises and that if it failed to do so, as a penalty, to it, all the articles were to be subject to removal and disposal by the State as its own property? If not we respectfully submit that the English language ought to be discarded as highly misleading and useless as a means of communicating thoughts and intentions.

Mr. Jenkins then goes on in his affidavit to state that the statement furnished to defendant by plaintiff does not comply with section three of Chapter 75 of the Laws of 1918. We shall discuss this further on under Point II.

Mr. Jenkins further says that the statement does not state a claim under the bond furnished by the defendant company. This we shall discuss under the subdivision of this point treating with the question whether plaintiff's claim comes under the bond.

Lastly, Mr. Jenkins complains of vagueness in plaintiff's affidavit as to the specific nature of the trucking work done. Certainly the work of removing the tools, tool sheds, machinery and other articles was done by plaintiff's men and trucks starting on January 4, 1929, and at various times thereafter until all the articles were trucked away from Totowa Borough to Grand Concourse, New York. Phillip Levine's affidavit after stating this uncontradicted fact, continues in paragraph 6 of his affidavit in the body of his letter of Feb. 5, 1929 confirming the revised estimate to say that at that time more than half of the articles had been trucked away and that "it will take a con-

siderable length of time until the rest of the things will be ready for carting away" (p. 23, ll. 31-35). The Butler Reisdorff Company in its letter of January 7, 1929 confirming the contract with the plaintiff thought it sufficiently definite to stipulate for the removal of "all the equipment, including tools, planks, machinery, mortar tubs," etc. See its letter, paragraph 5 of Phillip Levine's affidavit (p. 22, l. 21 to p. 23, l. 11). See also Phillip Levine's letter of Feb. 5th, 1929, reconfirming the Butler Reisdorff Company's letter in the identical words, paragraph 6 of Phillip Levine's affidavit (p. 23, ll. 12-42). These communications established a contract, a valid contract to remove all the equipment required for the rough work of a construction costing \$457,565.00 (p. 13, ll. 35-42). As may well be imagined the articles were numerous and miscellaneous in character, and it was neither practicable nor convenient to list each article to be trucked separately. The parties made a lump sum for the job without regard to the time it required, consequently no careful record of the time consumed was kept. But the uncontradicted facts appear on the face of the affidavit that all the articles contracted for were carted, started January 4, 1929 and continuing till after February 5, 1929. See paragraphs 4, 5, 6 and 7 of Phillip Levine's affidavit (p. 22, l. 17 to p. 23, l. 42).

We respectfully submit that the uncontradicted facts appearing on the face of the affidavits show the answer with its general and unsupported denials to be an obvious sham.

Plaintiffs claim for cartage comes within the bond and the second defense in the answer is bad in point of law.

The defense above referred to is contained in the answer as "Second Defense to Both Counts" 9, p. 7, ll.26-40) and is to the effect that plaintiff's claims for cartage are not lawful claims of laborers, etc. for labor performed in the carrying forward, performing or completing of the contract between the Butler Reisdorff Company and the State. This raises the legal question whether the cartage charges are within the terms of the bond furnished under Chapter 75 of the Laws of 1918. Under the well settled law they are and therefore this defense is bad in point of law.

First. Purpose of the Statute. The title of the statute is:

"An act to protect persons performing labor or furnishing materials for the construction, alteration or repair of public works." Laws of 1918, C 75, p. 203.

As shown by its title the purpose of the statute clearly is "*to protect persons performing labor or furnishing materials for the construction, alteration or repair of public works.*" Said the late Justice Katzenbach in *E. J. Lavino & Co. v. National Surety Co.*, 6 N. J. Mis. R. 478 (Sup. Ct. 1928) at page 462:

"The statute is designed for the benefit of those furnishing materials, and labor for a public work. In the broadest language possible this intention is shown by the statute and by the language of the bond of which the form is embodied in the statute."

