

INDEX

	PAGE
Summons	1
Complaint	2
Contract	4
Affidavit of Merits	36
Answer and Counter-claim	37
Demand for Bill of Particulars	42
Bill of Particulars	44
Reply	47
Judgment	49
Notice of Appeal	51
Grounds of Appeal	52
Charge to Jury	181
Exceptions to Charge	192
Plaintiffs' Requests to Charge	192
Opinion of Supreme Court.....	205
Order on Affirmance of Judgment.....	208
Notice of Appeal.....	209
Affidavit of Service.....	212
Order	213
Notice of Argument.....	214
Affidavit of Service.....	215
Grounds of Appeal.....	216
Affidavit of Service.....	218

TESTIMONY.

For Plaintiffs.

 William Deffur,

direct examination.....	55
cross "	56
re-direct "	63, 65, 66
re-cross "	64, 66, 67

 Daniel A. Hopper,

direct examination.....	68
cross "	69
re-direct "	73

	PAGE
<i>For Defendant.</i>	
Michael J. Tansey,	
direct examination.....	75
cross ".....	86
re-direct ".....	110
re-cross ".....	113
(recalled) direct ".....	141
cross ".....	142
James E. Wilson,	
direct examination.....	115
cross ".....	118
Daniel Glockner, Jr.,	
direct examination.....	120
cross ".....	123
James McCorkindale,	
direct examination.....	125
cross ".....	127
Joseph A. Luby,	
direct examination.....	128
cross ".....	129
Harry Justman,	
direct examination.....	130
cross ".....	132
re-direct ".....	134
Francis Rowe,	
direct examination.....	134
cross ".....	137
re-direct ".....	140, 141
re-cross ".....	140, 141

Rebuttal for Plaintiffs.

Daniel A. Hopper,	
direct examination.....	143
cross ".....	148
re-direct ".....	150

	PAGE
Peter Deffur,	
direct examination.....	150
cross “	156
Joseph Deffur,	
direct examination.....	158
cross “	161
re-direct “	163
William Deffur,	
direct examination.....	164
cross “	169
re-direct “	173

Rebuttal for Defendant.

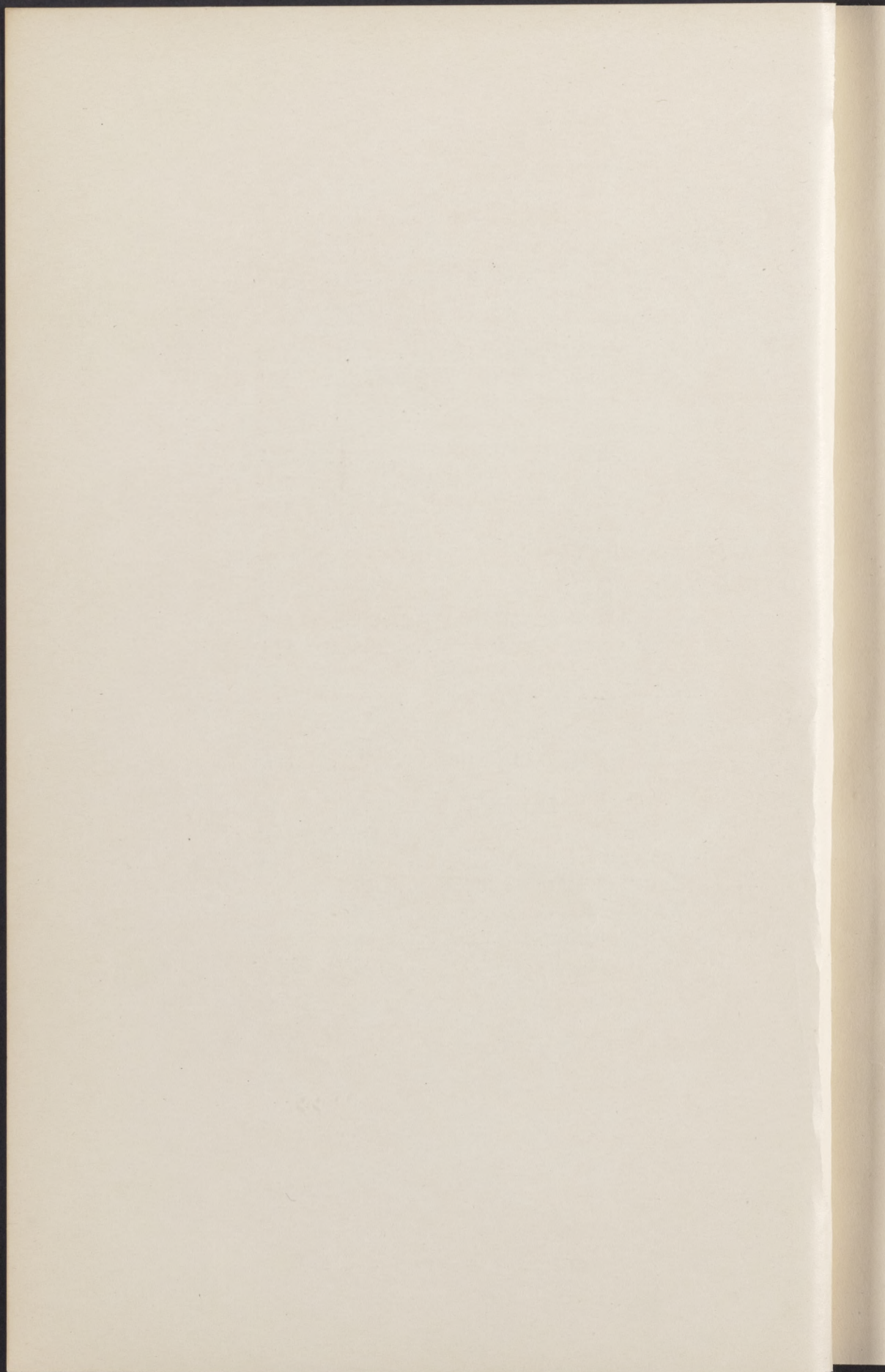
Michael J. Tansey,	
direct examination.....	174
cross “	176

Sur-rebuttal for Plaintiffs.

M. Francis Keating,	
direct examination.....	177

EXHIBITS.

	Off'd P't'd
P. 1. Contract	55
R. 2. Notice of March 7, 1925	57
P. 3. Work Order	64
P. 4. Final Certificate	69
D. 1. Notices	113
	178



Summons.

SUMMONS.

The State of New Jersey, to Michael
J. Tansey, you are summoned to an-
(SEAL) swer the annexed complaint of Wil-
liam Deffur, Joseph Deffur and Peter
Deffur, partners trading as Deffur
Brothers, in an action at law in the Essex County
Circuit Court. And take notice that unless you
file your answer to said complaint with the Clerk
of said County Circuit Court, at Newark, within
twenty days after service upon you of this writ
and the annexed complaint, the plaintiff may
proceed in the suit and judgment may be entered
against you. 10

WITNESS NELSON Y. DUNGAN, ESQUIRE, Judge
of our said Essex County Circuit Court at New-
ark, this 9th day of October, A. D. 1925. 20

JOHN H. SCOTT,
Clerk.

M. FRANCIS KEATING,
Attorney of Plaintiffs,
31 Clinton St.,
Newark, N. J.

30

40

Complaint.

COMPLAINT.

Filed October 9, 1925.

Essex County Circuit Court

10

WILLIAM DEFFUR, JOSEPH DEFFUR and PETER DEFFUR, partners trading as Deffur Brothers,

Plaintiffs,

vs.

MICHAEL J. TANSEY,

Defendant.

Action at Law.

Complaint.

20

The plaintiffs, William Deffur, Joseph Deffur and Peter Deffur, partners trading under the name of Deffur Bros. and residing in Hilton, Essex County, New Jersey, say that:

FIRST COUNT.

1. On May 28, 1924, the plaintiffs agreed in writing with the defendant, that they would
 30 on or before October 1, 1924, well and sufficiently erect a three-story, six-family frame dwelling or apartment house, on the premises known as 399-403 Sixteenth avenue, Irvington, New Jersey, according to certain plans referred to in said agreement and according to certain specifications annexed to said agreement and would furnish all materials necessary therefor, a copy of said contract and specifications is annexed hereto and made a part hereof, and
 40 marked "Schedule A."

Complaint.

2. In and by said agreement, defendant agreed to pay the plaintiffs the sum of \$23,000 for the erection of said building and the furnishing of said materials.

3. Said agreement, together with specifications annexed thereto, was filed in the office of the Clerk of Essex County, on May 28, 1924. 10

4. The defendant waived strict performance of the contract at the time specified and plaintiffs finished the entire work on December 30, 1924.

5. On December 30, 1924, the plaintiffs received from the architect, a certificate that the plaintiffs were entitled to the final payment of \$6,000 by the terms of the contract, and thereupon the payment of \$6,000 became due from the defendant to the plaintiffs. 20

6. Plaintiffs have performed all the terms and conditions of said contract on their part, except as to completing the work at the time specified in said contract, which said time was extended and strict performance waived by the defendant, but the defendant has refused to pay the plaintiffs the full sum of \$23,000 so as aforesaid agreed to be paid, and owes plaintiffs on account of said agreement, the sum of \$2,650 with interest thereon from December 30, 1924. 30

SECOND COUNT.

1. On October 7, 1924, the defendants, in writing directed the plaintiffs to scrape the floors of buildings owned by defendant at Nos. 395-399 and 399-403 Sixteenth avenue, Irvington, New Jersey, and agreed to pay the sum of \$300 therefor, a copy of said writing is annexed here- 40

Complaint.

to and made a part hereof, and marked "Schedule B."

2. Plaintiffs did and performed the said work.

3. Defendant has refused to pay for the same, or any part thereof.

Judgment is demanded in the first count for \$2,650 with interest from December 30, 1924.

Judgment is demanded on the second for \$300 with interest from December 30, 1924.

M. FRANCIS KEATING,
Attorney for Plaintiff.

This Agreement, made the Twenty-eighth day of May, in the year of our Lord One Thousand Nine Hundred and Twenty-four, BETWEEN Michael J. Tansey, of the City of Newark, in the County of Essex and State of New Jersey, party of the First Part;

And William, Peter and Joseph Deffur, trading as Deffur Brothers, of the Township of Maplewood, in the County of Essex and State of New Jersey, parties of the Second Part;

WITNESSETH, first, the said parties of the Second Part does hereby for themselves, their heirs, executors and administrators, covenants, promise and agree to and with the said party of the first part, his heirs, executors, administrators or assigns, that they, the said parties of the second part, their heirs, executors or administrators, shall and will for the consideration herein-after mentioned, on or before the 1st day of October, 1924, well and sufficiently erect and finish the new building located at 399-403 16th

Complaint.

avenue, Irvington, New Jersey, agreeably to the drawings and specifications made by D. A. Hopper Company, architect, and signed by said parties and hereunto annexed, within the time aforesaid, in a good workmanlike and substantial manner, under the direction of the said D. A. Hopper, to be testified by a writing, or certificate, under the hand of the said D. A. Hopper, as hereinafter mentioned, and also, shall and will find and provide such good, proper and sufficient materials of all kinds whatsoever, as shall be proper and sufficient for the completing and finishing of all the mason, carpenter, plumbing, heating, electric, painting works of the said building mentioned in the general specifications for the sum of Twenty-three thousand dollars and no cents \$23,000.00.

10

And the said party of the first part does hereby, for himself and his heirs, executors and administrators, covenant, promise and agree, to and with the said parties of the second part, their executors and administrators, that he, the said party of the first part, his executors and administrators, shall and will, in consideration of the covenants and agreements being strictly performed and kept by the said parties of the second part as specified, well and truly pay or cause to be paid unto the said parties of the second part, their executors, administrators or assigns the sum of Twenty-three thousand dollars and no cents (\$23,000.00), lawful money of the United States of America, in manner following:

20

30

Four payments as follows:

FIRST PAYMENT.

When the foundation walls are complete and ready for the frame work, \$2,500.00

40

Complaint.

SECOND PAYMENT.

When the building is enclosed 6,500.00

THIRD PAYMENT.

10 When rough plumbing, heating and
electrical wiring is in and the
scratch coat of plaster is on and all
exterior carpenter work is com-
pleted 8,000.00

FOURTH PAYMENT.

This final payment is to be made (10)
ten days after completion of the
contract. 6,000.00

Total\$23,000.00

20 Provided that in each of the said cases a
certificate shall be produced, signed by the said
architect to the effect that the work is done in
accordance with said drawings and specifications,
said certificate, however, in no way lessening the
total and final responsibility of the contractors;
neither shall it exempt the contractor from
liability to replace work if it be afterwards dis-
covered to have been done ill or not according to
the drawings and specifications, either in execu-
30 tion or materials.

And it is hereby further covenanted and
agreed by and between the said parties:

40 First. The Architect shall furnish to the con-
tractors all drawings or explanations of draw-
ings as may be necessary to illustrate the work
to be done, and the contractors shall conform to
the same as part of his contract, so far as they
may be consistent with the original drawings and
specifications, and all plans must be furnished to
the contractors at the time of signing contract.

Complaint.

Second. The contractors, at their own proper cost and charges, to provide all manner of materials and labor, of every description for the due performance of the work as per specifications.

GENERAL SPECIFICATION.

10

Specification of the work and material necessary for the completion of the six family dwellings, as per the plans and specifications drawn and prepared by:

D. A. Hopper Company, architect and engineers, 22 Ridgewood avenue, Irvington, New Jersey.

GENERAL CONDITIONS.

The several drawings herein referred to must be accurately followed and measured according to the scale and all notes and other explanations, whenever they appear on the plans, the drawings to be part of the contract the same as the specifications. 20

Agreeable to the plans and specifications, the contractor is to provide all materials and labor necessary for the complete and substantial erection of everything described, specified or shown, or reasonably implied as being part of the work. 30

Anything that is not mentioned in this specification and shown on the drawings or reverse, is to be done as if both were shown and specified.

All work and materials to be the best of their several kinds, subject to the approval of the owner.

The contractor shall lay out his work and be responsible for its correctness, he shall give his personal attention to the work, furnish all scaffolding and other appliances necessary for 40

Complaint.

the complete execution of the work, all to be done according to the true intent of the plans and the specifications.

10 The contractor is to be responsible for all violations of the laws or ordinances in force in the locality that the building is being erected, obtain all street permits at his own expense and all other relative to the erection of the building except the building permit which is obtained by the architect for the owner.

This contractor shall be responsible for all damage done to life, limb or property and shall hold the owner secure and exempt from the payment of any damage.

20 The said to be wholly under the control of the owner unless other arrangements are made, who by written notice may require the contractor to dismiss any workman who may in his opinion is not competent or is careless in the execution of the work, and may also by written notice require the contractor to remove all the materials that do not conform with the specifications. Whenever the owner shall require the contractor is to substitute without delay, satisfactory men and materials without additional cost.

30 The owner will have the right to make alterations, additions or omissions of the work or materials, such a change is to be made in writing and signed by the owner, this shall not in any way violate or vitiate the contract.

No allowance will be made for extra work, unless the cost of the same is agreed upon in writing by the contractor at the time of the written order for the changes are made by the owner.

Complaint.

The owner reserves the right to accept any or reject all bids furnished for the work by the contractors.

The contractors shall clean the building at the completion and during the progress of the erection keep the premises in a clean and presentable condition.

10

MASON SPECIFICATION.

Excavations: Do all the necessary excavation for the cellar, areas, piers, and all other foundations, as shown and required by the drawings, all to be excavated to firm and solid ground. All to be in depth as to clear the frost, the cellar to be excavated to a clean depth of 7'0" and as much deeper as the grade of the lot requires, all wells to have a trench under to be 12"x24" and the dirt to be used to level off the plot, all foundation walls after mortar is dry, to have the earth filled against the same, thoroughly tramping earth as same is thrown in.

20

FOOTINGS, composed as follows:

One part Portland cement (Atlas, Edison or other equally approved Portland cement), two parts, sharp, clean and coarse sand and four parts of hard broken stone.

30

To be 12"x24" and to extend 6" on each side of the foundation wall and piers, as shown or as directed, all done according to the plans.

FOUNDATION.

All cellar walls and areaways and inside walls to be built of good plain faced concrete block, laid in cement mortar as follows:

40

Complaint.

One part Portland cement (same as specified before) and two and one-half parts clean, coarse and sharp sand. Portions are to be carefully measured and thoroughly mixed, the cement block above the grade to be smooth plastered with the same mortar, to be not less than $\frac{1}{2}$ " thick.

10 WINDOW SILLS.

All window sills for the cellar to be concrete 4" and the full thickness of the wall to project 1" and to have a pitch of 1".

HOLLOW TILE WALLS.

Build the hollow tile walls above the first floor line of the best grade 8" hollow tile, laid up straight and true and to extend 2'0" above the roof, inside vent to be cement plaster and trowelled smooth to be painted white.

20

BRICK STEPS.

Build the brick steps and porch as shown on the plans, same to be No. 40 texture and common brick laid in white mortar as:

One part Portland cement (as specified elsewhere) and two parts white sand. All to be laid up straight and true.

LALLY COLUMNS.

30

Furnish the several 4" lally columns as shown on the plans, with the necessary caps and bases.

WATER PROOFING:

All foundation walls below the ground to have a coat of hot coal tar pitch over a coat of Portland cement mortar, as specified under "Foundations," the waterproofing to be to the grade line.

CHIMNEY.

40 Build the chimney as shown of hard burned brick, laid in cement mortar as above specified,

Complaint.

all as shown. Top out above the roof using the same brick, all to be neatly pointed with cement. Chimney to have a blue stone cap. All chimneys to have a 9"x9" tile lining with all joints smooth and even, to have the proper openings and thimble 5'0" above the roof.

CELLAR BOTTOM.

10

Cellar bottom to be leveled off and settled and to have a concrete base 3" thick as one part Portland cement (as specified elsewhere) one part sand and five parts cinders, no clinkers allowed. This to be thoroughly leveled and packed and topped off with cement as one part cement (as specified elsewhere) two parts clean, sharp sand and one part crushed stone dust.

TILING.

20

The bath room and vestibule to have a concrete base as specified under "Cellar Bottom" same to be laid over the floors as prepared by the carpenter. The tile to be level with the other floors and to cost not more than 80c per square foot, and to be as selected by the owner, the bath rooms to have a 6" turned up sanitary base.

LATHING.

All walls and ceilings on the 1st 2nd and 3rd floors except where otherwise marked to be lathed with the best quality spruce lath, laid $\frac{1}{4}$ " on the studs, joints to be broken every tenth lath, all to be nailed with 4 nails.

PLASTER BOARDS.

The front stair hall, side entrances to have plaster boards on the sides, ceilings and soffits of stairs, to be the best plaster board, and well nailed with nails that have $\frac{1}{4}$ "

40

Complaint.

heads, all as required by the Tenement House Board. Cellar ceiling to be plaster boarded.

PLASTERING:

10 All walls, ceilings and lathed and plaster boarded places throughout the cellar, 1st, 2nd and 3rd floors to be plastered with Adamant plaster in the usual manner, the first the brow or scratch coat and the second the white hard finish. The cellar ceiling to have just the white coat direct on plaster boards. The bath rooms and kitchens throughout the house to have the space from the floor to a point about 4'0" above the same ruled tile design, to the Keens cement. The carpenter will furnish the base and the cap in the kitchens and the cap in the bath rooms.

20 Plaster may be applied direct to the hollow tile.

WHITE WASH:

The cellar side walls to be white washed, two coats.

GENERAL:

30 All work to be left in complete and workman-like manner, observe all laws and regulations throughout, do all patching after the other trades, replace any flagg stones removed and leave the premises clean and the building broom clean on completion. Brick fill all partitions 8" above the floor level and do all other mason work necessary to make the job complete and first class.

CARPENTER SPECIFICATIONS.

FRAMING.

40 The building is to be frames complete mortice and tennoned, all to be properly done, brace and

Complaint.

pinned, all timber to be fir unless otherwise specified.

CROSS BRIDGING:

Cross bridge all floor joints in the building every 8'0" with 2"x2" hemlock properly cut in between the timbers as soon as the same are leveled and all to be securely nailed with two 10 D nails at the ends. 10

HEARTH AND TRIMMERS.

All headers and trimmers to be double properly framed and spiked, headers and trimmers over 4'0" to have iron joist hangers. Bath rooms and vestibule to have a sub floor about 3 $\frac{1}{4}$ " below the top, to be of $\frac{7}{8}$ / $\frac{3}{4}$ " boards on 1x2" strips, top of the beams to be leveled off. 20

TIMBER SIZES:

Girders in cellar 6x8": partitions or enclosing studs 2x4"-16" o. c. sills, laid flat and halved at the corners 4x6" posts 4x6" first floor beams 2x10"-16 o. c. second floor beams, 2x10"-16" o. c. third floor beams 2x10"-16" o. c. rafters 2x8-16 o. c. ceiling beams 2x6"-16 o. c. plates 4x4.

PARTITIONS.

All partitions fore and aft, to have 4x4" plates to carry the partitions above and the floor timber, all doors and windows to have studs set double, all partitions to be on top of the ones below as near as possible. All angles and corners to be formed solid and put in the necessary bracing. All partitions to be as and where shown on the plans. 30

EXTERIOR TRIM:

All exterior trim to be of good quality, well seasoned white pine, free from large and loose 40

Complaint.

knots and to be hand smoothed. Castings to be $1\frac{1}{4}$ " thick, cornice to be shown on the elevation of white pine.

SHEATHING:

10 Cover the entire frame with 1x10" shiplap N. C. Pine, laid horizontally, to have 2 10 d nails at each bearing:

CLAPBOARDS:

The front, sides and rear of the building to be clapboarded with first quality red cedar clapboards lapped not less than one" and nailed every 16" to be about $5\frac{1}{2}$ " to the weather. The sheathing boards to be covered with sheathing paper before the clapboards are applied.

SHINGLES:

20 Cover where shown on the plans, on the front with the best grade red cedar shingles 5" to the weather.

ROOF:

Flat roof to be covered with 1x10" hemlock boards, to be covered with a 5 ply slag roof. To be Burrett. This roof to be guaranteed for the period of 10 years, and to be kept in repair without any cost to the owner for that time.

30 **GUTTERS:**

From all gutters of the house as shown, all gutters to slope toward the leaders, put in the necessary tubes and heads for the connection of the leaders.

WINDOW FRAMES:

40 To correspond with the drawings, all in the sizes as marked in the plans made in the usual manner of $1\frac{1}{2}$ " white pine and the sizes on the drawings are the sash sizes.

Complaint.

DOOR FRAMES:

All outside door frames to be 2" white pine interior door jams to be 7/8" cypress, all to have 1/2x2" moulded stop planted on the face of the frames.

FLOORING:

Lay the floor on the 1st, 2nd and 3rd floor, of 7/8x2 1/2" #1 quality N. C. T. G. pine and blind nailed at each and every bearing. 10

DOORS:

All doors in the cellar to be batten doors 1" thick and hung with wrought iron hinges and suitable jambs, the front and vestibule doors to be of oak and as shown on the plans. All other doors throughout the house to be two paneled brick veneered doors. Erect the four self closing fire doors at the top and the bottom of the rear cellar stairs, and the fire door at the bottom of the vent shaft, all to be as per the rules of the Board of Fire Underwriters. 20

INTERIOR TRIM:

All trim to be cypress, all door and window to have plain trim, no moulded work. Casings of windows to have, unless otherwise directed to furnish as a neat stool and plain apron. Base to be 6" with a 1 1/4" base moulding and quarter round on the floor, to run around on all trim in the furnished rooms, halls, closets, all to have bases the same as the rooms. In the closets the base moulding and quarter round is omitted. The dining rooms to have neat plate rails 5'-6" high. 30

HARDWARE:

All doors to have mortice locks, escheons and two butts the front door three butts, to be old 40

Complaint.

brass as selected by the contractor, knobs to be the same material. The front vestibule doors to have Yale Locks and 10" escheons and three hinges, all doors to have a key and the front door 6 keys. The sum for the hardware not to exceed \$200.00.

10 SASH.

To be made in the usual manner, $1\frac{3}{8}$ " thick and to have mortice locks and cast iron weights, hung with the best Sampson Spot or other approved sash cord, to have two lifts at the bottom. All sash to be glazed with double thick American Glass.

STAIRS:

20 Build the stairs as shown on the plans, properly supported and rough bracketed, to have $7\frac{7}{8} \times 7\frac{1}{2}$ " risers, $1\frac{1}{4} \times 10$ " treads, T & G. glued together and both houses in the wall string. Treads to have nosing and cove under, the wall string to be $1\frac{1}{4}$ " thick. The treads to be N. C. Pine and risers the same, newells 6×6 " built as per the instructions and directions. Posts 6×6 " and $1\frac{1}{2} \times 1\frac{1}{2}$ balusters, to be set on a tread, rail 3×4 " and to have 3×10 " stringers to flight, front stairs to run to the roof. There is to be a hand rail on
30 the front stairs, well accored to the walls.

Stairs in the cellar to be constructed of 1" spruce planked planed.

The stairs in the rear hall to be made in the usual manner of N. C. Pine, strings $1\frac{1}{4}$ " as shown on the plans, treads $1\frac{1}{4}$ " and risers $\frac{7}{8}$ ", furnish same with a rail of $\frac{7}{8} \times 9\frac{1}{2}$ " pine ceiling and to have a moulded cap. The ceilings and side walls of the 1st, 2nd, and 3rd floors to be plastered by the Mason Contractor.

*Complaint.***CHINA CLOSET or DRESSER.**

To be constructed in the regular manner, glass door in the closet enclosing three shelves above the counter shelf to be two drawers and a pot and pan closet.

SHELVING:

Each bed room closet to have a hook strip with 12 hooks and a shelf above the same, other closets to have one shelf. 10

BOXING:

Box in all pipes where necessary, all to be of wood to match the trim of the room it passes.

MEDICINE CLOSETS:

Put in each bath room a medicine closet where shown on the plans, to be 24x30" with a mirror as directed. 20

CORNER BEADS:

Put all corner beads where necessary to be 5'0" high and to be from the base up.

MISCELLANEOUS:

Construct the coal bin and storage places in the cellar as shown on the plans, to be half boards and the upper half slats as shown on the plans, all to be on 2x4"-20 centers. 30

CORNICE:

Build the cornice as shown on the front elevation moulding and shingle siding.

SKYLIGHTS:

Furnish and have erected the Toncan iron skylights over the front hall, size as shown on the plans to have a vent and to be glazed with wire glass. 40

Complaint.

VENT DUCT:

The galvanized iron duct to be furnished and to be erected under this contract, all as shown on the plans.

SCUTTLE:

10 Furnish and have erected where shown on the plans on the roof where the stairs are located a galvanized iron scuttle, braced with 1x1" angles, same to have a balance weight.

GENERAL:

Do all other carpenter work necessary to make the job complete and first class without any room for exception.

20 PLUMBING AND HEATING
SPECIFICATION.

Plumbing Work.

EXCAVATION:

Do all necessary excavating of the trenches to make the job complete.

GALVANIZING IRON LEADERS:

30 Erect all the galvanized iron leaders where shown on the plans, same to run off on the ground or sewer, if to the *if to the* sewer same is to be properly vented and trapped, all to be securely fastened to the walls.

IRON SOIL AND VENT:

40 Put up the necessary line of cast iron soil 4" and vent pipe from the drain in the cellar up and through the bath rooms and roof, all joints to be caulked tight with lead and oakum, leave all necessary "Y" branches for all connections.

*Complaint.***KITCHEN SINKS:**

Furnish and erect complete where shown on the plans in the kitchen, 1st, 2nd and 3rd floor, a white enamel kitchen sink (6 in all) and wash tubs. Plate P 7425, Standard, to be 19½x21¼", all complete, to have a 2" lead pipe traps and waste, all traps to be vented to a cast iron pipe to extend above the roof. 10

LAVATORY:

Furnish and erect complete where shown on the plans 1st, 2nd and 3rd floors in the bath room, 6 in all, the one piece lavatory with back, to Ophire Plate P 3845 E, to be 17x21" complete as shown, to have waste and to be vented.

BATH TUBS:

Furnish and erect complete where shown on the plans, 1st, 2nd and 3rd floors, in bathroom (6 in all), Bath tubs 5'0" long, Essex with legs all complete as described. 20

VITARA CLOSET:

Furnish and erect complete where shown on the 1st, 2nd and 3rd floor plans, in the bath rooms (6 in all), Vitara syphons hopper closets with jet to be complete with low down tank and shank hung seat and covers. 30

WATER SUPPLY:

Tap the main in the street and lay a AA lead pipe from the main in the street to the meter. All fixtures to have a stop cock at or near the same, so each can be turned off independently of one and other, each bath room and kitchen to have a separate shut off.

Place a faucet on the exterior of the house and connections in the cellar a galvanized iron sink. 40

*Complaint.***WATER HEATERS:**

Furnish and connect to each boiler a Lyons Hot Water Heater.

HOT WATER BOILER:

10 Provide and set in each kitchen as shown on the plans a 30 gallon hot water boiler, extra clad on a galvanized iron standard, to have the necessary piping and cock on the same, furnish a cock on each supply.

GAS PIPING:

20 Run to each gas range, water heater and test according to the local companies rules. The plumber to pay all charge. Leave an outlet in each kitchen and hall as shown or as directed, all piping to be of ample size and all connections complete and ready to receive the gas meters, all branches to be tight and securely fastened.

HALLS TO HAVE SEPARATE GAS METER.**GAS RANGES:**

The Contractor will supply and erect all the gas Ranges as shown on the plans. The cost of the same not to exceed the sum of \$300.00.

NOTE:

30 All to be done according to the Sanitary Code of the Town of Irvington and the Health's Boards directions, and left in a complete and workmanlike manner and guaranteed for one year after the date of acceptance.

TINNING AND FLASHING:

40 The gutters, valley, flashing over the windows and doors, etc., to be tinned with Taylor's Old Style #35 coating tin, well nailed and soldered. Paint the under side before laying, build the necessary gutters, etc.,

*Complaint.***FINAL:**

Do all other plumbing work necessary to make the job complete and first class, without room for exception.

HEATING WORK:**Workmanship:**

The entire work to be enstalled and erected in the neatest, most substantial and thorough manner and in strict accordance with the rules of the Board of Fire Underwriters, and anything not so done and not to the owners satisfaction must be removed and replaced satisfactory at the constructor's expense before the work will be accepted.

10

SYSTEM:

Low pressure, single pipe, direct steam heating system, taken from the boiler in the cellar. Run all mains and returns the full size of the boiler outlet, feeding all radiators as shown on the plan. The entire system shall be erected with all the pipe properly graded so as to secure rapid and noiseless circulation and so that all expansion and contraction will be properly and satisfactory provided for.

20

The entire installation to be made to work satisfactory before the same will be accepted. It is the full purport of the plans and the specifications to include everything to make the system complete.

30

BOILER:

Furnish and erect complete, six Burham boilers or other approved of the capacities as follows:
 First Floor Boiler 500 square feet radiation
 Second Floor Boiler 550 square feet radiation
 Third Floor Boiler 600 square feet radiation

40

Complaint.

All to be were shown on the plans with all connection to the water supply and chimney flue, to be supplied with damper and a complete set of fire tools for each boiler, to be fully complete for steam and return piping.

PIPES and FITTINGS:

- 10 All pipes and fittings to be full weight wrought iron pipe, perfectly straight and all fittings to be heavy gray iron and full tapped treads, tapped true and straight. Use B. & L. fittings or flange unions in making the final joints, rainbow packing to be used throughout.

RISERS:

- 20 Furnish and erect all the necessary risers, the steam and return risers of the size necessary to make the several heating systems complete, all risers to be securely nailed and anchored in the most approved manner, run as directed.

VALVES:

Furnish all the necessary gate, globe and angle valves, (radiator valves to be nickel plated). The same to be Jenkins Brothers or other approved.

MAINS and RETURNS:

- 30 Furnish and erect complete the main pipe from the boiler to the risers and the necessary return mains and branches to the radiators to be of the proper size, the same to run on the cellar ceiling all mains and branches to be supported with heat and approved expansion hangers. Mains to be connected to the boiler in the cellar, all risers to be erected in the partitions.

AIR VALVES:

- 40 Each radiator to have a suitable air valve of the Star or other approved make, air valves to

Complaint.

be adjusted, all gats, globe or angle valves to have the stems properly packed.

RADIATORS:

Furnish and erect where shown on the plan the several radiators, plain design, to be American Radiators or other quality approved of the following sizes. 10

FIRST FLOOR

RIGHT APARTMENT	LEFT APARTMENT	
Living Room		
38" 2c-11s-44 sq. ft.	38" 2c-11-44 sq. ft.	
Dining Room		
38" 2c-9-36 sq. ft.	38" 2c-9s-36 sq. ft.	
Bath Room		
9 Square ft.	9 Sq. ft.	20
Kitchen		
38" 2c-10s-40 sq. ft.	38" 2c-10s-40 sq. ft.	
Chamber		
38" 2c-5s sq. ft.	38" 2c-5s-20 sq. ft.	
Chamber		
38" 2c-5s-20 sq. ft.	38" 2c-5s-20 sq. ft.	

SECOND FLOOR

Living Room		
38" 2c-13s-52 sq. ft.	38" 2c-13s-52 sq. ft.	30
Dining Room		
38" 2c-9s-36 sq. ft.	38" 2c-9s-36 sq. ft.	
Bath Room		
9 Square ft.	9 Sq. ft.	
Kitchen		
38" 10s-2c-40 sq. ft.	38" 2c-10s-40 sq. ft.	
Chamber		
38" 2c-5s-20 sq. ft.	38" 2c-5s-20 sq. ft.	
Chamber		
38" 2c-5s-20 sq. ft.	38" 2c-5s-20 sq. ft.	40

Complaint.

THIRD FLOOR

Living Room

38" 2c-13s-52 sq. ft. 38" 2c-13s-52 sq. ft.

Dining Room

38" 2c-9s-36 sq. ft. 38" 2c-9s-36 sq. ft.

Bath Room

10 9 sq. ft.

Kitchen

38" 2c-10s-40 sq. ft. 38" 2c-10s-40 sq. ft.

Chamber

38" 2c-5s-20 sq. ft. 38" 2c-5s-20 sq. ft.

Chamber

38" 2c-5s-20 sq. ft. 38" 2c-5s-20 sq. ft.

BRONZING:

20 All radiators and exposed piping, except in the cellar to have a coat of the best radiator bronze paint, color as selected.

PROTECTION.

Pipes passing through the floors and ceilings to have a N. P. floor and ceiling plates, the contractors to do all the necessary cutting to make the system complete.

TESTING:

30 The entire system to be tested according to the specifications. To be tested with 10 pounds steam pressure and made tight and absolutely noiseless in working under varied steam pressure, there is to be a written guarantee that the system will be free from defects in the materials or workmanship for one year after date of acceptance.

COVERING:

40 All exposed pipe in the cellar to be covered with the best quality Keasbury and Mattison air cell coverings, the pipes in the partitions to be

Complaint.

covered with the same materials. The boilers to have complete asbestos covering at least 1" thick, all the quality of asbestos to be approved.

