

INDEX

	PAGE
Summons	1
Complaint	2
Schedule A.	6
Schedule B.	18
Affidavit of Merits	19
Answer of Defendant, Louis Zapeikov	20
Reply	22
Substitution of Attorney	23
Motion for a Non-suit	76
Charge to Jury	104
Exceptions to Charge	108
Plaintiff's Requests to Charge	108
Postea	111
Notice of Appeal	113
Grounds of Appeal	114

TESTIMONY.

For Plaintiff.

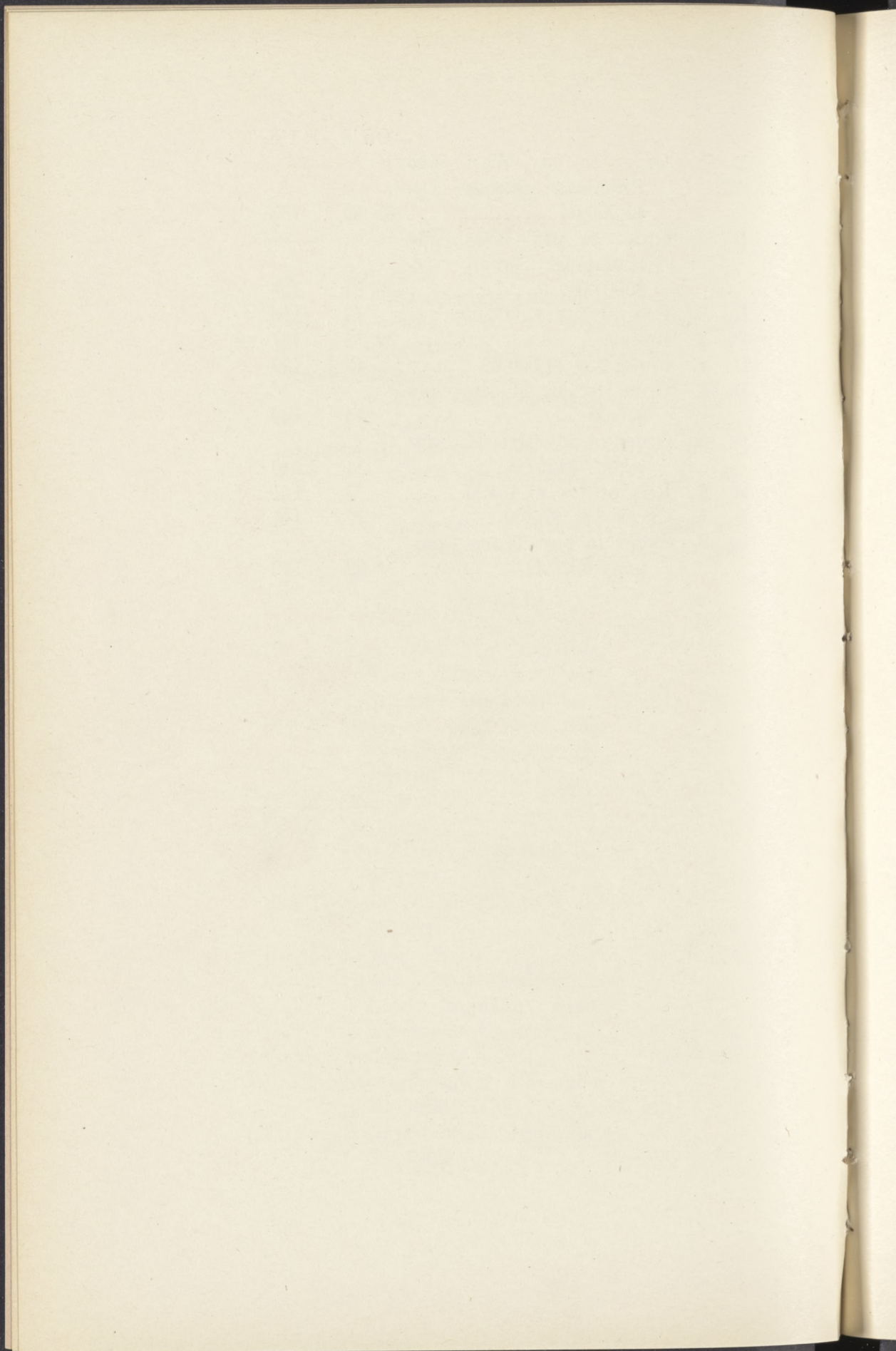
Joseph Grunt,	
direct examination.....	25
cross "	31
re-direct "	46
re-cross "	46
Maurice Huckman,	
direct examination.....	47
cross "	52
re-direct "	59
re-cross "	60
Allen Levan,	
direct examination.....	60
cross "	61
Jane Weisman,	
direct examination.....	62
cross "	65
Carl Benna,	
direct examination.....	68
cross "	70