Declared the Supreme Court of the United States, per Justice Brandeis, in *Illinois Surety Co. v. John Davis Co.*, 244 V. S. 376, in dealing with the Act of Congress, 33 Stat. 811, which almost identically with Chap. 75 of the Laws of 1918 is entitled "An act for the protection of persons furnishing materials and labor for the construction of public works," at page 380:

"First. The purpose of the act was to provide security for the payment of all persons who provide labor and material on public work. This was done by giving a claim under the bond in lieu of the lien upon the land and building customary where property is owned by private persons. Decisions of this court have made it clear that the statute and bond given under it must be construed liberally in order to effectuate the purpose of Congress as declared by the act. In every case which has come before this court where labor and materials were actually furnished for and used in performance of the work contemplated in the bond recovery was allowed if suit was brought within the period prescribed by the act. Technical rules otherwise protecting sureties from liability have never been applied in proceedings under the statute," citing scores of cases.

Said this court in *J. Jacob Shannon & Co. v. Continental Casualty Co.* 8 N. J. Adv. R. 52 (E & A) Feb. 3, 1930 (not yet officially reported) at page 56 in brushing aside a proposed technical defense in an action on a bond like the one here sued upon:

"The title of the act gives notice that the legislation is designed to protect persons and claims of the class represented by plaintiff and the account sued upon. Another noticeable feature is that the protection is not

merely a statutory pronouncement and that it does not substantially burden the owner as does the Mechanic's Lien Law. The protection is accomplished by causing the contractor to bring in a third party to stand sponsor for him. The defendant came in and assumed that liability, not necessarily as a matter of legal sequence but voluntarily and as we may assume from the fact, that such is the defendant's business for a consideration.

The statute proceeds to direct that the protection shall be by a bond, which shall be conditioned for the payment of "all indebtedness which may accrue" and the bond solemnly executed by and under the seal of the defendant obligates the latter to pay all "lawful claims" for "materials furnished" and contains an assurance that the undertaking is "for the benefit of any materialman having a just claim."

Of course in the instant case a claim for labor is involved but the bond covers both labor and material (p. 19, ll. 36-40) so that the principle is the same.

It will thus be seen that the purpose of the statute is to protect the laborer. The title of the act, the provisions of the act, and the provisions of the bond required by it all show this.

Second. Cartage charges have been expressly held to be within the terms of the bond given in this case.

In *Hammill v. Commercial Casualty Insurance Company*, 5 N. J. Mis. R. 685, (Supreme Court, 1927) suit was brought by a drayman against the surety on a bond given under Chap. 75 P. L. 1918 to recover for cartage charges. Judgment was given for the plaintiff and against the surety com-

pany in the court below. This judgment was affirmed by the Supreme Court which held at page 686:

“The first contention of appellant is that the furnishing of trucks and driving of trucks, was not labor performed within the meaning of Chapter 75 of the Laws of 1918. Pamp. L. 1918 p. 203. The purpose of Chapter 75 of the Laws of 1918, as evidenced by the act was to secure the payment by the contractor and by all subcontractors” for all labor performed in the construction, erection, alteration, or repair of such building, works or improvements.” The act was intended to protect those having lienable claims. In the case of *Davis v. Mial*, 86 N. J. L. 167, the Court of Errors and Appeals held that a mechanics lien claim would lie for the transportation and delivery of materials as for labor performed for the erection and construction of a building.”

and said the court at page 687:

“The appellant received the premiums for the execution of the bond. It should bear the burden of the contract it entered into.”

In accordance with *Davis v. Mial*, 86 N. J. L. 168, *supra*, any number of cases allow a mechanics lien for cartage charges:

W. J. & S. R. R. Co. v. Cape May County, 100 N. J. Eq. 181;

Improved B & L v. Larkin, 88 N. J. Eq. 52, 59;

Bates Meacham C. v. Trenton R. R. Co. 70 N. J. L. 684, 694.

The defendant does not accurately quote from *Illinois Surety Co. v. John Davis Co.*, 244 U. S. 376. In accord with *Hammill v. Commercial Cas-*

ualty Insurance Co., 5 N. J. Mis. R. 685, *supra*, see the opinion in that case, of Justice Brandeis for the United States Supreme Court at page 383 of 244 U. S. 376:

“Fourth: The specific objection made to the claim of the United States Equipment Company for rental of cars, track and equipment used at Noval Training Station *and the expense of loading the plant and freight thereon to and from the station* is also unfounded. The Surety Company contends that this is not supplying “Labor and materials.” This equipment was used in the prosecution of the work. Material was thus supplied although a loan serving the purpose no purchase of it was made. *The expense of loading and freight were properly included with the fixed rental as recoverable under the bond.* Title Guaranty & Trust Co. v. Crane Co., 219 U. S. 24, 34. Judgment affirmed.”