NOTE:

Do all other heating work necessary in order to make the job complete and first class without any room for exception. 10

ELECTRICAL SPECIFICATION.

This specification to cover all the materials and labor necessary for the complete installation of the electrical system of the building, with all outlets as shown on the plans and as to follow, all materials to be the best of their several kinds and all wiring shall be executed in the most thorough and substantial manner and to the entire satisfaction of the Owner. 20

NOTE:

The entire work to be erected in the neatest and most satisfactory manner, in strict accordance with the rules of the Board of Fire Underwriters and the Public Service Electric Company.

WIRE:

Use the best grade rubber covered wire, there is to be none smaller than #14 B & S and all wire larger than #6 to be standard to be 98% conductivity and the best trade Grimshaw, or general electric. 30

WIRING:

To be the B X System, well anchored and to have the proper outlet boxes.

*Complaint.***METER BOARD:**

Furnish and erect in the cellar where directed a meter Board on each side of sufficient size to accommodate 6 meters and the necessary fuses, panel boxes and main switches, all to be in iron boxes to have a meter for each apartment and one for the hall (front).
10

SWITCHES:

Furnish and set where marked on the plans, the switches flush with the wall, all switches to have face plates, where two or more switches are ganged they are to have one face in common.

Furnish all the necessary double pale knife switches where necessary. There is to be a switch (key) in the front hall to control all lights on each floor in the front hall. The lights
20 in the rear hall to be as, on third floor switch connected to a light, same to be connected to one of the lights on the first and second floors, also to an outlet in the cellar. On the second floor connected to a light on that floor and one on the first floor and one in cellar, on the first floor, one in cellar and one on 1st floor. The switches in the Kitchens to have a piolet light
30 attachment, all switches to be of G & E or other approved make. The plates of the switches are to match the hardware of the room.

Complaint.

OUTLETS:

Cellar

All as follows:

	Right Apartment			Left Apartment			
	Outlets	Switches	in Kitchen	Outlets	Switches	in Kitchen	
	6	3		6	3		
First Floor	Lights			Lights			10
Living Room	1	3	1	1	3	1	
Dining Room	1	3	1	1	3	1	
Rear Stairs	1	3	1	1	3	1	
	as above			as above			
Bath Room	1	1	—	1	1	—	
Pantry	1	1	—	1	1	1	
Kitchen	1	1	1	1	1	1	
	for cellar			for cellar			
Chamber	1	1	1	1	1	1	
Chamber	1	1	1	1	1	1	20
Second Floor							
Living Room	1	3	1	1	3	1	
Dining Room	1	3	1	1	3	1	
Rear Stair	1	1	1	1	1	1	
	as above			as above			
Bath Room	1	1	—	1	1	—	
Pantry	1	1	—	1	1	—	
Chamber	1	1	1	1	1	1	
Chamber	1	1	1	1	1	1	30
Kitchen	1	1	—	1	1	—	
	for cellar			for cellar			
THIRD FLOOR							
Living Room	1	3	1	1	3	1	
Dining Room	1	3	1	1	3	1	
Rear Stair	1	1	1	1	1	1	
	as above			as above			

Complaint.

Bath Room	1	1	—	1	1	—
Pantry	1	1	—	1	1	—
Kitchen	1	1	1	1	1	1
			for cellar		for cellar	
Chamber	1	1	1	1	1	1
Chamber	1	1	1	1	1	1

- 10 The outlets in the front hall to be on separate meter so same can be turned on and off according to the Tenement House Board's Rules. The lights on the front of the house to be also connected to this meter.

DOOR BELLS.

- 20 Furnish and erect complete the front door electric bells, to have a 2½" gong placed in the kitchen, to have combination push button, speaking tubes and letter boxes at the front door, to be placed as shown on the plans. The bells to be connected to a transformer in the cellar, which in turn is connected with the electrical system. Furnish and supply the electric door openers, erect same.

PERMITS:

This constructor is to obtain all necessary permits in order to completely finish the work.

30 FIXTURES:

The contractor is to give estimate to include the fixtures and the hanging the same, the cost of the same not to exceed \$300.00.

NOTE:

Do all other electrical work necessary to make the job complete and first class.

Complaint.

PAINTING SPECIFICATIONS.

The contractor to avoid storing clothes, brushed and materials in the closets, etc., and shall not in any way use the sinks or water closets, for washing or any other purpose.

The Owner will select all colors, all samples to be submitted to him for the approval of the same. 10

Cover all the sap and defects and knots in the wood work with a good strong coat of shellack before priming and after priming putty all nail holes and defects.

The painter will follow the carpenter as quickly as possible after the material is erected.

All paint and varnish spots to be removed from the walls and the floors on completion of the work. 20

Putty all inside work after staining.

EXTERIOR:

All outside work to receive except the shingles a good coat of prime as soon as ready, to be white lead and linseed, and after it is to receive two coats color as selected.

Use Atlantic or other approved lead and all colors to be ground oil. 30

All tin work to be painted two coats metallic paint and then painted with oil and colors as selected.

The shingles to be dipped before being applied to the building, after same is erected they are to have a brush coat of the stain. Use a good Creosote Stain. The shingles are to be dipped 12" deep.

Complaint.

INTERIOR:

10 All sash in the cellar, out and inside entrance door, etc., to receive two coats of paint. The woodwork throughout the house to be painted one coat shellack for a filler and three good coats white paint, doors on painted side to receive a good coat filler, and two coats penetrating stain so rich red mahogany color is obtained.

The living and dining room, hall stairs and kitchen on all floors to have a coat of filler and three coats of varnish.

All other rooms to be painted white.

FLOORS:

20 All stairs to have treads and risers natural *natural* finish, all floors in the living, dining room, halls front and rear, all floors to receive stained filler and two coats shallac. All nail holes to be properly puttied.

NOTE:

Do all other painting work necessary to make the job complete and first class without room for exception.

30 THIRD.—Should the owner at any time during the progress of the said Building request any alterations, deviations additions or omissions from the said Contract, shall be at liberty to do so, and the same shall in no way effect or make void the contract, but will be added or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation.

40 FOURTH.—Should the contractors, at any time during the progress of said work, refuse or neglect to supply a sufficiency of materials or workmen, the Owner shall have power to provide materials and workmen after three days'

Complaint.

notice in writing being given, to finish the said works, and the expense shall be deducted from the amount of the contract.

FIFTH.—Should any dispute arise respecting the true construction or meaning of the Drawings or Specifications, the same shall be decided by D. A. Hopper, Architect and decision shall be final and conclusive; but should any dispute arise respecting the true value of the extra work, or the work omitted, the same shall be valued by two competent persons—one employed by the Owner, and the other by the Contractors, and those who shall have power to name an umpire, whose decision shall be binding on all parties. 10

SIXTH.—The Owner shall not, in any manner, be answerable or accountable for any loss or damage that shall or may happen to the said work, or any part or parts thereof respectively or for any of the materials or other things, used and employed in finishing and completing the same. 20

SEVENTH.—No alterations or extra work shall be done without a written Order from the Owner, approved by the architect and an express agreement in writing as to the cost. 30

EIGHTH.—The Owner will insure the building in the joint names and interest if himself and the Contractors against loss or damage by fire, in such sums as may from time to time be agreed upon with the Contractors to cover work and materials used in the building and around the premises, and the policies to be made payable to Owner and Contractors, as their interests may appear. The Contractor shall see to it that this insurance is satisfactorily effected. 40

Complaint.

NINTH.—All work and materials delivered on the premises to form part of the work, whether actually incorporated therein or not, are to be considered the property of the Contractor until the same shall have been paid for, in accordance with the terms hereof; unless said Contractor shall, after receiving a payment thereon, have refused to proceed with the work in accordance with the terms of this contract. And the Contractor shall have free access at all reasonable times to the said material and to the said work until the same shall have been fully paid for as provided for by this contract. The Contractor shall remove all surplus material after the completion of the work.

TENTH.—Neither the Contractor nor the Architect shall, without the written consent of the Owner, have authority to vary, alter, amend or change this contract or any of the Plans or Specifications herein referred to.

ELEVENTH.—Whenever building permits shall be required by any municipality, or be necessary under any law, ordinance or other regulation, to the erection, alteration or repair of any building, the same shall be procured by the Owner.

TWELFTH.—In case this contract or a duplicate thereof, together with the specifications accompany the same, or a copy or copies thereof, be not filed in the office of the Clerk of the County in which the above mentioned buildings are situate before any work is done or materials furnished for said building, then and in that case the said Contractors shall produce and deliver to the Owner the release of all persons who may then have furnished materials or done work on said building, who may have a lien on

Complaint.

such building and land whereon the same is erected, release their lien on said building and the land whereon the same is erected, with an affidavit by said Contractor thereto annexed, that no person or persons other than those named in said release have any lien upon such building or land for work done or material furnished for the erection thereof according to statute in such case made and provided. 10

There were no words erased before signing.
Words erased before signing

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

MICHAEL J. TANSEY (L. S.)
DEFFUR BROTHERS (L. S.)
By WILLIAM DEFFUR (L. S.) 20

Signed, sealed and delivered in the presence of

DANIEL A. HOPPER, JR.

"SCHEDULE B"

WORK ORDER

Office of
D. A. Hopper Co.,
Architects and Engineers
22 Ridgewood Avenue
Irvington, New Jersey. 30

October 7, 1924.

I, Michael J. Tansey, of 164 Market street, Newark, New Jersey, do hereby authorize the contractors, William, Joseph and Peter Deffur, trading as Deffur Brothers, to proceed with 40

Complaint.

the work of scraping the floors on my buildings located at 395-397 16th avenue, Irvington, New Jersey; 399-403 16th avenue, Irvington, New Jersey, for the sum of One Hundred Fifty Dollars each (\$150.00).

10 The floors to be scraped smooth and even throughout the house, to be done in the neatest and most workmanlike manner.

Signed Michael J. Tansey,
Owner.

Architect

Contractor.

20 STATE OF NEW JERSEY, } ss.
ESSEX COUNTY.

Fred E. Ober, Special Deputy Sheriff of the County aforesaid, being duly sworn, on his oath deposes and says, that on the tenth day of October, A. D. 1925, he delivered personally to the said defendant, Michael J. Tansey, a true copy of the within summons and complaint, with a ten days' notice endorsed thereon.

FRED E. OBER.

30 Subscribed and sworn to this 13th
day of October, A. D. 1925.

HARVEY W. KEOUGH,
Notary Public of New Jersey.
My Commission expires June 1, 1927.

Complaint.

Served the within Summons and Complaint with a ten day notice endorsed thereon Oct. 10, 1925, thereon personally Michael J. Tansey, the within named defendant, at his office 164 Market street, Newark, New Jersey.

HARRY B. O'CONNELL,
Sheriff.

10

By Fred E. Ober,
Special Deputy.

To the within named defendant: Take Notice that if the within summons and complaint be served upon you personally and you intend to make defense then you must file an affidavit of merits within ten days of such service and that in default thereof judgment will be entered against you.

20

M. FRANCIS KEATING,
Attorney of Plaintiffs.

and must file an answer within twenty days of such service.

I hereby appoint and depute Fred E. Ober, to serve the within writ.

Witness my hand and seal this 10th day of October, 1925.

30

HARRY B. O'CONNELL,
Sheriff.

MR. ALFRED C. WALKER,
Under Sheriff.

Sheriff's Fees \$3.78 Seal.

40

Affidavit of Merits.

AFFIDAVIT OF MERITS.

Filed October 15, 1925.

ESSEX COUNTY CIRCUIT COURT.

10	WILLIAM DEFFUR, <i>et als.</i> , trad- ing as Deffur Bros., <div style="text-align: right;"><i>Plaintiffs,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		
	MICHAEL J. TANSEY, <div style="text-align: right;"><i>Defendant.</i></div>		<i>Affidavit of Merits.</i>

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

20 MICHAEL J. TANSEY, of full age, being duly sworn according to law, on his oath deposes and says, that he is the defendant in the above-stated cause, that he believes that he has a just and legal defense to said action on the merits of the case.

MICHAEL J. TANSEY.

30 Sworn and subscribed to before me
 this 14th day of October, 1925.

JOSEPH A. CONNOLLY,
 Attorney at Law of New Jersey.

Answer and Counter-claim.

ANSWER AND COUNTER-CLAIM.

Filed October 29, 1925.

ESSEX COUNTY CIRCUIT COURT.

WILLIAM DEFFUR, <i>et als.</i> , trad- ing as Deffur Bros., <div style="text-align: right;"><i>Plaintiffs,</i></div>	}	<i>Action</i>	10
<i>vs.</i>		<i>at Law.</i>	
MICHAEL J. TANSEY, <div style="text-align: right;"><i>Defendant.</i></div>	}	<i>Answer and</i>	
		<i>Counter- claim.</i>	

The defendant, Michael J. Tansley, answering the complaint of the plaintiffs, says:

20

ANSWER TO FIRST COUNT.

1. He admits the allegations contained in paragraphs 1, 2 and 3 of the First Count.

2. He denies the allegations contained in paragraph 4 of the First Count.

3. He neither admits nor denies the allegations contained in paragraph 5, but says that the plaintiffs are not entitled to the receipt of the certificates, as stated in said paragraph.

30

4. He denies the allegations contained in paragraph 6 of the First Count.

ANSWER TO SECOND COUNT.

1. He admits the allegations contained in paragraph 1 of the Second Count.

2. He denies the allegations contained in paragraph 2 of the Second Count.

40

Answer and Counter-claim.

3. By reason of the defective work in doing and performing the scraping and finishing of the floor aforesaid, defendant was put to large expense, to wit: the sum of \$300.00, in completing and finishing the same.

10 4. He denies that he owes any money to plaintiffs.

FIRST SEPARATE DEFENSE.

20 That according to the terms of the contract mentioned in the complaint, the plaintiffs covenanted and agreed to complete the same by October 1, 1924, and contrary to the terms and conditions in said agreement, the plaintiffs had failed and neglected to complete the erection of the premises mentioned in the contract annexed to the complaint, whereby the defendant, after due notice to the plaintiffs, to perform the terms of the contract, was obliged to, and did, complete the work left undone by the plaintiff, to his damage of \$250.00.

SECOND SEPARATE DEFENSE.

30 The defendant was obliged by reason of the failure of the plaintiffs to properly and sufficiently perform the work and labor required by him, as alleged in the Second Count of the complaint, in his action to have all of said work done, to his damage of \$300.00.

COUNTER-CLAIM.

By way of counter-claim against the plaintiffs, this defendant says:

Answer and Counter-claim.

FIRST COUNT.

1. That on May 28th, the defendant agreed with the plaintiffs in writing, a copy of which contract will be produced at the trial of this action, that they, the plaintiffs, would, on or before October 15, 1924, well and sufficiently erect a three-story six-family frame dwelling or apartment house on the premises known as 399-401 Sixteenth avenue, Irvington, N J., according to certain plans referred to in said agreement and according to certain specifications which are annexed to the complaint, and would furnish all materials necessary therefor, for the consideration of \$23,000.00. 10

2. The plaintiffs failed and neglected to complete all of the work and labor necessary, according to the terms of said contract on October 15th, or at any time thereafter whereby the defendant was unable to give possession of the six apartments in said premises until September 1, 1925. 20

3. That by reason of the wilful failure and refusal of the plaintiffs to comply with all the conditions, covenants, and agreements of the contract, attached to the complaint, the defendant lost the sum of \$3,200, that he would have otherwise received. 30

Judgment will be claimed on this count against the plaintiffs and in favor of the defendant, in the sum of three thousand two hundred (\$3,200) dollars.

SECOND COUNT.

1. The defendant repeats all the allegations in paragraph 1 of the First Count of the counter-claim, and makes them part of this count. 40

Answer and Counter-claim.

2. By reason of the failure of the said plaintiffs to construct and complete the said building according to contract he was forced and obliged to pay, lay out and expend large sums of money in completing the same in the following particulars:

10 (a) Waterproofing the cellars of the building, replacing cement walks and reconstructing driveways, \$500.00.

(b) Installing water connections in the cellar and outside; installing water faucets in the exterior of the house; establishing separate shut-offs in the bathrooms and kitchens; establishing sinks in the cellar; draining the air shafts and areaways; refinishing the floors; supplying keys for the doors; repairing leaks in pipes, supply-
20 ing gas meter supports and connections, \$750.00.

Judgment will be claimed on this count in the sum of \$1,250.00.

THIRD COUNT.

1. That on May 28, 1924, the defendant agreed with the plaintiffs in writing, a copy of which contract will be produced at the trial of this action, that they, the plaintiffs, would, on or
30 before October 1, 1924, well and sufficiently erect a three-story six-family house on the premises known as 395-97, Sixteenth avenue, Irvington, N. J., according to certain plans referred to in said agreement, and according to certain specifications which are annexed to the complaint, and would furnish all materials necessary therefor, for the consideration of \$23,000.00.

2. The plaintiffs failed and neglected to complete all the work and labor necessary, according
40 to the terms of said contract on October 1, 1924,

Answer and Counter-claim.

or at any time thereafter, whereby the defendant was unable to give possession of the six apartments in said premises until September 1, 1925.

3. That by reason of the wilful failure and refusal of the plaintiffs to comply with all the conditions, covenants and agreements of the contract, attached to the complaint, the defendant lost the sum of \$3,200.00, that he would have otherwise received. 10

Judgment will be claimed on this count against the plaintiffs, and in favor of the defendant, in the sum of three thousand two hundred (\$3,200.00) dollars.

FOURTH COUNT.

1. The defendant repeats the allegations in paragraph 1 of the Third Count of the Counter-claim, and makes them part of this count. 20

2. By reason of the failure of the said plaintiffs to construct and complete the said building according to contract, he was forced and obliged to pay, lay out and expend large sums of money in completing the same in the following particulars:

(a) Waterproofing the cellars of the building, replacing cement walks and reconstructing driveways—\$500.00 30

(b) Installing water connections in the cellar and outside; installing water faucets in the exterior of the house; establishing separate shut-offs in the bathrooms and kitchens; establishing sinks in the cellar; draining the air shafts and areaways; refinishing the floors; supplying keys for the doors; repairing leaks in pipes; supplying gas meter supports and connections—\$750.00. 40

Demand for Bill of Particulars.

Judgment will be claimed on this count in the sum of twelve hundred fifty dollars (\$1,250.00).

KRAEMER & SIEGLER,
Attorneys for Defendant.

10

DEMAND FOR BILL OF PARTICULARS.

Filed March 9, 1926.

ESSEX COUNTY CIRCUIT COURT.

20	WILLIAM DEFFUR, <i>et als.</i> , trad- ing as Deffur Bros., <div style="text-align: right;"><i>Plaintiffs,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		<i>Demand for Bill of Particulars.</i>
	MICHAEL J. TANSEY, <div style="text-align: right;"><i>Defendant.</i></div>		

To Messrs. Kraemer & Siegler, attorneys for the above named defendant, or whom it may concern.

30
Gentlemen:

TAKE NOTICE that the plaintiffs herein demand of the defendant herein a bill of particulars of the following matters and things set up in the answer, separate defenses and counter-claim filed by the defendant herein, viz:

As to the answer to the second count, and the second separate defense:

1. State in detail wherein the work of scraping and finishing the floor was defective.

40

Demand for Bill of Particulars.

2. Show in detail how the amount of \$300 alleged to have been expended by defendant, is arrived at giving the amounts paid for each separate portion of work alleged to have been done.

As to the First Separate Defense:

1. State in detail in what respect plaintiffs failed to complete the erection of the premises mentioned in the contract annexed to the complaint. 10

2. State in detail how the amount of \$1,250.00 alleged to have been spent by defendant, is arrived at, showing the amount paid for each portion of work alleged to have been done.

As to counter-claim.

First and third counts. 20

1. State in detail how the alleged loss is arrived at and what items go to make up the sum of \$3,200.00, alleged to have been lost and not received by defendant, giving the amount of each item, and the source from which said amounts would have been received.

3. State the nature of said alleged loss.

Yours respectfully, 30

M. FRANCIS KEATING,
Attorney for Plaintiff.

Service of a copy of the within demand acknowledged this 4th day of November, 1925.

KRAEMER & SIEGLER,
Attorneys for Defendant.

Bill of Particulars.

BILL OF PARTICULARS.

ESSEX COUNTY CIRCUIT COURT.

10	WILLIAM DEFFUR, <i>et als.</i> , trad- ing as Deffur Bros., <div style="text-align: right;"><i>Plaintiffs,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		
	MICHAEL J. TANSEY, <div style="text-align: right;"><i>Defendant.</i></div>		<i>Bill of Particulars.</i>

As to the answer to the second count and the second separate defense:

20 1. Dining room, parlor and kitchen and bedrooms on three floors, both sides of two six-family houses, 395-397 and 399-403 16th avenue, Irvington, New Jersey, marked, stained and covered with workmens' foot prints and dirt and shavings. Floors in halls marked and not varnished and scraped.

2. Scraping smooth floors, waxing and varnishing and staining 395-397 and 399-403 16th avenue, Irvington, New Jersey.

30	Materials	\$200.00
	Labor	100.00
		\$300.00

As to the First Separate Defense:

Six-family house No. 399-403 16th avenue, Irvington, New Jersey.

40 1. No sinks in cellar, both sides of house; no ice-box drains, both sides; furnace pipes loose, not rivited; no keys in house; two gas

Bill of Particulars.

connections missing; water in cellar from leaks in foundation and back cellar stairs and air shaft; leaks near windows in parlor, kitchen and bedrooms, dining-rooms, halls; air shaft fills with water, no drains; wash tub plugs and chains, missing, faucets leak; sewer clogged; skylights rusty and not water tight, bells and push buttons out of order, cellar not water tight. Walls and ceilings badly cracked and scaled. 10

2. Disbursements for repairs and for completing house.

Waterproofing cellar	\$1,008.00	
Installing plumbing &c.	242.00	
	\$1,250.00	
Total	\$1,250.00	
Other repairs estimated	500.00	
	\$1,750.00	20
Total	\$1,750.00	

Answer as to Counter-claim, First and third Counts:

Six-family house No. 395-397 16th avenue, Irvington, New Jersey.

1. No sinks in cellar, both sides of house; no ice-box drains, both sides; furnace pipes loose, not rivited; no keys in house; two gas connections missing; water in cellar from leaks in foundation and back cellar stairs and air shaft; leaks near windows in parlor, kitchen and bedrooms, dining rooms; halls; air shaft fills with water, no drains; wash tub plugs and chains missing, faucets leak; sewer clogged; skylights rusty and not water tight, bells and push buttons out of order, cellar not water tight; cold water faucet in wrong place. 30

Repairs as set forth for other house \$1,750.00 40

Bill of Particulars.

2. Loss of ten months occupancy by tenants
from November 1, 1925 to September 1, 1925.

Rent for first two floors each	\$50.00	\$100.00
Rent for apartments second and third floors (4) per month each	\$55.00	220.00

10	Total	\$320.00
	Ten months vacancy	\$3,200.00.

Also loss of ten months rent 399-401 16th ave-
nue, Irvington, N. J., \$3,200.00.

KRAEMER & SIEGLER,
Attorneys for Defendant.

Service of copy of Bill of Particulars hereof
acknowledged this day of 1926.
20

Attorney for Plaintiffs.

30

40

Reply.

REPLY.

Filed March 9, 1926.

ESSEX COUNTY CIRCUIT COURT.

WILLIAM DEFFUR, JOSEPH DEFFUR, and PETER DEFFUR, partners trading as Deffur Brothers, <p style="text-align: center;"><i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> MICHAEL J. TANSEY, <p style="text-align: center;"><i>Defendant.</i></p>	}	<p>10</p> <p><i>Action at Law.</i></p> <p><i>Reply.</i></p>
--	---	---

The plaintiffs, William Deffur, Joseph Deffur and Peter Deffur, partners, trading under the name of Deffur Brothers, and residing in Hilton, Essex County, New Jersey, say: 20

For reply to the answer filed herein including the information disclosed by the bill of particulars, that:

1. They join issue on all allegations of the answer which deny allegations of the complaint. 30

As to the first and second separate defenses, they deny all the allegations thereof, including the information disclosed in the bill of particulars.

AS TO THE COUNTER-CLAIM.
FIRST COUNT.

1. They admit paragraph 1.
2. They deny paragraph 2. 40

Reply.

3. At or before the trial of this action, they will move to strike out paragraph 2 and 3 on the ground that the damages claimed are remote, speculative, uncertain and not proximately caused by the breach on the part of the plaintiffs.

10

SECOND COUNT.

1. They deny the allegations of said count and further say that the establishing of sinks in cellar was duly waived by the architect in charge of the construction of said buildings, and that the agreement sued on did not require draining of air shafts and area ways.

THIRD COUNT.

20 1. Plaintiffs admit paragraph 1.

2. Plaintiffs deny each and every allegation contained in paragraphs 2 and 3.

3. At or before the trial of this action, plaintiffs will move to strike out paragraphs 2 and 3 of this count on the ground that the matters therein contained do not constitute a cause of action against plaintiffs, and that the damages claimed are remote, speculative, uncertain and
30 not proximately due to the alleged breach of agreement.

FOURTH COUNT.

1. Plaintiffs join issue on the allegations of this count.

M. FRANCIS KEATING,
Attorney for Plaintiffs.

40

Judgment.

JUDGMENT.

Entered January 7, 1927.

ESSEX COUNTY CIRCUIT COURT.

WILLIAM DEFFUR, JOSEPH DEFFUR and PETER DEFFUR, partners trading as Deffur Brothers, <div style="text-align: right;"><i>Plaintiffs,</i></div> <div style="text-align: center;"><i>vs.</i></div> MICHAEL J. TANSEY, <div style="text-align: right;"><i>Defendant.</i></div>	}	Action at Law. On Verdict by Jury.	10
--	---	---	----

Judgment for Plaintiff.	20
Damage	\$1,800.00
Costs	82.99
Total	\$1,882.99

M. Francis Keating, attorney of plaintiff.

This action was tried before Judge Worrall F. Mountain, with a jury at the Essex County Circuit Court on January 7, 1927.

The cause having been heard and submitted to the jury they returned their verdict as follows: 30

They find in favor of the plaintiff William Deffur, Joseph Deffur and Peter Deffur, partners trading as Deffur Brothers and against the defendant, Michael J. Tansey, for the sum of Eighteen Hundred Dollars (\$1,800.00) damage.

Whereupon it is adjudged that the plaintiffs recover of the defendant Michael J. Tansey, the sum of (\$1,800.00) Eighteen Hundred Dollars and costs of suit which are taxed at Eighty-two 40

Judgment.

dollars and ninety-nine cents. Making in the whole the sum of Eighteen Hundred Eighty-two dollars and ninety-nine cents.

Judgment entered and signed January 7, 1927.

WILLIAM S. GUMMERE,
Judge.

10

Recorded in Book 102, Circuit Court Judgments, page 152.

20

30

40

Notice of Appeal.

NOTICE OF APPEAL.

Filed January 12, 1927.

ESSEX COUNTY CIRCUIT COURT.

WILLIAM DEFFUR, <i>et al.</i> , trad- ing as Deffur Brothers, <div style="text-align: right;"><i>Plaintiffs,</i></div> <div style="text-align: center;"><i>vs.</i></div> MICHAEL J. TANSEY, <div style="text-align: right;"><i>Defendant.</i></div>	}	<i>Action at Law.</i> <i>Notice of Appeal.</i>	10
--	---	---	----

To M. Francis Keating, attorney of plaintiffs,
or whom it may concern:

SIR: 20

The defendant, Michael J. Tansey, hereby ap-
peals from the judgment entered against him in
the Essex County Circuit Court to the Supreme
Court of New Jersey.

Respectfully,

KRAEMER & SIEGLER,
Attorneys of Defendant.

Service of the within Notice is hereby acknowl- 30
edged this 11th day of January, 1927.

M. FRANCIS KEATING,
Attorney of Plaintiffs.

Grounds of Appeal.

GROUND OF APPEAL.

SUPREME COURT OF NEW JERSEY.

10	WILLIAM DEFFUR, JOSEPH DEFFUR and PETER DEFFUR, partners trading as Deffur Brothers, <i>Plaintiffs-Appellees,</i> <i>vs.</i> MICHAEL J. TANSEY, <i>Defendant-Appellant,</i>	}	<i>On Appeal.</i> <i>Specification of Error.</i>
----	---	---	---

To M. Francis Keating, Esquire, attorney for plaintiffs-appellees.

20 SIR:

TAKE NOTICE that the grounds of appeal in the above-entitled appeal are as follows:

Because the learned trial judge charged the jury as follows:

30 "7. An owner may waive the time for performance or extend it. Such waiver or extension may be express or implied. If you find that notwithstanding that the contract work was not done within the contract, and you also find that the defendant made a payment on account of the final payment called for by the architect's certificate on the house involved in plaintiffs' claim, which payment was made after the issuance of such certificate, you may find that the defendant waived performance within the contract time."

40 "8. If you find that there was an extension of time to perform, such extension fixing no time

Grounds of Appeal.

to perform, such extension was for a reasonable time."

"15. You may not consider any items claimed by defendant to be faulty or not done, which were not called for by the contract, notwithstanding there may be evidence of such items before you; nor may you consider any items called for by the contract, and not testified to." 10

"16. If you find that the alleged loss of rentals claimed by defendant, may have been due to causes other than the acts or omissions of plaintiffs, in that case, such alleged loss of rentals is speculative, remote, and not proximately due to plaintiffs' alleged breach of contract, and defendant is not entitled to recover therefor." 20

"If you find that the completion of the buildings was delayed through the failure of Mr. Tansey to make timely payments according to the contract, then he cannot now complain of such delay and recover damages therefor."

Respectfully submitted,

KRAEMER & SIEGLER,
Attorneys for Defendant-Appellant. 30

Grounds of Appeal.

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

10 HAROLD SPEISER, being duly sworn according to law, on his oath deposes and says, that on the 14th day of February, 1927, he did serve upon M. Francis Keating, attorney for plaintiffs-appellees in the within cause of action, a true copy of the specification of error herein, by leaving the said copy with the clerk in charge of the office of the aforesaid M. Francis Keating.

HAROLD SPEISER.

Sworn and subscribed to before
 me this 14th day of February, 1927.

20 ANNIE MICHELSTEIN,
 A Notary Public of New Jersey.

30

40

William Deffur, direct.

ESSEX COUNTY CIRCUIT COURT.

January 6, 1927.

TESTIMONY.

WILLIAM DEFFUR, JOSEPH DEFFUR, PETER DEFFUR, partners trading as Deffur Brothers, <i>Plaintiffs,</i> <i>vs.</i> MICHAEL J. TANSEY, <i>Defendant.</i>	}	Action at Law.	10
--	---	-------------------	----

Before Hon. Worrall F. Mountain, *J.*, and a jury. 20

For the plaintiffs appears M. Francis Keating.

For the defendant appear Kraemer & Siegler (by Joseph Siegler).

(A jury is called and sworn.)

Mr. Keating opens for the plaintiffs.

Mr. Siegler opens for the defendant.

WILLIAM DEFFUR, sworn in behalf of plaintiffs. 30

Direct examination by Mr. Keating.

Mr. Keating: I offer the contract in evidence by consent.

(Same is marked Ex. P. 1.)

Q Are you and your brothers partners to this contract? A We are. 40

William Deffur, cross.

Q Did you fully complete all the conditions and requirements set forth in that contract?

A To the best of my knowledge.

Q Did you complete the above mentioned work in compliance with the plans and specifications? A We did.

10 Q Did you receive this work order? A I did.

Q Which calls for the scraping of the floors and agreeing to pay you \$300? A Yes, sir.

Q Did you scrape the floors pursuant to that order? A We did.

Q Did you receive that \$300? A Partly and part due under the contract.

Q How much is due you on the contract and the written order? A \$2,650.

20 Q When was the building completed? A To the best of my recollection and the final certificate was issued on the 30th or 31st of December, 1924, at Mr. Tansey's direction.

Cross examination by Mr. Siegler.

Q Mr. Deffur, in this contract that you made with Mr. Tansey you agreed to complete this property on October 1, 1924? A I did.

30 Q Is that right? A Yes, sir.

Q Were you paid in full on October 1, 1924, on this contract? A I was not.

Q Was there any matters called to your attention with respect to the foundation walls? A No, sir, there was not.

Q Of these buildings? A No, sir.

Mr. Siegler: I ask for the notice of March 7, 1925.

40 Mr. Keating: Yes, here it is.

William Deffur, cross.

(Notice of March 7, 1925, is marked in evidence by consent Ex. P. 2.)

(Exhibit P. 2 read to jury.)

Q Do you remember being given that notice?

A I do.

Q Did you proceed to comply with the requests made by the owner? A They already had been complied with. 10

Q When? A Previous to the final issuance of the certificate.

Q Did Mr. Tansey examine the house at that time with you? A He did, with the architect.

Q Did you have occasion to go to these premises at any time after you completed the house? A I did not.

Q Do you know whether they were rented or anyone was in them? A It didn't concern me. 20

Q Did you have any occasion to notice the window sills in those apartments were all out of plumb? A I did not.

Q When did Mr. Tansey see you last about the construction of those buildings? A About the middle of January.

Q January of what year? A 1925.

Q Did he call your attention to anything that was left undone? A No, he did not. 30

Q So, when you got this letter of March 7, 1925, did you do anything about it? A I did not.

Q Didn't this come to you as a surprise in March about these particulars? A No, sir, I had been hounding Mr. Tansey for my money and that was the result.

Q When you got this notice you did not go to see him about it? A I communicated with him. 40

William Deffur, cross.

Q You said a few minutes ago when you got this notice— A I communicated with him.

Q How? A I called him up.

Q Did you tell him that you were going to do anything to comply with it? A I told him it was too late, the final certificate was issued
10 and the work was found satisfactory by the supervisor.

Q Then you said to him it was too late, you were unwilling to go to the property to see what Mr. Tansey was complaining about, correct? A Absolutely. When my final certificate was issued I was through with the job.

Q Even though there were any mistakes or anything overlooked by the man who issued the final certificate, you were not willing to go up
20 there with Mr. Tansey? A Well, I was up there with the supervisor to inspect the house before the final certificate was issued.

Q When this notice came to you it came as a surprise? A Somewhat.

Q Were you or not willing to overlook this surprise and satisfy the owner by going to the property and seeing whether these conditions existed? A If he had promised to settle
30 up, I would.

Q Because he made no promise to settle up with you you were unwilling to go to the property? A Absolutely.

Q So far as you know when this notice came to you you do not know whether these conditions existed on this property in March? A I do.

Q How do you know? A Not in March, no.

Q Tell us why you were not willing to go there? A Because after the certificate is issued
40 I have nothing to do with it.

William Deffur, cross.

Q You relied strictly on your contract?

A Yes, sir.

Q Because you had that certificate in your hand from the architect you were unwilling to bend in any way except to get the balance of the money? A Not from the architect, but the owner's directions.

10

Q Did the owner sign a certificate? A He authorized the architect—

Q Did the owner sign the certificate? A No.