	PAGE
Maurice Grunt, direct examination.....	72
<i>For Defendants.</i>	
Louis Zapiekov, direct examination.....	77
cross "	88
re-direct "	96
Maurice Zapiekov, direct examination.....	96
cross "	98
Maurice Huckman, direct examination.....	99
cross "	100
re-direct "	100, 101
re-cross "	101, 103

EXHIBITS.

	Off'd	P't'd
P. 1. Agreement for Building, Louis Zapiekov with Maurice Huckman	24	117
P. 2. Order to pay West Side Plumbing Supply Co. \$900.00	29	123
P. 3. Stop Notice	30	124
P. 4. Estimate	38	125
P. 6. Check—Nov. 27, 1928 for \$500.00	49	128
P. 7. Check—Nov. 27, 1928 for \$879.11	50	129
P. 8. Ledger Sheets	63	130
P. 9. Letter—Trane Company to Louis Zapeikov, dated November 9, 1928	92	132
P. 10. Yellow sheet L Z	99	133
P. 11. Receipt dated November 20, 1928	99, 103	133
P. 12. Receipt dated November 27, 1928	99, 103	134

	Off'd	P't'd
D. 1. Order to pay West Side Plumbing Supply Co. \$1,000.00	35, 80	135
D. 2. Order to pay West Side Plumbing Supply Co. \$900.00	36, 84	136
D. 3. Receipt for \$1,000.00	45	136
D. 3. Release	52, 78	137
D. 4. Check for \$1,000.00	45	139
D. 4. Order to pay M. Zapeikov \$75.00	54	140
D. 5. Order to pay Mrs. M. Zap- eikov \$425.00	54	140
D. 6. Receipt for \$1,454.11	77	141
D. 7. Check for \$75.00	77	141
D. 8. Order to pay Trane Com- pany \$879.11	82	142



SUMMONS.

The State of New Jersey to Louis Zapeikov and Maurice Huckman, You (L. s.) are SUMMONED to answer the annexed complaint of Joseph Grunt, trading as West Side Plumbing Supply Company, 10 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 the Essex 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.

WITNESS, His Honor, WILLIAM A. SMITH, Judge of Essex County Circuit Court, at Newark, this 20 2nd day of January, one thousand nine hundred and twenty-nine.

JOHN H. SCOTT,
Clerk.

MICHAEL G. ALENICK,
Attorney.

30

40

COMPLAINT.

Essex County Circuit Court

10	JOSEPH GRUNT, trading as West Side Plumbing Supply Com- pany, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div>	} <i>Action at Law. Complaint.</i>
	<i>vs.</i> LOUIS ZAPEIKOV and MAURICE HUCKMAN, <div style="text-align: right; padding-right: 20px;"><i>Defendants.</i></div>	

20 Plaintiff, Joseph Grunt, trading as West Side Plumbing Supply Company, residing in the City of Newark, County of Essex and State of New Jersey, says that:

FIRST COUNT.

1. At the time hereinafter mentioned the defendant, Louis Zapeikov, was the owner of a certain parcel of land and premises situated in the City of Newark, County of Essex and State of New Jersey, and more particularly described as follows:

30 BEGINNING at a point on the northerly line of Madison Avenue distant 70.08' Easterly from the intersection of the same with the Easterly line of South Eleventh Street; thence running (1) Easterly and along said line of Madison Avenue 53 feet; thence (2) North 22 degrees 55 minutes east along the westerly line of lot #48 on a map hereinafter referred to 101.25'; thence (3) Westerly

40

Complaint.

along the southerly line of lot #51 and binding thereon North 67 degrees 40 minutes West 53 feet and thence in a southerly direction parallel with the second course 102 feet more or less to the BEGINNING.

Being part of lots #49 and #50 on Map of property formerly belonging to Joseph B. Sanford situate in the City of Newark, N. J. made by Lehlbach Bros. surveyors, 1899. 10

2. On the 28th day of June, 1928, the defendant, Louis Zapeikov, made a contract in writing with the defendant, Maurice Huckman, hereinafter called the contractor, for the general heating and plumbing work in the building on the above described premises in accordance with the plans and specifications prepared by Siegler & Greenberg, architects, for the agreed price of \$4,450. 20

3. On June 29, 1928, the said contract, together with the specifications accompanying the same referred to therein, was filed in the office of the Clerk of Essex County.

