New Jesrey

Court of Errors and Appeals.

MICHAEL KORMAN, *Plaintiff-Appellee,* *vs.* MARY E. LIVESEY, *Defendant-Appellant.*	*On Appeal from Supreme Court.*

Brief of Carling and Hirschberg in behalf of Plaintiff-Appellee.

I.

The judgment of the District Court in favor of the plaintiff-appellee should not be disturbed.

The plaintiff sued in an action on contract to recover the sum of $105.00 as the balance due for the work, labor and services rendered by the plaintiff-appellee to the defendant-appellant pursuant to an agreement between them. The Trial Court found as a fact that the sum of $380.00 was the contract price and that $275 was paid on account, leaving a balance due and owlng of $105.00 (p. 6, ll. 20-34).

The finding of the Trial Judge as to the contract price was a question of fact and cannot be questioned on this appeal by appellant, for only questions of law can be considered. (P. L., 1915, p. 549).

The defendant-appellant filed a recoupment and the Trial Judge found as a fact that three items of the contract amounting to the sum of $21.20 should

have been performed and allowed the defendant-appellant on account of the contract price of $380.00, a deduction of $21.20.

We respectfully submit that the contract was substantially performed and the appellant was not prejudiced by the judgment of the lower Court. Feeney v. Bardsley, 37 Vroom, 239, where the Court of Errors and Appeals, through Van Syckel, J., said (p. 240), "If the contractor has substantially performed his contract, even though he has failed to do so in some minor particulars, he is entitled to recover the contract price less what will be a fair allowance to the owner to make good the defects in the performance of the contract."

2.

The contract was duly performed and accepted and the work thereunder accepted by defendant-appellant.

The Trial Judge found as a fact that the various items of the contract were properly performed pursuant to the terms thereof with three exceptions, for which the appellant received just allowance. This, therefore, was incompatible with a refusal by appellant to accept the work, having no lawful excuse therefor. The law will not countenance a refusal to accept the results of a properly performed contract on the part of one of the contractual parties, and will give relief to the one complying with its provisions.

The defendant accepted the work, as evidenced by the several payments covering a period of three months, amounting to $275.00, made on account of the contract price (p. 11, ll. 35 to 40).

The appellee after removing the existing veranda and putting in a complete glass store front, laying

concrete steps to the store and putting a cement coating on the sidewalks of the area way, repairing all the needed flags, removing all loose plaster from the ceilings and walls of basement hallway, and replastering such portions, repairing all hall breaks in the plaster of ceiling of walls and front basement room intended for the store, repairing and hanging properly the front and rear doors of the first floor hallway and doing all the work incidentally involved in constructing said store front, putting in beam in front of house, and erecting a toilet (p. 7, ll, 15 to 35), and charging therefor the sum of $380.00, was forced to make an allowance of only $21.20 to appellant. The items constituting this allowance when compared with the quantity and character of the work done (p. 6, ll. 36 to 40; p. 7, ll. 1 to 5) shows that the appellant received practically all that she contracted for. These three items did not in any manner affect the tenantable condition of the store and had nothing to do with the main purpose of appellant in desiring the erection of a store and store front.

The Trial Court did not commit any legal error in its alleged refusal to receive in evidence the contents of an alleged three day notice to complete the work.

The undisputed evidence adduced by both parties to this action showed in detail and particularly the work to be done and materials to be furnished by the plaintiff-appellee in the construction of the store front for the defendant as originally agreed upon (p. 7, ll. 15 to 35). The recoupment filed by the defendant-appellant contained several items which she alleged necessitated completion (p. 13 "C"). The nature and character of the testimony brought forth by the appellant in the lower tribunal

was corroborative and in support of the allegations in the recoupment. Thus the alleged rejection of the attempt to prove the contents of the alleged copy of an alleged notice was not predjudicial to the appellant. Upon viewing the various items constituting the alleged notice to complete the work (p. 13, ll. 27 to 40; p. 14, ll. 1 to 15), it will be observed that they are fully set forth in the recoupment. Besides, that, the recoupment contained additional claims included in the alleged notice (p. 12, ll. 24 to 40; p. 13, ll. 1 to 13.)

The Trial Court having before it the particulars making up the contract and also the alleged defects in construction which formed the basis for the recoupment determined that plaintiff-appellee properly performed the contract with a few minor exceptions (p. 7, ll. 35 to 38). The Trial Court, however, permitted appellant to testify that it was a three day notice to complete the contract and then found that the appellee did subsequently complete the contract. It, therefore, appears that no part of the appellant's defense was improperly excluded as the contents of the alleged notice to complete were admitted in evidence, together with proof of the mailing of the notice to plaintiff-appellee.

The judgment of the Supreme Court should be affirmed.

The Supreme Court did not err when, in affirming the opinion of the District Court, it said: "It is urged in support of this appeal that it was error to refuse to admit in evidence a copy of a three days' notice to proceed with the contract, which the defendant testified she mailed to the plaintiff. There was no notice given the plaintiff to produce the original at the trial, and we think that under such circumstances the paper was not admissible, but if

it was the defendant suffered no harm, for she was allowed to testify to the mailing, the admission of the plaintiff that he had received it and to the contents of the notice.