So that it will be seen that cartage charges are specifically held to be proper items under the bond as for labor furnished.

The defendant endeavors to distinguish Illinois Surety Co. v. John Davis Co., *supra*, upon the ground that in this case no trucks were hired but the plaintiff contracted to cart the mortar tubs, shanties, etc. with her trucks and men under her supervision. But assuming that such distinction exists (it does not), it makes the plaintiff's claim as being one for labor under the bond all the clearer and stronger. Moreover in Illinois Surety Co. v. John Davis Co. *supra*, as will be seen from the above quotation, the Supreme Court of the United States expressly held “freight thereon to and from the station” to be a proper item under the bond.

Defendant refers to the case of *Mandel v. United States*, 4 Fed. Rep. (2nd Series) 629 at 930 as holding that a claim by a railroad company for freight charges does not come under a bond furnished under a United States Government job. In the first place plaintiff's claim is not for railroad freight. She is engaged in the trucking business and her claim is for cartage by means of her trucks and men under her supervision (p. 9, l. 37 to p. 10, l. 10; and p. 22, ll. 17-20). In the second place assuming that case to so rule for the United States Circuit Court of Appeals (we have not been able to gain access to the volume reporting the case) it is directly contrary to the ruling in our state. In *N. J. & S. R. R. Co. v. Cape May Co.*, 100 N. J. Eq. 181 (Ch. 1926) it was held that a railroad may have a municipal lien for freight charges. That being so, such a claim would come under the bond given under Chap. 75, P. L. 1918, p. 203 under the well settled law as shown by *Hammill v. Commercial Casualty Insurance Co.*, 5 N. J. Mis. R. 685, 686, wherein the Supreme Court held:

"The act was intended to protect those having lienable claims."

Defendant quotes from the case of *American Surety Company vs. Lawrenceville Cement Company*, 110 Fed. Rep. 717 at page 721. If instead of stopping the quotation short and ending it before it reached its natural end it had been continued so that the whole thought intended would have been brought out it would read as follows:

"Therefore, in cases of transportation by a carrier from distant points, or, indeed, from another port than the port at which the contractor's work is being done, the carrier would not ordinarily be protected by

the statutory bond for two reasons. First, transportation for considerable distances in the regular course, by the ordinary lines of either steam, sail, or rail, cannot be brought within the words of the statute, supplying labor or materials; and second, inasmuch as carriage of that character, especially under an ordinary bill of lading; or its equivalent, creates a well recognized lien for freight, the equitable rule would apply that a carrier, under such circumstances, cannot give up his cargo and enforce his claim against a mere surety, after he has so placed himself that the surety cannot be subrogated to the security which the law gave. The first objection does not necessarily apply to truckmen who are moving material from a place of landing to the exact locality of the work under contract, although, the distance may be somewhat considerable, nor to waterborne transportation carried on by the servants of the contractor or for short distances without the aid of steam or a fully equipped vessel. The second objection moreover, must not be carried to any extreme, otherwise it would defeat the practical operation of the statute. Every person selling materials for cash holds a lien for the purchase money until he voluntarily waives it by delivery; and every person engaged in transportation who is not the mere servant of the owner of the merchandise transported, holds a carrier's lien, even though the carriage is of miscellaneous parcels, over short distances in the immediate locality, and at frequent irregular intervals. Nevertheless, with reference to each, such liens are not ordinarily insisted on, and it would be an unreasonable construction of the statute to hold that it intended to interfere with the convenience of minor dealings in such methods as the usual practices establish."

It will be seen therefore that the court in that case

expressly distinguishes between "transportation by a carrier from distant point, or indeed from another port than the port at which the contractors work is being done" "by steam, sail or rail" and "truckmen", "although the distance may be somewhat considerable", denying recovery on the bond to the former and allowing recovery on the bond to the latter. As a matter of fact a truckmen's claim was allowed in that case.