Q Have you anything in writing from this owner authorizing this payment? A No.

Q You were paid everything excepting how much money on October 1st? A \$2,650.

Q So, you had pretty nearly all your money out of \$46,000? A In dribblets, yes.

Q But you had all your money excepting \$2,650, out of a total sum of \$46,000? A Yes, sir.

20

Q On October 1st? A No.

Q December 1st? A January 3rd or 4th.

Q When was the last payment? A I think January 3, 1925.

Q When was the last work you did? A About December 30, 1924.

Q You were two months late under the terms of the contract according to your own statement? A No, sir, I was not.

30

Q Weren't you supposed to complete this contract by October 1? A Yes, sir, but Mr. Tansey didn't live up to his payments.

Q Who was paying you, Tansey or the mortgagee? A Tansey was paying me.

Q Did you sign any release? A To some extent, yes.

Q To whom? A To the mortgagee.

40

William Deffur, cross.

Q When did you say you knew anything about a mortgagee? A I received my money from Mr. Tansey.

Mr. Keating: I object to bringing the mortgagee in.

10 The Court: Proceed.

Q Did you sign a release to a mortgagee?
A I did.

Q Who is he? A I don't recall.

Q Do you know how much?

Mr. Keating: I object to that.

The Court: There was nothing for me to rule on. The question was answered and you made only a comment.

20 Q Did you accept your money from Mr. Tansey direct or from any person who was paying out any money for Mr. Tansey? A Mr. Tansey direct.

Q So, you do not know of anybody who was supplying money you were receiving? A No, sir.

Q Yet, you signed a release to the mortgagee, did you?

30 Mr. Keating: I object.

The Court: How is that material?

(Argument.)

The Court: Sustain the objection.

Q What kind of a foundation did you put in these buildings? A Concrete block.

Q What kind of cement or what kind of mortar did you use? A According to the specifications.

40

William Deffur, cross.

Q What was that? A I forget just now, but I think it was one, two and a half mixed.

Q You do not remember that? A I don't recall it, no.

Q Did you examine that foundation before you left the premises? A Absolutely we did.

Q Did you see any tar? A We did. 10

Q Was the foundation waterproofed? A It was.

Q How did you test it? A We didn't have to make it waterproof, it was waterproofed according to specifications.

Q Did you examine this foundation as to whether or not it was waterproofed? A I didn't have to.

Q I didn't ask you that. A There was no question. 20

Q I didn't ask you that, I asked you whether you made an examination as to those foundations being waterproofed? A No, I did not.

Q Did you make an examination to see whether those concrete blocks were in anywise open or broke? A I did.

Q When did you make that examination? A When the foundation was completed.

Q When was that? A About July 4, 5 or 6, 1924. 30

Q From July until January or December, did you make any examination of those foundation walls? A No, sir.

Q You did not? A No, sir.

Q So, when you had the building completed you have no knowledge at all as to whether or not there was anything the matter with the foundation walls? A There couldn't be anything the matter with them. 40

William Deffur, cross.

Q You have no personal knowledge of an examination you made? A I made an examination of the foundations when they were thoroughly and sufficiently done.

Q But from July until January of that year you made no examination? A We didn't excavate after we—
10

Q I say from July until January of that year you made no examination? A No, we did not.

Q Did you install water connections in the cellar? A I don't recall.

Q If they are missing you have no knowledge of it because you never looked at it? A If they are missing it is a trifle and we are willing to make good for it.

20 Q Did you install a water faucet on the exterior of the house? A I did not.

Q Did you establish a separate shut-off in the bathroom and kitchen? A Where called for.

Q Did you establish any in other places? A Where they were called for.

Q Did you make an examination of that? A We did, you know.

Q Did you? A I did.

30 Q Where did you make an examination? A In the kitchen and bathrooms.

Q When did you make that examination? A I can't recall.

Q Long before you left the premises? A No, about a week or ten days before.

Q You found everything installed? A Everything satisfactorily done according to the specifications and plans.

Q Did you establish a sink in the cellar? A No, sir.
40

William Deffur, re-direct.

Q So, after July you never went to the premises or paid any attention to any notice of Mr. Tansey? A No, sir.

Re-direct examination by Mr. Keating.

Q As a matter of fact, you never received any request from Mr. Tansey to go up there and look at the place again except the formal notice? A The notice that was sent in March or April, 1925. 10

Q That was the only request you had to go up? A That's all.

Q Did your contract require you to have a waterproof foundation? A No, sir, it did not.

Q Did you put in a foundation as required in the contract and specifications? A Absolutely. 20

Q Were you present about December 30 when Mr. Tansey and Mr. Hopper, the architect, were at the building making an inspection? A I was.

Q Tell us the conversation you heard Mr. Tansey have with Mr. Hopper and yourself. A No, I cannot tell you the conversation because I paid no attention to that conversation.

Q Did you hear anything said? A Nothing whatever, because I did not follow them around the building. 30

Q You did not hear anything? A Not a thing.

Q What part of the work did you do at the places, carpenter work, mason, plumbing, or what? A Everything but the painting and electrical work.

Mr. Keating: I ask to have this work order marked in evidence by consent. 40

William Deffur, re-cross.

(Work order is marked Ex. P. 3 by consent.)

Re-cross examination by Mr. Siegler.

10 Q Did you have any conversation with Mr. Tansey in July, 1924, when you were erecting the foundation walls of these houses? A I think so.

Q Did you tell him that you would have an absolutely dryproof, waterproof cellar? A No, I did not.

Q You did not expect him to have a waterproof cellar? A No, I did not, the conditions of the ground would not warrant it.

Q It was not up to you to make that cellar waterproof at all? A No, sir.

20 Q He was to have a house there where the water could seep in? A Naturally, if you build it in a pond, you cannot expect anything more.

Q You were not going to try and give them any waterproofing at all there? A I did the best I could under the contract.

30 Q Let me call your attention to the specifications and I ask you to look at them and please read what it says here (indicating) on the third page, the sixth paragraph. Please read, commencing— A “All foundations”?

Q No, right here, “Waterproofing.” A “All foundation walls below grade to have a coat of hot coal tar pitch over a coat of Portland cement mortar, as specified under ‘foundations’, the waterproofing to be to the grade line.”

Q So, there is something in here about waterproofing, isn't there? A That has been done.

40 Q You were supposed to waterproof that cellar, weren't you? A We did.

William Deffur, re-direct.

Q You said a few minutes ago that you were not supposed to waterproof it? A We did not guarantee to make the cellar waterproof.

Q Are there two ways of waterproofing, one that is wet and one that is not wet? A That is the architect's way of putting it.

Q What you intended to do? A What I 10
intended to do is just what that calls for.

Q And if what this calls for was not waterproofing then you were not bound by it? A Absolutely not.

Q On page 1 of the specifications I call your attention to the third paragraph or the fourth paragraph. Will you read that? "All work." A "All work and material to be the best of their several kinds, subject to the approval of the owner." 20

Q Was that cellar to the approval of the owner? A It was.

Q It was not when you got this notice? A That was a year after the cellar was done.

Q That was only three months? A No, sir, that was done in July, 1924, and the notice came in March or April, 1925.

Q The cellar was not ready for occupation until then? A Mr. Tansey had accepted it and found it O. K. 30

Re-direct examination by Mr. Keating.

Q Every time you wanted a bag of cement or a pail of paint or a piece of wood, did you go to Mr. Tansey and ask him if it met with his approval? A I did not. Mr. Tansey had nothing to do with it. He said everything was under the architect's supervision and he was the man to look forward to. 40

William Deffur, re-cross—re-direct.

Q The contract with specifications under the heading of waterproof says, "All foundation walls below the ground to have a coat of hot coal tar pitch over a coat of Portland cement mortar, as specified under 'foundations'." Did you put in mortar as specified in the foundations? A I did.

10 Q Did you put hot coal tar pitch over the foundations? A We did.

Q Under the heading "waterproofing," does that mean you give a guarantee that the cellar is to be waterproof, or is that a matter describing what must be done? A That's it.

Re-cross examination by Mr. Siegler.

20 Q This specification, on page 1, second paragraph, reads as follows: "Agreeable to the plans and specification, the contractor is to provide all materials and labor necessary for the complete and substantial erection of everything described, specified or shown, or reasonably implied as being part of the work." Now, when it says in the specifications, "Waterproofing" and a description of the work to be done, is it your implication that it does not mean a

30 waterproof cellar? A Absolutely.

Re-direct examination by Mr. Keating.

Q If you were to guarantee a waterproof cellar, that is, a cellar in which water could not and would not come, would you put it in the contract that you agreed to make the cellar waterproof rather than putting under the heading of "Waterproofing" what is now in this specification? A It would cost at least three

40

William Deffur, re-cross.

times as much to do that and it would be impossible to do that.

Q I am asking you if you intended to guarantee a cellar in which water would not come, would you put it in the specifications as it is here? A No, there is generally a separate contract on that.

10

Re-cross examination by Mr. Siegler.

Q Is that the reason why you did not make it waterproof because you found it would cost a thousand dollars more than the contract contemplated? A We did not try to make it waterproof any more than what the specifications called for.

Q I didn't ask you that, I asked you if the reason why you did not make it waterproof was because you found it would cost about a thousand dollars more than what the contract contemplated? A There was no question about it.

20

Q Is that the reason, because it would cost you a few thousand dollars more? A There is no question about waterproofing.

Q You can answer that yes or no. A It was not part of the contract. Why should I do it?

30

Q Don't you want to answer my question? A I answered it when I said I didn't do it because it wasn't part of the contract.

40

Daniel A. Hopper, direct.

DANIEL A. HOPPER, sworn in behalf of plaintiffs.

Direct examination by Mr. Keating.

Q You are an architect? A I am.

10 Q You have your office where? A 22 Ridgewood avenue, Irvington, New Jersey.

Q Were you hired by Mr. Tansey to supervise the work on these buildings? A I was.

Q What were you given, general supervision over the work? A Yes, sir.

Q What did your duties include? A To see that the work was done properly, and that certificates were issued when required.

20 Q Your duty was to see that the work was done properly and to issue the certificates when required? A Yes, sir.

Q Pursuant to that did you issue this certificate (indicating) to Deffur Brothers? A I did.

Q What does this certificate certify to? A The final payment.

30 Q What else? Speak louder and slower. A That shows the work had been completed according to the contract and the contractors are entitled to their final payment.

Q You say that this shows the work had been completed according to the contract and that the contractors were entitled to their final payment? A Yes, sir.

Mr. Keating: I offer this final certificate in evidence.

40 Mr. Siegler: I object to it. I do not see any authority for any statements of this man to bind us by any certificate he might

Daniel A. Hopper, cross.

make at any time he might think it required it.

The Court: I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Final certificate is marked Exhibit P. 4.) 10

Q When you issued that certificate all the work called for in the plans and specifications was completed according to the plans and specifications, is that right? A To my knowledge, yes.

Q How many years' experience have you had in this business? A Nineteen.

Q You will recall that Deffur Brothers received a work order from Mr. Tansey to scrape the floors? A They did. 20

Q Were the floors scraped pursuant to that order? A They were.

Q Were they completed? A They were.

Cross examination by Mr. Siegler.

Q When you made this certificate did you know whether or not that cellar was waterproofed or not? A I did. 30

Q Was that cellar waterproofed? A It certainly was.

Q Did you examine the cellar? A I certainly did.

Q Before you issued this certificate did you examine the cellar? A From the inside, not from the outside.

The Court: That is the final certificate you are referring to? 40

Daniel A. Hopper, cross.

Mr. Siegler: Yes.

Q So, your certificate was not based upon the fact of whether or not this cellar was waterproofed or not, was it? A Yes, sir, it was.

10 Q What? A Yes, sir, I wouldn't have issued it if it had not been waterproofed.

Q By waterproofed you mean as the contract testified to, that there might be water in the cellar? A There might be and there might not be.

Q What does "waterproofing" mean in those specifications? A It means to paint the walls down with Portland cement and then you tar it.

Q If the water came into the cellar and it was still a wet cellar, it is waterproofed, as far as you are concerned? A The walls were, yes.

20 Q What do you mean by waterproofing anyway? A Often times the water comes up from the floor on the side of the walls.

Q You would not want us to believe, and this jury to believe when you say "waterproofed cellar," it is subject to having water come in it freely as if nothing is done, do you? A No.

30 Q And did your examination for waterproofing show the fact that those walls were built out of cement block with tar finish and with cement and mortar to a certain depth? A Yes, sir.

Q Whether or not that really caused a waterproofed cellar did not concern you? A Oh, yes, it did.

Q Now, tell me whether or not this cellar was waterproof, by that I mean that no water could get into it. A Well, water can come in up from the crack in the foundation wall.

40 Q When you say the cellar was waterproofed and upon which you issued this statement you

Daniel A. Hopper, cross.

merely meant this man put some blocks there a certain height with cement and mortar and black tar, that is all? A Yes, sir.

Q You made no tests as to whether or not it was waterproofed, did you? A Yes, sir.

Q What tests did you make to find out whether or not this was a waterproofed cellar, after this work was done? A The only test was that I did not see any water in there. 10

Q You did not wait for any stormy day until it got in? A You could not tell until you got the floor in.

Q You assumed it was waterproof when you gave the certificate? A Yes, sir.

Q You did not make any special investigation about it? A No.

Q You made no special investigation about the faucets in this building, did you? A No, that slipped my notice. 20

Q How about the sink in the cellar? A There was none put in; there were none called for and there was no need for one there.

Q Would you require a sink in the cellar? A Yes, if it was in the specifications.

Q Now, if the sink was not established there that is an oversight on your part? A No, not an oversight. 30

Q I mean it was an oversight when you issued this certificate as to whether it existed there or not? A No, I knew it was not there when I issued the certificate.

Q Why didn't you have him install it? A What would you use it for?

Q You didn't think it was important enough? A There was nothing to use it there; no water connections. 40

Daniel A. Hopper, cross.

Q And you did not think it important enough to have it put in? A No.

Q The shut-offs in the bathrooms and the kitchen, you made no particular examination to see whether they were established? A Well, not exactly, no.

10 Q You made no investigation or examination to see whether the water faucets were installed on the exterior of the house? A No, that slipped me.

Q You made no particular investigation or tests to find out whether the roof on the house was watertight? A No.

Q You assumed it was all right? A Yes, because no water came in.

Q You assumed it was all right? A Yes.

20 Q The installations of the water connections in the cellar and the outside you assumed they were all right? A What water connections is that?

Q In the cellar? A You mean the faucet?

Q Yes. A You asked me that before.

30 Q If you had known these various things, which I have just mentioned, and which you assumed to exist actually did not exist would you have issued that statement, that certificate or have Mr. Deffur fix these various things up, I say if you had known at that time? A Well—

Q That these various items I have just called your attention to were not properly done or that they were overlooked, or were not performed, would you have had Mr. Deffur fix them up before you issued that final certificate? A I think not.

40 Q You would not have had him? A No.

Daniel A. Hopper, re-direct.

Q Having no knowledge at that time that they really were out of order or failed to be performed you assumed they were performed and on that ground you issued that final certificate? A Yes, sir.

Re-direct examination by Mr. Keating.

10

Q Why did you assume they were all right, was it because Mr. Tansey was up there and told you that the building was completed, go ahead and issue your certificate? A Yes, sir.

Q That is the reason you assumed they were all right, isn't it? A Yes, sir.

Q When the foundation was put in, back in July, 1924, you were around the building how often? A I was there all the time, two or three hours a day.

20

Q When the mortar was being mixed did you see that Deffur was putting the right proportion of sand and cement in? A Yes, sir.

Q Did he use the proportions set forth in the specifications? A Yes, sir.

Q In your opinion was the grade of blocks he put in a good grade? A Yes, sir.

Q Do you know whether, as a matter of fact, he put a coat of tar pitch on the foundation? A Yes, sir, I stayed right there until he finished it.

30

Q Did you make a personal inspection of that foundation before it was filled in? A Yes, sir.

Q Did you find it complete according to the specifications? A I did, yes, sir.

Q Quite an ado had been made about the waterproofing of that cellar. This is the contract and specifications you prepared? A Yes, sir.

40

Daniel A. Hopper, re-direct.

Q Under the heading of waterproofing it says "All foundation walls below the ground to have a coat of hot coal tar pitch over a coat of Portland cement mortar as specified under 'foundations', the waterproofing to be to the grade line." Does that mean, when it
10 appears in the specifications, that the cellar is guaranteed to be waterproof? A No, it does not.

Q What does it mean?

Mr. Siegler: I object to that as a matter of legal construction.

The Court: Sustain the objection.

Q Is it customary in drawing specifications of this kind to include a paragraph under the
20 heading of waterproofing?

Mr. Siegler: I object.

The Court: Sustain the objection.

Q When you issued that final certificate on December 30, 1924, although the cellar sinks were not in and the water faucets were missing, so Mr. Siegler says, and the roofs leaked and
30 other minor defects were there, you passed the job and issued the final certificate by the authority of Mr. Tansey, is that correct? A Yes, sir.

PLAINTIFFS REST.

Michael J. Tansey, direct.

MICHAEL J. TANSEY, defendant, sworn in his own behalf.

Direct examination by Mr. Siegler.

Q You are one of the defendants in this case? A Yes, sir.

Q Or the defendant? A Yes, sir.

10

Q You had a contract which is in evidence with Deffur Brothers? A Yes, sir, I did.

Q Did you have any occasion to call Mr. Deffur's attention to any of the work in your property that you wanted him to attend to? A I did, right from the beginning to the end, I had a number of things.

Q Tell us the first time you had occasion to communicate with Mr. Deffur in relation to any work you had found not in accordance with your contract? A There was a time when I communicated with him before I found things were not in accordance with the contract, which perhaps I might tell, and which is in answer to your question of me.

20

Q All right. A When Mr. Deffur was laying the foundations of the two six-family houses, which, by the way, were not in a swamp, but which were on a high bank of ground, which bank had to be cut down to make it conform to the street, I said to him, "Now, Mr. Deffur, we are not building these houses for fun, we want to rent them and get an income from them. Two six-family houses." And I said, "Of course, I want a dry cellar; you are building the cellar and I want a dry cellar." He said, "You will never have a drop of water in those cellars." I said, "Now, be sure about that." I said, "You are building them and I want to be sure that they will not give me any trouble."

30

40

Michael J. Tansey, direct.

10 I said, "A house where water is in the cellar is no good to anyone." He said, "Mr. Tansey, I assure you that you will never have a drop of water in those cellars," and with that I went on and he got his payments regularly, and in fact, I think much better than he was entitled to. Now, Mr. Hopper, who was the
junior of the father, the father only came there once in a while, when he wanted to push a payment through—

Mr. Keating: I object as a conclusion.

The Court: You had better ask questions.

20 Q After the work started, to your knowledge did Mr. Hopper do anything actively with respect to the supervision of that property?

A Mr. Hopper, the gentleman who was on the witness stand, I think, only came there on three or four occasions during the whole four or five months they were working on the buildings.

Q That was the only times during those four or five months he came in contact with you or his activity on that job came to your attention?

30 A The main time was when I told Mr. Hopper, "There is three feet of water in that cellar and I am not going to pay Mr. Deffur the balance due him until that is remedied." I said, "There are several other things also which should be taken care of."

Q When was that? A Along about December 31, and he said that Deffur gave him a laugh at the time and I inquired what it was and he said, "I got my certificate already."

40 While Mr. Hopper was telling me and asking me

Michael J. Tansey, direct.

about the defects he had already issued the certificate to Mr. Deffur and of course, Mr. Deffur gave me the laugh.

Q Going back before that, these houses were supposed to be completed on October, 1924. Now, during the time from June or July until October 1st, did you ever have any conversation with Mr. Deffur about the progress of the work so that you could have them ready to rent on November 1st? A Why, the committees of the West End Building and Loan would go up there and make an inspection—

Mr. Keating: I object to the testimony of any third parties, a building loan or mortgagee, as not in the case.

Q (Question read.) A He was urging his money and I told him that whenever the building loan committee pays a payment I would pay him, but that they were holding up his money because they did not think it was progressing sufficiently, and I urged him to go ahead and finish up by October 1st, which was required, I think one was October 1st and one November 15th, and he, of course, decided he would not do it and he laid down on the job and for two months did not do a tap.

Q During that period did you ever have any conversation with Mr. Deffur in which you spoke to him about the readiness of these premises for tenants? A Many times I have.

Q Tell us about one time. A I told him, "Mr. Deffur, your money is waiting for you just as soon as you complete your job, and I want the job finished," because in those times buildings were renting fast and I wanted them

Michael J. Tansey, direct.

ready; if they had been ready by October it would have been a great advantage to me.

Q Did you make that fact known to Mr. Deffur during the progress of the work? A Yes, sir, I told him in October and the latter part of September.

10 Q Did Mr. Deffur know where the money you were paying him was coming from? A Certainly he did.

Q In what way? A He went down to the lawyers of the West End Building and Loan and signed a release and got his money.

Q Did you pay him the money on these jobs? A Only in two or three payments. We took care of what we considered all the extra work.

20 Q The major portion of the contract, who paid him? A The West End Building and Loan by Levy & Fenster, on orders of their committee. I had the money already waiting for him.

Q Did you have any conversation with Mr. Deffur at any time during October concerning any of this work being in an incomplete state?

30 A I notified him that I wanted him to go ahead and he took his men off the job to some other job. I couldn't do any more than that.

Q Did he say why he would not go ahead?

A He never said why, yes or no. He simply disappeared.

Q When did he leave the job? A I don't recall the date now, but he left it around in October. Even if he had been delayed he could have actually finished it up by the 15th of October without any trouble and could have had it done by the 15th and I wouldn't have kicked.

40

Michael J. Tansey, direct.

Q What did you do in the meantime? A I won't tell you everything I did. I got pretty hot part of the time, but I did my best to get him and his architects moving.

Q Did you do anything to try to get him to finish the job? A I notified him and I told young Hopper that I wanted the job finished, and he notified Deffur but apparently he had other things to do. 10

Q How long did this go on until you finally gave him notice? A It got along in December and then the water began coming into the cellars and as I say the water got to be about three and a half feet in the cellars. We had to pump the cellar out and up to that time we had paid everything to Mr. Deffur excepting \$2,650 which represented the last payment and a little for the floor scraping. The floor scraping would not have been necessary if he had laid the proper boards in the floor. There were holes in the boards the same as a woodpecker makes in a tree when he bites a tree, and I told Mr. Deffur that and of course he said that is the material that comes through and we have to take the material, but anyhow, in order to push him I agreed to give him \$150 for each house to scrape it. Now, that is the situation, as far as that goes. Then, we discovered after he scraped the floors, one floor looked as if he used a jack knife on it instead of a scraper; it was full of ripples and ditches and I had four or five months of him, and it would have been a relief to me to get— 20 30

Mr. Keating: I object to the witness rambling on, and I ask that he be confined to answering the question. 40

Michael J. Tansey, direct.

Q (Question read.)

Mr. Siegler: I think Mr. Tansey is answering the question.

Witness: I am just telling you some of the defects.

10

Q When were those defects discovered by you? A At that time. I just related the final certificate incident.

Q Around December? A Some time in December and he claimed he had already the certificates. Then, I asked, I told young Hopper, "This isn't the proper way, to fool with me—"

20

Mr. Keating: I object to Mr. Tansey rambling and would ask that your Honor confine him to the question so that it may be answered responsively.

Q Did you have any conversation with Mr. Hopper about these defects? A I did.

Q When and what did you say to him? A After the time Mr. Deffur told me he had the certificates I said to young Hopper, "What are you going to do with the water in the cellar?" and he had already given those, checked up on those other things and he knew these things were missing.

30

Q About the cellar? A Yes, sir, he knew that, and he said to Mr. Deffur, after awhile, "Why don't you do this?" and Deffur said, "I am not required to do that." This was said in my presence, and he said, "Those other things, the sinks in the cellar, oh, they don't amount to that" (indicating). And then, he cleared out and told me he was through. He

40

Michael J. Tansey, direct.

said, "I am through." That was along in December and then my houses were unfinished and unoccupied, and of course, nothing could be done in the cold weather.

Q What did you do next to notify Mr. Deffur? A It came along, we couldn't get around the buildings, everything was frozen up and the water was so bad it pretty nearly washed the houses away and finally when spring opened up I gave him notice to come and remedy the defects. 10

Q Did he respond? A He did not.

Q What did you do then? A Then I got Mr. Wilson, who was then running the National Waterproofing Company, I think it was, and arranged with him by contract to waterproof the cellars.

Q Did he waterproof the cellars? A He dug down around the foundations on the outside and put cement on and various other things, and there wasn't any indication then— 20

Mr. Keating: I object unless he was there and saw this.

A (Continuing) I was there and saw this. I was there every day or so. He dug down around the foundations of the cellars the water was running in there the same as if there wasn't any foundation and in a dozen places there were whole blocks left out of the foundation and complete cement blocks left out and in other places there were blocks without any cement in; you could see the water seeping through, and there wasn't any indication of any tar having been used at all on the outside nor any cement except maybe a little bit of water, which was there; I saw this myself. 30 40

Michael J. Tansey, direct.

Q (By the Court.) No indication of tar?

A No indication of tar having been used at all. So that when they fixed it up they eventually remedied the defects which stopped the water.

Q Did that condition exist in both houses?

A Yes, sir.

10 Q What did it cost you to replace that?

A I meant to say that some of the blocks were broken.

Q What did it cost you to replace that?

A Something like a thousand dollars.

Q Was there anything else you found that you had to do over? A Well, of course, there wasn't any varnish on the floors nor any shellac; someone had gone in there and used a little jap-o-lac and went over it and, of course, when they walked on there they walked it all off, and the print of the people's feet; the workmen's feet were on the stairs in the so-called varnish and on the floors.

20

Q Is that in the apartments? A In all the apartments and on the stairs and hallways.

Q What did you have to do with that? A I didn't redecorate until just now I am having it redecorated and instead of the varnished floors, and the flaxseed that had never been used is there for inspection and there is no shellac on the floors. It calls for two coats of shellac besides a coat of varnish.

30

Q What will that cost to replace? A I understand it will cost \$350.

Q How about the roof on the house? A The roof began to leak and we could see the marks of the water coming down in between the flats and we thought some of the sheathing boards had not been properly laid and we found a leak was in the roof, and we finally remedied the leak

40

Michael J. Tansey, direct.

after it had come down through the ceiling or some rafter. He went up there and did the job for \$40.

Q Was there any installation of water connections in the cellar at that time? A No, they have not. I had an estimate on that of \$278.

Q Was there any installation of a water faucet on the exterior of the house? A There are no water faucets on the exterior of the house, nor are there any water faucets down the cellar. There is no sink in the cellar where I want to connect up icebox drains, and that will entail considerable expense to get them in.

Q Have you any expense on that? A The expense to get all the plumbing work in besides the icebox drains it will cost \$270. I don't know what icebox drains will cost.

Q Were there separate shut-offs in the bathrooms and the kitchen? A No, there are none there.

Q How many are missing? A I had the architect go over it and he made a report that they were missing and I believe completely there.

Q Has that been done? A Not yet. There were no keys to the doors and letter box keys were also missing.

Q How many keys were missing? A We had to get a whole set of keys for both houses.

Q How much did that cost? A Ten to twelve dollars.

Q This sink in the cellar; is there one in there now? A There are no sinks there.

Q In either cellar? A No.

Q Have you gotten any estimate as to what they will cost? A I understand it will cost \$270. Now, besides that—

Michael J. Tansey, direct.

Mr. Keating: I object to the witness going on. Let counsel ask the question.

10 Q Are there any other defects? A Why, yes, the water used to come in under the window sills, not on the windows; the snow would come in and rest on the inside sill of the window, come in under the window, but when it came in and under the window itself and ran over the floor you would have to shovel it up with the shovel then and that got worse, so it was some time before we could find out what the trouble was and some of the tenants threatened to leave, and eventually I engaged a firm of carpenter and builders to fix that, which I have here on the case.

20 Q Who is that? A Mr. McCorkindale. He went up to the building and he found leaks on all sides of the house. Under the windows, where the windows were not properly down on the weather boards—in fact, I saw it myself—he could push his rule right in between there a half an inch in between the weather board and the window frame which allowed the water to come right in there the same as if there wasn't anything in there at all, and whenever there came a rain on that side it was on the floor and the people would come in and see that and would not rent the house.

30 Q Who remedied that condition? A Mr. McCorkindale and his son.

Q What did that cost? A He charged me \$78 on that job.

Q For both houses? A Yes, he put molding there.

40 Q Was there any other defects that you can recall now? A We were obliged, when we

Michael J. Tansey, direct.

dug down around the foundation, we were obliged to dig up all the concrete walks that had been laid by a subcontractor, by my subcontractor having charge of that job, we had to tear those concrete walks up and dig down and then we had to necessarily build the concrete walks all over again, which was included in that expense of \$1,008. 10

Q That was in the foundation expense?

A Yes.

Q How about the readiness of those premises for occupancy? A On November 1st, they were not ready on November 1st; were not ready until the following; well, I think it was June 1st.

Q They were not ready until June 1, 1925?

A When we got the things in shape, then, the winter season had passed, so, they were not so much in demand. 20

Q What kind of rooms are in these houses?

A Well, they were intended to be there high class five-room flats with all improvements. They were supposed to be, and I had everything I could do to make that so.

Q How many flats were there in each house?

A Six flats in each house; five rooms and bath.

Q Five rooms and bath, separate furnaces and steam heat? A Yes, sir. 30

Q And all separate apartments? A Yes, sir, and garages in the rear, which was not included in this contract.

Q What was the rent for the apartment?

A Fifty dollars for the first floor and \$55 for the second and third.

Q And it was not until June 1, 1925, before you got ready? A I didn't actually get a tenant there until the following September, because the reason was plain, the season had passed and 40

Michael J. Tansey, cross.

everyone had made their connections, and I lost the rents for May.

10 Q During the progress of this building, between July and October 15th and November 1st, did you have arrangements made for tenants to take possession? A I had a number of people who were asking me about it and were anxious to go in and I was unable to say anything to them, so I lost them, and it continued until it pretty near got to be a joke.

Q So, you lost ten months' rent there? A Yes.

Q And each building brought in \$300 a month? A Yes, sir.

Cross examination by Mr. Keating.

20 Q You are a lawyer, aren't you, with offices in Newark? A Yes, sir.

Q You practice law? A I certainly do; I work hard.

Q Tell me when you found it possible to check up on Mr. Hopper, the architect, and ascertain that he was only up to those buildings three or four times during the whole five months?

30 A I used to be there every day and young Hopper is the man who dealt with me and he used to be on the job and it was only the times Mr. Hopper came on the job was at the special request of Mr. Deffur.

Q Tell me how you know Mr. Hopper senior was there only on three or four occasions? A I say when I saw him.

Q You do not know how many times he was there? A No, but he told me—

40 Q I am asking you a question. A No, but he told me he went there when Deffur sent for him.

Michael J. Tansey, cross.

Q You have referred to Mr. Hopper as "his man and Deffur's architect?" A I think it was so said, but that was not so.

Q As a matter of fact, he was your architect, wasn't he? A He drew the plans and specifications.

Q He had a contract with you to supervise the job, didn't he? A He undoubtedly did. 10

Q He was your architect? A I had hoped he was, but I found out I was my own architect, eventually.

Q Pursuant to the terms of your contract he had authority to give final certificates when the payments were due? A Yes, if I found it was being done right.

Q He had authority under your contract to issue certificates? A The contract speaks for itself. Naturally, I would expect him to supervise the work; I am sorry he did not. 20

Q Those buildings are situated where? A On Sixteenth avenue, Irvington, down the hill from Grove street, right near Oraton Park.

Q There is a decided slope on Sixteenth avenue going down there? A Yes, very good.

Q Those buildings lie in a hollow, don't they? A They do not lie in a hollow.

Q They lie today in a hollow? A They do not lie in a hollow; they are on the side of a hill. 30

Q Are they elevated? A Yes, up above the street three or four feet.

Q How far below the surface of Grove street? A I didn't measure that. I should say there is a drop of ten feet, probably.

Q Is it more than ten? A I say I think there is ten feet between the differences, you would have to get a surveyor. 40

Michael J. Tansey, cross.

Q Would you say there is not a drop of twenty feet? A I don't say that, but it looks to me to be about ten feet from Grove. From Grove street it runs 250 feet down on my property.

10 Q During the latter part of December, 1924, did you meet Mr. Hopper, senior, at the place?

A I did.

Q Did you go through the buildings with him? A Yes, sir, and at that time there was three foot of water in the cellar.

20 Q Did you point out to him the various matters? A I certainly did, and he gave me the same song and dance as young Hopper, "That must be remedied", and Hopper says, "There are the specifications", and Deffur said, "I have nothing to do with that", and then I said, "I have nothing to do with paying you your money for it."

Q Were you on the property when the foundation was being laid? A I was.

Q Did you see the proportion of sand and water that was being mixed? A I wouldn't know the proportions, but I know a broken rock when I see it.

30 Q Did you see any pitch at all put on the foundation? A No, sir, I never saw any and I don't believe there was any.

Q Were you up there after the foundation was up? A I was.

Q Were you up there after the foundation was up and before the sides were filled in? A I think I was.

40 Q Did you ever object then to the fact that there was no pitch on the foundation? A Not until I had talked to Mr. Deffur and he assured me that I would have an absolutely dry cellar

Michael J. Tansey, cross.

and not a drop of water in it. I said, "Remember this, I know enough about wet cellars and I want to avoid them." He said, "You need not worry. In this land here there is no possible chance of a wet cellar."

Q The contract as signed by you with Deffur Brothers does not provide or guarantee that a cellar should be waterproof? A That is a matter for the contract to say. I think it does, in all fairness. 10

Q Point out to me where it says the cellar is to be waterproof? A Mr. Siegler has already read that.

Q Point it out to me.

Mr. Siegler: I object to that.

A Mr. Siegler has read the portions which governs the waterproofing, and I call your attention to the article that says, "All matters that are not mentioned here, which can be reasonably implied to make a workmanlike job, are included in the specifications." 20

Q You have that paragraph in the specifications entitled "Waterproofing" and it sets forth what shall be done by the contractors to the foundation. Does it guarantee either specifically or by inference a waterproof cellar? A Yes, and besides that it was personally guaranteed to me. 30

Q Did you at any time in writing? A No, I did not, except as in aid of the understanding there, and further I think that a workmanlike job—

Q You have answered the question. A As guaranteed in these specifications does not contemplate bricks or blocks left out of the foundation, or broken or there without cement. 40

Michael J. Tansey, cross.

Q When did you make an inspection of the place and find bricks out of the foundation? A When the people dug down to see what the real trouble was, why the water would run in there.

Q When was that? A I think along in April, or some time like that; I can get you the exact date; it was after this notice was given to Mr. Deffur.

Q That was four or five months after the architect's final certificate was issued? A Yes. All that winter it had been full of water.

Q Whereabouts in the foundation were the blocks missing? A It was in the southeast corner of the westerly house.

Q The southeast corner? A Yes, and in the northeast corner of the easterly house.