4. Then and thereafter, the contractor proceeded to perform the contract on his part, and the plaintiff sold and delivered to him the plumbing and heating materials mentioned in Schedule "A" which is hereto annexed and hereby made part hereof, and the contractor thereby became indebted to the plaintiff and promised to pay him the sum of \$1,040.21. 30

5. The said materials were furnished for the erection and construction of the building contracted for as aforesaid.

6. The contractor has not paid the said sum of \$1,040.21 or any part thereof. 40

Complaint.

7. On or about November 20, 1928, and/or on or about November 27, 1928, the plaintiff demanded the said sum of \$1,040.21 from the said contractor and he then refused and has ever since refused to pay the same.

10 8. On or about November 20, 1928, plaintiff gave to the defendant a notice of an order signed by the contractor, addressed to the defendant, Louis Zapeikov, authorizing him to pay to the plaintiff the sum of \$900.00 for materials delivered and to be delivered to his premises at 243 Madison avenue, Newark, N. J., hereinabove mentioned and to deduct the same from the payment due to the contractor in accordance with the contract made between the said contractor and the defendant, Louis Zapiekov, and the said
20 defendant, Louis Zapiekov then and there promised and agreed with the plaintiff to withhold from the last payment due to the contractor the said sum of \$900.00 called for by the aforementioned order.

9. On November 27, 1928, plaintiff gave to the defendant, Louis Zapeikov, a notice in writing of the demand he had made upon the contractor for payment and of the refusal and of the amount
30 due, a copy of which notice, marked Schedule "B" is hereto annexed and hereby made part hereof.

10. The defendant, Louis Zapeikov, at the time notice was given to him as aforesaid was, and at all times since, has been fully satisfied of the correctness of the plaintiff's demand.

11. The contractor at all times after the making of the contract duly substantially performed
40 all things by the contract required to be per-

Complaint.

formed to entitle him to payments therein stipulated.

12. At the time of the service of the said notice of the order and of the said stop notice aforesaid, there was due and owing to the said defendant, Maurice Huckman, from the said defendant, Louis Zapiekov, the sum of \$1,500 in accordance with the terms of the contract aforesaid. 10

13. The defendants have not paid the said sum of \$1,040.21 so due to and demanded by the plaintiff.

The plaintiff demands the sum of \$1,250.00 from the defendants, Louis Zapeikov and Maurice Huckman.

SECOND COUNT. 20

1. The plaintiff repeats paragraphs 1, 2, 3, 4, 5, 6 and 7 of the first count.

2. There is due and owing to the plaintiff from the said defendant, Maurice Huckman, \$1,040.21 together with interest thereon.

The plaintiff demands damages in the sum of \$1,250.00 from the defendant, Maurice Huckman.

MICHAEL G. ALENICK, 30
Attorney of Plaintiff.

Complaint—Schedule A.

SCHEDULE "A"

Morris Huckman
54 16th Ave.
Newark, N. J.

July 31	39.33	Aug. 27	1.00
Aug. 1	10.19	Aug. 28	1.90
Aug. 1	2.50	Aug. 28	1.40
Aug. 1	1.89	Aug. 29	2.63
Aug. 2	3.22	Aug. 30	2.97
Aug. 4 .....	.18	Aug. 30	4.75
Aug. 4	16.88	Aug. 30	29.20
Aug. 6	22.71	Sept. 11	4.64
Aug. 7 .....	.99	Sept. 11	2.50
Aug. 7 .....	.20	Sept. 11 .....	.80
Aug. 8	1.26	Sept. 12	3.12
Aug. 8	6.48	Sept. 13	3.63
Aug. 8	2.59	Sept. 13	5.93
Aug. 9	8.88	Sept. 13 .....	.30
Aug. 9	5.88	Sept. 13	1.60
Aug. 10 .....	.38	Sept. 13	27.60
Aug. 10	2.20	Sept. 13	7.50
Aug. 13	2.95	Sept. 17	3.20
Aug. 14	1.71	Sept. 26 .....	.75
Aug. 14 .....	.32	Sept. 26 .....	.12
Aug. 14	2.92	Sept. 24	1.18
Aug. 14	9.50	Nov. 12	5.29
Aug. 15 .....	.20	Nov. 12	18.84
Aug. 15	1.40	Nov. 13	8.97
Aug. 15	23.94	Nov. 13	25.20
Aug. 16	15.81	Nov. 14	2.00
Aug. 16	2.00	Nov. 15	13.05
Aug. 17	6.07	Nov. 15	23.78
Aug. 18	9.81	Nov. 16	11.96
Aug. 20	1.91	Nov. 19	7.65
Aug. 20	5.69	Nov. 19	8.83
Aug. 20	1.08	Nov. 20	11.52
Aug. 21	56.55	Nov. 30 Contract account	1548.00
Aug. 21 .....	.27	Nov. 1	3.39
Aug. 22	11.23		
Aug. 22 .....	.90		\$2113.27
Aug. 23 .....	.18	Aug. 13 Credit	.35
Aug. 23	5.60	Aug. 30	70.86
Aug. 23 .....	.75	Nov. 14	1.85
Aug. 23	1.44	Nov. 19 Cash	
Aug. 24	11.52	Credit	1000.00 1073.06
Aug. 24	2.00		
Aug. 27	4.16		Balance \$1040.21
Aug. 27	12.40		