Defendant cites the cases of *W. Jersey etc. R. Co. v. Cape May County*, 148 Atl. 401 (not yet officially reported), *Delaware River etc. Co. v. Mercer Freeholders*, 88 N. J. Eq. 506 and *Cramer v. Board of Chosen Freeholders of Salem County*, 144 Atl. 639 (not yet officially reported) to the effect that the furnishing of automobile trucks and drivers to a road contractor does not give a claim for labor within the municipal Mechanics Lien Law but has neglected to add that in those cases, the barge and hawser and the trucks and drivers were furnished as mere instrumentalities to the contractor under the contractor's exclusive management and control. But where what is furnished is transportation, where the trucks and drivers are under the control of the truckman who undertakes the specific job of transporting the articles the lien is clearly allowable. The distinction is thus brought out in the case cited by the defendant of *Delaware River Q & C v. Board of Chosen Freeholders of Mercer*, 88 N. J. Eq. 506, *supra* at page 508:

"1. The Holbrook Corporation hired automobile trucks with drivers, which were used by the contractor in hauling material from its plant to the work. During the operation the trucks were under the exclusive management and control of the latter. The claim-

ant had no hand in the work, nor did it undertake to perform any part of the contract. The furnishing of instrumentalities to a contractor in the performance of a contract, does not constitute labor within the scope and purview of the statute. *Troy Public Works Co. v. City of Yonkers*, 207 N. Y. 81, *Post and McCord v. City of New York*, 148 N. Y. Supp. 568; affirmed 152 N. Y. Supp. 1138. But counsel contends that having furnished drivers to operate the auto trucks the claimant performed labor, arguing that the trucks were merely incidental to the labor of the drivers, and citing *Post and McCord v. City of New York*. That case does not support the position taken. *There the claimant Johnsons, labored with wagons and drivers.* The undertaking of the Holbrook Corporation did not involve the performance of any part of the municipal contract. It was in no sense a subcontractor. Its drivers like the trucks were instrumentalities furnished to the contractor. *There is a marked distinction between a charge for rental of instrumentalities used by the contractor and a claim for labor performed by the lienor by means of instrumentalities. In the latter instance as remarked in the last cited case, the claimant "is entitled to a lien for the value of the labor so performed and this value is merely enhanced by the instrumentalities used in the labor". The nature of the engagement is the controlling element."*

In the case at bar the plaintiff did not furnish trucks and drivers as mere instrumentalities subject to the contractor's (Butler Reisdorff's) control, but she contracted that with her trucks and control would transport the mortar tubs, planks, tool shanties, etc. See paragraphs 3, 4, 5 and 6 of Phillip Levine's affidavit setting forth the correspondence between Butler Reisdorff Co. and

Phillip Levine plaintiff's manager (p. 21, l. 22 to p. 23, l. 11) So that it will be seen that the cases of Cramer v. Board of Chosen Freeholders, W. Jersey etc. R. Co. v. Cape May County and Delaware River etc. Co. v. Mercer Freeholders are not in point.

The case of Hammill v. Commercial Casualty Co. and Illinois Surety Co. v. John Davis Co. *supra*, cover the case at bar being suits on bonds identical with the one being considered and both allowing transportation charges as labor within the terms of the bond.

So far as mechanics liens are concerned there is a wide differentiation between this case and the cases of Cramer v. Board of Chosen Freeholders, W. Jersey etc. R. Co. v. Cape May County and Delaware etc. Co. v. Mercer Freeholders *supra* as pointed out in the last cited case and the following cases would apply were this a case of a Mechanics Lien:

Davis v. Mail, 86 N. J. L. 167.

W. J. & S. R. R. Co. v. Cape May County,
100 N. J. Eq. 181.

Improved B. & L. v. Larkin, 88 N. J. Eq.
52, 59.

Bates Meacham Co. v. Trenton R. R. Co.,
70 N. J. L. 684, 694.

Third. Under the tenth provision of the contract between Butler Reisdorff Co. and the State, the Butler Reisdorff Co. was required to remove the equipment, etc. and the plaintiff in doing so by her labor performed a specific provision of the contract.

The tenth provision is:

“Tenth—All material of any kind or character belonging to the party of the first part

(Butler Reisdorff Co.) which shall remain upon the premises of the Training School for Feeble Minded Females at Totowa, New Jersey after the expiration of sixty days from delivery of the certificate by the party of the second part to the party of the first part for the amount of money due to said party of the first part upon completion of the work to be done under this contract, shall be come absolutely the property of the State of New Jersey subject to be used and disposed by said party of the second part as said party of the second part may deem proper" (p. 17, l. 37 to p. 38, l. 12).