Q Where was it, in the corner of the foundation? A It was in the corner of the foundation down underneath the ground, down underneath one of the footing courses; there was a whole block left out of the west house, and a broken block in the east house where the water was coming through and there were many, many blocks without any cement where the water was coming through between the courses.

Q Couldn't you see the foundation walls and the blocks in the foundation walls, from the interior of the house? A Some of it, yes.

Q Could you note them as being missing from the inside? A No, not here. This was right in the footing course, down below the ground.

Q What was there in the place of the blocks? A Nothing at all, but mud and water. Some fellow must have been in a hurry in working up his foundation and was short a block or something, and left one out.

Michael J. Tansey, cross.

Q How far below the surface did you find that? A It was away down below the surface.

Q It was in the footing course? A It was in the footing course, or right near there. I think the first or second course of blocks. The men called me to see it and I looked at it.

Q Describe to me the foundation from the bottom as you found it, right on up, when you took it apart? A When I took it apart? 10

Q When your workmen did. A I saw them there and the ditches down around the foundation.

Q How deep did you go? A They had to go far down under the foundation to get to the place to put cement.

Q What did you find there was between there? A Under the bricks or cement?

Q Was it concrete or concrete block? A I think it was concrete block; I am not sure which; whatever they usually put on footing courses. 20

Q What did you find on top of them? A Then, after that we found these blocks missing and we found the blocks without cement and the broken blocks.

Q Just where was that block missing and what was on top of it? A Other blocks.

Q What were they set on? A I don't know. They broke a joint, you know. 30

Q What were they put on? A On another block.

Q There wasn't anything underneath? A Not there.

Q Was it just standing in the air? A You can guess better than I can.

Q Have you a record of the payments you made Deffur Brothers on this contract? A I can hunt up the checks; I haven't them here with me. 40

Michael J. Tansey, cross.

Q Do you recall when the last payment was made by you? A I do not. He was always active for payments.

Q Was it before or after the issuance of the final certificates? A I think it was some time before that. I do not think I gave them any-
10 thing on the final certificates; I hope not.

Q Would it refresh your memory any if I gave you the dates Mr. Deffur has? A If it corresponds with mine; if you are right and he is right.

Q Kindly get the checks. A I haven't them here. I will get them tomorrow morning for you. You will find there were many active payments.

Q When did you make the examination that
20 disclosed workmen's footprints all over the floor? A That was before the final certificate was made, they tried to do a hurry-up job and varnished, so that they could get ready for their top, and I called Mr. Deffur's attention to it; they put on varnish in cold weather and it did not dry right and I said to him, "Mr. Deffur, besides these woodpecker boards will you look after these footprints," and he said to
30 me, "All I am required to do is to leave this room clean." I said, "Here is varnish with people's footprints all the way up. Aren't you supposed to clean that up and get them out of the way?" "No, sir, my final payment is through. Now, that's all," he said.

Q Did any people other than the contractors have access to that building? A Not at all, Mr. Deffur kept it locked.

Q He was the only one? A Except when I
40 got there myself.

Michael J. Tansey, cross.

Q What about the appraisers from the building loan? A They did not walk through the buildings. I suppose they looked through from the outside.

Q You do not know? A I never was there when they were there.

Q They had access to the place? A I 10
couldn't tell you. Mr. Deffur knew; I suppose he met them.

Q You had the windows washed, didn't you, by a lady? A Yes, sir.

Q When? A I think around December there, when we tried to get things cleaned up as best we could.

Q She had access to the place, didn't she? A I presume so. She had to wash the windows, but it wasn't her foot tracks on the varnish, that is sure. 20

Q How do you know that? A Because the varnish, such as it was, when she was there was dry before she went there.

Q How do you know the footprints were not hers? A She did not have any such big feet as that.

Q You do not know what she wore when she was washing the windows, do you? A I 30
couldn't say that. Why, Mr. Deffur would not let the contractors—speaking of entering the houses—Mr. Deffur would not let the contractors who built my garages there, put their material in that cellar; he kept the house locked completely himself, and furthermore—

Q You have answered the question. Point out to me in the contract where it provides for the installation of icebox drains? A It doesn't and I didn't say it did. It provides for the installation of sinks in the cellar. 40

Michael J. Tansey, cross.

Q Where for the installation of icebox drains? A It doesn't say so and I didn't say so.

Q Didn't you just state that there were no icebox drains in the cellar? A No, I did not, but if I did I would be glad to withdraw it. Of
10 course, the sinks are for the icebox drains.

Q Just what was the matter with the plumbing work? A Well, the toilet bowls, for one thing, never were fastened down to the floor and some of my tenants made complaints that they were in danger of breaking their backs if they used them; so I had to have them all attended to.

Q Did you have that attended to? A Yes, sir.

Q What else was wrong? A I can't go into
20 details. It was testified to here.

Q I am asking you what you know was wrong with the plumbing work? Is that all you know? A Well, we had for instance the furnace pipes, as soon as they began using furnaces the pipes fell out; the sections were together, but they did not hold, so when they started to shake the furnaces, down came the pipes. So, that was only one of the little rough
30 taps he left me.

Q Did you ever know of flue pipes being riveted or bolted together in furnaces? A I always had them so, and we had to do that in this case, in order to keep them from falling down again. There were places there for the rivets, but there hadn't been any used.

Q What other objection did you find to the plumbing? A Well, Rowe is here and I think he is better qualified to testify to that. He is my caretaker of the place, and has been there
40 ever since the place was ready.

Michael J. Tansey, cross.

Q Tell us in detail all you know. A I think that's about all I know about the plumbing.

Q When did you ascertain that the roof leaked? A I don't recall that, but it was a short time around the time the cellar was leaking, the roof showed signs of the water coming in. The ceilings came down and some of the ceilings of the flats that were occupied, and we looked around for a long time to find out and finally located a leak in the roof. 10

Q What was the trouble there? A The roof was the trouble; when he guaranteed me a ten year roof.

Q Just when did you find that out? Was it after the first of the year, 1925? A After we gave him this notice we found that out. You see, we found out about the cause of these window leaks after that, too; the snow coming in the windows, we knew that was because the sashes did not fit, but the window leaked where the water was coming in in streams. 20

Q Did you ever communicate with Mr. Deffur about that? A Yes, I told him the same thing, that Mr. Hopper wanted me to pay him. I paid him all but \$57 and when I found out what happened I held that back. 30

Q When did you notify Mr. Deffur of the leak in the roof? A I did not. When he said he would not bother again. 30

Q The notice makes no notice of the roof leaking. A I don't know whether it does.

Mr. Siegler: Yes, it does, "Make roof on house water-tight."

Q So, you never gave Deffur any notice about the roof? A I wouldn't say I didn't; I 40

Michael J. Tansey, cross.

don't recall. I didn't see that it was necessary for me to give him notice continually and get the same answer. He said he had his certificate and would stand on that.

10 Adjournd to Friday, January 7, 1927, at ten o'clock, A. M.

SECOND DAY.

Friday, January 7, 1927.

Continued pursuant to adjournment.

Present, counsel as before stated.

20 MICHAEL J. TANSEY resumes the stand.

Cross examination (continued) by Mr. Keating.

Q Yesterday you mentioned that there were some shut-offs missing from the plumbing work. Tell us to what you refer. A Shut-offs in the bathroom, I think it was, as covered by that notice; I didn't carry it in mind.

30 Q When you inspected the building what shut-offs did you find in the kitchen and in the bathroom? A Those recorded by the architect?

Q What did you find? A I didn't make an inspection myself.

Q Then, you do not know whether there were any shut-offs there or not? A Yes, I do know that they were not there.

40 Q How do you know it? A He told me that.

Michael J. Tansey, cross.

Mr. Keating: I move that that answer be stricken out as not responsive.

The Court: Strike it out as hearsay as to what someone told him.

Mr. Siegler: Hearsay within his own knowledge.

10

Q Do you know for a fact whether or not there was one coat of filler and two coats of shellac put on the floors? A Yes, sir, there was not.

Q How do you know that? A Because my expert painter told me there was no shellac on the floor.

Mr. Keating: I ask that that be stricken out.

20

The Court: You want stricken out what the expert told him?

Mr. Keating: Yes.

The Court: I will grant that motion.

Q How many three-day notices did you serve on the plaintiff? A I think one on the three day notices, two or three three day notices; one was on this March, one we saw yesterday, and there was another one when we turned the water on all the fixtures leaked like sieves and we had to then give him notice that the plumbing had to be done; that is in the notices.

30

Q When did Mr. Wilson waterproof this cellar? A In March, 1925, I think it was. My records will show, if you want the exact date.

Q Let me have it, please. When do you think Mr. Wilson completed that waterproofing?

A It appears to start at March 12, 1925, and

40

Michael J. Tansey, cross.

I think he finished up on April 13th. He has a bill here which he submitted to me.

Q That is enough; you have answered the question. When did you pay Mr. Wilson? A At the time he submitted his bill.

10 Q What? A He submitted his bill on April 17th and was paid right then.

Q What work did you actually have done on that house? A You mean by Mr. Wilson?

20 Q No, by any one. Let me have the work you had done, the men who did it and the date done and the amount paid, if any? A The National Fire Proofing Company did the plastering of the sidewalls and the back filling of the trenches alongside of the building for which they charged me \$560. They laid 416 square feet of sidewalk in addition to the contract, that is, after they tore up the first walk, costing me \$104 at twenty-five cents a square foot. That would total up \$664 paid to them on that.

Q What else did you pay the National Fire Proofing Company, if anything? A We paid them for the concrete and grading as per contract, \$1,425, and furnishing and laying drain pipes to carry off drain water from roof, \$199.40.

30 Q Why did you have all that work done? A That was outside the contract; that had nothing to do with Mr. Deffur; it was concrete and grading.

Q I want just the items that had to do with Mr. Deffur's work. A I thought you said the National Company.

40 Q I think you said yesterday the waterproofing in the cellar cost you \$1,000. So far, you have only given us \$664. Where is the rest? A At that time I testified without hav-

Michael J. Tansey, cross.

ing the bills with me. I think you can consider that is all we paid to Mr. Wilson's company for the extra work.

Q \$664? A Yes, sir, on the Deffur contract.

Q The last item of \$104 is for what? A 415 square feet of sidewalk additional to the contract. 10

Q So Mr. Deffur's contract provided for the laying of sidewalks? A No.

Q What else did you have done; plumbing work? A He tore up the first sidewalk—

Mr. Siegler: Don't you want him to make a complete answer?

Mr. Keating: Address your remarks to the Court. 20

Mr. Siegler: I object to counsel interrupting the witness.

A (Continuing.) The first walks had been laid.

Mr. Keating: May I ask that this witness be instructed to answer only the questions and not volunteer anything? 30

Mr. Siegler: He wanted to make a further answer to that question.

Q Was the laying of sidewalks included in Deffur Brothers' contract? A No.

Q This item of \$560 paid to the National Company, what was that for, waterproofing what cellar? A They were in both cellars.

Q Waterproofing the two cellars? A Yes, sir. 40

Michael J. Tansey, cross.

Q As a matter of fact, did the National Company succeed in making you a waterproof cellar? A As near waterproof as can be. Still, of course, there would be a little water seeping through any cellar.

10 Q You admit that? A I say it will come in in dampness, but not floating around.

Q The cellar is not as yet waterproof? A Yes, I think it is waterproof. We have had no important complaints.

Q Did you ever admit the cellar was not waterproof? A With the exception of what water comes from the areaway, airshaft which had never been drained to make the cellar practically water tight, never did, there is some water flowing in there between the airshaft and the front areaway.

20 Q Did you ever admit to me at your own office about September, 1925, that Mr. Wilson of the National Company had waterproofed your cellar, taken your money and yet could not give you a waterproof cellar? A I don't like to admit anything like that.

Mr. Keating: I would like to take the stand to testify if I have to.

30 Mr. Siegler: I object to counsel making that statement.

Q What other work did you have done? A I had laid 416 square feet of sidewalk.

Q What other work beside that? A At a cost of \$104.

Q Which was not in Deffur's contract? A That was made necessary—by reason—

40 Q What other work beside that? A That cost \$104.

Michael J. Tansey, cross.

Q Which was not in Deffur's contract? A
It was made necessary by reason—

Q I say it was not in Deffur's contract? A
No, but he tried to tear up the sidewalk.

Mr. Keating: If your Honor please, will
your Honor ask this witness to answer the
questions and confine himself to them. 10

The Court: Do not go on after you have
answered the question.

(Continuing.) Then, when the tenants be-
gan to go in in December, 1925, I found there
was considerable tapping and plumbing altera-
tions to be done, I had Harry Justman, a
plumber, on September 22nd. He fixed the gas
pipe and cleaned the sewer, repaired the leak
and put in a drain bed at a cost of \$15. 20

Q He charged you \$15 for that work? A
Yes, sir. Then we had to have a new set of keys
made by T. Thomas & Company of 144 Mul-
berry street. I paid them \$12 one time and
\$6.50 another.

Q What other work did you have done and
paid for? A Then, in order to stop the leaks
coming in the areaway as much as possible I
had— 30

Q Just a minute, before telling us that. I
asked you what work you had done which was
called for in Deffur's contract which he neg-
lected to do. A You asked me what other
work I had done, but all this was covered by his
contract.

Q What work did you have done in the area-
way? A The water used to flow down and in
through the steps of the areaway and all the
water flowed into the cellar, so I had structures 40

Michael J. Tansey, cross.

built on the outside of the houses over the areaway on the two houses so as to turn off the water as much as possible. That was not entirely successful on account of the fact the water would come in through the steps.

10 Q Did your contract with Deffur Brothers call for your making structures above the areaway? A No, but it called for draining the areaway.

Q What called for that? A The application which they filed with the Tenement House Board.

Q Deffur Brothers was dealing with you and had contracted with you, hadn't they? A That is what we said.

20 Q Will you point out in this contract where it provided for them to drain the areaway? A I just told you.

Q Point out in the contract where it provided for the areaway? A I didn't say it was in the contract.

Q It is not in the contract, is it? A Except that it should be made a workmanlike job.

30 Mr. Keating: I object to the witness not answering the question.

Q It is not in the contract, is it? A I say it is covered by "Workmanlike job."

Mr. Keating: Your Honor, this witness is argumentative and will not answer the questions.

The Court: He is telling you where he thinks it is.

40 Mr. Keating: I asked him whether he thought it was in the contract.

Michael J. Tansey, cross.

Mr. Siegler: He says it is in the contract.

Q Is that provision in this contract? A In the way I told you, it is.

Q I am not asking you how you told me, is it or isn't it in the contract? A Yes.

10

Q Show me where it is. A "Agreeable to the plans and specifications, the contractor is to provide all materials and labor necessary for the complete and substantial erection of everything described, specified or shown, or reasonably implied as being part of the work. Anything that is not mentioned in this specification and shown on the drawings or reverse, is to be done as if both was shown and is specified. All work and materials to be the best of their several kinds, subject to the approval of the owner."

20

Q Where does it show anything about areaways? A That covers that.

Q I say where does it show anything about the areaways? A You will have to get that from your own idea. I am telling you where I find it.

Q In other words, you do not find—

30

The Court: Where is that?

The Witness: On the first page of the general specification.

Q (By Mr. Keating.) What other work did you have done? What was the cost of that structure? A \$120.

Q (By the Court.) What was that? A Covers to the areaways in order to turn some of the water off. Done in December, 1925.

40

Michael J. Tansey, cross.

Q (By Mr. Keating.) Did Mr. Deffur ever tell you he would give you a guarantee that you would not have any water in the areaways? A He didn't specifically say a guarantee; he said I would have a dry cellar and wouldn't have a drop of water in it; the areaway is part of the
 10 cellar because the water flows right in through the areaway.

Q He never told you that? A He didn't use the word "Guarantee."

Q As a matter of fact, he never told you you wouldn't have it there? A He certainly did.

Q When did he tell you that? A Well, when he was laying the foundation, along in July, 1924.

20 Q What other work did you have done there? A Then, there was a gas leak, repair to the tank which cost me thirty-five cents.

Q Let us have the rest. A Then, I had Harry Justman, a plumber, come and estimate on what he would take—

Q What have you done and paid for? A Then I had Fred Daum do some work there, of which I have the particulars in another bill which my caretaker can testify to, with those
 30 bills; this was in June, 1925. Daum Brothers, plumbing, they put in hose connections and adjusted the tanks and painted the furnaces.

Q Hose connections for what? A I presume the hose connections were downstairs, where they should have been installed under this contract, the faucets. Put in 70 feet of half inch pipe, ten half inch footings; two half inch stops, two faucets; one gallon of black asphaltum and some nipples at a cost of \$31.60.
 40 Then, in July he put in one half inch stop, one

Michael J. Tansey, cross.

and a half inch tee, one inch nipple and a half inch nipple, "L", a coupling, hose cock and three foot of half inch pipe for which he charged \$10.50, that is \$42.10.

Q So every one of those items are items that had been left out of the work by Deffur Brothers? A Yes, sir, everything was left out of Deffur Brothers' contract; that is, it should have been done by him and was not. Harry Justman again in September, 1925— 10

Q How many inspections did you make of this property? A Each time we had to get a new tenant in the flat his flat needed something done in the line of work and we had the plumber go up there or the carpenter or whoever it might be to take care of the necessary things.

Q In other words, if you didn't have any of those flats rented until today and there were some things missing you would want him to put them in today? A If it was in his contract. 20

Q Regardless of whether he put them there originally? A No, not if he put them in originally.

Q Do you know, as a matter of fact, whether they were put in by Deffur and disappeared? A They were not put in to disappear. 30

Q Do you know that as a fact? A Yes, sir, I do.

Q Someone told you? A I saw they were not there. So far as the hose connection I just told to you.

Q What other work did you have done? A Mr. Justman went up and in September, 1925, and extended the gas line to the gas meters and that was \$5 and then he cleaned it out.

Q When Deffur Brothers finished their work in December, 1924, there weren't any gas 40

Michael J. Tansey, cross.

meters in the street, were there? A Yes, sir, there were. The gas was clear down to there; it had been put in by the Public Service so we could get the service.

Q It was in in December, 1924? A Yes, sir, and it was part of Deffur's contract to connect up the gas line.

10 Q Are you sure that was there? A Even if it wasn't, it was his business—

Q You have answered the question. A On October 1st, 1925, he again cleaned another sewer. Both sewers were stopped up and repaired the leak on the first floor and put in new washing bib, \$10. On January 7th, 1926, he repaired the smoke pipe to some boilers and put in washers.

20 Q That was the year of the issuance of the final certificate? A January 7th, when someone went in there to live.

Q What was the trouble with the smoke pipe? A It was not riveted for one thing and there was some difficulty in it.

Q It was not riveted and fell down and he had to pipe some new sections? A It was attached to the chimney.

30 Q In other words, it did not meet with your approval? A No, none of the stuff did.

Q He did not take it down to your office first and ask you if it met with your approval? A No, he didn't have to come to my office to bring the smoke pipe there. January 27, 1926, repaired smoke pipe and steam boiler and putting in washers in smoke pipe, \$3. August 4th, 1926.

40 Q Four months ago? A Yes, sir, this was on the third floor he reset the closet bowl and repaired the basin cock and put in new tray beds, \$8. His bill there at that time was \$30.

Michael J. Tansey, cross.

Q That is the last time you have employed him? A Yes, sir.

Q It would be cheaper if you took him by the year, wouldn't it? What other work have you done? A We had the roof repaired for which we paid \$40. That was last year, in June, 1925 or 1926. I have the time here; just wait a minute. I have those checks you sent for yesterday also. 10

Q I am glad you brought them? A On June 14, 1926, we paid to John Pederski Roofing Company \$40 for roof work on the Sixteenth avenue house.

Q That was a year and a half after the issuance of the final certificate? A June, 1926. The roof was guaranteed for ten years.

Q Did you ever communicate with Mr. Deffur about the roof being in bad condition and leaking? A Not in 1926. 20

Q Did you ever communicate with him at all about the roof? A I think the roofs were included in one of those notices because we had been having trouble and could not locate where the leak was.

Q You had Deffur build two houses for you, didn't you? A Yes, sir.

Q The one Deffur now is suing on applies to only one house? A No, it applies to two houses, because we only had him on the two houses; about \$2,600, as he says. 30

Q Are you sure about that? A Yes. He got paid all except \$1,000 on each house, and I think about \$300 on each house makes \$2,600 on both; so his suit is on both houses.

Q If you look at the pleadings it is not.

Mr. Siegler: Do you want to stand on that, that it is \$1,000 on each house? 40

Michael J. Tansey, cross.

Q Give us the dates and the amounts you paid them. A Roughly speaking, I paid Deffur Brothers \$10,000 myself.

Q Have you a check there? A Yes, sir, I have the checks and the building and loan paid him \$34,000.

10 Q Have you the dates? A On July 12, 1924, at the beginning of the work on the 3rd of July I paid Deffur Brothers myself \$2,500.

Mr. Siegler: I take it that we will take up a lot of unnecessary time on those payments as there is no question about the amount of \$2,650 being due on the contract of \$46,000. We do not deny that proposition. There was \$2,650 due on this contract when Deffur quit.

20 The Court: Why go into the payments if that is admitted?

Mr. Keating: It is necessary to show that Deffur Brothers were entitled to the various payments and when they were actually paid to them. In other words, Tansey was in default.

Witness: Never.

30 Mr. Keating: He was in default with these payments and that is why the work was not done.

Witness: I will say right here, in answer to your—

Q Just a minute. You haven't been asked any question. Let us have the amounts and the dates of the payments made by you. A On July 12, 1924, Deffur had been about—July 3rd.

Q What are the amounts of the payments?
40 A \$2,500, July 12th, 1924, I paid that myself;

Michael J. Tansey, cross.

July 23rd, 1924, I paid \$2,000. On July 30th, 1924, \$2,500. On August 5th, 1924, \$840. August 18, 1924, \$1,000. September 27, 1924, \$1,000, and then on July 24th, I have a receipt here for another \$2,000 from Deffur Brothers.

Q What is that date? A July 24th.

Q A receipt for how much? A \$2,000. 10
Then, I gave him seventy-five—

Q Let me see that receipt. Let me see your check for \$2,000 paid on July 23rd. A Here (indicating).

Q Is it possible this receipt and check covers the same item? A It is possible, I wouldn't say it did not. I wouldn't say one way or the other now. At any rate I have a check and a receipt and I don't think Mr. Deffur would give a receipt without getting a check. 20

Q What other payments have you? A I gave him \$75 according to my checks here, which appears to be on account of the floor scraping, and I gave him another \$75, a total of \$150 on that.

Q What is the date of that? A That was November 8, 1924. I haven't had time to check up all these and total them up.

Q Have you any memorandas there as to 30
the amount paid by the building and loan or not? A Why, the building and loan had granted the loan.

Q Have you any memorandas in your possession now that you can testify from as to when checks were given by the building and loan? A No, to my recollection those checks were given between those dates.

Q You haven't any doubt when you testify to that? A No. 40

Michael J. Tansey, re-direct.

Q That street up there, Sixteenth avenue, was it paved? A No, it was not.

Q Was it curbed? A It was curbed, yes.

Q When? A There was a sidewalk there and a makeshift curb which had been there since the street was laid out.

10 Q It was not paved and it was in what kind of condition? A It was the ordinary road condition before paving.

Q In other words, it was in poor shape? A No.

Q It was a dirt road, in other words? A Yes.

Q When did you make the last payment on the first house No. 395? A I don't know.

20 *Re-direct examination by Mr. Siegler.*

Q You made some reference to laying the sidewalk. What relation did that have with the making of the foundation walls that you found defective? A Well, the sidewalk which I refer particularly to was the one around the house, the walks around the house in front of the house. There was a sidewalk or walk clear around the house, each house.

30 Q Why was it necessary to have anything done on the walk? A After the National Company had laid the walk originally they were obliged to tear it up in order to dig down around the foundations, and they had to tear it up completely.

Q There was a walk there after the building was finished. That was put there by some other people? A Yes, sir.

40 Q That walk is around the house? A Yes, sir.

Michael J. Tansey, re-direct.

Q When you found this defect in the foundation walls this walk had to be ripped up again? A Ripped up and rebuilt.

Q That is included in the cost of the foundation walls and the cellar being made waterproof? A Yes, sir.

Q Was there any other expense that you were put to by reason of this cellar to anybody outside of those figures you have given us this morning? A Except my caretaker had to be there and cleaning it out from time to time. 10

Q Was there any work done that had no relation to this contract? A I think there was. I said yesterday when the case came on suddenly I didn't have any time to prepare it.

Q Now, we are clear on that? A Yes, sir.

Q Instead of being \$1,008 it was \$664 as far as Mr. Wilson is concerned? A Yes, sir. 20

Q You said something about the areaway in those houses. Is that connected with any part of the cellar? A It is, Mr. Deffur built the areaway.

Q Who built the areaway? A Deffur Brothers.

Q Was that part of his contract? A Yes, sir.

Q Now, there were some floors there that you undertook to pay \$300 to be scraped. Do you remember that? A I do. 30

Q Were those scraped in such a way that they were acceptable to you? A They were not.

Q In what respect were these floors unsatisfactory? A Why, instead of using a sharp tool on the scraping, he had used a dull knife, whatever it was, and left it pulled to pieces, what do you call it, rippled or furrowed? 40

Michael J. Tansey, re-direct.

Q You paid them \$50 on account of that \$300? A Yes, sir.

Q Did it cost you any money to put those floors in shape so they could be used? A Yes, sir.

Q Who made that estimate?

10

Mr. Keating: I object.

The Court: Sustain the objection.

Q Now, with respect to the balance of \$2,650, is that a balance that is due on the contracts of both houses amounting to \$46,000? A Yes, sir.

Q To split the contract there would be \$1,325 on each house? A Yes, sir.

20

Q I call your attention to a letter from the State Board of Tenement Houses Inspection under date of March 17th and one under date of March 17th and I ask you to look at those and ask you whether or not they refresh your recollection as to any condition in that house. A Yes, sir, they do.

Q How is your recollection refreshed now?

A Now, they refer to the—

30

Mr. Keating: I object to what they refer to.

The Court: Sustain the objection. If he will answer your question responsively I will admit it.

A Yes, my recollection is refreshed by that.

Q Can you tell me what you found, if you remember, by reason of your recollection being refreshed by these letters, on those premises?

40

A I found that the air shaft and areaways had not been drained.

Michael J. Tansey, re-cross.

Q What did you find in the cellar? A Of course, I found water there continually.

Q That was on what day? A I think this was along in March 17, 1925.

Mr. Siegler: Counsel is willing to have the copies of the notices for houses number 10
399 and 401 marked in evidence.

(Same are marked Ex. D. 1.)

Re-cross examination by Mr. Keating.

Q You just testified, in answer to a question by your counsel, that the sidewalks were put down after the building was finished, is that right? A I am not referring to the outside sidewalks.

Q Were there sidewalks inside? A Side- 20
walks around the house.

Q The ones that had to be ripped up? A Yes, sir, after the building was finished they were laid so as not to lose any more time than was necessary. Mr. Wilson did the work on the grading and the laying of the sidewalk.

Q When did he lay them, do you know? A Along in November or December.

Q As a matter of fact those sidewalks were 30
laid in cold weather and they froze and had to be taken up for that reason, and relaid, is that right? A Not at all, no, sir. They did not have to be taken up for that reason at all.

Q The item of \$664 you paid to the National Company includes \$104 that you paid for laying the sidewalks? A Yes, sir.

Q Now, as the architect issued certificates for payments Deffur Brothers brought those certificates to you and you paid them and gave 40

Michael J. Tansey, re-cross.

them checks? A No, most of those certificates he left with Levy & Fenster.

Q He referred them to you or your agents?

A They were agents for the building and loan; they had the money, all that was necessary.

10 Q The final certificates were left with you or your agents, were they not? A No, I got some, I guess, and Levy & Fenster insisted on all being turned over to them.

Q Do you know whether or not you received the final certificates on the houses number 395-399? A I think I saw this certificate and I think he showed it to me and said, "I have this certificate now," but I do not think he turned it over to me; in fact, I know he did not.

20 *Re-cross examination by Mr. Keating.*

Q Was Mr. Deffur, the contractor in this case, your selection or the architect's selection?

A The architect recommended him to me; I never heard of Deffur before.

Re-cross examination by Mr. Keating.

30 Q The contractor was not selected by the architect; he was recommended to you by the architect? A He figured on the job.

Q And you selected him? A Yes, the figures suited me.

James E. Wilson, direct.

JAMES E. WILSON, sworn in behalf of defendant.

Direct examination by Mr. Siegler.

Q Where do you live? A 262 Highland avenue, Newark.

Q What is your business? A Contractor. 10

Q Do you know Mr. Tansey? A Yes, sir.

Q Did you have any occasion to do any work for him? A I done a job for him in November, 1924, I believe.

Q Where was that job? A On Sixteenth avenue, I guess, below Grove street.

Q In what town? A Irvington.

Q What did you find when you got there and what did you do? A Why, I came and estimated on the job to put a retaining wall and a sidewalk around the two apartment houses and a sidewalk on Sixteenth avenue. 20

Q That was your first job? A That was my first contract.

Q What else were you called there for? A In the following spring I was called there again and he asked me to give him a figure on waterproofing two cellars.

Q What did you find when you got there about the cellar? A The cellars had about two feet of water in them at the time and we pumped that out, or shovelled them out. 30

Q Did you examine or inspect the foundation walls of those houses? A Yes, sir, the foundation walls, the water was coming through like a sieve.

Q What was coming through? A The water.

Q What was that due to? A Why, it seeped through the ground. 40

James E. Wilson, direct.

Q Why? A Well, it was the spring of the year, I suppose.

Q I mean why was it coming into the cellar?
A Because the mortar was not between the blocks.

Q The mortar had come out of the blocks?

10 A It was a block cellar and after we had dug down to the foundation the first course of the blocks were about a half an inch and you could see right through the cellar, so at one corner of the cellar there was one of the blocks out and there was another block that was broken after we had dug down to the foundation walls. Now, on the outside of the walls there wasn't any mortar. It should have been placed on the outside and pitch put on it, but there wasn't any of that. It was just like the ordinary block.

20 Q Let me ask you, when you dug down into that foundation wall, did you observe whether those blocks were coated with any material at all? A There wasn't no coat on that at all, just the paint.

Q What did you find the condition of the cement blocks were in many places? A There was two blocks broken and one block out entirely in one corner; I don't recall the corner.

30 Q Was that a general condition that existed in the foundation walls? A Well, it was not a general condition. In some places the mortar between these blocks was out entirely; there wasn't any mortar at all. When you dug down you could look through several places in the cellar.

40 Q What was omitted from this foundation wall that should have been there to make it a good job? A When we dug down we put a half an inch coat of lime cement on the outside

James E. Wilson, direct.

and a coat of tar on the outside of that, and then covered it up.

Q Was that the same condition in the other house also? A Yes, sir.

Q What did you find there? A Well, we found the same condition in the other house; I don't know whether we found—there was only one block out of the two houses; I don't know which one it was now; I couldn't tell you; but there were two blocks broken in either one of the two walls. 10

Q When you came there was that cellar water tight or not? A No, it was not waterproof.

Q When you got through with it was the cellar waterproof? A We went back there two or three times after that and found no water.

Q You went back after rains? A Yes, sir, after heavy rains. 20

Q In order to make this repair were you or were you not obliged to have anything done to the sidewalk or walk around the house? A We had to tear up the walk.

Q Why? A To get at the foundation.

Q That was the only way to do it? A We put the walk down in November, 1924, and we done the walls in March, 1925. The walks were down from November until March and we tore them up and replaced them again after we fixed the walk. 30

Q In other words, the walks had to be ripped up to get to the foundation walls and do that job? A Yes, sir, there was two foot of sidewalk against the house all the way around the house.

Q What was the charge that was made by your company for this work? A I think it was \$664. 40

James E. Wilson, cross.

Q Do you consider that a reasonable charge?

A Yes, sir.

Q That is all the work you done? A That's all the work I did, yes, sir.

Cross examination by Mr. Keating.

10 Q Who was the contractor there with Tansey, was it Mr. Wilson or the National Company? A The National Company.

Q What was the principal business of the National Company? A General contracting, concrete work.

Q And trucking? A Trucking, yes.

Q Mostly trucking, wasn't it? A No.

20 Q What experience had you had previous to 1924 in the contracting business? A Well, we had been in the contracting game since 1921.

Q What experience have you had in all superintending since 1921? A Well, as I say, I had three years' experience.

Q Previous to that, you had no experience whatsoever in the contracting business? A None whatsoever.

30 Q You say that it was possible, when you had the side walls dug up, to look right into the cellar? A Yes, sir.

Q When you were looking out from the cellar couldn't you also see out? A Yes, sir.

Q Then it was possible for a man inside the building when he made an inspection to note that condition from the inside? A Yes, sir, it was.

40 Q It was in the spring of the year when you went there and the water was coming in? A Yes, sir.

James E. Wilson, cross.

Q Is the building located high and dry or in a valley? A High and dry on the side of a hill.

Q The hill slopes down and the house is located on the bottom of the hill? A No, at the middle of the hill; it is about 100 feet below the surface of Grove street.

10

Q It is 100 feet below? A Yes.

Q There is a drop of 100 feet coming down? A It is 100 feet from Grove street, Sixteenth avenue, to this building. I don't mean it is 100 feet below Grove street. The property where these two houses are is 100 feet on Sixteenth avenue below Grove street and I should say the street is about 500 feet long.

Q When you went up there to do that work was the street paved? A No.

20

Q Was it in good or poor condition? A It was a dirt street.

Q In the usual condition? A Usual condition. Our trucks went in there with material.

Q In making your repair work to the whole two houses all you found missing was one block out of the two houses? A Yes, sir.

Q And you found two broken blocks in the two houses? A Yes, sir.

30

Q From the experience you have had and the work you have done is it unusual to have a block broken after it is put in? A I have never done any mason work in blocks; I never laid any concrete blocks.

Q You have had no experience whatsoever in the block line? A No.

Q You say you put on a half an inch coat of cement? A Yes, sir.

Q And a coat of tar? A Yes, sir.

40

Daniel Glockner, Jr., direct.

Q You say there was a black paint on the blocks? A Yes, sir.

Q Did it show on the blocks or wasn't there some semblance of a coat of paint there? A No, just the asphalt paint.

10 Q Not a bit of cement was there? A No, sir.

DANIEL GLOCKNER, Jr., sworn in behalf of defendant.

Direct examination by Mr. Siegler.

Q Where do you live? A 342 Highland avenue.

20 Q Newark? A Yes, sir.

Q What is your business? A Contractor.

Q General? A Yes, sir.

Q Any particular branch, or just general contract work? A Mostly excavating at the present time.

Q Are you in the employ of the National Company? A Not any more.

Q Were you in March, 1925? A Yes, sir.

30 Q In what capacity? A Superintendent.

Q Do you know Mr. Tansey? A Yes, sir.

Q Did you do any work or supervise work up on Sixteenth avenue off Grove street on two of his properties? A I did.