Complaint—Schedule A.

AUGUST 1, 1928		
3 L. 3" S. H. X. H. Pipe.....	1.38	4.14
2 L. 3" D. H. do	1.45	2.90
3 L. ½" Black Pipe 63 ft.....	.05	33.15
		<hr/>
		10.19
AUG. 1		
To charge difference between a 4" S. V. Trap and a 2" P Trap.....		2.50
		10
AUGUST 1		
2 4 x 3 X. H. Ys.....	.76	1.52
1 2" 1/5 bend.....		.37
		<hr/>
		1.89
AUG. 2		
1 3 x 1½ X. H. Tapped TY.....		.67
1 3 x 2 Tapped Tee X. H.....		.67
1 4 x 2 X. H. Reducer.....		.28
1 4 x 3 Vent Y		1.13
1 2½ x 1¼ Steam tee.....		.47
		<hr/>
		3.22
AUG. 4		
2 2 x 1½ Black bushings.....	.09	.18
		20
AUG. 4		
2 L. 4" D. H. X. H. Pipe.....	1.96	3.92
4 4" 1/5 bends.....	.61	2.44
66# Pig lead.....	.08	5.28
1 4 x 1½ Cross Tapped Tee.....		.99
1 3 x 2 Reducer .....		.28
1 4 x 3 Y .....		.76
1 4" P Trap.....		1.23
1 2" Long Drg. TY.....		.62
4 2" Galv. Close Nipples.....	.09	.36
12 x 1½ Galv. bushing.....		.25
1 Set 1" Toledo dies.....		.75
		<hr/>
		16.88
		30
AUG. 6		
18 1¼ Gate valves.....	1.25	22.50
1 L. Perf. iron.....		.21
		<hr/>
		22.71
AUG. 7		
1 2" Drg. 45.....		.32
1 2 x 1½ Long Drg. TY.....		.67
		<hr/>
		.99
AUG. 7		
1 Furnace Pin .....		.20
		40

Complaint—Schedule A.

	AUG. 8		
	1 2" Drg. TY .....		.48
	1 2" " E11 .....		.32
	1 2" " 45 .....		.32
	1 2" Galv. Close nipple.....		.09
	1 Candle .....		.05
			1.26
	AUG. 8		
10	1 L. 1½ Galv. pipe 21 ft.....	.16	3.36
	12 1¼ Steam 45s .....	.11	1.32
	12 1¼ Close nipples .....	.05	.60
	12 ¾" Steam 45s .....	.07	.84
	12 ¾" Galv. shoulder nipple.....	.03	.36
			6.48
	AUG. 8		
	1 4" X. H. Y.....		.84
	1 4 x 3 Bushing .....		.40
	1 2 x 1½ do .....		.09
	1 3" Flange union.....		.90
	¾ # Rubber packing.....	.40	.30
			2.59
	AUG. 9		
	1 3" I. B. Gate valve.....		7.0
	18 ¾" Black caps .....	.05	.9
	18 ½" do .....	.03	.5
	2 3 x 6 Black nipples.....	.22	.4
			8.8
	AUG. 9		
	3 L. 4" D. H. X. H.....	1.96	5.8
	AUG. 10		
	2 1½ x 1¼ bushings .....	.06	.12
	2 1¼ x 4 Blk. nipples .....	.06	.12
	2 1¼ x 5 do .....	.07	.14
			.38
30	AUG. 10		
	1 4" Steam ell.....		
	1 4 x 12 Blk. nipple		
	12 ¾" Blk. ells.....		2.20
	AUG. 13		
	To charge difference on		
	2 10 x 10 lead bends and		
	2 18 x 18 do and 1.....		2.58
	1½" P lead trap and 1.....		.37
			2.95
	2" P lead trap		

Complaint—Schedule A.