CONCLUSION.

We submit that the judgment in the Supreme Court should be affirmed with costs.

Dated November Term, 1917.

CARLING & HIRSCHBERG,
Attorneys for Plaintiff-Appellee.

SAMUEL A. BESSON,
Of Counsel.

NEW JERSEY

Court of Errors and Appeals.

MICHAEL KORMAN, *Plaintiff-Appellee,* *vs.* MARY E. LIVESEY, *Defendant-Appellant.*	*On Appeal from Supreme Court.*

Brief of Collins & Corbin in Behalf of the Defendant-Appellant.

I.

Statement of the Case.

This is an appeal by the defendant from a judgment of the Supreme Court affirming a judgment of the Hoboken District Court (p. I). The grounds of appeal here are the same as those set forth in the Supreme Court (p. 15). The plaintiff, Michael Korman, brought suit against the defendant, Mary E. Livesey, to recover $500 which he alleges was due him as a balance on contract price for extra work and for materials supplied and labor performed in the construction of a store front at 119 Garden street, Hoboken (pp. 10 and 11). The defendant filed a recoupment alleging that plaintiff had failed to perform his work in accordance with the contract entered into between the parties and said recoupment also contained a claim for loss of rents

because of inability to secure tenant resulting from such failure to complete said contract. The case came to trial before Honorable J. W. Rufus Besson, without a jury, on December 5, 1916, and a judgment was rendered by him in favor of the plaintiff for $83.80 (p. 4, ll. 25-30). The testimony was not taken down stenographically, counsel were unable to agree on a statement of the case and it was therefore settled by the Trial Judge (p. 5). The state of case as settled by the Trial Judge does not contain the entire record of the trial but only such conclusions of the Trial Judge as were questioned by the defendant and urged by her as appellant in her specification of points (p. 9, ll. 35-40; p. 14, l. 20 et seq.). Exception was duly taken and allowed the counsel for defendant, to any and all of the rulings of the Trial Judge as contained in the agreed state of case (p. 9, ll, 30-35).

The Supreme Court affirmed the decision of the District Court (p. III.). From this judgment of the Supreme Court the present appeal is taken.

2.

Grounds of Appeal.

The Supreme Court affirmed the judgment of the Hoboken District Court, whereas said Supreme Court should have reversed the judgment of said District Court for one or more of the following reasons (p. I. and II.):

1. Said Court erred in entering judgment in favor of the plaintiff.

2. Said Court erred in failing to enter judgment in favor of the defendant and against the plaintiff.

3. Said Court erred in refusing to receive in evidence a certain three day notice given by the defendant to the plaintiff dated March 20, 1916.

4. Said Court erred in permitting the plaintiff to recover on an express contract.

5. Said Court erred in permitting the plaintiff to recover on an express contract when the pleading showed that the plaintiff was suing on an implied contract.

6. Said Court erred in permitting the plaintiff to recover on an express contract when there was no evidence that said contract had been performed.

7. Said Court erred in permitting the plaintiff to recover on an express contract when there was no evidence that said contract had been fully performed.

8. Said Court erred in permitting the plaintiff to recover on an express contract when there was a failure of consideration on the part of the defendant.

9. Said Court erred in permitting the plaintiff to recover on an express contract when there was a partial failure of consideration on the part of the defendant.

10. Said Court erred in permitting the plaintiff to recover part of the amount of money that was to be paid by the defendant for the performance of a bilateral contract by the plaintiff when said contract was one entire contract for a single consideration and such consideration had not been given or performed by the defendant.

The above grounds of appeal can be considered under two heads (so far as we care to argue them), first, that the Trial Court erred in refusing to receive in evidence a certain three day notice given by the defendant to the plaintiff dated March 20, 1916, and second, the Trial Court erred in entering judgment in favor of the plaintiff when the defendant had not accepted the work for which suit was brought and the work had not been substantially completed.

3.

Brief of the Argument.

I.

The Trial Court erred in refusing to receive in evidence a certain three day notice given by the defendant to the plaintiff dated March 20, 1916.

The testimony was not taken down stenographically. Counsel were unable to agree upon a settlement of the state of case and therefore it was settled by the Trial Judge (p. 5, ll. 20-30; p. 9, ll. 35-40). The defendant testified as a witness in her own behalf and adduced testimony as to a certain document that had been written by her to the plaintiff. She testified that on March 20, 1916, because of the failure of the plaintiff to complete the contract for the construction and erection of a store front she gave him notice in writing to complete the said work within three days from the date thereof or she would be compelled to employ other contractors to complete the work (p. 8, ll. 30-40). An original copy of this three day notice dated March 20, 1916, was produced by the defendant, said notice being in her own handwriting and signed by her, copy of which is contained in the state of case (p. 8, l. 35 to p. 9, l. 5; p. 13, l. 20 et seq.