We have shown before that the uncontradicted fact is that these articles all being articles required in the rough work in the construction of the buildings were removed by the plaintiff when the rough work was completed and only interior and finishing work remained to be done at a time when the articles transported were a hindrance to the completion of this interior and finishing work and to the enjoyment of the buildings which were dormitories. (p. 24, l. 20 to p. 25, l. 2). This provision shows in the clearest possible way an intention of the parties to the contract that the Butler Reisdorff Co. was to remove the articles in question after their usefulness on the job had terminated and they had become a burden to the completion and enjoyment of the premises, and that if it failed to do so as a penalty to it, all the articles were to be subject to removal and disposal by the state as its own property. Therefore disregarding the fact that plaintiff in removing the articles in question was aiding the completion of the construction, or the general object of the contract, and looking at this case in the narrowest possible view, the plaintiff by her labor specifically assisted the

Butler Reisdorff Co. in performing an expressly stipulated term of the contract. Consequently it necessarily follows that plaintiff's claim comes under the bond, under the strictest possible interpretation. But we shall now show that under the law the bond is to be most rigidly construed against the defendant surety company and in favor of the plaintiff laborer.

Fourth. When a surety company goes on a bond such as this for a premium, as was done in this case it is carrying on the insurance business with all the incidents and liabilities of an insurer. There was a time when the surety was a trusting individual whose confidence was abused by one who imposed on his friendship. Sensing this, the courts evolved the rule that the liability of a surety is *strictissimi juris*, to be strictly construed. But that state of affairs has faded away, and large corporations for adequate money considerations undertake to become sureties, soliciting the business with a keen rivalry. These corporations are under the supervision of the State Department of Banking and Insurance, they must comply with the provisions of the statute relating to insurance companies, and in addition to their so-called surety business, engage in other forms of insurance. Take for instance the Aetna Casualty & Surety Co. It will go on almost any kind of bond, insure against liability for automobile accidents, against burglary, and assume any number of other risks. With this change of conditions, since the reason for the former rule does not apply the rule itself is held not to apply to this changed state of affairs. The business now being an insurance business, the rule applies that the contract is to be most construed against the insurer and in favor of the obli-

gee. Thus it is stated in 32 Cyc. 306 Title Principal and Surety:

"E. Construction and Operation of Contract. Generally speaking, a contract of suretyship by a surety company is governed by the same rules, as the contracts of other sureties, but some distinctions are made by the courts in construing such contracts. The doctrine that a surety is a favorite of the law, and that a claim against him is strictissimi juris, does not apply where the bond is executed upon a consideration by a corporation organized to make such bonds or undertakings for profit. While such corporations may call themselves "surety companies" their business is in all essential particulars that of insurers. Their contracts are usually in the terms prescribed by themselves, and should be construed most strongly in favor of the obligee."

We respectfully submit the answer of the defendant consisting wholly of general denials is shown by the affidavits to be a plain sham, that the defendant's only affidavit, that of its New York superintendent of its Bond Department which merely states argumentative or legal conclusions, does not in any shape or form support the answer, that in the face of plaintiff's affidavits clearly and uncontradictedly reciting the facts in the case it is entitled to no consideration. That the second defense in the answer is bad in point of law in view of well settled rules and that therefore the court below properly struck out the answer and entered summary judgment for the plaintiff.

POINT II.

The plaintiff within eighty days after the work was accepted furnished the defendant with a statement of the amount due her and the suit was properly brought.

Admittedly a statement of the amount due was furnished to defendant by plaintiff within eighty days after the work was accepted (p. 10, l. 16-33, p. 11, ll. 1-22) But defendant says that the statement "is not directed to the defendant, does not identify the contract under which it is being made; neither does it identify the bond". Defendant does not deny in its affidavit that the statement was enclosed in a letter to defendant's New York Bond Claim Department, attention of W. H. Jenkins, Manager, in which letter and in any number of previous letters from plaintiff's attorneys similarly addressed, it was stated that enclosed was an itemized statement for the amount due plaintiff for work done for the Butler Reisdorff Co. in connection with the State Training Home at Totowa, New Jersey and that the amount due was demanded from the defendant as surety on the bond it had executed as surety with Butler Reisdorff Co. as principal.