AUG. 13		
1 3 x 2 Steam tee.....		.71
8# 2" lead pipe.....	.09	.72
		1.43
Credit		
2 3" steam ells.....	.42	.84
2 2½ x 2 x 1½ Steam tee.....	.47	.94
		1.78
	Credit	.35
		10
AUG. 14		
1 2" P-lead trap.....		.95
2 2" solder nipples.....	.32	.64
2 1½" plugs.....	.06	.12
		1.71
AUG. 14		
1 2" Male solder nipple.....	.32	.32
AUG. 14		
5# Wesco Cement.....	.20	1.00
1 1¼ x 1 Steam tee.....		.15
3 1¼ x 1 x ¾ do.....	.15	.45
6 ¾ x 4 galv. nipples.....	.06	.36
6 ¾ x 3 do.....	.06	.36
6 ½ x 4 do.....	.05	.30
6 ½ x 3 do.....	.05	.30
		2.92
AUG. 14		
24 ¾" Steam ells.....	.05	1.20
4 ¾" " tees.....	.08	.32
1 Bdle. ¾" Black pipe 133 ft.....	.06	7.98
		9.50
AUG. 15		
2 Balls Lampwick.....		.20
AUG. 15		
1 3" Testing plug.....		.85
1 ½" Stop & waste.....		.55
		1.40
AUG. 15		
1 1½ x ½ brass tee.....		.84
3 1½ " ells.....	.48	1.44
1 1½ x 1½ x 1¼ brass tee.....		.84
2 1¼ gate valves.....	1.50	3.00
24 ½" brass ells.....	.10	2.40
10 ½" Brass St. ells.....	.16	1.60
12 ½" Brass Asst. nipples.....	.12	1.44
4 ¾ x ½ Brass tees.....	.22	.88
8 ¾" Brass ells.....	.14	1.12
		40

Complaint—Schedule A.

	1 1¼ x 5 brass nipple.....		.30
	1 1¼ close do .....		.15
	1 1¼ x ½ x 1¼ brass tee.....		.62
	2 1¼ brass ells.....	.36	.72
	2 1¼ x 1 x 1 brass tees.....	.62	1.24
	1 1¼ x 1 brass do .....		.62
	2 1¼ x ½ brass do .....	.62	1.24
	3 1" brass St. ells.....	.27	.81
	3 ¾" brass St. ells.....	.21	.63
	6 ¾" brass Asst. nipples.....	.15	.90
10	2 1" brass 45s.....	.21	.42
	5 1" brass ells.....	.21	1.05
	1 1½ x ½ x 1½ brass tee.....		.84
	1 1½ x 1¼ x 1 brass tee.....		.84
			<hr/>
			23.94

AUG. 16

	8 ¾ x ½ Steam ells.....	.08	.64
	4 ¾" " tees .....	.08	.32
24	¾" " ells .....	.05	1.20
	1 Bdle. ¾" Black pipe 136.....	1.06	8.18
	1 L. Perf. iron.....		.21
	2 1¼ brass ells .....	.28	.56
	2 1½ " cplgs. ....	.25	.50
	1 1¼ x 1 x 1¼ brass tees.....		.48
20	6 ft. 1¼ brass pipe 15½ #.....	.24	3.72
			<hr/>
			15.81

AUG. 16

	1 1¼ brass ell.....		.30
	1 1¼ " tee .....		.50
	1 1 x ½ " do .....		.34
	1 1 x ¾ " bushing .....		.13
	1 1¼ x 1 do .....		.18
	6 ¾ x 6 galv. nipples.....	.07	.42
	1 1¼ brass close nipple.....		.13
			<hr/>
			2.00

AUG. 17

	1 2" Drg. TY.....		.62
	1 1" Brass close nipple.....		.08
30	2 1 x ½ Brass tees.....	.34	.68
	1 ¾ x ½ x ½ brass tee.....		.22
	1 1 x ½ x 1 " " .....		.34
	6 1½ " " .....	.14	.84
	1 1 x 5 " nipple .....		.20
	1 1 x 4 do .....		.17
	2 1" brass caps .....	.15	.30
	1 1" brass tee .....		.27
	1 1 x ¾ x ¾ brass tee.....		.34
	1 ½ x ¾ do .....		.34
	8 ½ x ⅜ ells.....	.13	1.04
	3 1" brass ells.....	.21	.63
			<hr/>
			6.07

Complaint—Schedule A.