Q What did you find there when you reached the premises? A I was sent there to lay the sidewalks and do the grading and during my time there I had occasion to go in the cellar and found considerable water on the floor.

40 Q You say that was when you laid the sidewalks? A Yes, sir.

Daniel Glockner, Jr., direct.

Q That was in November, 1924? A No, when I went there in the spring. There were walks to be laid when I went there which hadn't been done around the house, driveways had to be put in.

Q Then, you went back to look about the foundation walls, didn't you? A I was sent up to make an estimate on the cost of water-proofing the walls. 10

Q What did you find when you went up there to make that estimate? A Well, I found a very poor job of back fill on the walls for one thing, and there had been a coat of paint of some kind put on the wall, I wouldn't say pitch, some kind of black asphalt paint and a very poor job of plastering.

Q Did you examine the cement blocks? A The blocks were not properly laid, that is, they did not have enough mortar in between them and as Mr. Wilson stated before there was a block or two broken and one missing. 20

Q Were any blocks broken you could see from the inside to the outside of the building? A After we had opened up the trench you could see through them.

Q Did you make a trench alongside the foundation walls? A Yes, sir. 30

Q Did you make that in both houses? A Yes, sir.

Q When you made that did you find any defective work there? A Oh, yes.

Q Tell us in detail, or so the jury can tell what you found when you made the trench what you saw. A The conditions I found were just the same as Mr. Wilson stated before and the blocks he stated were broken, and we found this coat of paint of some kind on the wall, but I 40

Daniel Glockner, Jr., direct.

don't know whether it was pitch, and the blocks were not coated enough with mortar; that was the condition we found.

Q Well, now, is it necessary to coat the cement blocks with cement? A Well, they should be if you want to make an absolutely
10 waterproof job, they should be coated no less than a half an inch of cement and a coat of heavy pitch.

Q What would a coat of heavy pitch be; usually what thickness would that take? A Well, the pitch they used for waterproofing it is almost impossible to put it on less than one-eighth of an inch thick, because it has to be heated to at least 300 degrees to get it to run.

Q It was not there when you made your investigation? A No, it was a coat of paint,
20 but I wouldn't say it was pitch.

Q Was that condition the same in the other cellar? A Yes, sir.

Q What work did you do? A We did waterproofing; dug a trench around each house and put a coat of plaster on and went inside also and plastered up where there were blocks resting on the footing courses; back filled the
30 trenches and laid the walks.

Q Why did you have to break up the walks? A To put the trench down.

Q When you got through, in your opinion, was that cellar waterproof? A I think it was as dry as could be made.

Q Is \$664 a reasonable charge for the work done on those foundations and walls? A I think so.

Daniel Glockner, Jr., cross.

Cross examination by Mr. Keating.

Q You are not a boss contractor, are you?

A Yes, sir.

Q Were you a boss contractor at that time?

A Not at that time, no.

Q Do you know whether or not \$664 is a reasonable charge for a boss contractor to make at that time? A I made the estimate myself. 10

Q Yet, you were not a boss contractor?

A No.

Q You found a coat of pitch up there, or something you would not say was pitch, is that right? A I wouldn't say it was pitch.

Q Will you say it was not pitch? A Yes, I would say it was not.

Q It was not pitch? A Yes, sir.

Q What was it like? A It looked like a coat of black asphaltum paint to me. 20

Q What on that date was the difference in cost between asphalt paint and pitch, do you know? A I am not qualified to answer that question.

Q You do not know? A No.

Q Do you know whether it happened to be more or less? A I couldn't say that.

Q You put on the coat of mortar and you put on the coat of pitch one-eighth of an inch thick? A No. 30

Q Didn't you make it one-eighth of an inch thick? A No, I didn't put any pitch on.

Q What work did you do? You plastered up the sidewalls and put a coat of pitch on that? A You did not hear me say that.

Q You would say, would you, that was the only thing that could be done to make the cellar waterproof? A I didn't say it was the only thing to be done. I said we made it waterproof. 40

Daniel Glockner, Jr., cross.

Q When you say it was waterproof?

A Yes, sir.

Q When you say it was waterproofed, what do you mean? A I don't know what else I can say. When I say it was waterproof, that's all I can say, that it is waterproof, unless you want me to say that it was dry.

10

Q Would you say that it was in such condition that no water could get into it? A I would say that water could not seep through in any quantity. Of course, dampness might get through. After a heavy rain you could collect perhaps one or two cups of water, and I would not say a job was not waterproof under those conditions.

Q In other words, if it can seep through it is waterproof? A No, if it can seep through it is not waterproof, but if it is damp it is waterproof. Any wall will sweat.

20

Q Whereabouts did you relay those sidewalks? A Around each house.

Q Whereabouts? A From the back around to the front, on both sides of the house. I just forget now whether the walk was three feet wide; I think it was all the way around each house.

Q What was the distance between the foundation wall and the sidewalk? A I think about three feet.

30

Q I mean the inside side of the walk. A The inside of the walk, that is the side towards the house.

Q How far is that from the foundation wall? A That is against the foundation wall.

Q In what condition did you find those walks that had already been laid when you ripped them up? A They were in good condition, as far as I remember now.

40

James McCorkindale, direct.

Q You did not help to lay them originally, did you? A No.

Q You do not know what the condition was?
A I just told you that as far as I recollect they were in good condition.

10

JAMES McCORKINDALE, sworn in behalf of the defendant.

Direct examination by Mr. Siegler.

Q Where do you live? A 82 Willoughby street.

Q Newark? A Yes, sir.

Q What is your business? A Carpenter and builder.

20

Q Do you know Mr. Tansey? A Since I done his work I do.

Q Did you do any work for him on his property in Sixteenth avenue, in Irvington? A Yes, sir.

Q When did you do any work? A June 8th.

Q What year? A 1926.

Q What did you find when you went to these buildings? A I found the water coming in around the sills on the windows underneath and on the top.

30

Q The roof? A No, on the side of the house, all around through the side.

Q The side of the house? A Yes, sir.

Q You mean coming through into the apartments? A Yes, sir.

Q Did you examine the condition in each apartment? A I did.

Q What did you find; tell us. A I found the casing, inch and a quarter casing on the out- 4)

James McCorkindale, direct.

side, I found that gone about a quarter of an inch under some of them so I finally put molding underneath the window sills.

Q In how many apartments did you find that condition? A Pretty nearly every one of them.

10 Q Did you repair every one of those apartments so they would be watertight or air tight, or whatever you may term it? A Yes, sir.

Q What expense was that? A About \$85 to \$87.

Q Did you examine or inspect the roof or find any condition in the roof that was defective? A In the bathroom there was water coming down there and I took the roofer up there to flash the skylights.

20 Q Were the skylights flashed before that? A Well, they were flashed but there was a little leak around them.

Q Did you make a charge for that? A No, sir, Mr. Tansey paid for that, I had nothing to do with that; I took him up and showed him where it was.

30 Q What was the cause of the condition of these places along the side of the house you had repaired? A Well, the only fault I found was where it was done in a little opening and the water came in there.

Q Why did that condition exist; what was omitted there by the man who did it? A That I couldn't say; I don't know.

Q What should he have done to have that in such a condition that the air or water could not seep in? A He could have his sills locked tight.

40 Q If he had done that that condition would not have existed, would it? A No.

James McCorkindale, cross.

Q Did you examine the scuttle in the skylight? A Yes, sir.

Q Was there any trouble there? A I didn't see any trouble there.

Q You did not? A No.

Cross examination by Mr. Keating.

10

Q What did you say was flashed by the roofer? A The skylight on the roof.

Q When you made your examination up there and did your work it was in June, 1926, this past year, wasn't it? A Yes, sir.

Q Is that right? A Yes, sir, the 7th or 8th of June.

Q Around June? A Yes, sir.

Q If those buildings had been put up in the fall of 1924, isn't it possible that condition you found to exist, those spaces between the sills, could be caused by shrinkage? A Well, those sills were down considerably and they should have been nailed before the frames had set. 20

Q It is possible to have that condition exist through shrinkage? A Well, sometimes, yes.

Q When you examined the skylight you found that they had been flashed so there was a slight leak there, is that right? A There was. 30

Q You found they had originally been flashed? A Yes, they were flashed.

40

Joseph A. Luby, direct.

JOSEPH A. LUBY, sworn in behalf of defendant.

Direct examination by Mr. Siegler.

10 Q What is your business? A Interior decorator.

Q Do you know the premises of Mr. Tansey up on Sixteenth avenue? A I do.

20 Q Did you at his request make an inspection of the condition of the floors? A Well, it wasn't just his request; it was due to my doing some interior decorating there regarding walls and the tenants considered that I had in the contract in doing the decorating to do the floors; and I objected to doing them, so the tenants wanted me to do the floors and I told them I had nothing whatever to do with them.

Q Then, you asked Mr. Tansey about the floors? A I spoke to him about it.

Q Did you make an inspection of all the floors in those premises? A I did afterwards, yes, sir.

Q Are those floors finished and shellaced with varnish? A They are not.

30 Q What did you find the floors covered with?
A I couldn't say what they were covered with, but the floors received a coat of something; it was a coat of non-drying oil job because I could tell that.

Q What condition did you find the floors when you made your inspection? A I found the floors looked to me as if they had a coat of something of just oil over.

40 Q If they had received two coats of shellac what would the condition of those floors be? A
A first class job.

Joseph A. Luby, cross.

Q You could have discovered that condition by examination? A Anyone could.

Q What would be the cost to put those floors in that condition, to varnish and give two coats of shellac?

Mr. Keating: I object to this man answering that question unless he is qualified. 10

Q How long have you been a painter? A A little over twenty-five years or more.

Q What is the reasonable cost of shellacing those floors? A Well, I don't know what some one else would estimate.

Q What would you estimate? A My whole figure on the whole job, to do the job now and make a first class job, would cost him in both houses \$350. 20

Cross examination by Mr. Keating.

Q When did you make that examination? A Recently. I started there about September and just finished on the last day of the old year.

Q Less than a week ago A About a week ago.

Q Did you finish the job? A I finished the job. 30

Q It was through the insistence of the tenants that they wanted the floors done? A Yes, sir.

Q When you got in touch with Mr. Tansey he gave you the job? A He didn't give me the job; I didn't want the halls coming down; it was so bad he wanted it done before New Years to oblige one or two of the tenants, and I done that; that is outside of my contract. 40

Harry Justman, direct.

Q He will get a bill for that? A He will get a bill.

Q What kind of flooring was down? A It is pine flooring. I didn't just notice whether it was yellow pine; it is pine of some kind.

10 Q If those floors, pine, or whatever they might be, had received one coat of varnish and two coats of shellac, back in the year 1924, isn't it possible they would be in the condition they are today assuming they received usage with people walking in and out? A No, because those floors are practically bare, they haven't received any usage.

Q Aren't those apartments occupied? A No.

20 Q Never been occupied? A No, not all; only some.

Q How many flats have never been occupied? A You can easily see that, because I charged him extra for painting the front flats that were occupied. There were three flats in one house, and two in the other that had been occupied and I charged him extra for painting, the kitchen trimming there, and the other seven flats have never been occupied.

30

HARRY JUSTMAN, sworn in behalf of defendant.

Direct examination by Mr. Siegler.

Q What is your business? A Plumbing contractor.

40 Q Did you do any work up on Tansey's houses up on Sixteenth avenue? A Yes, sir.

Harry Justman, direct.

Q Did you examine those houses for shut-offs? A I found one in the cellar for each flat.

Q Did you find any shut-offs missing? A I found there were none in the flats.

Q Did you put them in the flats? A No.

Q What did you do? A I did some other 10
repair work in the flats and in the cellar.

Q You are sure there are no shut-offs in the flats? A No.

Q Did you see whether there was a sink in the cellar? A No.

Q Is there any connection for a sink in the cellar? A No.

Q Did you make any connections with the gas pipe? A Yes, sir.

Q Where? A In the cellar, the gas line we 20
ran over to the gas meters and I run them over there and spaced them out.

Q Did you get paid for that? A Yes, sir.

Q How much? A Mr. Tansey has the bill.

Q What would it cost to put those shut-offs in each apartment? First, how long have you been a plumber? A Do you mean contracting?

Q Altogether. A About twelve years. 30

Q How long have you been a contractor? A Two years.

Q What is the reasonable price to put those shut-offs in; what would you charge to put them in? A It all depends if you want to have the one shut-off for the entire flats, or separate shut-offs for each fixture. For each fixture or all the fixtures?

Q Each bathroom and kitchen to have a separate shut-off, what would it cost to install 40

Harry Justman, cross.

that? A At the present time about twenty to twenty-five dollars a flat.

Q Is that a reasonable price? A Yes, sir.

Q There are twelve flats, that would be \$240 for the shut-offs. Now, to put a cellar sink in, what would that cost, labor and materials?

10 A Well,—

Q Two sinks? A For two sinks?

Q Yes. A It would be at least \$150 for both.

Q Do you mean \$75 for each? A Yes, sir.

Q That would include the connections, labor and material? A Yes, sir.

Q What would it cost to install the water connections in the cellar and outside? A Hose connections?

20 Q Yes. A One for each cellar, or two?

Q One for each cellar. A That would be about \$15 for one connection in one house.

Q \$30 for two? A Yes, sir.

Q Does that mean the outside faucets? A Yes, sir.

Q Now, do you know what is necessary to do there to drain the airshaft and areaways? A Well,—

30 Q Did you examine it? A Well, I looked around but I didn't see any drains; there are no drains there.

Q There are no drains there? A No.

Q How does the water drain off? A You can't have any drains there according to the plumbing.

Cross examination by Mr. Keating.

40 Q You just gave us an estimate on cellar sinks, what was that, \$150? A For both, yes, sir.

Harry Justman, cross.

Q What kind of a sink would you furnish?
A Well, a plain sink, just a plain sink to take care of the ice box drains.

Q Would that include the ice box drains? A No.

Q \$75 for one iron sink? A Yes, sir.

Q Do you have reference to galvanized iron sinks? A There isn't much difference. 10

Q What would you charge him for a galvanized iron sink? A I think about a dollar and a half difference on a sink.

Q Just a dollar and a half difference on a sink? A Yes, sir.

Q That would be about \$73.50 for each sink? A Yes, sir.

Q A little black galvanized iron sink in the cellar, \$73.50? A Yes, sir. 20

Q When you made those gas connections the Public Service had already run the gas lines in the house? A Yes, sir.

Q And you knew where to put your gas line? A Yes, sir.

Q How long had the connections been there, do you know? A I don't know.

Q How long had the connections been there? A I say I don't know. 30

Q You made some mention a minute ago that the health code or the town code would not permit you to run a drain from the areaway to the sewer, what do you mean? A The plumbing ordinance in Irvington is against connecting any drains to the central sewer.

Q So, it would have been a violation if the plumber had done it? A Yes, sir.

Francis Rowe, direct.

Re-direct examination by Mr. Siegler.

Q About that sink, does that include your labor and your connections from the sink out to the main pipe? A It includes the material and the labor of installing.

10

FRANCIS ROWE, sworn in behalf of defendant.

Direct examination by Mr. Siegler.

Q Did you have anything to do with the taking care of the property of Mr. Tansey up on Sixteenth avenue? A Yes, sir.

20 Q What did you do there? A Shoveled water.

Q From when to when? A At all times with the exception after it had been fixed, since Mr. Wilson fixed it.

Q What connection did you have with that property? A I am looking after it.

Q You were Mr. Tansey's caretaker? A Yes, sir.

30 Q You lived on that property, didn't you? A No, I am there every day, Sundays and all.

Q You have been there since when? A Two years ago.

Q When the property first went up? A Yes, sir.

Q Did you observe any condition in the cellar after the foundation walls were up? A I had to put on rubber boots.

Q What for? A Walking around the cellar.

40 Q When was that? A At all times after it rained.

Francis Rowe, direct.

Q What was the condition of the building, I mean how far had it proceeded in its erection?

A Well, it was only about two months after the house was supposed to be completed.

Q When you went into the cellar you found what? A Water.

Q How deep was the water? A Well, I 10
had to have hip boots on.

Q Were you able to rent any of the apartments? A No, I could not, because the people came there and when they saw the cellar they would go away.

Q Were there separate heaters in that cellar? A Yes, sir.

Q Were they able to get to the heaters without getting wet? A No, we always had to have boots on. 20

Q When the prospective tenants came to look at the property and went to the cellar were you able to rent the property? A No, they said they wouldn't live in a wet cellar.

Q Did you observe the condition of the apartments with respect to the outside wall, was there anything you noticed there? A On the outside walls in the house?

Q Yes. A Under several windows there is a big wet mark down to the footboard and the casing on the floor and I marked them off with a lead pencil and had Mr. McCorkindale come in and fix them. 30

Q Could you see right through them? A In the cellar, yes.

Q What happened by reason of that condition in the apartments? A The water came in through them.

Q How about the snow? A The snow flew in, too. 40

Francis Rowe, direct.

Q Was that condition prevalent in all the apartments? A Yes, sir.

Q Was it that way since the time you went there two years ago? A Yes, sir.

Q Is it that way now? A No, only from the areaway and back cellar way it comes in every time it rains.

10 Q Did you notice the floors while you were there? A Yes, sir.

Q What was the trouble with the floors? A It wasn't shellaced.

Q Do you know anything about shellac? A I worked on passenger car work since 1887.

Q For whom? A Pennsylvania Railroad and the D. L. & W. Railroad.

Q Did you do any of that work there? A Upholstery and also that work, too.

20 Q Do you know whether these floors had two coats of shellac? A No.

Mr. Keating: I object.

Q Were you present when the Wilson Company through its employees made the repairs on the foundation? A Yes, sir.

Q Tell us what they did and what you saw after the work was in the process of being done?

30 A In the first place they had to tear boards and paper off the sidewalk on the top where the new sidewalk was laid around the houses, there was boards and paper there until they came there and had to break down the sidewalk to get into the foundation and after they got down there there were holes in the walls where the streams of water were running through there.

Q What was the condition of the blocks? A They were in bad shape, some of them.

40 Q What do you mean by "bad shape"? A You could see through some and the water was leaking through in some places.

Francis Rowe, cross.

Q How about the mortar between the blocks?

A I didn't see any.

Q Did you see any thick tar or pitch on the blocks? A No, it looked like black paint.

Q How about the blocks, were they all there?

A There were one or two broken in the corners.

10

Q Is that the same condition in the other house, too? A Yes, sir.

Cross examination by Mr. Keating.

Q As a matter of fact, you are not a mason, are you? A No, sir, I am not, I am an upholsterer.

Q An upholsterer? A Yes, sir.

Q You said a few minutes ago you did work for the Lackawanna and the Pennsylvania Railroad? A Yes, sir, upholstering.

20

Q In your duties there how did you have to use shellac and on what materials did you use it? A We used it a great deal for the Pennsylvania on every one of the passenger cars and on the doors and often times in our work we were doing chairs if they happened to strike them or bruise them we had to fix them up.

Q You never had occasion to use it in a dwelling? A I have in my own house.

30

Q You never had to use it in your business? A I done work at home, furniture work, too.

Q Have you ever had any experience with shellacing floors? A Yes, sir, my own floors.

Q As a business, have you ever had experience? A No, but at home. My business is an upholsterer.

Q You never had any occasion to shellac floors in your business? A Only as I say, platforms, trap doors.

40

Francis Rowe, cross.

Q When did you first visit these buildings?

A The day they started building the garages.

Q Can you give us the month or approximate time? A I think it was in November.

Q November, 1924? A Yes, sir.

10 Q When you visited the buildings in November, 1924, what condition did you find them in?

A I found water in the cellar then.

Q Were the buildings completed then or partially? A Yes, they were supposed to be then.

Q What part of November was this? A I think about the first part of November I was there.

Q When you went there you found the building practically completed? A Yes, sir.

20 Q Supposed to be completed? A Yes, sir.

Q Did you find water in the cellar? A Yes, sir.

Q Now, you said when people came to look at the place they would not rent the flats because there was water in the cellar, you had to put boards down to get around? A Yes, sir.

30 Q Before, you made some reference to the water being two to three feet deep? A I shoveled that out.

Q That is what would be left after you shoveled it out? A Yes, sir, you couldn't get it all out because the floor wasn't level and it would lay in pools in certain places.

40 Q Were you present in January when Mr. Deffur and Mr. Tansey, either December or January, when Mr. Deffur and Mr. Tansey went through the building? A I forget about it, I have seen both of them there; I have been there two years.

Francis Rowe, cross.

Q Do you ever remember seeing them going through without any rubbers on, walking in the cellar without getting their feet wet? A I know Mr. Deffur's men went in there to shovel the water out with me.

Q They were doing that to get things right?
A They couldn't work unless they did. 10

Q Were you in charge of renting that place for Mr. Tansey? A Yes, sir.

Q What condition was the street in in November, 1924? A Mud street.

Q Sixteenth avenue, in front of the houses?
A Yes, sir.

Q What condition? A A dirt street.

Q Was it in a muddy condition after rainstorms? A Like every other dirt street would be, always muddy. 20

Q In other words, in poor condition? A Yes, sir.

Q You have been there since the buildings have been erected? A Yes, sir.

Q How many flats have rented? A Five.

Q Seven of the flats never have been rented?
A Never, no one has been in them but me and the people I showed them to. 30

Q They were not rented, notwithstanding the fact the buildings are now fully completed and the cellars made right and the plumbing work all fixed up and the street is now paved with asphalt pavement? A Yes, sir.

Q Notwithstanding that, the people would not rent the flats now? A There is not such a demand today as there was then.

Q You are not a real estate man, are you?
A Not quite. 40

Francis Rowe, re-direct—re-cross.

Re-direct examination by Mr. Siegler.

Q Do you know anything about the roof?

A Yes, sir.

Q What have you observed about the roof?

10 A I got Mr. McCorkindale up. I have pails up there today around that areaway, the water still leaks in.

Q You say there was a demand away back when you started to go there? A Yes, sir, there were people there every day.

Q There isn't so much of a demand there now? A No, there is so many empty houses they don't have to go to a six-family house.

20 Q A lot of people know that property suffers from that condition? A Yes, sir, they all go away talking about it.

Re-cross examination by Mr. Keating.

Q When did the first flat rent? A September, 1925.

Q The second flat? A October.

Q The third flat? A October. Three in October and one in November.

30 Q From that day to this no other flat has been rented? A No.

Q Do you know when the Public Service put those gas connections in the house? A They were there as far as I know since I have been there; I know they worked on the street, but what they done I don't know.

40 Q Isn't it possible that some of the people who came to look at the flats and inquired as to the rents and all the other conditions were merely curious, as well as the prospective tenants? A That could be, yes.

Michael J. Tansey, direct.

Re-direct examination by Mr. Siegler.

Q You did not treat them as curiosity seekers? A No, sir, I approached every one to rent the place to them.

Q You had no exhibition for curiosity there, did you? A No.

10

Re-cross examination by Mr. Keating.

Q You hoped to have everyone a tenant there? A Yes, sir.

Mr. Siegler: Will your Honor permit me to recall Mr. Tansey to the stand. I omitted one or two things.

Mr. Keating: I have no objections.

The Court: You may.

20

MICHAEL J. TANSEY, defendant, recalled.

Direct examination by Mr. Siegler.

Q What was your arrangement with Mr. Deffur after this contract was made with respect to the payments from the building and loan, if any? A They should be paid according to the certificates of the committee of the building loan.

30

Q Did he accept his payments that were from building and loan checks? A Yes, sir.

Q What was the understanding between you and Mr. Deffur with respect to the apportionment of these payments on the contract?

Mr. Keating: I object unless the time and place is fixed.

40

Michael J. Tansey, cross.

A It was before he did any work at all, when we were executing the contract.

Q What was the arrangement? A The understanding was I had obtained the main loan from the West End Building and Loan and also obtained second mortgages to cover the difference and the arrangement was made that he was to respect the findings of the committees as to payments, notwithstanding the terms of the contract.

Q How about when a payment was made to him? A It was made as the two houses had progressed, as far as he would go, supposed to apply on either house.

Q In other words, every payment you made to him was half on one house and half on the other?

A That was our understanding. He was running them both up at once.

Cross examination by Mr. Keating.

Q I call your attention to paragraph 10 of the contract, which among other things provides "That neither the contractors nor the architects shall, without the written consent of the owner, have authority to vary, alter, amend, or change this contract, or any of the plans or specifications herein referred to." Did you have any written agreement with Mr. Deffur as to those changes?

A No, written agreement, except that he accepted the payment from the committees.

Q As a matter of fact, every payment he received was from you, notwithstanding the fact it may have been a building and loan check, and if it was a building and loan check it was endorsed by you? A No, he received \$34,000 from Levy & Fenster and he received only \$10,000 from me. Levy & Fenster drew them

Daniel A. Hopper, direct.

up and I endorsed them over to Deffur. The building and loan through Levy & Fenster— A checks to me and I endorsed them to Deffur. They were not sending out any checks unless the building and loan provided for it.

Q And as soon as you had procured the building and loan through Levy & Fenster— A You know I made application to the building and loan. 10

Q As soon as you had obtained a mortgage loan you used Levy & Fenster as your agent? A No, I did not, the building and loan did.

Q Did you have anything to do with it? A No, they said, "Levy & Fenster will take care of the legal details concerning the building and loan."

Q You had nothing to do as to who should pay the checks? A No, they told me. 20

Q Yet, you own the houses? A Yes.

DEFENDANT RESTS.

DANIEL A. HOPPER, recalled in behalf of plaintiff, in rebuttal.

Direct examination by Mr. Keating. 30

Q You were the architect of Mr. Tansey in this matter? A I am.

Q Have you a record of the dates you issued certificates, under this contract? A I have.

Q And the amounts for which you issued the certificates? A I have.

Q Will you let us have the dates and the amounts? A They are in my coat pocket.

Q Kindly get them. A I have them. 40

Daniel A. Hopper, direct.

Q Tell us the date when you issued the first certificate and the amount? A The first was on July 1, 1924, \$2,500 on No. 395 and 399.

Q The next certificate? A Was July 16, 1924, \$6,500.

Q Which house was that on? A The same
10 house.

Q The next certificate was issued? A The next certificate was issued on July 21, 1924, for \$2,500 on 399-408.

Q The next certificate was issued when? A The next certificate was issued August 12, 1924, \$8,000 on the first house.

Q The next certificate? A The next one was August 12, 1924, for \$6,500 on the second house.

Q The next one? A The next certificate was
20 October 1, 1924, \$8,000 on the second house.

Q The last certificate I have noted is the certificate on the second house on October 1st for \$8,000? A Yes.

Q What is the next certificate? A The next certificate was issued September 30, 1924, \$6,000 on the first house.

Mr. Siegler: Is that the next one, or the
30 one before the last one?

Witness: That is the last one.

Q (By the Court.) Is that the last certificate? A Yes, sir, on the first house.

Q What is that? A December 30, 1924, \$6,000 on the last house.

Q (By Mr. Keating.) Two certificates you issued on December 30th, were they intermediate certificates or the final certificates? A Final,
40 the last payment.

Daniel A. Hopper, direct.

Q When you issued the certificates were they returned to you? A No, I haven't seen them.

Q How long did you say you were an architect? A Nineteen years.

Q Actively engaged in the profession? A About fourteen years actively engaged. I have been in the business for longer than that, but I had a license for nineteen years. 10

Q How many hours a day and how many days a week did you visit these two houses when they were in the course of construction? A I would spend anywhere from an hour and an hour and a half at these houses and spend every day there including Saturdays.

Q Is it true, as Mr. Tansey testified, that you were only on the job on three or four occasions? A No, sir. 20

Q Were there any broken blocks put in the foundation walls, that you saw? A No, sir.

Q Was there a plastering coat of cement put on the foundation walls, from the footing courses up to the surface? A There was.

Q What was put on top of that, if anything? A A coat of tar.

Q By that you mean pitch? A Yes, sir.

Q It is the same? A Yes, sir. 30

Q Was there any asphalt or paint on it? A No.

Q You were there when that was done? A I was.

Q You know of your own personal knowledge it was done according to the plans and specifications? A I do.

Q Is it not possible for a house, built in that location, that is, a good grade of cement blocks building up the foundation, a good heavy coat of plaster cement on the sidewalls and one- 40

Daniel A. Hopper, direct.

eighth inch coat of tar and pitch on the outside, to leak? A Yes.

Q Is it possible to do that? A Yes, sir.

Q Is that the fault of anybody on the part of the contractor? A Not necessarily, no.

10 Q You are the architect who drew the specifications? A I am, yes.

Q What did you contemplate when you set forth this paragraph about waterproofing? A To waterproof the cellar.

Q By that you mean what? A I didn't guarantee a dry cellar.

Q You didn't guarantee a dry cellar? A No.

Q What did you mean should be done?

20 Mr. Siegler: I object to what he meant should be done.

The Court: Sustain the objection.

(Argument.)

Q There was no sink placed in the cellar, by the contractors, was there? A No.

Q Although it had been required in the contract? A Yes, sir.

30 Q Tell us why it was not placed there?

Mr. Siegler: I object.

The Court: I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

40 Q Tell us why it was not placed there? A Because there were no ice box drains; I didn't think there was any need of it.

Daniel A. Hopper, direct.

Q Did you instruct the contractor not to put it there? A I don't know whether I did, offhand, but I think I did.

Q So, you instructed the contractors not to put it there? A Yes, sir.

Q Did you inspect the sills and other portions of the carpenter work? A I did. 10

Q Did you find them to be laid in a purely workmanlike or good workmanlike manner? A In a good workmanlike manner.

Q Did you find any spaces in between the sills and the foundation? A I did not, no.

Q In your experience as an architect, if after a year and a half or two years there is a space of a quarter of an inch, could that not be caused by shrinkage? A It would, yes, sir.

Q When you made the first inspection of the foundation walls did you find any space where there was nothing in there, cement or cement blocks? A I did not. 20

Q How was the cellar job, good workmanlike manner? A Yes, sir.

Q When the roof was put on did you make an inspection there? A I did.

Q What did your inspection disclose? A I didn't see anything wrong with the roof.

Q Do you know whether or not the skylight had been flashed? A Yes, sir, it had. 30

Q Did you find it flashed? A I did.

Q Before you issued your final certificate did you make an inspection of the floors of the buildings? A I did.

Q Did you find that they had received one coat of varnish and two coats of shellac? A Yes, sir.

Q Taking the job as a whole, and considering your experience, was the job completed in a 40

Daniel A. Hopper, cross.

good and workmanlike manner in its entirety, or not? A It was, yes, sir.

Q And it was completed when? A I don't know, offhand. It must have been completed around the first of December or the middle of December.

10 Q That is previous to the time you issued your certificate? A Yes, sir.

Cross examination by Mr. Siegler.

Q The houses were good and workmanlike jobs except all the things you mentioned yesterday that were left out? A Yes, sir, some things that were left out.

20 Q Do you mean to tell me you had a right to issue the final certificate without a deduction on the contract price for the omission of two sinks that cost \$150 to put in? A Mr. Tansey said that everything was O. K.

Q I asked you whether you had a right to issue the final certificate without a deduction for the things you knew were missing? A No.

Q Then, why did you issue the final certificate to this man? A I had orders from Mr. Tansey to do so.

30 Q Were you the architect upon whose judgment this man was relying or were you taking orders from someone else? A Taking orders from Mr. Tansey.

Q If these houses had been half finished and Mr. Tansey wanted you to give out the final certificate would you have done so? A No, not if it was only half finished.

40 Q You said you saw this job on the foundation walls as they were being erected? A I did.

Daniel A. Hopper, cross.

Q Did you inspect that the same was as you inspected the exterior and interior faucets and water connections in the cellar, or did you assume this work was done right? A No, I did not.

Q You did not assume the work was done right? A No. 10

Q Did you see the pitch actually put on the foundation walls? A I did.

Q You saw the pitch on there? A With a brush and pail.

Q Did you ever see them put that on with a rag to get the required thickness? A They put it on with a mop.

Q Was your son supervising this building? A No, sir, he was not.

Q He would examine the buildings for you? A He was up there once or twice, that's all. 20

Q Did you send him there? A No.

Q How did you know he was there? A From what he said.

Q Who said? A My son.

Q What was he doing there? A Just looking around.

Q Did he bring you any reports? A No, he never brought me any reports.

Q Did you make any reports, or have you anything here now that refreshes your recollection that this work was done on the foundation walls? A I have notes here. 30

Q I mean, do you know about when you made your inspections? A Yes, sir. I have no record of when I was there.

Q What is there about those foundation walls that especially refreshes your recollection that they were covered with cement and pitch? A I was there at the time. 40

Peter Deffur, direct.

Q You were there at the time? A Yes, sir.

Q Were you there at the time when the jambs were put in on the apartments in there? Were you there when the jambs were put in every one of the apartments? A I was there off and on; I didn't live on the job.

10 *Re-direct examination by Mr. Keating.*

Q As a matter of fact you issued that final certificate, that was put in evidence yesterday, at the express authorization of Mr. Tansey? A Yes, sir.

Q Where was he when he gave you that authorization? A On the job.

Q Your duties on that job were merely to supervise the work as the architect? A Yes, sir.

20

PETER DEFFUR, sworn in behalf of the plaintiff, in rebuttal.

Direct examination by Mr. Keating.

Q You live where? A 36 Meadowbrook Road, Maplewood.

30

Q Are you one of the plaintiffs in this action? A Yes, sir.

Q What does the partnership of Deffur Brothers consist of; who are the partners? A William Deffur, Peter Deffur and Joseph Deffur.

Q What is your trade? A Plumber.

Q Did you do the plumbing work on this particular house? A I did with the men.

40 Q In other words— A Myself and the men.

Peter Deffur, direct.

Q Did you put in a drain from the areaway to the sewer? A No, sir, I did not.

Q Why didn't you? A Because we were not allowed to.

Q What would not allow you to? A The Board of Health would not allow you to connect any areaway or cellar drains with the sewers. 10

Q And if you had done that, it would have been a violation? A Yes, sir.

Q What would the result of that have been? A They would probably have revoked my license or fined me \$350.

Q Would they pass the job in that condition? A No, it would have to be taken out.

Q Did you put any faucets on the outside of the house? A No, sir, I did not.

Q That is one thing you omitted? A I 20 omitted that.

Q When you ran the gas line to the house was the Public Service gas connection in the building? A No, sir.

Q Did you know where the Public Service was going to run this line in? A I notified the Public Service and expected them to come there and give me a location where they were going to put the service, so I put my pipe in and the inspector up there O. K.'d every part of it. 30

Q Did you complete the gas line as called for in the specifications? A I did.

Q Did you fasten all the poles to the floor? A I did.

Q Tell me what quality of pipe you used in the furnaces for running the blind to the flue? A Standard quality, about 26 gauge furnace pipe.

Q Is that good quality? A That is the average quality. 40

Peter Deffur, direct.

Q When you set the furnace up did you rivet or bolt the two sections together? A I never do.

Q How do you fasten it? A They are made to push together the same as a stovepipe in any house; you push them together and leave them that way unless there is a big run; but when
10 there is a short run it is not necessary to fasten them.