The defendant testified that the original copy of said notice was mailed to the plaintiff on the morning of March 20, 1916, and that in the evening of that day plaintiff called with the original notice which had been so mailed to him and stated that he would complete the work in accordance with the terms of the contract and in accordance with the requests contained in the said three day notice. Defendant testified that the copy of the notice that she produced on the trial was an identi-

cal copy of the original mailed to the plaintiff, which he had in his possession when he called on the evening of March 20, 1916, to inform her that he would complete the work; that both the original notice mailed to the plaintiff and the one that she produced on the trial were in her own handwriting, made at the same time (p. 9, ll. 1-20).

Prior to the testimony of the defendant as above, the plaintiff, called as witness in his behalf, testified on cross-examination that no such notice had ever been received by him, and he of course denied the call on the defendant on the evening of March 20, 1916 (p. 9, ll. 1-10). After such proof had been adduced, the original copy of said notice, which was testified to by the defendant, copy of which is contained in the state of case and marked "C" (p. 13), was offered in evidence by counsel for the defendant and said offer was objected to by counsel for the plaintiff on the ground that the original notice mailed to the plaintiff should be produced. The objection of the counsel for plaintiff was sustained and said document ruled out on that ground (p. 9, ll. 20-30).

The question presented is whether this ruling of the Trial Judge is erroneous. It is true that the best evidence would have been the original notice mailed to the plaintiff by the defendant on March 20, 1916, but in the nature of things it was impossible to produce the original notice sent to the plaintiff, because plaintiff, who was the man who was supposed to have it in his possession, testified under oath that he had never received it and never had it.

The law does not seek to compel a man to do that which he cannot possibly perform. The rule of *lex non cogit ad impossibilia* should be applied. The maxim is also expressed *impotentia excusat legem* or

impossibility is an excuse in the law. When the three day notice, which was in fact an original itself, being in the handwriting of the defendant, having been written at the same time as the original copy which was sent to the plaintiff, was offered in evidence, the testimony was, as given by the plaintiff, who was supposed to have the original copy, that he did not have the original copy and that he had never received it. It was therefore impossible for the defendant to produce it and the best evidence under the circumstances was the original copy, which the defendant had in her possession and which she produced at the trial. The Trial Judge says in the agreed state of case:

> "I allowed the defendant to testify that it was a three day notice to complete the contract, and then found that the plaintiff did subsequently complete the contract, with the exception of the items for which an allowance was made" (p. 9, ll. 25-35).

This, of course, does not cure the ruling out of the document if it was properly offered, for the Trial Judge did not permit plaintiff to testify to the contents of the notice and furthermore the document showed that as early as March 20, 1916, there were numerous other defects in the work in addition to those for which an allowance was made by the Trial Judge, and there can be no doubt that the substantial rights of the defendant were affected by the refusal of the Trial Judge to permit the document to be offered in evidence, for the document showed that before any legal contest was contemplated, there were numerous defects in the work which were called to the defendant's attention, and that the plaintiff, after receiving the notice, called

and said he would remedy such defects. This three day notice was a very important piece of evidence from the defendant's standpoint. On the trial the testimony of the plaintiff was diametrically opposed to that of the defendant, but if the Trial Judge believed defendant, he could not help finding that all of the defects which are set forth in the three day notice (Exhibit C, p. 13), existed and were not remedied, while on the other hand, if he believed the plaintiff, he could not help finding against the defendant. If the three day notice had been received in evidence, counsel for the defendant could have argued most strenuously that the notice having been sent at a time when a legal contest was not contemplated, was evidence of what the parties at that time had in mind, and it would have given the Court something definite upon which to pass a judgment for the contract was an oral one, and the plaintiff and defendant differed as to what work was to be done thereunder.

We therefore submit that the Trial Court erred in refusing to receive in evidence said three day notice. The rule is stated in 17 Cyc., 479, as follows:

> "The contents of a notice cannot be proved by parole evidence unless the document itself is produced or its absence satisfactorily explained."

In the case at bar the original copy that the defendant produced was of equal dignity with that which was sent to the plaintiff for they were both original copies in the handwriting of the plaintiff made at the same time and the defendant testified that the plaintiff called with the original notice in his possession. However, in addition to this evidence we have the evidence of the plaintiff under oath that he did not have the original notice at the

time of the trial and that he had never received it. We can therefore say that the contents of the notice could be proved in the manner in which the defendant attempted to prove it because the absence of the original notice sent to the plaintiff had been "*satisfactorily explained.*" It was the best evidence under the circumstances and therefore was admissible.

II.

The Trial Court erred in entering judgment in favor of the plaintiff when the defendant had not accepted the work for which suit was brought and the work had not been substantially completed.