AUG. 18

1 #2 Armstrong Stock & die.....		6.00	
1 #1 Pipe cutter		1.75	
4 1/2 x 3 galv. nipples.....	.05	.20	
1 1 x 3/4 brass tee .....		.34	
2 1 x 1/2 do .....	.34	.68	
1 1 x 1/2 x 1 do .....		.34	
1 1 x 3/4 x 3/4 do .....		.34	
2 3/4 x 1/2 brass bushings.....	.08	.16	
		<hr/>	
		9.81	10

AUG. 20

6 1/2" brass ells .....	.10	.60	
5 1/2" " tees .....	.14	.70	
1 1/2" Stop & waste.....		.55	
1 1/2" plug .....		.06	
		<hr/>	
		1.91	

AUG. 20

6 3/8 x 6 galv. nipples.....	.06	.36	
15 4"5" nipples .....	.06	.90	
10 3/8" caps 1 1/2 #.....	.21	.32	
2 1/2 x 3/8 brass ells.....	.13	.26	
2 6" bell traps .....	.65	1.30	
3 3" P traps X. H.....	.85	2.55	
		<hr/>	
		5.69	20

AUG. 20

6 1/2" brass ells.....	.10	.60	
3 1/2" do .....	.16	.48	
		<hr/>	
		1.08	

AUG. 21

2 L. 3" D. H. X. H. Pipe.....	1.45	2.90	
8 L. 4" S. H. do	1.87	14.96	
4 L. 4" D. H. do	1.96	7.84	
18 ft. 1/2" brass pipe 48 #.....	.24	11.52	
1 4" P trap IH. H.....		1.13	
2 4 x 3 X. H. Ys.....	.76	1.52	
1 3" X. H. P trap.....		.85	30
1 6 x 6 bell trap.....		.65	
2 10 x 10 do	1.35	2.70	
2 4" 1/4 bends .....	.52	1.04	
1 4" 1/8 bend .....		.47	
33 L. 3/4" covering 99 ft.....	.05	4.95	
17 L. 1 1/4" do 51 ft. ....	.06 1/2	3.32	
15 L. 1" do 45 ft. ....	.06	2.70	
		<hr/>	
		56.55	

AUG. 21

3 1/2" brass cplgs.09	.27	
--------------------------	-----	-----	--

Complaint—Schedule A.

		AUG. 22	
		1 2 x 1 steam tee.....	.27
		3 1" do .....	.09 .27
		1 1 x 1/4 bushing.....	.05
		1 1 1/2 x 1 1/4 x 1 tee.....	.18
		1 1 1/4 x 3/4 bushing.....	.06
		3 1" black unions.....	.24 .72
		6 1 x 2 1/2 black nipples.....	.05 .30
		1 3/4" black union.....	.18
		2 1 1/4 do .....	.35 .70
10		3 1 1/4 x 2 tees.....	.15 .45
		2 1 1/4 check valves.....	1.50 3.00
		4 2" black unions.....	.65 2.60
		6 2 x 2 1/2 black nipples.....	.07 .42
		3 2 x 6 do .....	.13 .39
		1 1 1/4 x 1/2 steam tee.....	.15
		1 1/2" Black G. J. union.....	.15
		1 1/2" check valve .....	.70
		6 1/2 x 4 nipples.....	.03 .18
		2 3 x 2 black bushings.....	.17 .34
		2 1 1/4 x 1 do .....	.06 .12
			<hr/>
			11.23
		AUG. 22	
		1 2 x 1 1/4 steam tee.....	.27
		2 2" do .....	.24 .48
20		1 1 1/4 x 1 x 1 do .....	.15
			<hr/>
			.90
		AUG. 23	
		2 1/2" brass cplgs. ....	.09 .18
		AUG. 23	
		1 2 x 1 steam tee .....	.27
		1 1 x 3/4 " bushing .....	.05
		2 2 x 3/4 x 2 tees .....	.27 .54
		3 2" do .....	.24 .72
		2 2" ells .....	.16 .32
		2 1 1/4" tees .....	.14 .28
		1 1 1/4 x 3/4 x 1 1/4 tees .....	.15
		1 2" cap .....	.20
30		3 2 x 4 nipples .....	.09 .27
		1 2" check valve.....	2.50
		3/4 # rubber.....	.30
			<hr/>
			5.60
		AUG. 23	
		2 1/2" brass ells.....	.10 .20
		1 1/2" Stop w/ waste.....	.55
			<hr/>
			.75
		AUG. 23	
		16# lead pipe.....	.09 1.44
		AUG. 24	
40		4 L. 1/2" brass pipe 48#.....	.24 11.52

Complaint—Schedule A.