Q Is one end of that pipe corrugated? A Yes, sir, to fit into the other end.

Q What was the distance, if you recall, of this run of pipe? A I judge the distance about eighteen inches from the center of the furnace pipe to the flue.

Q What did you use, two joints? A No, just an elbow and a short piece set in between.

Q How was the furnace set in the place, was it solid? A Very solid.
20

Q Was it set so that if you shook the grate the whole furnace would shake and the pipe fall down? A I don't see how it would be possible. The furnace weighs 800 pounds and fastened to a pipe on the top and two pipes on the bottom, I don't know how you could shake it.

Q When you completed running the gas line did you make an inspection of it yourself? A
30 Yes, sir.

Q Did you have the Public Service man inspect it, too? A Yes, sir.

Q He O. K.'d it and passed it? A He did.

Q Why didn't you put the shut-offs in the kitchens? A Because I brought that particular question to Mr. Tansey's attention and I told him that if I put the shut-offs in the kitchens and if the places were vacant at any time there would be water up as far as that shut-off and it would freeze, and I told him if I put it
40

Peter Deffur, direct.

in the cellar there would be no chance of water going up to the flats.

Q What did he say? A He said, "You know more about it than I do; I want a good job."

Q So, with that in mind you left them out?
A Yes, sir. I had one shut-off for each flat 10
in the cellar.

Q Why didn't you install the two galvanized iron sinks in the cellar as called for in the specifications? A Because the Board of Health rules are that the sinks can only be used for ice box drain purposes and they are very small sinks and if there is no ice box to be put there the people will sift ashes on it and cause trouble to the sewer.

Q That is one of the requirements of the 20
Health code of Irvington? A Yes, sir, the sink is made for ice box drains only.

Q In addition to that did you receive any directions from Mr. Hopper, the architect? A Yes, sir, I took it up with him and Mr. Hopper.

Q What did Mr. Hopper tell you to do? A I don't know just what he said. He said omit it, and I told Mr. Tansey.

Q He said omit what? A The sinks, be- 30
cause he didn't want to pay the cost of the installation of the icebox drains.

Q Did you do any other work on the job not called for in the plans and specifications to make an allowance to Mr. Tansey for the work you omitted? A Yes, sir.

Q What did you do? A I concealed the pipes inside, all exposed pipe. The pipe originally was to be exposed and run on the outside of the walls through the rooms and in those cases there is more or less breakage and I told him I 40

Peter Deffur, direct.

would conceal them and put them under the floor so they could not be seen.

Q That was in place of the sinks? A Yes, sir.

Q How many years have you been in the plumbing business? A Nineteen years.

10 Q Been in business for yourself how long?
A Close to fifteen years.

Q What is the reasonable charge for a galvanized iron sink as provided for in these specifications, taking not only the material but the time and labor to install it? A Right now, I should judge it would be worth \$25 to \$30 to install it.

Q That is furnishing the material, the sink and installation? A Yes, sir, the sink is worth
20 about \$1.50.

Q How do you make up the total of \$25 to \$30? A The labor, because if we put it in in the first place we could put the footing in the stake, but now we have to cut that stake, which would take additional time.

Q So, each sink is worth \$25 to \$30? A Yes, sir.

Q The omission of one sink in each house is a total of \$50 to \$60? A Yes, sir.

30 Q Mr. Tansey, or one of his witnesses, made some reference to the sewer being clogged up twice, can you tell us what the cause of that was? A No, I cannot. The sewer was not clogged up when I was there and I was there twice after we left.

Q When did you complete the plumbing work on your contract? A Some time towards the last of December.

40 Q When you completed your job was your sewer in then? A No.

Peter Deffur, direct.

Q When did the sewer come in? A After December, sometime in January; I believe the sewer was the first brought in.

Q Who had the sewer put in? A I believe Mr. Tansey had to see that the sewer was put in.

Q Was that part of your duties? A No.

Q Did you run the sewer line from the interior of the house outside the foundation walls? 10

A I did.

Q When did you do that? A Sometime around July or August.

Q To connect the sewer line you ran it outside the foundation walls to the city sewer in the street? A The contractor who puts the sewer in the street does that, somebody outside of us.

Q Was it within your province to connect that sewer? A No, sir. 20

Q Was it up to you to see the outlet was opened? A Our end of the outlet was open. The town comes along and hooks to it and if they are there before we are we connect to the sewer.

Q Did you have any work up on the roof? A No, sir.

Q What work did you do there? A Just the flash pipe we put on the roof. 30

Q Did you flash the skylight? A No.

Q You did not do that? A No.

Q When did you complete your work there and leave the building? A I believe sometime in December, 1924.

Q When you left the building were any keys in the keyholes? A I believe so. We unlocked and locked every door as we went through.

Q Was there any necessity for Mr. Tansey to have keys made? A Probably there was. 40

Peter Deffur, cross.

I don't know who opened them after we left, from the date we left. I am sure every key of every door we went through had keys, because every door was locked to keep it from slamming.

Q While you were working on the job, were any tools, materials, keys stolen from the job?

10 A Yes, sir.

Q Were they taken by yourself or your brothers or by any of your employees or third persons, to your knowledge? A Not by any one employed by us or by us.

Cross examination by Mr. Siegler.

Q There was plenty of water in that cellar while you were working there? A Yes, there was a little.

20 Q You had to wear boots sometimes? A No.

Q You have shovelled it out? A I have shovelled some water out.

Q You did not pay much attention to that, did you? A What is that?

Q I say you did not pay much attention to the quantity of water in that cellar? A I told them to shovel it out.

30 Q Did you pay any attention to whether or not you could grade it? A What is that? There is nothing to grade.

Q When you got your final payment did you call the attention of the architect to all these things that were missing you speag of? A There was nothing missing except the hose pieces on the outside of the house.

40 Q There were two sinks missing, weren't there? A That was considered long before the final certificate.

Peter Deffur, cross.

Q According to you now, they were worth \$50, weren't they? A Yes, sir.

Q You say the cost of the sink was \$1.50?
A At the time I would have put the sinks in the cost would have been about \$5, because it was in the routine work.

Q What do you mean by a dollar and a half? 10
A At the time while I was working, a dollar and a half or two dollars.

Q What do sinks cost now? A A dollar and a half, galvanized sinks.

Q And the labor costs \$27.50? A Yes, sir, or thereabouts.

Q That is the comparison between the cost of material and the cost of labor? A I don't understand.

Q That is the difference between the work? 20
A Yes, sir.

Q \$27.50 takes up quite some labor, doesn't it? A No, it does not, not in that case.

Q These shut-offs, did you notify the architect about those shut-offs, that they were missing in the apartments before you got your final certificate? A These shut-offs are generally in the cellar, or that shut-off.

Q Did you notify the architect about the shut-offs in the apartments? A I made the adjustment, certainly, and talked to Mr. Tansey and the architect. 30

Q When the architect gave you the final certificate he knew the shut-offs were missing?
A I don't know. That was a thing that came up in the line of work and it was called to his attention and he probably said, "Omit it."

Q As far as you know you did not know they were missing? A I couldn't say. He probably can answer that. 40

Joseph Deffur, direct.

JOSEPH DEFFUR, sworn in behalf of the plaintiffs, in rebuttal.

Direct examination by Mr. Keating.

10 Q You are a member of the partnership of Deffur Brothers? A Yes, sir.

Q You are one of the plaintiffs in this action? A Yes, sir.

Q What part of the work do you do in the firm of Deffur Brothers? A I do all the mason work.

Q You are a mason by trade? A A mason by trade, yes, sir.

Q How long have you been a mason? A Eight or nine years.

20 Q Did you do all the mason work on these two houses, on Sixteenth avenue? A Not exactly all of it, no.

Q What portion of it did you do? A Well, I superintend my part of it; the men done the actual work.

Q As far as you did the work, with the assistance of helpers—

Mr. Siegler: No, he did not say that.

30 Q Did you do the work with the assistance of helpers? A Yes, sir.

Q Did you run in the foundation to the footing courses? A Yes, sir.

Q Describe to us in detail how you laid the footing courses and the sidewalls, the plaster coat you put on the sidewalls, and the coat of tar and pitch you put on that, and how you did it? A You mean you want a full explanation?

40 Q Yes, and whether or not it is possible to have a space between the footing courses and

Joseph Deffur, direct.

the blocks where there won't be anything but air.

A In the first place you dig the footing courses according to the specifications and fill it with concrete according to the specification, and then you lay your course of block on top of that. After you get that up there, everything is properly done in a workmanlike way, and the chances are there will be something overlooked, but everything is overcome after it is finally inspected by most of the men on the job. You go along and have to have the foundation up to grade height and put a coat of cement plaster on the outside, and that is allowed to set on there until it is thoroughly dry so you can apply the hot coat of tar on it, which was performed on that particular job. After that is completed you fill the foundation up.

Q How did you apply the tar or pitch? A The tar or pitch is applied with a mop; the pitch is heated and then it is applied with a mop.

Q What did you put on the foundations of these two houses? A Tar.

Q Or did you put some kind of asphalt paint? A I bought it as tar. I don't know what it was; it acted like tar. I am no judge of tar, but from all my experience it is cement or tar we tar the foundations with.

Q You have had eight years' experience? A Yes, sir.

Q When you had completed the foundation and before you had filled it in did you made an inspection to see whether it was done according to the plans and specifications? A Yes, sir, we always do, and if there is anything wrong the man who sees it notifies me so it might be fixed.

Joseph Deffur, direct.

Q Who made the inspection up there? A Personally, I made the first inspection and secondly the architect and the owner made the next.

Q Were any objections raised at that time?

A No, sir, absolutely not.

10 Q When were those inspections made? A Some time in July, I think.

Q July, 1924? A Yes, sir.

Q Did you ever tell Mr. Tansey he would have a water-tight cellar and no water in there?

A Not that I remember.

Mr. Siegler: We do not contend that he did.

20 Q Did you build the areaway? A Yes, sir, I did.

Q Was it built according to the plans and specifications and in a good and workmanlike manner? A It was.

Q Do you know whether the rain came in the areaway? A Naturally it would, there is no roof on it.

30 Q Do you know whether any provision had been made to take care of that rain? A Since that time?

Q No, under the contract. A No.

Q Was there anything that you could do or any builder or general contractor could do to alleviate that situation? A Nothing outside of putting a drain in the areaway, if there was somewhere to run the drain to.

Q That could not be done or connected to the sewer, because the city would not let you? A That was explained before.

40 Q Did you put the cellar bottom in these houses? A Yes, sir.

Joseph Deffur, cross.

Q What kind of a cellar bottom did you put there? A Well, I put, I think, if I recall right, three or four inches of cinder concrete, according to the mixture of the specifications, including sand and then I think an inch top coat on top of that.

Q Is that the usual way of laying a cellar bottom? A That is the customary cellar bottom, yes, sir. 10

Q Did you ever make an inspection of the sidewalks that were laid around on the side of that house? A Well, I don't know, but at the time we done the job we were just about finishing up there and it was very cold weather at that time.

Q As soon as they were laid and before they were laid, did you make an inspection of the work? A I happened to be about there that past spring and the sidewalks were all scaled on top. 20

Q From your experience what would that indicate? A I know if I had done the job I would have had to take it up or forfeit the price of it.

Q What would it indicate? A It would indicate that the frost had gotten ahold of the cement and froze it. 30

Q In what condition were the walks? A Naturally, rough.

Q Poor condition? A The foundation was probably all right, but the top surface was rough.

Cross examination by Mr. Siegler.

Q You did not do the work there yourself, did you? A What work do you mean?

Q The laying of the foundations. A Yes, sir, part of it. 40

Joseph Deffur, cross.

Q Did you actually work on it or supervise it? A I actually worked on it.

Q Most of the time you were either supervising or away from the job on some other job?

A Not as far as the foundation was concerned; it only took a few days to build the foundation.

10 Q Did you personally put on the cement? A Yes, sir, I put part of that on.

Q Did you put on the tar? A No.

Q Yourself? A No, it was too dirty a job.

Q Did you see the blocks laid? A I laid blocks there myself.

Q What did you use to lay the blocks? A What I used, mortar, cement mortar.

Q Was there any reason why that should fall out after a short time? A It couldn't fall out.

20 Q Suppose water was coming through, would that effect the cement mortar in the block? A If the water came through?

Q Yes. A It would naturally come through if there was no cement there.

Q If that condition existed that would affect the mortar and cement between the blocks, wouldn't it? A No, I couldn't say that.

Q The water got in there some way, didn't it?

30 A Water will go through cement.

Q It won't go through? A It will go through.

Q You paid no attention to putting it in such shape so that the water wouldn't go through?

A What do you mean, the foundation as a whole?

Q Yes. A Only what the specifications called for, to put a coat of plaster on the outside and a coat of tar.

40 Q If the specifications provided any such condition that permitted the water to go through

Joseph Deffur, re-direct.

just as if mortar or cement was not there, that did not concern you at all? A I don't get your point.

Q I mean, if the specifications provided in such form that the water could go through as if there was nothing there, you were not concerned about that? A That is part of the owner and architect's business. 10

Q You were not supposed to make that cellar waterproof at all? A Only to the extent the specifications called for.

Q Only to the extent the water could come in there as freely as if it was not there? A If it did not specify that I wouldn't have to put it there.

Q Do you mean to tell me that you put a coat of cement over the walls for the purpose of having the water come in? What was the idea of putting a coat of cement and mortar on those blocks? A The idea was to keep the water from going through. 20

Q What was the idea of putting pitch and tar on there? A To keep the water from going through the wall.

Q When the water came through the wall it indicated that it was not put on properly and had to be done in some other way? A Not necessarily. 30

Q What did it indicate to you if the water could come through there after you put this on. That it was waterproofed? A Why, yes, absolutely.

Re-direct examination by Mr. Keating.

Q The specifications, under the heading of "Waterproofing" provide that "All foundation walls below the ground to have a coat of hot 40

William Deffur, direct.

coal tar pitch over a coat of Portland cement mortar, as specified under 'Foundations,' the waterproofing to be to the grade line.' Did you do what is called for in those specifications? A Absolutely, I done that.

10 Q As these specifications are drawn do they guarantee a dry cellar? A They do not.

Mr. Siegler: I object.

Q (By the Court.) Did you see this plaster spread on the foundation walls? A I helped put it there.

Q Did you see the tar put on it? A Yes, sir.

20 Q How did you do it? A The man heats a big vat of pitch and doles it out with a dole and works it around the foundations and swabs it on.

Q What did they do on this job? A That is what he done on this job.

WILLIAM DEFFUR, recalled in behalf of plaintiffs, in rebuttal.

30 *Direct examination by Mr. Keating.*

Q You are in charge of the actual construction of Deffur Brothers? A I am.

Q You did the carpenter work? A I did.

Q You heard testimony put in the case that the sills were not properly set with the result that there were places a quarter of an inch or so in between them? A I did.

40 Q Tell us whether or not you set them properly and whether there was any spaces when you

William Deffur, direct.

set them and completed the work? A There is a possibility of spaces arising in the course of a year, or a year and a half, due to shrinkage.

Q When you completed your work were the sills properly set, or were there spaces then existing? A No, there was not.

Q How much time did you spend on this particular job? A Every day from 8 o'clock until 4:30 with the exception of the time I had to go to see Mr. Tansey. 10

Q Do you know whether or not the floors received two coats of shellac and one coat of varnish? A They did.

Q Did you put it there yourself? A No, I did not.

Q Did you see the painter put it there? A I did.

Q Did he put it there under your supervision? A Absolutely. 20

Q When you had a conversation with Mr. Tansey did you inform him that he would have a watertight cellar? A I done nothing of the kind. I told Mr. Tansey from the beginning that the cellar was in very bad shape that there was drains running in that ground, and that he would have more or less trouble with that.

Q You informed him of that when you started? A In the beginning. 30

Q This contract is dated May 28, 1924. Can you tell me when you commenced work up there? A Probably ten days later.

Q Can you tell me why the ten days' delay? A I think we waited for the survey.

Q You waited for the survey so you could Tansey's delay in getting the survey? A Yes, sir.

Q Whose duty was it to get that survey? A Mr. Tansey's. 40

William Deffur, direct.

Q You were delayed about ten days by Mr. Tansey's delay in getting the survey? A Yes, sir, about that.

Q When was the first building, 395-399 completed? A On or about the first day of December.

10 Q When you say "completed" you mean it was completed with the exception of the galvanized sink which the architect— A They had an understanding as to that there was a substitution there for something.

Q The outside hose connections were omitted by accident? A Yes, sir.

Q What other things were then uncompleted? A Nothing, to my knowledge.

Q Tell us on what date you received payments from Mr. Tansey? A I certainly will; 20 I have a statement here of the payments made.

Q Let us have the dates and the amounts. A July 12, 1924, \$2,500.

Q Next. A July 23rd, \$2,000; July 25th, 30 \$2,640; July 30th, \$2,500. August 5th, \$840; August 18th, \$1,000; August 20th, \$8,640; September 9th—that \$8,640 was all the payments we had on each house, one payment of \$6,000 and another payment of \$2,640. September 19th there was a payment of \$2,000 and a payment of \$3,000. September 27th, \$1,000. October 18th, \$6,000; October 31st, \$3,000. November 15th, \$150; November 20th, \$380. December 31st, \$5,000. January 30th, 1925, \$3,000.

Q That leaves a balance of how much due on the contract and work order? A \$2,650.

Q When you received the certificates from the architect what did you do with the certificates? A Gave them to Mr. Tansey.

Q You received one certificate from him on 40 July 1st? A Yes, sir.

William Deffur, direct.

Q What did you do with that one? A Brought it to Mr. Tansey's office.

Q Did you give it to him? A I did. Upon receiving the check I would turn over the certificate and sign it.

Q There was a certificate issued July 16th. What happened to that? A I believe I had that in two or three payments, I don't recall how many payments were made on that. 10

Q Did you give it to Mr. Tansey eventually? A Eventually, yes sir.

Q A certificate of \$2,500 issued July 31st? A Mr. Tansey had it.

Q A certificate for \$6,500 on August 12th? A Mr. Tansey has that.

At 1 o'clock P. M., the Court takes a recess for one hour. 20

AFTER RECESS.

WILLIAM DEFFUR, resumes the stand in behalf of the plaintiff, in rebuttal.

Direct examination (continued) by Mr. Keating. 30

Q Did you receive a final certificate from the architect on the first house located at 395-397?

Mr. Siegler: That has already been testified to.

The Court: I think it has. This is rebuttal.

Q What did you do with that certificate? A I presented it to Mr. Tansey for payment. 40

William Deffur, direct.

Q What happened? A He paid me and he has the certificate.

Q That is as to the first house? A As to No. 395-399.

Q Now, you received the final certificate as to 399-401, that is the second house, didn't you?

10 A I did.

Q You presented that for payment? A Partly.

Q What date did you receive payment on account of the final certificate? A January 30, 1925.

Q That is one month after the issuance of the final certificate you received payment on account? A Right.

20 Q How much was the payment? A I haven't the record here.

The Court: You told us \$3,000.

A I received \$3,000 payment, but I don't know what the certificate called for.

Q Did Mr. Tansey give you any reason for not paying the balance? A None whatever.

Q Did he make any objection to the condition the building was in? A No, he did not.

30 Q Did Mr. Tansey make his payments regularly and as soon as the architect's certificates were presented to him for payment? A He did not.

40 Q Can you tell us when he did not make payments regularly and how much he was in default on account of the contract? A The payments were to be made, four payments each house and the records showed he made it in seventeen payments, from two weeks to a month, six weeks beyond the time.

William Deffur, cross.

Q Can you give us some idea as to what amount he was in arrears? A One payment called for \$8,000; that is, the second or third payment called for \$8,000, I believe and I received \$2,120.

Q Leaving you how much in arrears? A \$5,880. 10

Q Any other instance? A On the second certificate, which was issued, I believe, on the 16th of July, I received on the 23rd of July \$2,000 on account.

Q Leaving a balance of what? A \$4,500.

Q Any other instance along those lines? A I haven't separated them here as to just how they come out.

Q Without going into detail and being specific, as a general thing was Mr. Tansey paid up, keeping his payments up there, or was he in arrears? A He was not, he was always in arrears to the extent of three or four thousand dollars on every payment, from three, to four, to five, to six weeks. 20

Q Did you carry him along as best you could? A I did.

Q Did you have any difficulties as the result of his default? A I did, I had to borrow money on account of his default, of which I informed him of. 30

Cross examination by Mr. Siegler.

Q You took the money and kept on going just the same, didn't you? A To the best of our ability, yes, sir.

Q You knew the money was coming in from the building and loan funds, the major part of it? A The major part of it, no, I don't know 40

William Deffur, cross.

anything of the kind; I know he had a mortgage on the premises.

Q Didn't you go to Levy & Fenster constantly to get your checks? A No, sir, I went to Mr. Tansey.

Q That was the building and loan checks? A
10 That may be.

Q You knew he told you constantly the money was coming from the building and loan and would be paid according to the report of the building and loan? A Mr. Tansey told me constantly the money was waiting for me when my certificates were issued.

Q You knew the committee of the building and loan were up there at various intervals to inspect the property, you knew that. You
20 knew they were up there to make inspections from time to time? A I knew that.

Q You knew you got your checks from the building and loan? A I got my checks from Mr. Tansey.

Q They were building and loan checks endorsed to you? A That is true.

Q You knew that was based on the committee's report? A True.

Q You were not embarrassed at all about
30 that, were you? A They were considerably in arrears.

Q I know, but you never considered the arrangements made under this contract for payments after you knew where the money was coming from? A Absolutely.

Q Why didn't you quit after the first payment? A I threatened to quit on several occasions and he gave me an additional sum of
40 money to go along.

William Deffur, cross.

Q Did you send him a notice that you wanted to quit? A I went there in person.

Q I say did you send him a notice of your intention to quit? A No, I called on him.

Q It seems to me that you were getting money pretty regularly, here, July 12th, \$2,500; July 23rd, \$2,000. When did you go to work on this job? A About May 1st or thereabouts, May 10th. 10

Q What is the date of your first certificate? A You have it down there.

Q July 3rd. How much was that for? The date of the first certificate is July 3rd, is that right? A I haven't it here. Mr. Tansey, have you it?

Q July 1, 1924, and you got paid \$2,500 on that? A On July 12th.

Q You got paid right along, July 23rd, July 30th, August 5th, August 15th, 20th, is that right? A True. 20

Q You were getting money very regularly? A There was a \$2,000 payroll due every week.

Q You did not insist on terms when you accepted this money? A I tried to do the best I could to help everyone along.

Q You went right ahead, didn't you? A Absolutely, to the best of our ability. 30

Q There was no interruption of the work on account of that? A Yes, sir, there was; I laid off some help because I didn't have funds to carry them on.

Q When? A Towards the end of the job.

Q When? A September and October, along in there.

Q I see on September 29th you got two checks, one for \$2,000 and one for \$3,000? A True.

Q You did not have to lay off any help on that account? A That doesn't cover my ma- 40

William Deffur, cross.

terial bills. October 1st the material bills come in there.

Q August 20th you got \$8,640? A September 1st the bills came in for material.

Q On August 20th when you got the \$8,640, there was no occasion to lay off any help then?

10 A Why not?

Q I don't know why not. A I can tell you why not, after you pay the material bills there is nothing left.

Q On September 9th you got \$2,000? A True.

Q On September 23rd you got \$3,000? A True.

Q October 18th you got \$6,000? A Probably I did.

Q That did not stop you from going ahead?

20 A This did not all pay the labor. There is material to be considered in this. The material bills are the major item in the contract.

Q Up until September 9th I figure out you got close on to \$26,000? A Probably I did.

Q You were within three months of completion then, is that right? A I don't know.

Q Your contract was for \$46,000? A Yes, sir.

30 Q You got almost over half of that by September 27th? A Yes, sir.

Q You were within three months of completion. How could you possibly be prejudiced by these payments not being on time? A Because I laid off some of the help during the period the money was not forthcoming.

Q Wasn't it because you were running short on other jobs? A No, I was doing no other jobs at that time.

40 Q You say the sinks were an oversight? A Not the sinks, I didn't say that.

William Deffur, re-direct.

Q What was? A The hose bits on the exterior of the house.

Q When you got the notice of March 7th from Mr. Tansey that was not an oversight? A No.

Q You never went back to try and fix it up? A We were reasonable. We gave him an allowance for that. 10

Q You gave him an allowance for that? A We have spoken of that before.

Q Did Mr. Tansey tell you that the last payment of January 7th, \$3,000 he was going to withhold that money until you made good these things you overlooked and for the loss of rent if you did not complete the buildings? A No, Mr. Tansey would have paid the full amount of money out of that money if he had had it, but he was short of funds in the building and loan. 20

Q Didn't you know, as a matter of fact, that there was over \$2,000 in the building and loan for that year, and Mr. Tansey just collected that a little while ago? A No, I do not.

Re-direct examination by Mr. Keating.

Q Your contract provided for the first payment when the foundation walls were completed and already for the frame work, \$2,500? A That's right. 30

Q The second payment of \$6,500 when the building is enclosed? A Yes, sir.

Q The third payment when the rough plumbing, heating and electrical wiring is in and the scratch coat of plaster is on and all exterior carpenter work is completed, \$8,000? A Right.

Q And the fourth payment to be made ten days after the completion of the work, \$6,000? A Right. 40

Michael J. Tansey, direct.

Q This contract did not provide for payment in dribs and drabs, did it? A No, sir.

Q Did you ever abrogate this section of this agreement providing when payment should be made? A No, I did not.

10 Q Did you ever enter into another agreement with Mr. Tansey that you would regard this contract as a scrap of paper and rely on the building and loan to take your payments when you got them? A I absolutely did not, I considered that contract binding on both of us.

Q Then you received your final certificate on September 30th, 1924? A That's right.

Q And you received a three-day notice to go back and finish up those minor details in March, 1925? A That's right.

20 Q Why didn't you go back in March and finish them up? A There was nothing to be finished because the job was considered closed on December 30th. Mr. Tansey had made a payment on top of that, a part payment on the final certificate.

Q And he had accepted the final certificate on the first house? A He had accepted the final certificate on the first house and paid it.

30

PLAINTIFFS REST.

MICHAEL J. TANSEY, defendant, recalled in rebuttal.

Direct examination by Mr. Siegler.

40 Q It has been testified here that you substituted or made arrangements whereby you

Michael J. Tansey, direct.

waived installation of the sinks for some other work on the property? A I did not.

Q Did you waive the installation of any of the faucets or the shut-offs? A I did not, the matter was never brought to my attention by those people.

Q Did you tell Mr. Deffur that the reason why you did not pay the balance of this money on January 30th was because you did not have it? A I did not. 10

Q And that all the money from the building and loan was already received by you? A I did not.

Q Is that a fact? A That is not a fact.

Q Was there any money in the building loan on January 30th? A The building loan held the \$2,000 until last June, 1926; that was for the express purpose of taking care of these matters left over. I told Mr. Deffur at that time he would have to dry the cellar out and take care of the other details like varnishing the floors before he would ever get a cent. I also told him I was losing my rent on account of this matter and would look to him for any reimbursement. 20

Q What happened to this \$2,000? 30

Mr. Keating: I object to that as not material.

Q The money was there any way until last June? A They asked me to take it off their hands.

Mr. Keating: I object to this witness answering questions outside of the scope of the question put. 40

Michael J. Tansey, cross.

Q Did you have a conversation with Mr. Deffur on June 30th, 1925, when you gave him \$3,000, that everything was all right in that building and that you could not pay him any more? A I did not, I told him—

10 Q What did you say to him? A I told him about the cellar, the sidewalk, and other differences, and that I would insist upon his standing by his arrangements, which was a dry cellar, and of course, he fell back on his own statement, "I have my certificate".

Q Did Mr. Deffur ever tell you that he was going to quit the job or threaten that if you did not pay him according to the terms of that contract? A Never. In order to meet his certificates I myself paid the money in advance of the building and loan committee going up there so he would not be inconvenienced in any way, and he never mentioned to me at any time that he was inconvenienced. He was satisfied to meet with the committees and report progress.

20 Q Did he meet with the committees? A He got very substantial payments right along.

Cross examination by Mr. Keating.

30 Q You know that your contract with Deffur Brothers provided for four payments? A I don't dispute that.

Q You got substantial payments. You paid him \$2,500 on July 12th? A Yes.

Q \$2,000 on July 23rd? A Yes.

40 Q \$2,640 on July 25th. \$2,500 on July 30th. \$840 on August 5th. \$1,000 on August 18th. Were those payments in accordance with the contract? A I think so, because he was only entitled to \$2,500 on the first payment when the foundation walls were completed and he hadn't

M. Francis Keating, direct.

much more than that (done when we gave him that. He always hollered ahead of time, before his money was due, and he got it. I took very great pains to have that property financed before I undertook it at all.

DEFENDANT RESTS.

10

M. FRANCIS KEATING, sworn in behalf of plaintiffs, in surrebuttal.

(Questions and answers by Mr. Keating.)

Q Did you ever meet with Mr. Tansey in reference to this matter and discuss the waterproofing of the cellar with him? A I did.

Q When and where did the meeting take place? A At Mr. Tansey's office at 164 Market street, in September, 1925. 20

Mr. Siegler: I object to this. I do not think this is rebuttal or surrebuttal.

The Court: You know you must contradict him about something he said in a conversation.

A (Continuing). Mr. Tansey informed me that the cellar had been waterproofed the second time by Mr. Wilson and notwithstanding Mr. Wilson's work that the cellar was in such poor condition then, in September, 1925, that the water still poured in the cellar and it was not waterproof. 30

PLAINTIFFS REST.

DEFENDANT RESTS.

Mr. Siegler sums up for the defendant. 40
Mr. Keating sums up for the plaintiffs.

Exhibits.

Notice.

Defendant's Exhibit D. 1.

MESSRS. WILLIAM, PETER and JOSEPH
DEFFUR, Trading as Deffur Brothers, Hil-
ton, New Jersey.

10

GENTLEMEN:

You are hereby notified and required to provide a sufficiency of materials and workmen to complete your contract for the construction of six family dwelling at 395-399 Sixteenth Avenue, Irvington, New Jersey, in the following particulars, namely:—

1. Cement the foundation walls below the ground with a coat of Portland Cement mortar as specified under "Foundations," and cover with a coat of hot coal tar pitch over said Portland Cement mortar.
2. Make the roof on house water tight.
3. Install water connections in the cellar and outside.
4. Install water faucet on the exterior of the house.
5. Establish separate shutoff in the bath-rooms and kitchens.
6. Establish sink in the cellar.
7. Drain the air-shafts and areaways.

30

In the event that you don't furnish such materials and workmen for the completion of the above particulars, on or before March 11th, 1925, I shall provide such materials and workmen to finish the said works and shall deduct the expense thereof from the amount of the contract.

40

Exhibits.

Sills on window
Concrete walks—\$78—

Respectfully yours,

MICHAEL J. TANSEY,
Owner.

Dated: March 7th, 1925.

10

Notice.**Defendant's Exhibit D. 1.**

MESSRS. WILLIAM, PETER and JOSEPH
DEFFUR, Trading as Deffur Brothers, Ir-
vington, New Jersey.

GENTLEMEN:

20

You are hereby notified and required to pro-
vide a sufficiency of materials and workmen to
complete your contract for the construction of
six family dwelling at 399-401 Sixteenth Ave-
nue, Irvington, New Jersey, in the following
particulars, namely:—

1. Cement the foundation walls below the
ground with a coat of Portland Cement mortar
as specified under "Foundations," and cover
with a coat of hot coal tar pitch over said Port-
land Cement mortar.

30

2. Install water connections in the cellar and
outside.

3. Install water faucet on the exterior of the
house.

5. Establish separate shutoff in the bath-
rooms and kitchens.

6. Establish sink in the cellar.

7. Drain the air-shafts and areaways.

40

Exhibits.

In the event that you don't furnish such materials and workmen for the completion of the above particulars, on or before March 11th, 1925, I shall provide such materials and workmen to finish the said works and shall deduct the expense thereof from the amount of the
10 contract.

Respectfully yours,

MICHAEL J. TANSEY,
Owner.

Dated: March 7th, 1925.

20

30

40

Charge to Jury.

CHARGE TO JURY.

The Court charges the jury as follows:

MOUNTAIN, J.:

This is an action by a builder against the owner of property upon which two houses were built. It is an action primarily based on contract. The only thing that bound these parties together is that contract. When they affixed their names to that contract they each assumed certain liabilities; up to that point they were contractually as far apart as the poles. As soon as their signatures were affixed they each had certain obligations to perform. So, to start with, naturally, and in an orderly way, we begin by examination of the contract. It consisted, if I may so express it, of two parts, a contract and to it, affixed, specifications. Generally speaking, the contract between the plaintiff and the defendant provided that the plaintiff should build houses at 399 to 403 Sixteenth avenue, Irvington, New Jersey; two houses we were told. Daniel A. Hopper was nominated as the architect. The price as I understand it was \$46,000 and the manner in which the payments were to be made and the approval of the architect obtained was set forth in that contract. The specifications, of course, indicated how the carpenter work, plumbing work, mason work, and so forth, should be done; specifications drawn by the architect for the guidance of the builder.

Under this agreement \$46,000 was supposed to have been paid by the defendant. The plaintiffs claim that they substantially performed the contract and that there is a balance of \$2,650 due them on the contract. That the defendant admits, but insists that that admission

10

20

30

40

Charge to Jury.

is qualified by a counter-claim filed by him indicating that the amount I have mentioned would have been due if the contract had been properly done. This counter-claim is his defense as well as his counter effort to recover from the plaintiffs in part or all of this amount of money as you may find due to him, if any, because of certain defects in the performance of the contract.

10

Let us go back again to this contract, which is so important. The burden of proof is upon the plaintiff to prove by the greater weight of the evidence that he is entitled to the amount of damages he asks for. The burden of proof is upon the defendant to prove the allegations of his counter-claim which I shall refer to in a moment.