The state of demand of the plaintiff sets forth a cause of action on the common counts (pp. 10 and 11). On the trial the plaintiff proved an express contract whereby the defendant agreed to pay plaintiff $300 for the erection and construction of a store front as part of the first floor of premises known as 119 Garden street, Hoboken (p. 6, ll. 10-20). In addition to said express contract plaintiff also sued for work, labor and services performed in the construction of a water closet and also for the erection of what was called a new beam. The cost of the water closet was alleged to be $50 and the cost of the new beam $30 (p 6, ll. 20-30). The present appeal does not raise any question with regard to this exra work except that the total cost thereof was $80, which would leave only a balance due on the express contract for $300 of but $25, for the total amount sued for was only $105. The Trial Judge gave judgment for $83.80, or in other words disallowed $21.20 of the plaintiff's claim (p. 6, ll. 30-40).

The facts as found by the Trial Judge are that

the plaintiff was to construct and erect for the defendant a store front on the first floor of premises known as 119 Garden street, Hoboken, and defendant was to pay therefor the sum of $300. The contract was an oral one.

Under the contract the plaintiff was to remove the existing veranda and put new weatherboards where the veranda was attached to the house, put in a plate glass store front, remove the earth from the areaway, lay concrete steps to the store and put cement coating on the sidewalks of the areaway, repair all of the sidewalk in front of this house, supply the needed flags, remove all loose plaster from the ceilings and walls of basement hallway and replaster such portions, repair all holes and breaks in the plaster of ceiling, of walls and front basement room intended for the store, repair and hang properly the front and rear doors of the first floor hallway, construct proper cesspools in front of said store so as to properly drain the area at that point and to do all the incidental work that might be involved in constructing the said store front (p. 7, ll. 10-30).

The Trial Judge found that the plaintiff performed the said contract with the following exceptions (p. 7, l. 35 to p. 8, l. 20):

> "1. He did not erect weatherboards on the house above the store floor where the veranda had formerly been, as agreed, and for his failure to do this the Trial Judge allowed the defendant the sum of $10.80, which was the amount the defendant proved it would cost to erect said weatherboards.
>
> "2. The plaintiff did not construct the cesspools in front of the said store front so as to properly drain that area, and for his failure

to do this the Trial Judge allowed the defendant the sum of $5.40, which sum the defendant proved as the proper cost for perfecting said drainage system.

"3. The plaintiff, after excavating in front and around said store front, carted the material so excavated to the rear yard of the premises, whereas said material ought to have been carried away and disposed by him. The defendant had to do this and pay therefore $5. The Trial Judge therefore allowed the defendant said sum, making a total allowance on the plaintiff's claim to the defendant of $21.20."

The question presented was first, whether the defendant had accepted the work and second, if not accepted whether it had been substantially completed. There was no evidence that the work had been accepted, but on the contrary the evidence was undisputed that it had never been. The Trial Court went on the theory that there had been a substantial performance of the contract. We submit that there was no substantial performance of the contract on the undisputed facts as found by the Trial Judge. The drainage system had never been perfected. The weather boards were never erected and the store itself was never made inhabitable by the plaintiff, nor the earth had never been removed from the areaway.

The Trial Judge's finding that part of the work of the contract had not been performed cannot be questioned on this appeal by the appellee for only questions of law can be considered (P. L., 1915, p. 549). The defendant having sued on the *quantum meruit* could not only recover on the theory by showing that the work had been accepted by the defendant. The distinction is pointed out in the case of

Dyer vs. Lintz, 76 N. J. L., 204, 206, where this Court, speaking through Voorhees, J., said.

> "Although the Court below found as a fact that the work had not been accepted yet that was an immaterial matter unless the suit was brought upon *quantum meruit* which was not the case."

Therefore, if in this case we are to assume that the Trial Judge decided the case on the *quantum meruit* according to the pleadings the judgment cannot be sustained because there was no evidence of acceptance of the work. On the other hand, if we attempt to sustain the judgment on the theory that there was a substantial performance we are met by the undisputed facts as found by the Trial Court that three of the most important parts of the work were never performed, namely, the placing of weatherboards on the building, perfecting of the drainage system and the removing of the earth from the areaway of the building so that the first floor of the building could be occupied as a store, which was the only reason why the store front was put in.

We submit that where the facts are undisputed as they are in the case at bar the question is one of law for the Court to say whether there was or was not a substantial performance. It will be remembered that the contract was only for $300 and the extra work only amounted to $80, making a total of $380, and that the plaintiff was paid on account as the work proceeded $275. The defendant was perfectly justified in refusing to pay the balance of $105, until the substantial defects as found by the Trial Judge were remedied and the contract completely performed.

CONCLUSION.

We submit that the judgment in the Supreme Court should be reversed with costs to the appellant.

Dated November Term, 1917.

COLLINS & CORBIN,
Attorneys for and of Counsel with
the Appellant.

INDEX

NOTICE AND GROUNDS OF APPEAL

(Filed July 3, 1917).

New Jersey Supreme Court

10

MICHAEL KORMAN, *Plaintiff-Appellee,* *vs.* MARY E. LIVESEY, *Defendant-Appellant.*	*Notice and Grounds of Appeal.*

20

To Michael Korman, or Messrs. Carling & Hirschberg, his Attorneys.