AUG. 24			
1 Chromard Urinal strainer.....		2.00	
AUG. 27			
40 1 x 3/4 black bushings .....	.05	2.00	
1 3 x 2 steam ell.....		.48	
1 3" " tee.....		.24	
24 3/4" galv. nipples 2 1/2" 3".....	.06	1.44	
		<hr/>	
		4.16	
20 3/4" Hot water ellses.....	.55	11.00	10
12 1/2 x 2 galv. nipples.....	.05	.60	
12 1/2 x 2 1/2 do .....	.05	.60	
1 # Wesco .....		.20	
		<hr/>	
		12.40	
AUG. 27			
2 3" Steam 45s .....	.50	1.00	
AUG. 28			
2 1 1/2" brass ells.....	.55	1.10	
1 1 1/2 x 6 do .....		.53	
1 1 1/2 F. F. Blk. union.....		.27	
		<hr/>	
		1.90	
AUG. 28			20
1 1 1/2" brass tee .....		.75	
1 1 1/2 x 1/2 " bushing.....		.28	
1 1 1/2 x 4 " nipple .....		.28	
1 2 x 1 1/2 blk. bushing.....		.09	
		<hr/>	
		1.40	
AUG. 29			
2 1 1/2" Brass ells.....	.55	1.10	
1 1 1/2 x 4 " nipple.....		.28	
1 1" Gate valve		1.25	
		<hr/>	
		2.63	
AUG. 30			
1 L. 1/2" Brass pipe 12 #.....	.24	2.88	30
1 1/2" " Cplg. ....		.09	
		<hr/>	
		2.97	
AUG. 30			
Credit			
1 3 x 2 steam tee.....		.67	
1 3" " ell .....		.40	
2 1 1/4 x 2 " tees .....		.27	
2 1 1/4 x 3/4 " ells .....		.18	
2 1 1/4" " tees .....		.25	
6 1 1/2" " ells .....		.60	
1 1 1/2" " 45s .....		.13	
6 1 1/4" " ells .....		.48	
1 1" " do .....		.06	
1 2 1/2 x 6 Black nipple .....		.21	
		<hr/>	
			40

Complaint—Schedule A.

	1 2" cap .....		.15
	12 L. 1" Black pipe 252 ft.....	.0717	.64
	4 L. 1 1/4" do 84 ft.....	.09	7.56
	2 4" P Traps X.H.		1.60
	1 5 x 4 Y .....		.98
	1 4 x 2 Tapped TY .....		.84
	1 4 x 4 x 2 S.O.		1.87
	1 5" Long sweep		1.15
	2 L. 5" D.H.X.H. pipe.....		4.80
	1 L. 1 1/2" brass pipe 36 1/2 #.....	.22	8.03
10	3 L. 1" do 65 1/4 #.....	.22	14.36
	5 L. 3/4" do 75 #.....	.22	16.50
			<hr/>
			78.73
	Less 10% for handling.....		7.87
			<hr/>
	Total credit		70.86
	AUG. 30		
	1 Set 3" Dies.....		
	1 3" Collar		4.75
	SEPT. 11		
	8 3/4" Brass ells .....	.14	1.12
	4 3/4" " St. Ells .....	.21	.84
	6 1/2" " ells .....	.10	.60
20	3 1/2" " St. Ells .....	.16	.48
	2 3/4" " unions.....	.45	.90
	2 1/2" " " .....	.35	.70
			<hr/>
			4.64
	SEPT. 11		
	1 Set green Porc. trimmings for K111...		2.50
	SEPT. 11		
	2# Putty .....	.08	.16
	1# Wesco Pipe joint cement .....		.20
	4 1/2 x 4 brass nipples .....	.11	.44
			<hr/>
			.80
	SEPT. 12		
30	3 3/4 x 1/2 Brass bushings.....	.08	.24
	1 L. 1/2" " pipe 12 #.....	.24	2.88
	SEPT. 13		
	1 L. 1/2 Brass pipe 12 # .....	.24	2.88
	3 1/2" Brass ells.....	.10	.30
	1 1/2" " 45s.....		.11
	1 1 x 1/2 " tee .....		.34
			<hr/>
			3.63

Complaint—Schedule A.