20

We find each of the parties arrayed like two combatants, one claiming as I say, a balance due or alleged to be due on the contract and the other claiming what it alleges it is entitled to because of the way the work was done. Ordinarily, when a man builds a house he seeks the assistance of an architect because the average man with his business is too occupied and too unskilful in that art to attempt to build it himself; he wants somebody to help him and he gets an architect as his agent and ordinarily after the architect has satisfied him with plans and specifications the architect then advertises for bids. The architect usually watches the house as it progresses, insists on it being built properly—or should, if he follows out his obligation under the duty which he owes to his principal—indicates when the payments are due to the builder under the contract and does so by issuing certificates. It is not an uncommon mistake for one of us who is not familiar with the

30

40

Charge to Jury.

skill provided to build any edifice, when the contract is drawn, to take a form provided by some obliging printer who prints these contracts in large quantities, and assume that because it is printed it is all right, and then, after this form of printing has been bought for a few cents from the printer and filled in the architect attaches his specifications. Now, as in this case the specifications and the contract are not in natural conciliation, then how are you going to read the two? It has been assumed throughout this case and was assumed by me until I retired to my chambers that when the architect signed one of these certificates, except for fraud or palpable mistake, it was conclusive, and that the owner did not have much to say, but when you read this contract and read the plans and specifications you may find that the owner had considerably more to say, than, perhaps, we would have imagined as the case developed, and I will show you what I mean. The printed contract between these men nominated, as I said, D. A. Hopper, to be the architect, he was the man who represented Mr. Tansey. Mr. Tansey was a lawyer, not a builder. What power did Hopper have? Well, whatever power he had was given to him by the terms of the contract and it provides that to this contract should be annexed the drawings and specifications of this architect and that the work should be done in a good, workmanlike and substantial manner, under the direction of the architect, to be testified to by a writing or certificate under his hand; these certificates to be delivered, of course, as the work progressed, in accordance with the terms of the contract. If we stop there, it might be assumed that that almost

10

20

30

40

Charge to Jury.

made the architect's certificate final, in the absence, as I say, of palpable mistake or fraud, but the first provision in this same contract from which I have been reading says (referring to the payments and their times of payment as the work progresses), "That in each of the
10 said cases a certificate shall be produced signed by the said architect to the effect that the work is done in accordance with said drawings and specifications; said certificates, in no way lessening the total and final responsibility of the contractors, neither shall it exempt the contractors from liability to replace work when it is afterwards discovered to have been done not in accord with the drawings or specifications either in execution or material," and while I am talking
20 about the contract, I am going to turn right over to the specifications. Following that idea as to how much authority this architect had to bind Mr. Tansey, because that is a question of fact I am going to leave to you, we find that the specifications to which these parties agreed, provided that, "All working materials to be the best of their several kinds subject to the approval of the owner." Does that look as though the owner had relinquished all his
30 rights to question whether or not the working materials were proper or whether he had not? The very last paragraph on that page says, "Said work to be wholly under the control of the owner unless other arrangements are made." Now, at once you see that you are presented with these, as I say, printed specifications, or printed contracts, evidently drawn up without any idea of the specifications and the specifications apparently attached to them in the hope that the two of them would make a contract.
40 The reason I bring that up is this: What is

Charge to Jury.

the measure of damages to which the plaintiff is entitled? The plaintiff, if you find the contract has been substantially complied with (and I think you will remember the contract as I recall it was for \$46,000), the plaintiff can recover the contract price less a fair allowance to the owner to make good the defects in the performance. Ordinarily, in a contract where the architect is given the power to decide as to the character of the work and where he fully represents the owner and is the *alter ego* of the owner, where he takes the place of the owner and where the owner has no control over the architect, as being a principal in the background, the certificate of the architect under such circumstances must be furnished before payment can be obtained by a contractor, or its production must be accounted for, or it must be waived. What is the effect in that instance of a certificate by the architect? You see you can picture the situation of the average owner, knowing nothing about a building and turning to the architect and saying to the architect, "Now, I want you to plan this building, superintend this building and represent me in doing it. If I went to the building I wouldn't know how to tell this builder what to do and I wouldn't know if he did things right, and I might not know if he did them wrong. I ask you to decide when the contractor should receive his payments, and I will pay them. Your information to me that it is due must be by a certificate in writing." That is the thing I refer to. What is the effect of that certificate which, if provided for, must be produced, accounted for or the production waived. The effect of that certificate is this, that in the absence of fraud or of palpable

10

20

30

40

Charge to Jury.

mistake on the part of an architect in the giving of certificates required by the architect it is conclusive upon the owner and binds him. Of course, an architect must give an honest decision. Now, that is the case where the architect fully represents the owner, where the owner had
10 turned over to the architect the entire affair and has practically left himself without anything to do but make the payments. In that instance when the contractor comes to the owner with a certificate the owner has to pay the money on that certificate; that certificate is conclusive, but what happens when you find a contract in which the owner does not strip himself entirely of such authority? Well, perhaps, that is best answered by reading a case, or the syllabus
20 of a case which is worded more concisely than I could do it. "The parties to a building contract are legally bound by a provision that the decision of the architect shall be final and conclusive, subject, however, to the implied condition that the decision shall be an honest one." Now, in view of the reservation in the contract which is manifested by this first provision that the architect should give this certificate, said
30 certificate in no way lessening the total and final responsibility of the contractors, or exempting the contractors from liability to replace work if it should be afterwards discovered to have been done ill or not in accordance with the drawings or specifications either in execution or material, I am going to leave it to you to decide what in the exercise of fair and reasonable judgment, the owner and architect should have approved and accepted. By that I mean that the decision of both had to be honest even
40 although these certificates were given under this

Charge to Jury.

contract because the parties had agreed to it. If subsequently, it was found the work was done improperly or not in accordance with the drawings and specifications, then the defendant should have an allowance for those defects.

The plaintiff, as I say, claims that the work was done in a substantial manner, except for one or two little items, one I think was the hose connection outside the house and for some other small matter which for the moment escapes my memory. A great deal of the time has been occupied with the testimony as to the counter-claim. The defendant, Mr. Tansey, alleges that there were twelve apartments; that these were supposed to have been completed by the terms of the contract on October 4, 1924. That he lost ten months' rent; that the rent of the apartments on the first floor were \$50 and on the second and third floor was \$55. I understood that all the rent was not lost for that time. There was testimony that each building brought in \$300 a month. Mr. Tansey alleges further that the waterproofing of the cellar was improperly done and the testimony, as I recall it, indicates that after the excavation was made concrete block was used as a foundation set upon a footing course and the specifications required that after this concrete building block was erected to its proper height, a coat of plaster or cement was to be applied to the outside, and on that was to be made a hot application of tar pitch. The plaintiffs allege they did that. Mr. Tansey said they did not do it, and what was done was not done in a workmanlike manner; that one of the blocks was entirely missing and I think two of them were broken and that the cement which was supposed

10

20

30

40

Charge to Jury.

to have been between the blocks in many cases was absent, and that the water flowed through. That an examination of the outside showed a black substance of some kind, and inferentially I think he denies that the kind of tar and pitch was used that was provided for in the specifications. The plaintiffs aver that it was. He claims he was put to an expense of \$550 because he had to tar that all up and rewaterproof the outside and had to take up 416 feet of sidewalk which cost him \$104 because he was unable to get to the side of the concrete foundation without moving the sidewalk which ran closely around the house. Then he claimed, if I understood him, and if I am in error of any statements I make, you will take your own recollection of the testimony and not mine, because you are the arbiters of all questions of facts—that it would cost \$30 to have installed a water connection and \$31.50, if I remember rightly, to install the faucets outside, and there was an estimate given that it would cost \$240 to establish separate shut-offs in the bathroom and kitchen. There were certain sinks it is admitted were left out of the cellar, two of them I think. The estimates as to the sinks, except the cost of installation, ran from \$50 to \$60 dollars apiece to \$75 apiece. Then, there is a claim that the drain of the air shaft and areaways were not properly put in by the plaintiff. I think there is no mention of that in the specifications, but, however, there might be, and you can ascertain by examining them. I even think that there was testimony that that was not there. If the plaintiffs, of course, were not required to drain the areaway or the air-shaft, why they did not have to do it. The

Charge to Jury.

specifications, among other things, provide that what the contractor did, should be done in accordance with the ordinance of the town. The defendant alleged that the floors were not finished properly and it would have cost \$350 to have done that; that it would have cost \$18.50 to have supplied keys; \$15 to repair the leaks in the pipes and \$5 to supply gas meter supports and connections. I have not added up the amount of the counter-claim because there is a variance of figures and that is for you to determine. 10

The plaintiffs allege, as I recall it, that the floor was properly laid and properly treated in accordance with the contract after it was put down, that the requisite amount of shellac was furnished in accordance with the contract. This is denied by the defendant. The plaintiffs contend that they left the keys there. 20

Practically speaking, when you retire to the juryroom you are faced with the claim of the plaintiff admittedly \$2,650 on the one side of the ledger and the claim of the defendant detailed to the best of my recollection, but which must be decided by you, on the other side of the ledger for adjustment. 30

I have been asked to charge you on behalf of the plaintiff a number of requests. Some of these will save me the trouble of quoting any more law.

The first request I refuse to charge, not because it does not state a general proposition of law, which I have already charged, but because of the fact I think it is for the jury to decide under the contract and specifications, and particularly those parts to which I have called 40

Charge to Jury.

their attention as to the character of the acceptance of the defendant, and that of course includes the character of the work done whether the defendant should have accepted it. I think that is a jury question.

10 The same applies to the second, which I will deny. The third request I will deny. I will charge the fourth with some qualification. I will read the entire request first.

20 4. "While a certificate of an architect may be attacked for fraud or mistake, you are bound to accept it as fixing the obligation of the defendant, unless there is evidence before you of fraud or mistake. And a mistake which will be sufficient to vitiate such certificate must be a substantial mistake, involving more than mere trifling matters, as the law takes no notice of trifles." That is the general law, but it is modified to some extent as I said in this case by the fact it is for you to decide in view of the clauses in the contract and in the specifications as to the character of the work, the effect of the decision of the architect, the effect of the decision of the owner; all of those things in view of the written agreements between the parties become factors in the case. You might
30 find as a matter of fact that the architect's certificate was conclusive on the other hand, you may find, in view of the provisions I have read that it was not conclusive, but only a factor to be regarded by you.

The fifth and sixth I will deny. The seventh I will charge.

40 7. "An owner may waive the time for performance, or extend it. Such waiver or extension may be express or implied. If you find that notwithstanding that the contract work was

Charge to Jury.

not done within the contract, and you also find that the defendant made a payment on account of the final payment called for by the architect's certificate on the house involved in plaintiffs' claim, which payment was made after the issuance of such certificate, you may find that the defendant waived performance within the contract time." 10

The eighth I will charge.

8. "If you find that there was an extension of time to perform, such extension fixing no time to perform, such extension was for a reasonable time."

The ninth, tenth, eleventh, twelfth and thirteenth and fourteenth I will deny.

I will charge the fifteenth.

15. "You may not consider any items claimed by defendant to be faulty or not done, which were not called for by the contract, notwithstanding there may be evidence of such items before you; nor may you consider any items called for by the contract, and not testified to." 20

I will charge the sixteenth.

16. "If you find that the alleged loss of rentals, claimed by defendant, may have been due to causes other than the acts or omissions of plaintiffs, in that case, such alleged loss of rentals is speculative, remote, and not proximately due to plaintiffs' alleged breach of contract, and defendant is not entitled to recover therefor." 30

And the seventeenth.

17. "If you find that the completion of the buildings was delayed through the failure of Mr. Tansey to make timely payments according

Plaintiffs' Requests to Charge.

to the contract, then he can not now complain of such delay and recover damages therefor."

[The jury retires.]

Mr. Keating: I respectfully pray an exception to your Honor's refusal to charge the first,
10 second and third requests of the plaintiff.

Exception noted as ground of appeal.

Mr. Keating: I respectfully pray an exception to your Honor's qualification of my fourth request.

Exception noted as ground of appeal.

Mr. Keating: I respectfully pray an exception to the refusal of your Honor to charge the fifth, sixth, ninth, tenth, eleventh, twelfth and
20 fourteenth requests of the plaintiff.

Exception noted as ground of appeal.

Mr. Siegler: I respectfully pray an exception to your Honor's charging the seventh, eighth, fifteenth, sixteenth and seventeenth requests of the plaintiff.

Exception noted as ground of appeal.

The plaintiffs request the Court to charge the jury as follows:

- 30 1. The contract involved in this case, names Daniel A. Hopper as the architect, and contains a provision that payments will be made as specified in the contract, "provided that in each of said cases a certificate shall be produced, signed by the said architect to the effect that the work is done in accordance with said drawings and specifications." If you find that such a certificate was given to the plaintiffs by the architect employed in this case, as to the house involved in
40 plaintiff's claim, and that it conformed to the

Plaintiffs' Requests to Charge.

contract requirements, it is final and conclusive, and binds the defendant unless it were procured by fraud or through mistake. Denied.

2. If it appears from the evidence that the parties agreed that payments should be made in accordance with a certificate issued by said architect, both parties are bound by said agreement, and the issuance thereof fixes the liability of the defendant to pay the amount called for in such certificate. Denied

3. The issuance of such a certificate as a final certificate is conclusive evidence that the work has been done in accordance with the plans and specifications which are made a part of the contract. Denied.

4. While a certificate of an architect may be attacked for fraud or mistake, you are bound to accept it as fixing the obligation of the defendant, unless there is evidence before you of fraud or mistake. And a mistake which will be sufficient to violate such certificate must be a substantial mistake, involving more than mere trifling matters, as the law takes no notice of trifles. Charged.

5. There are two houses involved in defendant's counter-claim, one of which is the subject of plaintiffs' claim. The architect was the agent of the defendant, and if you find from the evidence that the defendant was present and authorized the architect to issue the final certificate, calling for the final payment, on the house involved in plaintiffs' claim, you will find that defendant accepted the work, and is liable for the amount remaining unpaid, with interest. Denied.

6. If you find that there was delay in performing the agreement within the stipulated

Plaintiffs' Requests to Charge.

time, and also that there was delay in making the stipulated payments, the delay in the time of performance is excused by the delay in such payments. Denied.

10 7. An owner may waive the time for performance, or extend it. Such waiver or extension may be express or implied. If you find that notwithstanding that the contract work was not done within the contract, and you also find that the defendant made a payment on account of the final payment called for by the architect's certificate on the house involved in plaintiffs' claim, which payment was made after the issuance of such certificate, you may find that the defendant waived performance within the contract time. Charged.

20 8. If you find that there was an extension of time to perform, such extension fixing no time to perform, such extension was for a reasonable time. Charged.

9. If you find there was a part payment by a defendant after the delayed completion of the building, such payment operated as a waiver of the delayed completion. Denied.

30 10. As I have already charged, the architect was the agent of the defendant, and it was his duty to supervise the work, and to object to faulty work or material, and to demand its correction. If he failed to do so, and nevertheless issued his final certificate, the owner cannot now go behind the certificate and repudiate the acts of his agent. Denied.

40 11. There are two houses involved in this action. If it appears from the evidence that full payment was made on one of said houses, you will find that as to such house, defendant

Plaintiffs' Requests to Charge.

has accepted performance, and cannot recover on his counter-claim. Denied.

12. If you find that defendant paid the full contract price on one of the houses, and a part of the final installment on the other, after the issuance of final architect's certificates in both cases, you will find that such payments are evidence of a full acceptance of the work and a waiver of full and strict performance of the contract at the time specified. Denied. 10

13. If you find that the plaintiffs have substantially performed their contract, they are entitled to recover the full contract price, less such reasonable reduction as will compensate the defendant for fully completing the contract. Denied.

14. It was the duty of the defendant, if he claimed faulty or non-performance by the plaintiffs, to minimize their damages as much as possible; and if you find that as to one house, a three-day notice to complete was given to plaintiffs on _____, 1924, and as to the other, such a notice was given on _____, 1925, after the issuance of the architect's final certificate, and that the defendant took no steps to complete the houses until June, 1925, you may find that the interval between the giving of notice, and undertaking completion, was reasonable, and that the defendant did not perform his duty to plaintiffs, and may not recover on his counter-claim, for any part of his alleged damages due to such failure to perform his duty. Denied. 20 30

15. You may not consider any items claimed by defendant to be faulty or not done, which were not called for by the contract, notwith- 40

Plaintiffs' Requests to Charge.

standing there may be evidence of such items before you; nor may you consider any items called for by the contract, and not testified to.

Charged.

10 16. If you find that the alleged loss of rentals claimed by defendant may have been due to causes other than the acts or omissions of plaintiffs, in that case, such alleged loss of rentals is speculative, remote, and not proximately due to plaintiffs' alleged breach of contract, and defendant is not entitled to recover therefor.

Charged.

20 17. If you find that the completion of the buildings was delayed through the failure of Mr. Tansey to make timely payments according to the contract, then he cannot now complain of such delay and recover damages therefor.

Charged.

30

40

*Exhibit D. 1.***EXHIBIT D. 1.**

STATE OF NEW JERSEY
 Board of Tenement House Supervision
 972 Broad Street
 Newark, N. J.

March 17th, 1925. 10

C-13244

Referring to tenement house
 395-97—16th Ave., Irvington, N. J.

Mr. Michael J. Tansey,
 612-14 So. Belmont Ave.,
 Newark, N. J.

Dear Sir:

Your attention is called to the fact that the
 above-mentioned tenement house, of which you
 are reported to be the owner, does not conform
 to the provisions of the Tenement House Act in
 the following particulars: 20

Par 138

Floor of cellar and vent shaft must be made dry;
 about 1" of water still remains in places.

If you do not understand the requirements of
 the Tenement House Act, an abstract of which
 is printed on the reverse side of this notice, or if
 you desire any information to help you to com-
 ply with the Law, please call at this office and
 bring this notice with you. 30

Another inspection of these premises will be
 made in about Thirty Days from the date of
 this notice, and you are requested to have the
 above violations removed before said inspection
 is made.

Yours very truly,

T
 A-30

C. Ray Swain, 40
 Secretary.

Exhibit D. 1.

TENEMENT HOUSE ACT

Abstract of Paragraphs Nos. 2, 50, 122, 123, 138,
144, 161, 164, 166, 170 and 171

10 Par. 2. A tenement house is any house or building or portion thereof which is rented, leased, let or hired out to be occupied or is occupied as the home or residence of three families or more, living independently of each other, and doing their cooking upon the premises.

Par. 50. A metal-covered scuttle must be placed in the roof and the space between the ceiling and such scuttle must be completely enclosed. A securely fastened iron ladder must extend from the floor to the scuttle.

20 Par. 122. No room shall be used for living purposes unless such room shall have, (1) a window opening to the street, or (2) a window opening to a yard not less than four feet deep, or (3) a window opening to an uncovered court or shaft of twenty-five square feet in area, or (4) a sash window, three feet by five feet, in the partition between such room and a room in which there is a window opening to the street or to a yard at least four feet deep. If it is not possible to place a window three feet by five feet, in the
30 partition between rooms, a window having a glazed area of twelve square feet will be accepted. An alcove opening, in addition to door openings, may be accepted as the equivalent of a partition window.

40 Par. 123. If a public hall in a tenement house, four stories or more in height, is not sufficiently lighted in the daytime, all doors opening from rooms into such hall must be provided with panels containing five square feet of translucent glass, or a fixed sash window containing five

Exhibit D. 1.

square feet of translucent glass must be placed in the partition separating such hall from a room having a window opening to the street, a yard or court. A hall may also be lighted in the daytime by a window at the end of the hall opening to the street, yard or court.

Par. 138. Every tenement house must be kept clean and free from dirt, filth, garbage or other matter. The yards, courts, passages, areas, alleys, rooms, stairs, floors, windows, walls, ceilings, water closets, hall, and cellar must be kept in good condition at all times. 10

Par. 144. Every tenement house must be maintained in good repair. All rain water must be drained away from the building so as to prevent dampness in the walls, ceilings, yards, courts or areas. 20

Par. 161. At least one water closet must be provided for the use of each two families. 20

Par. 164. If a sewer connection is possible, all privy vaults, school sinks, cesspools or other similar receptacles for fecal matter, urine or sewage must be completely removed and the places, where they were located, disinfected and filled in with clean earth.

Par. 166. All enclosures around water closet bowls must be completely removed and the floor under and around the bowls kept clean. 30

Par. 170. Every tenement house, located on a street in which water mains are laid, must be properly connected to such mains and must have at least one sink located directly within each apartment.

Par. 171. Every sink must be of durable non-absorbent material, must be supported on legs of similar material, and must not be enclosed in any way. 40

Exhibit D. 1.

BOARD OF
TENEMENT HOUSE SUPERVISION
of New Jersey
972 Broad Street
Newark, N. J.

10 NOTICE TO REMOVE VIOLATION

In every tenement house now existing or hereafter erected a proper light shall be kept burning by the owner, in the public hallways, near the stairs, upon the entrance floor; and in every tenement house, over two stories high, such a light shall also be kept burning upon the second floor above the entrance floor of such house every night throughout the entire year, and upon all other floors of such tenement house from sunset each day until ten o'clock each evening.

20 All Violators of This Law Will Be
Subject to a Fine of \$100.

30

40

*Exhibit D. 1.***EXHIBIT D. 1.**

STATE OF NEW JERSEY
 Board of Tenement House Supervision
 972 Broad Street
 Newark, N. J.

March 17th, 1925. 10

C-13245

Referring to tenement house
 399-401—16th Ave., Irvington, N. J.

Mr. Michael J. Tansey,
 612-14 So. Belmont Ave.,
 Newark, N. J.

Dear Sir:

Your attention is called to the fact that the
 above-mentioned tenement house, of which you
 are reported to be the owner, does not conform
 to the provisions of the Tenement House Act in
 the following particulars: 20

Par 138

Floor of cellar and vent shaft must be made dry;
 about 1½" of water still remains in places.

If you do not understand the requirements of
 the Tenement House Act, an abstract of which
 is printed on the reverse side of this notice, or if
 you desire any information to help you to com-
 ply with the Law, please call at this office and
 bring this notice with you. 30

Another inspection of these premises will be
 made in about Thirty Days from the date of
 this notice, and you are requested to have the
 above violations removed before said inspection
 is made.

Yours very truly,

T
 A-30

C. Ray Swain, 40
 Secretary.

Exhibit D. 1.

TENEMENT HOUSE ACT

Abstract of Paragraphs Nos. 2, 50, 122, 123, 138,
144, 161, 164, 166, 170 and 171

10 Par. 2. A tenement house is any house or building or portion thereof which is rented, leased, let or hired out to be occupied or is occupied as the home or residence of three families or more, living independently of each other, and doing their cooking upon the premises.

Par. 50. A metal-covered scuttle must be placed in the roof and the space between the ceiling and such scuttle must be completely enclosed. A securely fastened iron ladder must extend from the floor to the scuttle.

20 Par. 122. No room shall be used for living purposes unless such room shall have, (1) a window opening to the street, or (2) a window opening to a yard not less than four feet deep, or (3) a window opening to an uncovered court or shaft of twenty-five square feet in area, or (4) a sash window, three feet by five feet, in the partition between such room and a room in which there is a window opening to the street or to a yard at least four feet deep. If it is not possible to place a window three feet by five feet, in the
30 partition between rooms, a window having a glazed area of twelve square feet will be accepted. An alcove opening, in addition to door openings, may be accepted as the equivalent of a partition window.

40 Par. 123. If a public hall in a tenement house, four stories or more in height, is not sufficiently lighted in the daytime, all doors opening from rooms into such hall must be provided with panels containing five square feet of translucent glass, or a fixed sash window containing five

Exhibit D. 1.

square feet of translucent glass must be placed in the partition separating such hall from a room having a window opening to the street, a yard or court. A hall may also be lighted in the daytime by a window at the end of the hall opening to the street, yard or court.

Par. 138. Every tenement house must be kept clean and free from dirt, filth, garbage or other matter. The yards, courts, passages, areas, alleys, rooms, stairs, floors, windows, walls, ceilings, water closets, hall, and cellar must be kept in good condition at all times. 10

Par. 144. Every tenement house must be maintained in good repair. All rain water must be drained away from the building so as to prevent dampness in the walls, ceilings, yards, courts or areas. 20

Par. 161. At least one water closet must be provided for the use of each two families.

Par. 164. If a sewer connection is possible, all privy vaults, school sinks, cesspools or other similar receptacles for fecal matter, urine or sewage must be completely removed and the places, where they were located, disinfected and filled in with clean earth.

Par. 166. All enclosures around water closet bowls must be completely removed and the floor under and around the bowls kept clean. 30

Par. 170. Every tenement house, located on a street in which water mains are laid, must be properly connected to such mains and must have at least one sink located directly within each apartment.

Par. 171. Every sink must be of durable non-absorbent material, must be supported on legs of similar material, and must not be enclosed in any way. 40

Exhibit D. 1.

BOARD OF
TENEMENT HOUSE SUPERVISION
of New Jersey
972 Broad Street
Newark, N. J.

10

NOTICE TO REMOVE VIOLATION

20

In every tenement house now existing or hereafter erected a proper light shall be kept burning by the owner, in the public hallways, near the stairs, upon the entrance floor; and in every tenement house, over two stories high, such a light shall also be kept burning upon the second floor above the entrance floor of such house every night throughout the entire year, and upon all other floors of such tenement house from sunset each day until ten o'clock each evening.

All Violators of This Law Will Be
Subject to a Fine of \$100.

30

40

OPINION OF SUPREME COURT.

Filed November 25, 1927.

NEW JERSEY SUPREME COURT.

#73 May Term, 1927.

WILLIAM DEFFUR, JOSEPH DEFFUR and PETER DEFFUR, partners trading as Deffur Brothers,
Plaintiffs-Respondents,

vs.

MICHAEL J. TANSEY,
Defendant-Appellant.

10

20

Submitted May Term 1927. Decided November , 1927.

On appeal from Essex Circuit Court.

For Appellant: Kraemer & Siegler.

For Respondents: M. Francis Keating.

Before Gummere, Chief Justice, and Justices Black and Lloyd.

PER CURIAM:

30

This was an action for a balance claimed to be due for the construction of houses at Irvington. The defendant was the owner of ground on 16th avenue on which he wanted to have constructed two six-family houses and he entered into a contract with the plaintiffs for their erection. The contract called for the completion of one on October 1st and the other on October 15th. The case went to the jury under instructions which in part consisted of affirmance of certain

40

Opinion of Supreme Court.

requests submitted by the plaintiffs. There was a verdict for the plaintiffs for \$1800, being a little more than one-half of their claim. From the consequent judgment the defendant appeals assigning as grounds for reversal that the trial judge erred in charging certain requests submitted by the plaintiffs.

The defense in the case consisted of a counterclaim for delay in completion, and for certain defects in performance of the contract.

The requests which were charged are as follows:

7. "An owner may waive the time for performance, or extend it. Such waiver or extension, may be express or implied. If you find that notwithstanding that the contract work was not done within the contract, and you also find that the defendant made a payment on account of the final payment called for by the architect's certificate on the house involved in plaintiffs' claim, which payment was made after the issuance of such certificate, you may find that the defendant waived performance within the contract time."

8. "If you find that there was an extension of time to perform, such extension fixing no time to perform, such extension was for a reasonable time."

16. "If you find that the alleged loss of rentals, claimed by defendant, may have been due to causes other than the acts or omissions of plaintiffs, in that case, such alleged loss of rentals is speculative, remote, and not proximately due to plaintiffs' alleged breach of contract, and defendant is not entitled to recover therefor."

Opinion of Supreme Court.

17. "If you find that the completion of the buildings was delayed through the failure of Mr. Tansey to make timely payments according to the contract, then he can not now complain of such delay, and recover damages therefor."

We fail to see whether there was error in any of these instructions. The first one required submission to the jury of the question of waiver based on the fact that the defendant made a payment on account of the final payment called for by the architect's certificate. Such payment constituted some evidence from which the jury could infer waiver of completion within the period fixed by the contract. The remaining requests were sound and need no discussion.

The judgment is affirmed.

10

20

30

40

ORDER ON AFFIRMANCE OF JUDGMENT.

NEW JERSEY SUPREME COURT.

10	WILLIAM DEFFUR, <i>et als.</i> , <i>Plaintiffs-Appellees,</i> <i>vs.</i> MICHAEL J. TANSEY, <i>Defendant-Appellant.</i>
----	---

20 This cause having been duly submitted on briefs at the May Term, 1927, of this Court by Michael J. Tansey, of counsel for the appellant, and M. Francis Keating, of counsel for the appellees, and the Court having inspected the record and judgment below, and considered the causes assigned for error and the grounds of appeal therein;

30 It is thereupon, on this eleventh day of February, 1928, ORDERED that the judgment of the Essex County Circuit Court be in all things affirmed, and that the record and proceedings be remitted to the said Essex County Circuit Court to be proceeded with in accordance with this judgment and the practice of the said Court.

Filed February 11th, 1928. Judgment actually entered February 15th, 1929 as of aforesaid date on motion of

M. FRANCIS KEATING,
 Of Counsel for Appellees.

NOTICE OF APPEAL.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

WILLIAM DEFFUR, JOSEPH DEFFUR and PETER DEFFUR, partners trading as Deffur Brothers, <div style="text-align: center;"><i>Respondents,</i></div> <div style="text-align: center;"><i>vs.</i></div> MICHAEL J. TANSEY, <div style="text-align: center;"><i>Appellant.</i></div>	}	10 <i>On Appeal.</i> <i>Notice of Appeal.</i>
---	---	---

To Messrs. Keating & Keating, attorneys for respondents, or whom it may concern. 20

SIRS:

PLEASE TAKE NOTICE, That on Thursday, March 21st, 1929, at 10 o'clock in the forenoon or as soon thereafter as the matter can be heard, I shall make application to the New Jersey Court of Errors and Appeals, at the State House, Trenton, N. J., for an Order permitting the appeal in the above cause of action to be taken to the New Jersey Court of Errors and Appeals, within the time limited for taking appeals, from the judgment of affirmance entered in the New Jersey Supreme Court on February 11th, 1928; and for an Order staying the suit by the present respondents, in the Essex County Circuit Court, against the National Surety Company, surety on the appellant's appeal bond, on the following grounds, to wit: Notice of appeal was served and filed in the proper manner and within the time limited for taking appeals, and that failure 30 40

Affidavit of Clerk in Supreme Court.

to prosecute same was due to no fault or negligence on the part of the appellant, the affidavits annexed hereto and made a part hereof will be used in support of the above argument.

Dated March 12, 1929.

10

MICHAEL J. TANSEY,
Appellant,
Attorney *pro se.*

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

DAVIS J. McCAFFERY, of full age, being duly sworn according to law, upon his oath deposes and says:

20 I am a clerk in the office of the Clerk of the Supreme Court of the State of New Jersey and am in charge of the Docket in which is recorded the case of William Deffur *et als.*, plaintiffs-appellees *v.* Michael J. Tansey, defendant-appellant.

30 On February 11, 1928, a rule of affirmance and remittitur was filed in the above action by M. Francis Keating, attorney for the plaintiffs-appellees. The above rule was properly numbered and stamped filed, but through inadvertence was not docketed in the case but was filed away with the file of this action, in the files of this office.

Michael J. Tansey requested to be advised when this rule of affirmance was entered, and a pencil note to that effect was made on the docket. Mr. Tansey also visited the office a number of times to learn whether the rule was entered but was advised to the contrary.

40 On referring to the file of this case on February 15, 1929, the rule was discovered and

Affidavit of Clerk in Supreme Court.

entered on the docket under the date on which
it was filed, February 11, 1928.

DAVIS J. McCAFFERY.

Sworn and subscribed to before me
this 15th day of February, 1929.

10

RUE BREARLEY,
Notary Public of New Jersey.

20

30

40

Affidavit of Service.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10	WILLIAM DEFFUR, JOSEPH DEFFUR and PETER DEFFUR, partners trading as Deffur Brothers, <div style="text-align: right; padding-right: 20px;"><i>Respondents,</i></div>	}	<i>On Appeal.</i>
	<i>vs.</i>		<i>Notice of Appeal.</i>
	MICHAEL J. TANSEY, <div style="text-align: right; padding-right: 20px;"><i>Appellant.</i></div>		<i>Affidavit of Service.</i>

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

20 I, CHARLES A. REID, being duly sworn according to law, upon my oath depose and say: that on March 12, 1929, I served a notice of appeal in the above-entitled action, on M. Francis Keating, attorney for respondents, by leaving a true copy of the same at his office at 60 Park Place, Newark, New Jersey.

CHARLES A. REID.

30 Sworn and subscribed to before me this 12th day of March, 1929.

ELLA TANSEY,
 Notary Public of New Jersey.

ORDER.

Filed March 26, 1929.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

 WILLIAM DEFFUR, *et als.*,
Plaintiffs-Respondents,
vs.
 MICHAEL J. TANSEY,
Defendant-Appellant.

10

*On Appeal.**Order.*

It appearing to the Court that by reason of error in the Office of the Clerk of the Supreme Court the rule for affirmance of the judgment of the Essex Circuit Court on appeal was filed, but no judgment actually entered thereon until February 15, 1929, as of February 11, 1928, but that appellant filed an appeal on December 7, 1927, upon the assumption that judgment of affirmance had been entered; it is thereupon on this 21st day of March, 1929, on motion of Michael J. Tansey, attorney *pro se*, ordered that said appeal of December, 1927, be and is hereby vitalized and given legal effect as within time; and that the appellant file his grounds of appeal within ten days from the date hereof, and bring on the hearing of said appeal at the next (May, 1929) term of this court.

20

30

By the Court,

E. R. WALKER,

Chancellor and P. J.

A true copy.

JOSEPH F. S. FITZPATRICK,

Register.

40

NOTICE OF ARGUMENT.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	WILLIAM DEFFUR, <i>et als.</i> , <i>Plaintiffs-Respondents,</i> <i>vs.</i> MICHAEL J. TANSEY, <i>Defendant-Appellant.</i>	} <i>On Appeal.</i> } <i>Notice of</i> } <i>Argument.</i>
----	---	---

To Messrs. Keating & Keating, attorneys for respondents, or whom it may concern.

SIRS:

20 TAKE NOTICE, that the argument of the issue joined in this cause will be moved before the New Jersey Court of Errors and Appeals on the third Tuesday of May, 1929, at Trenton, New Jersey, at ten o'clock in the forenoon, or as soon thereafter as the said court can attend to the same.

Dated April 29, 1929.

MICHAEL J. TANSEY,
Attorney for Appellant *pro se.*

30

40

Affidavit of Service.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

WILLIAM DEFFUR, <i>et als.</i> , <i>Plaintiffs-Respondents,</i> <i>vs.</i> MICHAEL J. TANSEY, <i>Defendant-Appellant.</i>	}	<i>On Appeal.</i> <i>Affidavit</i> <i>of Service.</i>	10
---	---	---	----

COUNTY OF ESSEX,
STATE OF NEW JERSEY. } *ss.*

I, CHARLES A. REID, being duly sworn according to law, upon my oath depose and say: that on Monday, April 29, 1929, I served a notice of argument in the above-entitled action, personally on M. Francis Keating, attorney for plaintiffs-respondents, by leaving a true copy of the same with him at his office at 60 Park Place, Newark, New Jersey.

CHARLES A. REID.

Sworn to and subscribed before me
this 29th day of April, 1929.

ELLA TANSEY, 30
Notary Public of New Jersey.

GROUND'S OF APPEAL.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	WILLIAM DEFFUR, JOSEPH DEFFUR and PETER DEFFUR, partners trading as Deffur Brothers, <i>Plaintiffs-Appellees,</i> <i>vs.</i> MICHAEL J. TANSEY, <i>Defendant-Appellant.</i>	} <i>On Appeal.</i> } <i>Grounds</i> } <i>of Appeal.</i>
----	---	---

20 To M. Francis Keating, Esquire, attorney for plaintiffs-appellees.

TAKE NOTICE, plaintiff-appellant alleges as grounds of appeal the following:

Because the learned trial judge charged the jury as follows:

30 "7. An owner may waive the time for performance or extend it. Such waiver or extension may be express or implied. If you find that notwithstanding that the contract work was not done within the contract time and you also find that the defendant made a payment on account of the final payment called for by the architect's certificate on the house involved in the plaintiff's claim, which payment was made after the issuance of such certificate, you may find that the defendant waived performance within the contract time."