SIRS:

Take notice, that the defendant-appellant appeals to the Court of Errors and Appeals of New Jersey from the whole of the judgment entered in this cause, on the following grounds:

The Supreme Court affirmed the judgment of the District Court of Hoboken, whereas said Supreme Court should have reversed the judgment of said District Court for one or more of the following reasons:

30

1. Said Court erred in entering judgment in favor of the plaintiff.

2. Said Court erred in failing to enter judgment in favor of the defendant and against the plaintiff.

3. Said Court erred in refusing to receive in evidence a certain three day notice given by the defendant to the plaintiff, dated March 20, 1916.

40

NOTICE AND GROUNDS OF APPEAL

4. Said Court erred in permitting the plaintiff to recover on an express contract.

5. Said Court erred in permitting the plaintiff to recover on an express contract when the pleading showed that the plaintiff was suing on an implied contract.

10

6. Said Court erred in permitting the plaintiff to recover on an express contract when there was no evidence that said contract had been performed.

7. Said Court erred in permitting the plaintiff to recover on an express contract when there was no evidence that said contract had been fully performed.

8. Said Court erred in permitting the plaintiff to recover on an express contract when there was a failure of consideration on the part of the defendant.

20

9. Said Court erred in permitting the plaintiff to recover on an express contract when there was a partial failure of consideration on the part of the defendant.

10. Said Court erred in permitting the plaintiff to recover part of the amount of money that was to be paid by the defendant for the performance of a bilateral contract by the plaintiff when said contract was one entire contract for a single consideration and such consideration had not been given or performed by the defendant.

30

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

Service acknowledged July 2, 1917.

CARLING & HIRSCHBERG,
Attorneys of Plaintiff-Appellee.

40

OPINION.

(Filed June Term, 1917).

NEW JERSEY SUPREME COURT.

MICHAEL KORMAN, *Plaintiff-Appellee,* *vs.* MARY E. LIVESEY, *Defendant-Appellant.*	*On Appeal from Hoboken District Court.*

10

Argued February Term, 1917, before Justices GARRISON, PARKER and BERGEN.

20

HARLAN BESSON, for Plaintiff-Appellee.

COLLINS & CORBIN, for Defendant-Appellant.

PER CURIAM:

The plaintiff brought his suit to recover on a contract with the defendant to pay plaintiff $300 for the construction of a store front and also for extra work amounting to $80, which was subject to a credit of $275, leaving a balance due of $105.

30

The Court deducted certain items from the sum claimed, amounting to $21.20, and gave judgment for plaintiff for the balance.

It is urged in support of this appeal that it was error to refuse to admit in evidence a copy of a three days' notice to proceed with the contract which the defendant testified she mailed to the plaintiff. There was no notice given the plaintiff to produce the original at the trial, and we think that under such circumstances the paper was not

40

admissible, but if it was the defendant suffered no harm for she was allowed to testify to the mailing, the admission of the plaintiff that he had received it, and to the contents of the notice.

The state of the case shows that the Trial Court found that after the notice was given, the plaintiff completed the contract with the exception of the items for which it made allowance. We fail to see any harmful error on this branch of the case.

It is next urged that the defendant had not accepted the work. While the declaration filed in this case was the common counts, nevertheless the case was tried on the theory that there was a contract for $300, and additional work amounting to $80, and in such a case where the Court finds that there was a substantial performance, as it did in this case, the question whether or not the defendant had accepted the building was of no consequence.

The judgment will be affirmed.

NOTICE OF APPEAL.

Filed Dec. 19, 1916.

Hoboken District Court.

10

MICHAEL KORMAN, *Plaintiff*, *vs.* MARY E. LIVESEY, *Defendant.*	*Notice of Appeal.*

20

To Michael Korman, or Carling & Hirschberg, his Attorneys:

SIRS:

Take notice, that the defendant, Mary E. Livesey, hereby appeals to the New Jersey Supreme Court from the judgment of the Hoboken District Court, rendered in the above stated action on December 5, 1916.

COLLINS & CORBIN,
Attorneys of Defendant.

30

Service acknowledged this 18th day of December, 1916.

CARLING & HIRSCHBERG,
Attorneys for Plaintiff.

40

ORDER.

Filed Dec. 18, 1916.

HOBOKEN DISTRICT COURT.

MICHAEL KORMAN, *Plaintiff*, *vs.* MARY E. LIVESEY, *Defendant*.	*Order.*

10

Upon application duly made, it is ordered that the defendant, who is appealing from the judgment entered in this cause have until the further order of this Court, in which to settle and agree upon the state of case herein.

20

J. W. RUFUS BESSON,
Judge.

Dated December 19, 1816.

30

40

CLERK'S TRANSCRIPT.

Filed Feb. 13, 1917.

DISTRICT COURT OF THE CITY OF HOBOKEN.

Before

J. W. RUFUS BESSON, Esq., Judge, 10
Harry Bennett, Clerk.

STATE OF NEW JERSEY,
HUDSON COUNTY. } ss.