Apart from all this, this contention was not raised in the court below. W. H. Jenkins, superintendent of the Bond Claim Department of defendant's New York Office to whom the letter enclosing the statement was sent and for which plaintiff's attorneys hold a registered return receipt, in defendant's only affidavit makes no such allegation. His only complaint was that the statement

“does not give my company adequate information as to the nature of the work for which claim is made and does not state a claim under the bond furnished by my Company on this contract” (p. 27, ll. 20-26). In fact defendant states in its statement of the case in its brief in this court at page 2:

“The plaintiff claimed that her claim came within the terms of said bond and should therefore be paid by the defendant. The defendant denied that contention. Suit was brought * * *”

And this statement by the defendant itself is confirmed by the previous mentioned correspondence between W. H. Jenkins and plaintiff's attorneys. The motions in this case were submitted to the Supreme Court on briefs (p. 33, ll. 18-19) and its argument on this point was given at page 9 of its brief submitted to that court as follows:

“The statute (Chapter 75 of the Laws of 1918) provides that a statement be served on the Bonding Company within eighty days after acceptance of the work by the municipality and sixty days thereafter if the claim is not paid the claimant may sue the Bonding Company. The Bonding Company is therefore given eighty days in which to decide whether to allow or disallow the claim. It is clear that the legislature must have had in mind that the statement furnished to the Bonding Company would give them sufficient information on which to decide whether the claim is or is not a proper claim. In the case *sub judice* we respectfully submit that the statement does not show a claim within the Bond Act. The statement should at least be specific enough to show on its face a proper claim within the Bond Act.”

So that it will be seen that the defendant is inter-

posing this imaginary objection for the first time in this court. It cannot do so for it is well settled that a case will be reviewed on appeal on the theory on which it was tried below. Said this court in *Busko v. First Uhro & Society*, 8 N. J. Adv. R. 89 (not yet officially reported) at page 92:

“Cases must be reviewed on the theory on which they are tried”.

Furthermore all that the statute requires the laborer to furnish the surety is:

“a statement of the amount due to any such person, firm or corporation.” L. 1918, C. 75, p. 204.

This the statement in this case does. In fact it does much more; it gives the dates of the various items comprising the total claim, it lists the various items separately and it gives the places where the articles were trucked and names the articles trucked and finally gives the sum total of \$490.00. From the statement the surety company is enabled to find out anything it would want to know concerning the work for which claim is made, assuming of course it is not seeking to avoid its just obligation and really desires to be informed of its just debt.

Naturally since the work was done for Butler Reisdorff Co. the statement was made out in Butler Reisdorff Company's name and enclosed with the letter to W. H. Jenkins, Superintendent of defendant's Bond Claim Department of its New York Office. The defendant was liable for Butler Reisdorff Company's debt as surety and the statement showed the amount due in compliance with the fact and with the statute.

We respectfully submit that defendant's conten-

tion on this branch of the case is unfounded when viewed either from the standpoint of the affidavits or the statute.

POINT III.

After the answer was struck out by the Circuit Court Judge sitting as Supreme Court Commissioner judgment was entered by virtue of an order of Supreme Court Justice Black and the judgment is therefore properly entered.

Assuming rule 84 of the Supreme Court Rules requires a summary judgment to be entered only by virtue of an order of the court or a justice at chambers, that rule was complied with in this case. After the order was signed by Circuit Court Judge Mackay in accordance with his opinion (p. 33) an order was signed by Mr. Justice Black, which after reciting that Circuit Court Judge Mackay had ordered the answer struck out as sham and the second defense in said answer struck out as not setting out facts sufficient to constitute a defense in point of law, ordered that final judgment be entered for the plaintiff (p. 35, ll. 12 to 42). Therefore rule 84 was complied with. Said this court in *Lully v. National Surety Co.*, 8 N. J. Adv. R. 202 (not yet officially reported) at page 207, per Chancellor Walker:

“While a Supreme Court Commissioner cannot order a summary judgment entered in that tribunal, nevertheless, after answer struck out by such commissioner, the court or a judge at Chambers may enter a judgment. *National Surety Co. v. Mulligan*, 7

N. J. Adv. R. 789 (not yet officially reported)".

The judgment itself which is signed by Chief Justice Gummere recites that it is entered by virtue of Mr. Justice Black's order (p. 36).