40 "8. If you find that there was an extension of time to perform, such extension fixing no time

Petition of Appeal.

to perform, such extension was for a reasonable time."

"15. You may not consider any items claimed by defendant to be faulty or not done, which were not called for by the contract, notwithstanding there may be evidence of such items before you; nor may you consider any items called for by the contract, and not testified to." 10

"16. If you find that the alleged loss of rentals claimed by defendant, may have been due to causes other than the acts or omissions of plaintiffs, in that case, such alleged loss of rentals is speculative, remote, and not proximately due to plaintiffs' alleged breach of contract, and defendant is not entitled to recover therefor."

"If you find that the completion of the buildings was delayed through the failure of Mr. Tansey to make timely payments according to the contract, then he cannot now complain of such delay and recover damages therefor." 20

Respectfully submitted,

KRAEMER & SIEGLER,
Of Counsel with Appellant.

30

40

*Affidavit of Service.*NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	WILLIAM DEFFUR, JOSEPH DEFFUR and PETER DEFFUR, partners trading as Deffur Brothers, <i>Plaintiffs-Appellees,</i> <i>vs.</i> MICHAEL J. TANSEY, <i>Defendant-Appellant.</i>	}	<i>On Appeal.</i> <i>Grounds of Appeal.</i> <i>Affidavit of Service.</i>
----	---	---	--

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

20 I, CHARLES A. REID, being duly sworn according to law, upon my oath depose and say: that on March 30, 1929, I served the grounds of appeal in the above-entitled matter on M. Francis Keating, attorney for plaintiffs-appellees, by leaving a true copy of the same with his clerk at his office, 60 Park Place, Newark, New Jersey.

CHARLES A. REID.

30 Sworn to and subscribed before me
 this 30th day of March, 1929.

FRANCIS J. TANSEY,
 Attorney at Law of New Jersey.

NEW JERSEY COURT OF ERRORS AND APPEALS

WILLIAM DEFFUR, JOSEPH DEFFUR and PETER DEFFUR, partners trading as Deffur Brothers,

Plaintiffs-Appellees,

vs.

MICHAEL J. TANSEY,

Defendant-Appellant.

*Action
at Law.*

On Appeal.

APPELLANT'S BRIEF.

Facts.

This case arose from an alleged faulty execution of a contract to construct two six-family houses, made by the plaintiffs with the defendant, located at #395-401 Sixteenth avenue, Irvington, New Jersey. The work was begun about July 1, 1924, and was stipulated in the contract to be completed, one on October 1st and the other on October 15th, 1924, the understanding being that the two six-family houses, containing twelve flats of five rooms each, were to be ready for rental to tenants at the time stated. The contract provided for certain payments, but inasmuch as the Building and Loan had granted the loan, the payments were made subject to the findings of their committees, and the contractors were not dissatisfied with that arrangement, but took their money from time to time as the committees reported the same should be paid to them. As the work progressed, the plaintiff and defendant, in discussing the elements of construction, touched upon the condition of the cellars of the buildings, the owner defendant ex-

pressing himself to the contractor as being opposed to anything but an entirely dry cellar, and the contractor assured him that there would be absolutely no water in the cellar; it would be absolutely bone dry. The contracts further provided that all work and materials should be subject to the approval of the owner. As the work progressed, it became evident that the contractor was not endeavoring to finish the buildings within the time stipulated, and the owner repeatedly urged him to go on with his work and complete the same. The buildings were not finished in the time stipulated. The cellars were found to be wet to the extent that three or four feet of water came in before the building was finally declared finished by the builder, and afterward, and the owner objecting to the abandonment of the work by the contractor under the circumstances, demanded that they make good the undertaking for a dry cellar. The contractor, however, refused to be in any way further obligated and abandoned the work early in the winter of 1925.

There was retained in the hands of the Building and Loan Association, as part of the amount due on the jobs, Two Thousand (\$2,000.00) Dollars, and in the hands of the owner, Six Hundred Fifty (\$650.00) Dollars, which was held pending the final completion of the work. The contract price for each building was Twenty-three Thousand (\$23,000.00) Dollars, and to that contract price there was added for scraping the floors, One Hundred Fifty (\$150.00) Dollars for each house, making Three Hundred (\$300.00) Dollars in all. The owner was unable to rent the premises at the time specified, and not until several months after, because of the failure of the contractor to complete, and the wet condition of the

cellars. After notifying the contractor to dry the cellars, and his refusal, the owner made a contract with the National Company, another concern, in the City of Newark, to undertake the waterproofing of the cellars. Walks had been laid, and in order to get at the cellars it was necessary to break up the walks around the houses and dig down to the bottom of the foundations, a matter of four or five feet, and when such digging was done it was discovered that the foundations in many places were without cement between the blocks, and that the water could run through between the blocks in those places, and in fact that one could look through and see plainly from inside to outside of the cellar, or from outside to the inside of the same through the cracks, and in at least two instances whole blocks were left out of the foundation, and some blocks were cracked, through all of which apertures the water was running without any let or hindrance. The architect admitted that he did not know of the omissions and defects when he issued final certificate to the contractors. The owner was obliged to pay for this waterproofing Six Hundred Ninety-six (\$696.00) Dollars, and for other items, such as faulty construction of the roof, which admitted water coming through and destroying the ceilings, faulty setting of the window frames, which permitted snow and rain to come in on the floors of the flats, and various other matters in a sum approximating One Thousand Eight (\$1,008.00) Dollars. He was unable to rent the flats until the following fall, viz., 1925, and lost all the rent which should have accrued, at the rate of Fifty (\$50.00) Dollars a month for four lower flats and Fifty-five (\$55.00) Dollars a month for eight upper flats, for a total of ten months, and when he was later sued on the contract, besides the defense of the faulty

work and construction of the building, he set up a counter-claim demanding, among other things, compensation for his loss of rent, ten months at Three Hundred Twenty (\$320.00) Dollars a month, each house, making a total of Sixty-four Hundred (\$6,400.00) Dollars. A verdict of Eighteen Hundred (\$1,800.00) Dollars was given on the trial, in favor of the plaintiffs, their claim being approximately Three Thousand (\$3,000.00) Dollars, the amount of the payments held back, with interest.

LAW.

The Court erred in charging plaintiffs' seventh request:

"7. An owner may waive the time for performance or extend it. Such waiver or extension may be express or implied. If you find that notwithstanding that the contract work was not done within the contract, and you also find that the defendant made a payment on account of the final payment called for by the architect's certificate on the house involved in plaintiffs' claim, which payment was made after the issuance of such certificate, you may find that the defendant waived performance within the contract time."

This is clearly an invasion of the doctrine set down universally of waiver, because it contemplates the giving up of a legal right, that is to say, the full and complete performance of the terms of a written document, without anything more by the obligee than the payment on account of the contract for part of the work that may have been satisfactorily performed. It does not take into account or recognize the performance of that part of the contract that is still uncompleted and not complied with according to

the terms of the contract. It can readily be observed that in a contract for the erection of a building, that a portion may have been properly completed and a still larger portion remain uncompleted. It would then follow, if the Court's charge were correct in law, that the defendant in this case, by a part payment, would lose his legal right of recourse for so much of the remaining work as was improperly performed.

The doctrine of waiver is very well understood and clearly stated in the text in the following language:

“According to the generally accepted definition a waiver is the *intentional* relinquishment of a known right. It is a voluntary act, and implies an election by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded and insisted on. The terms ‘estoppel’ and ‘waiver’ are sometimes loosely used interchangeably, but though a waiver may be in the nature of an estoppel and maintained on similar principles, they are not convertible terms, and the distinction between them is one easy to preserve when express waivers are under consideration. As already seen, a waiver is an *intentional* relinquishment, while the indispensable elements of an estoppel are ignorance of the party who invokes the estoppel, a representation by the party estopped which misleads, and an innocent and deleterious change of position in reliance on that representation. It is, however, unquestionably true that the dividing line between waivers implied from conduct and estoppels oftentimes becomes so shadowy that in the law of insurance the two terms have come to be quite commonly used interchangeably. When the term waiver is so used, however, the elements of an estoppel almost invariably appear, and it is quite apparent that it is employed to designate, not a pure

waiver, but one which has come into an existence of effectiveness through the application of the principles underlying estoppels." 27 Ruling Case Law, pages 904, 905, section 2.

It is further stated in the law well established, 27 Ruling Case Law, page 908, section 5, as follows:

"To constitute a waiver within the definitions already given, it is essential that there be an existing right, benefit, or advantage; a knowledge, actual or constructive, of its existence, and an *intention* to relinquish it. No man can be bound by a waiver of his rights, unless such waiver is distinctly made, with full knowledge of the rights which he intends to waive; and the fact that he knows his rights, and intends to waive them, must plainly appear. A waiver may be express or implied, but in the absence of an express agreement a waiver will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to. To make out a case of waiver of a legal right there must be a clear, unequivocal and decisive act of the party showing such a purpose of acts amounting to an estoppel on his part. A waiver, to be operative, must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition."

From the evidence, and the terms of the contract, duly established in this case, one house was to be completed on October 1, 1924, and the other house on October 15, 1924, and all through the evidence it appears by the testimony of the defendant that constant demand was made upon

the plaintiff from time to time that the premises must be completed on the day set in the contract for their completion. The defendant, time and time again warned the plaintiff that he failed to supply sufficient men and materials to complete the premises on the day set in the contract. There is nothing in the evidence of any affirmative character, either express or implied, from which a jury could conclude that the defendant extended the time for the performance of the contract to any definite period, or any period other than that stated in the contract. On the contrary, the evidence clearly points to the fact that the defendant insisted and relied entirely upon the terms of the contract and its completion on the date set therein. Therefore, when the Court charges that a payment made on account, made on a certificate issued by the architect, who under the terms of the contract was not the final arbitrator as to the completion of the premises, it cannot be said "that there was a clear, unequivocal and decisive act" by the defendant waiving his right to have his buildings erected and completed according to the terms of the contract. It was, therefore, an erroneous statement of the law by the Court to the jury to say that the jury had the right to find that the defendant waived the performance within the contract time, merely because the defendant made a payment on account of the final payment called for by the architect's certificate, and thereby the defendant was prejudiced in his right to damages by the jury for a breach of the contract by the plaintiffs to complete said premises within the time set forth in the contract, and is entitled to a reversal of the verdict and the judgment.

It has been held in several cases by the New Jersey courts that a partial payment made on account of a building contract after default in the performance without more is no evidence of waiver of such default so as to take the case to the jury, particularly where in cases as in this it appeared that the building was not completed according to the contract or was faultily constructed.

Byrne v. Sisters of St. Elizabeth, 45 Law, 16 Vroom 213;

Schweitzer v. St. Leo's Catholic Church of Irvington, 78 Atl. Rep. 400.

Even occupancy of the dwelling is held not to be a waiver of default in performance of the contract.

Bozarth v. Dudley, 44 N. J. Law 304.

In the case of *Steelman v. Ludy*, 77 N. J. Law 446, which cites with approval *Byrne v. Sisters and Bozarth v. Dudley*, it was held that the facts proved in that case were sufficient to go to the jury on a question of implied waiver of a default in the terms of a building contract but those facts included, "the acceptance and possession of the building by the defendant, and his repeated and unconditional promises to pay the plaintiff the balance due on the contract."

In all the other cases in the courts of this State on the question of implied waiver it has been held that to constitute sufficient evidence to go to the jury a party against whom the implied waiver is alleged must have consistently acted in such a way as to indicate to his co-contractor that he does not intend to hold the latter to a particular provision in the agreement such as not insisting on a deposit of \$1500.00 to

guarantee payment of rent, permitting a tenant after entry without the payment of the deposit to make changes and alterations in the premises as authorized by the lease; instructing parties in possession of part of the premises to recognize the party entering as their landlord and accepting from him for two years installments of rent called for by the lease and permitting him to pay the annual taxes upon the demised premises in accordance with the requirements of that instrument.

Schlegel v. Bott, Err. & Apps. 93 N. J. Equity 607-611.

In *Grigg v. Landis*, 21 Equity 494, after a breach in the condition of the contract the complete purchase price was paid and accepted and some of the improvements had been made as required by the contract and this was held evidence of waiver of the time conditions of the contract sufficient to warrant specific performance.

In the case of *Lane v. Blackwood Estate*, 138 Atlantic Reporter 371, twenty-seven sales of land were made after the time limit in the contract had expired and payments were received and accepted for the twenty-seven sales. The defendant then gave notice to the defaulting party of cancellation of the contract by reason of the default previously occurring. The Court held that under the facts proved the case was a jury question and not a question of law.

It is plain, however, that in all these cases there was more than the mere partial payment of the contract price after the default in the contract and that standing alone such partial payment would not be evidence to go to the jury on a question of implied waiver.

The Court erred in charging the jury in the following language:

“8. If you find that there was an extension of time to perform, such extension fixing no time to perform, such extension was for a reasonable time.”

We will concede that if the proposition of law set down by the Court to the jury were founded in fact, that it would be a correct statement of the law. The trouble with the situation is that there is no evidence in the entire case to support such a statement of the law to the jury. The contrary exists, that there is no evidence in this case either by the plaintiffs or the defendant, that the defendant by any act of his, either actual or constructive, showed a clear intention to relinquish his right under the terms of the contract. On the contrary, the evidence shows clearly that the defendant insisted upon every one of the conditions of the contract, particularly that which provided for the completion of the premises according to the date set in the contract. The fact is that the plaintiffs failed to complete the buildings according to the terms of the contract, and the jury must have so found when they allowed the defendant a substantial amount of money for the failure to make the cellars waterproof and other items that were defective; and because the plaintiffs did not complete the erection of said premises according to the terms of the contract, the defendant was unable to and deprived of the advantage of renting the apartments in said buildings even though there were many tenants available to rent the apartments to.

Therefore, we contend that the Court, having presumed the existence of proof in the case which did not exist, and therein presented to the jury for its consideration, made a mis-statement

of fact that was prejudicial to the defendant and presupposed an extension of time by the defendant to the plaintiffs, having not in fact been made, and thereby deprived him of the proper consideration of the evidence by the jury.

The Court erred in charging the jury in the following language:

“16. If you find that the alleged loss of rentals claimed by defendant, may have been due to causes other than the acts or omissions of plaintiffs, in that case, such alleged loss of rentals is speculative, remote, and not proximately due to plaintiffs’ alleged breach of contract, and defendant is not entitled to recover therefor.”

This request presumes on its face that the plaintiffs complied with their contract in all its terms, and that the loss in rentals were not the result of the failure of the plaintiffs to complete the buildings according to the time set in the contract. The evidence in this case is entirely directed to the failure of the plaintiffs to complete the buildings on the day set in the contract. The plaintiffs admit that the buildings were not completed on that date, according to their own evidence, and there is nothing in the case that could possibly show that there was anybody else, outside of the plaintiffs, whose acts or omissions caused the failure of the plaintiffs to complete the buildings in time. There is no evidence in the case of any other factor or agency which could have possibly affected the rental of said premises, excepting the fact that the plaintiffs failed to have the buildings ready and completed on the day set in the contract.

We therefore contend that the jury had a right to consider whether or not the building was

completed in time, and if it was not completed according to the terms of the contract, the defendant was entitled to have the jury consider that he was deprived of renting the premises because of the plaintiffs' failure to have them ready on the day set in the contract. This was the only issue or element which the jury were entitled to consider on the question of the damages being the approximate cause of the plaintiffs' failure to complete said premises on the day set in the contract. Besides this, the jury had a right to consider even if the acts or omissions of someone else contributed to the failure of the plaintiffs to complete the building, and have the same ready for rental, whether or not the plaintiffs also contributed by their failure or their non-performance of the terms of the contract, whether or not that was the cause that the premises were not completed according to the time in the contract, and thereby defendant deprived of his opportunity to rent the said premises.

The Court erred in charging the jury in the following language:

“17. If you find that the completion of the buildings was delayed through the failure of Mr. Tansey to make timely payments according to the contract, then he cannot now complain of such delay and recover damages therefor.”

This is clearly erroneous because it presupposes that if the defendant failed to pay on the precise day, that the plaintiffs will be entirely relieved of their obligation on the entire contract. There is nothing logical or sound in this statement of the law which would then put a building contractor in a position where he could relieve himself of a burdensome contract merely

because the owner would fail to pay precisely on the day, payment on the following day under this principle of law would justify the contractor in relieving himself of the entire contract. The rule, as we understand it to be, is that a building contract and its conditions are independent conditions particularly as to payments of money under the contract, and the failure to pay a payment pursuant to a contract, if it does not come to the essence of the contract, does not entitle the contractor to abrogate the terms of the contract and refuse to proceed with the erection of the building. The contractor is given his right of action against the owner for the payment upon the due date thereof, as every other creditor has for an obligation, but is not given the right to declare the contract void and relieve himself of the obligation of performing the balance of the contract. The fact is, and the evidence is uncontradicted throughout the whole case, that all of the money which the contractor was entitled to at any stage of the erection of the building was in the hands of the West End Building & Loan Association and there ready to be paid out to him just as fast as he was entitled to receive them under the terms of the contract. The evidence indicates clearly that on the contract for Forty-six Thousand (\$46,000.00) Dollars, there was only Two Thousand (\$2,000.00) Dollars left unpaid at the time the last payment was made, showing that the money was always ready when the contractor was entitled to receive it.

We contend, therefore, that the defendant was prejudiced by the statement of law made by the Court to the jury that because Mr. Tansey may have failed to make timely payments according to the contract, that he could not complain of the

delay and recover damages for the breach of his contract.

Respectfully submitted,

KRAEMER & SIEGLER,
Of Counsel with Appellant.

New Jersey Court of Errors and Appeals

WILLIAM DEFFUR, JOSEPH DEFFUR and PETER DEFFUR, partners trading as DEFFUR BROTHERS,

Plaintiffs-Appellees,

vs.

MICHAEL J. TANSEY,

Defendant-Appellant.

Action-at-Law.

*On Appeal
from New
Jersey
Supreme
Court.*

APPELLEES' BRIEF

FACTS

By two written contracts dated May 28, 1924, plaintiffs agreed to erect and complete a six-family dwelling on 16th Avenue, Irvington, N. J., by October 1, 1924, and a second six-family dwelling adjacent thereto by November 15, 1924. The defendant agreed to pay the plaintiffs \$23,000 for each house, upon production of architects' certificates, in four installments: \$2,500 when the foundation walls were completed, etc.; \$6,500 when the building was enclosed, etc.; \$8,000 when the exterior carpenter work was completed, etc.; and \$6,000 ten days after completion.

Plaintiffs substantially performed their contracts, and there being a balance of \$2,500 due on the contract covering one of the houses, and \$150 due on a work order for said house, they instituted suit for \$2,650 with interest. The defendant counterclaimed for defects in the construction of the two houses, and for ten months' loss of rental on the two houses.

The defendant's chief objection to the work was that the cellar became wet because of the improper construction thereof. The plaintiffs' witnesses testified (William Deffur, p. 62, l. 3-6; p. 63, l. 18-19, Daniel A. Hopper, p. 149, l. 11-17, Joseph Deffur, p. 159, l. 1-40, p. 163, l. 37-40, p. 164, l. 1-24), that the cellar was properly built and in full compliance with the specifications.

Neither at the time the contracts were executed, nor at any other time did the plaintiffs assure the defendant that the cellar would be "watertight." (William Deffur, p. 165, l. 22-30) and the defendant's counsel so admitted (p. 160, l. 17-18), but on the contrary one of the plaintiffs informed the defendant from the beginning that because of the condition of the soil, he would have more or less trouble with the cellar. (William Deffur, p. 165, l. 22-29.)

Defendant's witness (James E. Wilson, p. 118, l. 32-37) testified that the defects he found could have been seen from the interior of the cellar by anyone making an inspection thereof.

Shut offs, called for by the specifications, but not installed, were waived by the defendant (Peter Deffur, p. 152, l. 34-40, p. 153, l. 1-11). Plaintiffs were unable to install cellar sinks (for ice box drains) because of their prohibition by the Plumbing Ordinance of the Town of Irvington (Defendant's witness Harry Justman, p. 133, l. 30-40, Peter Deffur, p. 151, l. 1-18, p. 153, l. 12-31). However, due allowance was made for the omission of the shut-offs and cellar sinks by plaintiffs doing extra for which no charge was made (Peter Deffur p. 153, l. 23-40, p. 154, l. 1-4).

Notwithstanding that plaintiffs substantially completed their contracts during the latter part of 1924 and obtained (pursuant to the terms of their

contracts) the architects final certificates, the defendant failed to give the plaintiffs notice of the defects until the following Spring (Defendant, p. 81, l. 7-14). Defendant further testified he continued to make repairs (for which he held plaintiffs accountable) in October, 1925; January, 1926; June, 1926; August, 1926, and December, 1926, and that some of the defects were not corrected at the time of trial (Defendant, p. 82, l. 13-32), and that each flat had defects to be corrected every time a tenant was obtained.

The defendant sought allowance for ten months rental, notwithstanding that his witness (Francis Rowe, p. 139, l. 11-38) testified that when the buildings were completed in 1924 by the plaintiffs the street on which they faced was a dirt street, in poor condition, and always muddy, and that although the street had since been paved with asphalt one flat rented in September, 1925, three in October, 1925, and one in November, 1925, and seven flats had not been rented up to the time of trial (January, 1927). Another of defendant's witnesses, Harry Justman (p. 130, l. 21-29) corroborated Mr. Rowe's testimony that seven of the flats had never been rented.

The plaintiffs relied upon the defendant's representation that he was financially able to make payments under the contracts as they became due; they had no knowledge, when the contracts were executed, that the defendant was obtaining or contemplated obtaining financial assistance from a loan association; and plaintiffs never consented to accept payments as the loan committee might dole them out, but expected their payments, the times of payment, and the amounts thereof, to be in compliance with the terms of the contracts. (William Deffur, p. 174, l. 1-14.)

Pursuant to the contract, the architect issued his

certificates (Daniel A. Hopper, p. 144, l. 1-40) and upon the issuance thereof plaintiffs became entitled to the amounts therein specified. The defendant defaulted in making payments at the times specified and for the amounts specified, and made late payments, made partial payments, etc., and thereby caused plaintiffs financial embarrassment, which made it necessary for the plaintiffs to borrow money (William Deffur, p. 169, l. 27-33) in order to carry on the job with its \$2,000 weekly payroll, and although plaintiffs threatened to quit the job on several occasions (William Deffur, p. 170, l. 30-40), the defendant became in arrears to such an extent that plaintiffs were compelled to lay off some of the help because of lack of funds (William Deffur, p. 171, l. 31-34; p. 172, l. 32-36) thereby causing considerable delay. The defendant testified (p. 77, l. 20-30) that plaintiffs abandoned the job and failed to do any work for considerable time. There was no abandonment, but the delay was directly attributable to defendant's failure to make timely payments.

There is no dispute as to the amounts paid by the defendant to the plaintiffs, nor the dates of payment. By checking the dates of payment and the amounts paid with the dates of issuance of the architects certificates and the amounts called for thereby, it conclusively appears that the defendant was in default with his payments from July 16, 1924, until the buildings were completed, and that he was in arrears for various sums. For instance, up to August 12, 1924, plaintiffs were entitled to payments aggregating \$26,000, but received only \$10,480, leaving an arrearage of \$15,520, and again, up to October 1, 1924, plaintiffs were entitled to payments aggregating \$34,000, but had received only \$26,120, leaving an arrearage of \$7,880, etc.

The defendant made an inspection of the premises, and although the various defects and omissions subsequently objected to could be observed without difficulty, he accepted the houses, and while on the premises, directed the architect to issue the final certificate (Daniel A. Hopper, p. 148, l. 28-33; p. 150, l. 12-18), and made no objection to the work until several months after completion of the work (William Deffur, p. 166, l. 27-29).

LAW

THE COURT'S SEVENTH CHARGE WAS PROPER.

The law applying to waiver or extension of time of performance in connection with building contracts is set forth in 9 Corpus Juris, page 788,

“THE OWNER MAY OF COURSE WAIVE OR EXTEND THE TIME WITHIN WHICH THE CONTRACT IS TO BE PERFORMED BY THE BUILDER. THE WAIVER OR EXTENSION MAY BE IMPLIED AS WELL AS EXPRESS; AND WHERE, AFTER THE TIME FOR COMPLETION OF THE WORK, THE OWNER ASSENTS TO THE CONTINUANCE, WITHOUT OBJECTION TO THE DELAY, HE WILL BE DEEMED TO HAVE WAIVED THE PROVISION AS TO TIME OF PERFORMANCE, ESPECIALLY WHERE THE CONTINUANCE OF THE WORK IS AT THE EXPRESS REQUEST OF THE OWNER AND ON HIS PROMISE TO PAY THEREFOR WHEN COMPLETED, OR WHERE, ON THE CONTINUANCE OF THE WORK AT THE REQUEST OR ASSENT OF THE OWNER, HE MAKES PARTIAL PAYMENT TO THE BUILDER FOR THE WORK PERFORMED.”

There was evidence in this case to substantiate the plaintiffs' claim of waiver or extension. Defendant assented to the continuance of the work, without objection, after the time of performance, and even requested the completion thereof, saying, "Your money is waiting for you just as soon as you complete the job, and I want the job finished." He made several payments after the time set for performance, and even after the issuance of the architects final certificates.

In *Sun Dredging and Construction Co. v. Ottens*, 84 N. J. L., 740, 87 Atl., 1003, this Court held that the principle is familiar law that the Court will refuse its aid to one who remains silent when duty, candor and fair dealing require him to speak out, and such estoppel in pais may be set up in actions at law as well as in Equity, and that where after a breach of the contract the defendant permitted the plaintiff to go on and complete the contract, and made payments under it, the defendant would be deemed to have affirmed it.

Plaintiffs action was founded on contract, and upon substantial completion, they were entitled to the contract price, less a fair allowance for defects, and this notwithstanding that the defendant did not actually accept the buildings.

In *Feeney v. Bardsley*, 66 N. J. L., 239, 49 Atl. 443, this Court held that upon substantial performance, the contractor was entitled to recover the contract price, less a fair allowance to the owner for defects.

In *Dyer v. Luitz*, 76 N. J. L., 204, 68 Atl. 908, it was held that if there was substantial performance, even though the work was not completed in a workmanlike manner, the contract price must be paid,

less an allowance for defects, and that **THE ACCEPTANCE OF THE JOB WAS IMMATERIAL** (except when the action is founded on quantum meruit.) This case was followed by our New Jersey Court of Errors and Appeals in the case of *Korman v. Livezey*, 91 N. J. L. 699, 103 Atl. 381, where it was held that the question of whether or not the defendant accepted the building was of no consequence.

Appellant cites several cases as authorities for propositions of law that he sets forth, but upon investigation the cases cited appear to hold something other than he contends.

Byrne v. Sisters of St. Elizabeth, 45 N. J. L., 213, does not hold that mere evidence of part payment after default in insufficient evidence of waiver so as to take the case to the jury, but the facts show and the Court states that **THERE WAS NO ATTEMPT TO SHOW A WAIVER OF THE ARCHITECTS CERTIFICATE.**

Schweitzer v. St. Leo's Catholic Church of Irvington (not officially reported) 78 Atl. 400, holds that where the architects certificate is a condition precedent to payment, and the certificate is not obtained, but in fact was refused by the architect, there can be no recovery. In passing, the Court said that a **PAYMENT ON ACCOUNT IS NOT NECESSARILY** evidence of acceptance.

Bozarth v. Dudley, 44 N. J. L., 304, holds that the acceptance of a building by the owner may be express or implied.

Steelman v. Ludy, 77 N. J. L., 446, 72 Atl. 423, following *Byrne v. Sisters* and *Bozarth v. Dudley*, and citing them with approval, holds that a waiver may be established by express words, or may be

inferred from such acts or conduct as are inconsistent with the purpose of exacting performance; and THE QUESTION OF WAIVER IS ONE FOR THE JURY, citing 9 Cyc. 777 (13 Corpus Juris 791).

Schlegel v. Bott, 93 N. J. Eq., 607, 117 Atl. 605, holds that where a party has consistently acted in such a way as to indicate to his contractor that he does not intend to hold the latter to a particular provision, HE IS TO BE TAKEN TO HAVE WAIVER HIS RIGHT TO ENFORCE THAT PROVISION.

The defendant consistently acted in such a way as to indicate to plaintiffs that he did not intend requiring performance with time; he urged completion after the expiration of time for performance, promising to pay when completed; he made payments after expiration of time for performance; he made two payments after issuance of final certificates, and the issue of waiver or extension was thereby raised, and the Courts charge thereon was proper.

THE COURT DID NOT ERR IN MAKING THE EIGHTH CHARGE.

Appellant in his brief admits that the law as charged (found in 9 Corpus Juris 780) is correct, but urges that the charge presumed facts which did not exist.

The evidence referred to heretofore clearly indicates that the question of waiver or extension was raised, and properly submitted to the jury. Plaintiffs' claim was about \$3,000, and the jury gave a verdict for only \$1,800, apparently finding that plaintiffs substantially performed, but made some omissions. By its verdict the jury must have found that there was, in fact, a waiver or extension.

Therefor, the charge complained of, dealing with the duration of the extension of time, was proper.

THE COURT DID NOT ERR IN MAKING THE SIXTEENTH CHARGE.

The evidence disclosed that when plaintiffs completed the houses in 1924, and for years prior thereto, the street upon which the houses faced was an unpaved street, always in a muddy condition, and that the houses were located in a depression, on the side of a hill. It also disclosed that the houses were six-family tenements, and that at the time of trial, more than two years after their completion, although most defects had been remedied, there were seven of the twelve flats that had never been rented or occupied.

17 Corpus Juris 753: "Damages which are uncertain, contingent or speculative in their nature cannot be made the basis of recovery.—Compensation cannot be based upon a mere conjectural probability of future loss."

17 Corpus Juris 788: "—In order that it (profit) may be a recoverable element of damages, the loss of profits must be the natural and proximate result of the breach complained of and they must be capable of ascertainment with reasonable certainty. A recovery of speculative or conjectural profits will be denied."

17 Corpus Juris 798: "Where, by reason of defendant's wrongful act, plaintiff has lost the tenants of his property and is unable to rent the same, he may recover for his loss of rents. **HOWEVER, THERE CAN BE NO RECOVERY FOR FAILURE TO RENT PREMISES, WHERE THE POSSIBILITY OF RENTING THEM IS SPECULATIVE.**"

In *Justesen vs. Penn R. Co.*, 92 N. J. L. 257, 106 Atl. 137, it was held that damages chargeable

to a wrongdoer must be shown to be the proximate result of his delinquency, and that the term "proximate" indicated that there must be no other culpable and efficient agency intervening between the defendant's dereliction and the loss.

9 Corpus Juris 809: "An owner who has sustained injury by reason of a breach of contract by the builder may recover all damages which are the proximate result of the breach; BUT HE CANNOT RECOVER REMOTE OR SPECULATIVE DAMAGES. Where the builder is justified in abandoning further work under the contract, the owner cannot recover damages for failure to fully perform the contract.

In *Clifford vs. Leroux*, 14 Tex Civ. A. 340, it was held that loss of rents was too speculative and could not be recovered, where the contractor failed to construct an elevator in an office building.

In *Winslow Elevator & Machine Co. vs. Hoffman*, 107 Md., 621, 69 Atl. 394, there was no recovery for loss of rents for failure to install elevator in an office building, the court holding that the loss was so uncertain as to be little more than a guess. *Lanahan vs. Heaver*, 79 Md. 419, 29 Atl. 1036, was cited, wherein the Court stated the rule was that "wherever it is purely problematical whether any profits would be realized at all by reason of contingencies which might never happen, or where the profits have reference to dependent or collateral engagements entered into on the faith of the performance of the principal contract, there, without regard for any uncertainty as to mere amounts, probable profits cannot be recovered, because too speculative, indefinite and remote."

Defendant's inability to rent his flats might have been due to many other conditions, such as the question of the desirability of the rooms, their lay-

out, the type of building, the location of the building, or the amount of rent asked and the fact that at the time of trial there were seven flats that were never occupied or rented, although the buildings had been then completed two years or more, indicated that this loss probably was due to causes other than the acts or omissions of the plaintiffs. Defendant's said claim was problematical, uncertain, indefinite, speculative, remote and not proximately due to plaintiffs' alleged breach of contract.

No properly qualified testimony was offered as to the renting value of the premises, but testimony as to the amount asked was introduced.

The fact that the defendant failed to make timely payments according to the terms of the contract delayed the completion of the job, and the delay was attributable to the defendant himself.

Defendant's measure of damage was limited to an allowance on the contract price for the defects or omissions only.

In view of the facts in this case and the admission that defendant's flats were never rented, the Court's sixteenth charge was proper.

THE COURT'S SEVENTEENTH CHARGE WAS PROPER.

From the evidence, it appeared that the defendant was nearly always in arrears in his payments, sometimes to the extent of more than \$15,000 or more. His methods of payment, the times of payment, and the amounts of payment caused plaintiffs embarrassment and ultimately forced them to curtail operations on the job by laying off some employees.

9 Corpus Juris 783. "The failure of the builder to perform the contract in the time stipulated will be excused and the owner cannot take advantage

thereof, where such failure is caused by the wrongful acts of the owner or by his failure to perform his part of the contract. **THUS THERE IS A VALID EXCUSE FOR NON-PERFORMANCE WITHIN THE STIPULATED TIME, WHERE THE DELAY IS CAUSED BY THE OWNER'S FAILURE TO PAY WHEN DUE THE INSTALLMENTS OF THE COMPENSATION WHICH ARE PAYABLE AS THE WORK PROGRESSES.**

In *Schauffele v. Greenberg*, 82 N. J. L., 343, affirmed in 83 N. J. L., 737, 82 Atl. 921, affirmed in 85 Atl. 178, it was held, following *Hinds v. Henry*, 36 N. J. L., 328, that insofar as plaintiff was unable to show literal performance of the contract, his inability to do so was caused by the defendants acts, which the latter could not interpose as a defense to a claim otherwise just.

In *Kress House Moving Co. v. George Hogg Co.*, 263 Pa. 191, 106, Atl. 351, the Pennsylvania Supreme Court states that the guiding principle is that one who impedes the performance of a contract by another cannot take advantage of his own wrong to prevent a recovery.

Defendant failed to make the payments required by the contract and he thereby delayed the job, and he cannot now take advantage of this delay and recover damages on his counterclaim from plaintiffs.

The charged complained of was proper.

CONCLUSION

FOR THESE REASONS THE JUDGMENT OF THE SUPREME COURT AFFIRMING THE JUDGMENT BELOW SHOULD BE AFFIRMED BY THIS COURT.

KEATING AND KEATING,
Attorneys of Plaintiffs-Appellees.

M. FRANCIS KEATING,
Of Counsel.