No. 18948

MICHAEL KORMAN,
Plaintiff,

vs. } *On Contract.* 20

MARY E. LIVESEY,
Defendant.

$500.00

Carling & Hirschberg, Pltff's Atty.
Collins & Corbin, Def'ts. Atty.

Costs. 30

	City al.
Summons, Copy	$1.50
Service and return	0.60
Trial Fee	1.50
Atty fees 5%	4.19

(SEAL)

A summons was issued, tested August 4, 1916, returnable August 17, 1916, atten o'clock in the forenoon at the Court Room of said Court in the City of Hoboken. The Sergeant-at-Arms returned 40

the summons as follows, viz.: I served the within summons on the within named defendant, Mary Livesey, this 7th day of August, 1916, by reading the same to her and leaving her a true copy thereof, John Solferino, Sergeant-at-Arms. August 17, 1916, plaintiff adjourned to September 7, and by other adjournments this cause was continued to December 5, 1916. December 5, 1916, parties appeared filed state of demand and recoupment and proceeded to trial.

On the part of the plaintiff the following witnesses were sworn and gave their evidence: Michael Korman, Herman Friedenstein, Bruno Friedenstein, Harry Shiffman and Benjamin Levy. Plaintiff offered one exhibit in evidence and was marked P 1.

On the part of the defendant the following witnesses were sworn and gave their evidence; Mary E. Livesey, James Livesey, David J. Kennedy and Charles Beschel. Defendant offered seven exhibits in evidence and were marked, D 1, 2, 3, 4, 5, 6, & 7

Whereupon it is, on this fifth day of December, A. D. 1916, by this Court considered and adjudged that said Michael Korman, plaintiff, recover against said Mary E. Livesey, defendant, the sum of eighty-three dollars and eighty cents, debt, and seven dollars and seventy-nine cents, cost of suit.

December 19, 1915, defendant filed notice of appeal and bond on appeal.

I, Harry Bennett, Clerk of the District Court of the City of Hoboken, J. W. Rufus Besson Esq., Judge, do hereby certify that the foregoing is a true copy of the record of a judgment of said Court.

In Witness Whereof, I have hereto set my hand as Clerk of said Court and af-

fixed the seal of said Court, this twentieth day of December, one thousand nine hundred and sixteen.

HARRY BENNETT,
Clerk.

10

STATE OF CASE.

Filed Feb. 27, 1917.

HOBOKEN DISTRICT COURT.

MICHAEL KORMAN, *Plaintiff*, *vs.* MARY E. LIVESEY, *Defendant.*	*State of Case as Settled by Trial Judge.*

20

The above entitled action was instituted by the service of a summons upon the defendant on August 7, 1916, returnable on August 17, 1916. The trial of the action was adjourned from time to time and on December 5, 1916, the parties appeared, plaintiff filed state of demand and the defendant a recoupment and proceeded with the trial, Messrs. Carling & Hirschberg appearing as attorneys for plaintiff, and Messrs. Collins & Corbin appearing as attorneys for defendant. After the trial of the issues on said December 8, 1916, before Hon. J. W. Rufus Besson, without jury, judgment was entered in favor of the plaintiff and against defendant for

30

40

$83.80 and costs amounting to $7.79. A copy of the state of demand filed by the plaintiff is hereto attached and marked "A;" a copy of the recoupment filed by the defendant is hereto attached and marked "B." The total amount sued for by the plaintiff was $105, and the amount of the recoupment filed by the defendant was $500. The state of demand of the plaintiff sets forth the state an action on the common counts but on the trial the plaintiff proved an express contract whereby the defendant agreed to pay $300 for the erection and construction of a store and store front in the first floor of premises known as 119 Garden street, Hoboken (work and labor to be performed and material to be supplied under said contract will be hereinafter more fully set forth), and in addition to said express contract whereby defendant was to pay $300 for said construction work plaintiff also sued for work, labor and services performed in the construction of a water closet in said premises and also for a new beam to be put in said premises. The cost for the construction of the water-closet was alleged to be $50, and the cost of the new beam $30, making a total demand of the plaintiff of $380 upon which the p aintiff credited the defendant with payment of $275, leaving a balance due and owing according to plaintiff's alleged demand for $105. The items of the defendant's recoupment are fully set forth therein. totaling an amount of $500.

The Trial Judge gave judgment for $83.80, or in other words, disallowed $21.20 of the plaintiff's claim. The items allowed in favor of the defendant are as follows:

Carpenter work in repairing weather-boards	$10.80
Concrete work in perfecting cesspool	5.40

Removing dirt and rubbish caused by repairs from the yard..... 5.00

$21.20

These items, were proven by the defendant, the others being disallowed.

10

The facts are that the plaintiff was to construct and erect for the defendant a store front on the first floor of premises known as 119 Garden street, Hoboken, N. J., and defendant was to pay therefor the sum of $300. The contract was an oral one.