We therefore respectfully submit that rule 84 was complied with in entering judgment.

POINT IV .

The rule for summary judgment signed by Justice Charles C. Black is valid; the notice of the application to strike out the answer and for summary judgment required by Rule 84 was given; said rule properly provided that it be entered nunc pro tunc.

It is true that rule 84 of the Supreme Court Rule requires four day notice to be given of the application to strike out an answer as sham and for summary judgment as provided for in rule 80. The application in this case was made before Circuit Court Judge Mackay as Supreme Court Commissioner under the statute Pamp. L. 1926, p. 103. The Supreme Court has declared that owing to the burden of work it will not hear motions but will require them to be heard before the Circuit Court Judge. *E. O. Painter & Co. v. Kil-Tone Co.*, 103 N. J. L. 320. More than four days notice of the application was given defendant's attorneys. See the notice of motion (p. 8) and the supplemental motion (p. 28) served Jan. 23rd, 1930 and Jan. 25, 1930 respectively, and both returnable before Judge Mackay as Supreme Court Commissioner

on February 1st, 1930. The defendant's attorneys appeared on the motion and the matter was submitted on briefs in which the motion was thoroughly argued, (p. 33, ll. 18-19). On March 10, 1930, Circuit Court Judge Mackay as Supreme Court Commissioner filed an opinion deciding the application in favor of the plaintiff (pp. 29-32). An order was drawn in accordance with the opinion, signed by Circuit Court Judge Mackay as Supreme Court Commissioner on March 12, 1930, and entered on March 15, 1930 (p. 33). Owing to the fact that this is a Supreme Court issue, it was necessary in accordance with the practice which has sprung up to have the formal rule for judgment signed by the Supreme Court or Supreme Court Justice at chambers. *Lully v. National Surety Co., supra.* Since due notice of the application to strike out the answer as sham and for the entry of summary judgment had been given to the attorneys or defendant, no notice of the presentation for signature of the rule for judgment to Mr. Justice Black was necessary. All that could be said for or against the application was stated before Circuit Court Judge Mackay as Supreme Court Commissioner. Had the matter been returnable before a Supreme Court Justice he would have signed one order on rendering his opinion. Surely no notice of the formal presentation for signature to Mr. Justice Black of the rule for judgment was necessary. This was merely a ministerial act carrying into effect what had already been argued and decided upon once for all. As well require notice of presentation for signature of a postea or rule for judgment after the verdict of a jury where notice of trial has been duly served. Nor does it make a difference that the rule for judgment signed by Mr. Justice Black

provided that it be entered *nunc pro tunc* to comply with the prior entry of Circuit Court Judge Mackay's order.

In *Franchino v. Overseer of Poor of Orange* 103 N. J. L. 301 (Sup. Ct. 1927) *affd.* on opinion below, 104 N. J. L. 435 (E & A 1928) Quarter Sessions Court on June 17, 1926, made an order moulding a verdict of a jury in a bastardy appeal rendered Sept. 29, 1925, *nunc pro tunc* as of Sept. 29, 1925. The Supreme Court held at page 304 of 103 N. J. L. 304:

"The final reason is that the order in question was unprovidently made and illegally entered.

This is argued under two heads:

First, that the order was made without notice to the prosecutor. Our attention is not directed to any authority for this contention and we find none."

The case was unanimously affirmed by this court on appeal.

In *Allen and Dean v. Bradford*, 3 Alabama 281, 37 Am. Dec. 689, the court held at page 689 of 37 Am. Dec.:

"This court has repeatedly holden that a judgment *nunc pro tunc* may be entered though no notice is given to the opposite party. *Fuqua and Hewitt v. Cariel and Martin*, Minor 170; *Clemens v. Judson and Bunks*, Id. 395. In point of law no inconvenience can result from the want of notice, as such judgments are always founded on matter of record, or some entry or memorandum in the cause and cannot be gainsayed by showing to the court extraneous facts.

A judgment *nunc pro tunc* is merely consummating what the court had ordered, or but imperfectly performed, and it has a retrospective relation, nothing that has occurred post factum can be present in opposition to it."