The Trial Judge found that under this contract the plaintiff was to remove the existing veranda and put new weatherboards where the veranda was attached to the house, put in a plate glass store front, remove the earth from the areaway, lay concrete steps to the store and put cement coating on the sidewalks of areaway, repair all sidewalk in front of the house, supply the needed flags, remove all loose plaster from the ceilings and walls of basement hallway and replaster such portions, repair all holes and breaks in the plaster of ceiling of walls and front basement room intended for the store, repair and hang properly the front and rear doors of the first floor hallway, construct proper cesspools in the front of said store so as to properly drain the area at that point and to do all the work that might be incidentally involved in constructing said store front.

20

30

The Trial Judge found that the said plaintiff performed the said contract with the following exceptions:

1. He did not erect weather boards on the house above the store floor where the veranda had formerly been as agreed, and for his failure to do this

40

the Trial Judge allowed the defendant the sum of $10.80, which was the amount the defendant proved it would cost to erect said weather boards.

2. The plaintiff did not construct the cesspools in front of the said store front so as to properly drain that area, and for his failure to do this the Trial Judge allowed the defendant the sum of $5.40, which sum the defendant proved as the proper cost for perfecting said drainage system.

3. The plaintiff, after excavating in front and around said store front, carted the material so excavated to the rear yard of the premises, whereas said material ought to have been carried away and disposed of by him. The defendant had to do this and pay therefor $5. The Trial Judge therefore allowed the defendant said sum, making a total allowance on the plaintiff's claim to the defendant of $21.20.

The Trial Judge found that for this work and labor for constructing the water-closet the plaintiff was entitled to the sum of $50. Likewise the Trial Judge found that plaintiff had constructed a new beam to support the said building at defendant's request, and that the cost thereof was $30. The defendant testified as a witness, in her own behalf, and adduced testimony as to a certain document that had been written by her to the plaintiff. Defendant testified that on March 20, 1916, because of the failure of the plaintiff to complete the said work, she gave him notice in writing, by mail, to complete the said work within three days or she would be compelled to employ other contractors to complete said work, and charge the expense thereof to plaintiff. An original copy of this three-day notice dated March 20, 1916, was produced by the defendant, said notice being in her own hand writ-

ing and signed by her, copy of which is annexed hereto and marked C.

Prior to the testimony of the defendant, the plaintiff had testified on cross-examination that no such notice had been received. The defendant in testifying stated that said notice was mailed to the plaintiff on March 20, 1916, in the morning, and that in the evening of that day he called with the original of said notice and stated that he would complete the said work in accordance with the request contained in said notice. The defendant testified that said notice was an identical copy of the original mailed to the plaintiff, which he had in his possession when he called on the evening of March 20, 1916; that both were in her own hand writing, and made by her. After such proof had been adduced, the original copy of said notice, marked C, was offered in evidence by counsel for the defendant, and said offer was objected to by the plaintiff's attorney on the ground that the original notice should be produced. The objection of counsel for the plaintiff was sustained, and the said document ruled out on that ground. I allowed the defendant to testify that it was a three-day notice to complete the contract, and then found that the plaintiff did subsequently complete the contract, with the exception of the items for which an allowance was made, as above stated, and rendered judgment for the plaintiff for $83.80, as above stated. Exception was duly taken to and allowed the counsel for defendant to any of my rulings herein contained.

I hereby certify that the above is the state of case, so far as is necessary to state same for this appeal, in order to raise the grounds of appeal urged by the appellant.

J. W. RUFUS BESSON,
Judge Hoboken District Court.

Dated February 21, 1917.

STATE OF DEMAND.

Filed Dec. 5, 1916.

DISTRICT COURT OF THE CITY OF HOBOKEN, N. J.

Before Hon. J. W. Rufus Besson, Judge.

10

MICHAEL KORMAN, *Plaintiff*, *vs.* MARY E. LIVESEY, *Defendant.*	*Action upon Contract.* *State of Demand.*

20

The plaintiff demands of the defendant five hundred dollars for that whereas the said defendant heretofore, to wit, on the 13th day of March, in the year of Our Lord one thousand nine hundred and sixteen, at Hoboken, in the County of Hudson and State of New Jersey, was indebted to the plaintiff in one hundred five and 00/100 dollars for the price and value of goods sold and delivered by the plaintiff to the defendant at the latter's request; 30 and in the like sum of money for the price and value of goods bargained and sold by the plaintiff to the defendant at the latter's request; and in the like sum of money for the price and value of work done, and materials for the same provided by the plaintiff for the defendant at the latter's request; and in the like sum of money for money lent by the plaintiff to the defendant at the latter's request; and in the like sum of money for money received by the defendant for the use of the plaintiff; and in 40 the like sum of money for money paid by the plaint-

STATE OF DEMAND

iff for the use of the defendant at the latter's request; and in the like sum of money for interest due from the defendant to the plaintiff having forborne moneys due from the defendant to the plaintiff at the defendant's request, for a long time then elapsed; and in the like sum of money for money found to be due from the defendant to the plaintiff on an account then and there stated between them; and the defendant afterwards (to wit) on the day and year last aforesaid, in the county aforesaid, in consideration of the premises, respectively promised to pay the said several last mentioned moneys respectively to the plaintiff on request; yet the defendant disregarded such promises, and has not paid any of the said moneys or any part thereof, to the plaintiff's damage one hundred five dollars, and thereupon the plaintiff brings suit, &c.

CARLING & HIRSCHBERG,
Attorneys for Plaintiff.

The following is a bill of particulars of the demand and copy of the upon which the above action is founded:

For work, labor and services done in store in the basement in 149 Garden St., Hoboken	$300.00
For work, labor and services in construction of water closets	50.00
For putting in new beam	30.00
	$380.00
1916.	
January 10th, recd. on account	60.00
January 15th, recd. on account	40.00
February 3rd, recd. on account	75.00
March 13th, recd. on account	100.00
Balance	$105.00

RECOUPMENT.

(Filed December 5, 1916).

"B"

HOBOKEN DISTRICT COURT.

10 MICHAEL KORMAN,
Plaintiff,

vs.

MARY E. LIVESEY,
Defendant.

Recoupment.

The defendant hereby gives notice that at the trial of the above stated cause she will seek to recoup damages from the plaintiff because of the failure of the plaintiff to carry out the contract in the state of demand set forth in the following particulars, to wit:

20

1. Install a new sink in store.

2. Install a drain in front of basement hall.

3. Improve the drain in front of store.

4. Repair all holes and breaks in places of ceilings and walls of store, toilet, closets and basement hall.

30

5. Remove from the yard the earth, etc., which plaintiff excavated from front basement.

6. Place new weatherboards on places formerly covered by the veranda.

7. Place new front door in the store.

8. Repair all holes and breaks in woodwork of store, toilet, closets and basement hall.

9. Make the door of toilet fit properly.

40

10. Failure to replace the following articles:

jackscrew, imposing stone, two veranda posts and six boards, all to the damage of the defendant in the sum of $300.

And the defendant also, by reason of the failure of the plaintiff to carry out said contract, has been unable to rent the said premises so improperly repaired and has been and will be put to other loss and expense to the damage of the plaintiff in the sum of $200.

Dated November 27, 1916.

"C"

March 20, 1916.

Mr. Michael Korman:

If you do not, within three (3) days from date, complete the work which you agreed to do in December last, at 119 Garden street, Hoboken, N. J., I will employ others to complete said work and will charge the expense which I shall thus incur to you.

In order to fulfill your contract, you must do the following work and supply the following materials:

Install a *new* sink in store;

Install a drain in front of basement hall;

Improve drain in front of store (present drain is ineffective);

Remove all loose plaster from ceiling and walls of basement hallway and from closets in store, and replaster same;

Repair all holes and breaks in plaster of store and toilet;

Repair the wainscoting of basement hallway, store and closets in store, using new material where needed, so as to make a proper job;

Repair and hang properly the front and rear doors of basement hallway, replace their locks, etc.;

Make window sill of toilet level;

Place new wheather boards on space formerly covered by veranda;

10 Place new front door in store; (present door does not fit properly);

Fit properly the door of toilet in store;

Remove from the yard the earth which you excavated from front basement and areaway.

MARY E. LIVESEY.

SPECIFICATIONS OF POINTS OF APPELLANT

20 NEW JERSEY SUPREME COURT.

MICHAEL KORMAN, *Plaintiff-Appellee,* *vs.* MARY E. LIVESEY, *Defendant-Appellant.*	*On Appeal from Hoboken District Ceurt.*

30

Mary E. Livesey, defendant below and appellant herein, herewith files her specifications of the determinations and directions of the Hoboken District Court with respect to which she is dissatisfied in polnt of law,

1. Said Court erred in entering judgment in favor of the piaintiff.

40 2. Said Court erred in failing to enter judgment

in favor of the defendant and against the plaintiff.

3. Said Court erred in refusing to receive in evidence a certain three day notice given by the defendant to the plaintiff, dated March 20th, 1916.

4. Said Court erred in permitting the plaintiff to recover on an express contract 10

5. Said Court erred in permitting the plaintiff to recover on an express contract when the pleading showed that the plaintiff was suing on an implied contract.

6. Said Court erred in permitting the plaintiff to recover on an express contract when there was no evidence that said contract had been performed.

7. Said Court erred in permitting the plaintiff to recover on an express contract when there was no 20 evidence that said contract had been fully performed.

8. Said Court erred in permitting the plaintiff to recover on an express contract when there was a failure of consideration on the part of the defendant.

9. Said Court erred in permitting the plaintiff to recover on an express contract when there was a partial failure of consideration on the part of the defendant. 30

10. Said Court erred in permitting the plaintiff to recover part of the amount of money that was to be paid by the defendant for the performance of a bilateral contract by the plaintiff when said contract was one entire contract for a single consideration and such consideration had not been given or performed by the defendant.

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

40