See in accord 15 R. C. L. page 624, section 65; Long v. Stafford, 103 N. Y. 374. ~~Rule 214~~

It therefore appears on the record that the rule 84 was complied with in respect to notice of the application to strike out the answer and for summary judgment and notice of the presentation for signature of the rule for judgment signed by Mr. Justice Black was not necessary.

Admittedly rule 214 of the Supreme Court Rules requires every rule to "be entered in the minutes of the court within ten days from the granting of same." But clearly this provision was complied with in this case. The rule was granted April 2, 1930 and entered April 4, 1930, within two days thereafter (p. 35, ll. 12-41). The rule nowhere requires that a rule be entered within ten days of the time it is entered as of where it is entered *nunc pro tunc*. It merely requires that it be entered "within ten days from the granting of same" which was done in this case. The defendant's argument on this branch of the case is based on a fictitious premise.

Assuming that rule 214 of the Supreme Court Rules provides that a rule "shall take effect only from the time of such entry" how does that affect this case. The rule states at the foot of it, the true date of entry and has the further notation that it is entered on the true date of entry as of the prior date.

It states

“Entered April 4, 1930 as of March 15, 1930” (p. 35, ll. 38-41)

Moreover the rule did not take effect prior to its entry. Until entered on April 4, 1930 it had no effect, but when entered on that date it and every one of its provisions then for the first time took full force and effect, including the one that it be entered *nunc pro tunc* as of March 15, 1930 to comply with the prior entry by the Clerk of Supreme Court Commissioner Mackay's order which had been entered March 15, 1930. (p. 33). The plaintiff was entitled to the judgment on March 15, 1930 and no harm came to the defendant from entering it *nunc pro tunc* as of that time. The trouble with defendant's contention is that it proves too much. If it is sound, then no *nunc pro tunc* order, which admittedly is within the discretion of the court, can be made. In *Emma v. Loggia Fasci Italico*, 6 N. J. Mis. R. 413 (Sup. Ct. 1928) the Supreme Court on April 30, 1928 gave leave to enter a rule *nunc pro tunc* as of November 25th, 1927. In *Singer v. Juechter*, 2 N. J. Mis. R. 714, (Sup. Ct. 1924) the Supreme Court on July 22nd, 1924 gave leave to enter a rule *nunc pro tunc* as of May 7th, 1924. The alleged difficulty defendant now suggests was as applicable to those cases as the one at bar.

Moreover, assuming for the sake of argument that rule 214 was not complied with, under the broad powers of the Supreme Court under Rule 218 of the Supreme Court Rules it could suspend rule 214. Said the Supreme Court in *Emma v. Loggia Fasci Italico supra*, at page 414 of 6. N. J. Mis. 413:

“Assuming that rule 214 of the rules of

this court required the entering in the minutes of the court of a rule to the effect that an alternative writ of mandamus had been directed by the Court to issue in the above case within ten days from the filing of the opinion of this court which was on November 25, 1927, we are of the opinion that the motion to quash should be denied. Rule 5 of the Practice Act of 1912 which was enacted after the decision of the case of Jersey City v. Davis, *supra* and which is now embodied in the rules of this court and known as rule 218, provides as follows:

'218. Rules May be Suspended. These rules shall be considered as general rules for the government of the court and conducting of causes; and as the design of them is to facilitate business and advance justice, they may be relaxed or dispensed with by the court in any case where it shall be manifest to the court that a strict adherence to them will work surprise or injustice.'

We feel that the advancement of justice requires that the relator in the present case should have an opportunity to present his case under the alternative writ of mandamus allowed. The counsel of relator has permission to enter a rule *nunc pro tunc* in the minutes of this court with reference to the allowance of the alternative writ of mandamus under the decision of this court filed November 25th, 1927."

See in accord; Maxwell v. Pinyak, 116 Atl. 101, (Sup. Ct. 1922, not yet officially reported.)

Thus assuming for the sake of argument that rule 214 was not complied with (although it was), the Supreme Court exercised its undoubted power in entering the rule for judgment (p. 35, ll. 12-41).

We respectfully submit that the imaginary,

technical and wholly unsubstantiated reasons urged by the defendant present no reason for disturbing the judgment below and we respectfully submit that the judgment below be affirmed.

Respectfully submitted,

KIMMEL & KIMMEL,
Attorneys for and of counsel with
Plaintiff-Respondent.

MAY TERM, 1930.