SEPT. 13		
6 3/4" Brass tees.....	.18	1.08
12 3/4" " ells .....	.14	1.68
6 3/4" " St. ells .....	.21	1.26
2 3/4 x 1/2 " tees.....	.22	.44
5 3/4" " cplgs.....	.13	.65
1 Ball lampwick .....		.10
3 3/4 x 3 1/2 Brass nipples.....	.11	.33
3 3/4 x 4 do .....	.13	.39
		5.93
		10
SEPT. 13		
6 Difference between 3/4 Stops no waste to 3/4 stops with waste .....		.30
SEPT. 13		
96 ft. 3/4" Brass pipe 120# .....	.23	27.60
SEPT. 13		
12 3/4" Brass nipples to 3".....	.10	1.20
1 8" strainer .....		.40
		1.60
		20
SEPT. 13		
2 1/2" Std. valves Chromard.....		7.50
SEPT. 17		
1 Pr. Std. all Porc. handle Basin cocks	1.60	3.20
SEPT. 26		
1 3/4" Gate valve .....		.75
SEPT. 26		
3 1" Black plugs .....	.04	.12
NOV. 12		
1 12" Round tapped black sink.....		1.00
1 2" Galv. trap.....		.85
1 2" " close nipple.....		.09
1 2 x 6 do .....		.20
1 #90 clamp vise		3.15
		5.29
		30
NOV. 12		
1 2" F. F. Blk. union.....		.35
1 1 1/4 x 3/4 steam tee .....		.15
8 ft. 1" Brass pipe 14 1/2# .....	.23	3.34
1# #13 Excelso heater.....		15.00
		18.84
		40

Complaint—Schedule A.

			NOV. 13		
			2 1½ x 3 Blk. nipples .....	.07	.14
			3 1½" Steam ells .....	.11	.33
			1 1½ Blk. G. J. union .....		.45
			1 ¾" Gate valve .....		.75
			12 ½" Brass ells .....	.10	1.20
			6 ¾" " " .....	.14	.34
			2 1 x ¾ " bushings .....	.13	.26
			5 1" " ells .....	.21	1.05
			2 ¾" " tees .....	.18	.36
10			2 1" " unions .....	.61	1.22
			3 ¾" do .....	.45	1.35
			6 1 x 4 " nipples .....	.17	1.02
					8.97
			NOV. 13		
			1 17 x 19 Apron basin P4205		7.75
			1 18 x 24 I. E. sink		9.00
			1 L. 1" brass pipe 21¾ # .....	.23	5.00
			1 L. ¾" do 15 # .....	.23	3.45
					25.20
			NOV. 14		
			1 1½" Blk. G. J. union .....		.45
			1 1¼ Steam ell .....		.09
			4 1¼ x 1 bushings .....	.06	.24
20			1 ¾" N. P. supplies .....		.90
			1 1½" N. P. Tailpiece .....		.32
					2.00
			NOV. 14		
			1 K970 2" w/ 1½" slip chromard nipples & esc.		7.30
			2 K970 1½" Chromard w/ nipple & esc.		7.76
			1 K290 5' 6" Chrom. less curtains		3.36
					18.42
			1 F6522 Sea Green seat	6.03	
			1 F6222 Orchid "	6.03	
			2 K960 1¼ Trap	3.22	
			1 K960 1½" "	2.06	
			1 6622 Mag. seat	2.93	20.27
			Credit		1.85
			2 L. 1" N 15		
			2 L. 1" Blk. pipe 42 ft. ....	.08	3.36
			2 L. ½" Brass pipe 24 # .....	.24	5.76
			1 ¾ x ½ x ½ " tee .....		.22
			1 1¼ x ¾ Steam ell .....		.10
			1 ¾ x ½ do .....		.07
			1 1¼ do .....		.09
			6 ¾ " Galv. ells 3 #		
			2 1 x ¾ " tees 1¼ #		
			4 1 " " ells 3 #		
			2 ¾ " " tees 1 # 8¼ # .....	.17	1.40
			1 L. ¾" Black pipe 21 ft. ....	.06	1.26
			2 ¾" Black G. J. unions .....	.17	.34
			1 ¾" Gas service cock .....		.45
40					13.05

Complaint—Schedule A.

NOV. 15			
1 K970 1½" Trap		4.00	
1 K999 Chromard 1½ 2" .....		.58	
1 F6503 Pearl seat		13.50	
1 K291 5' 6" Chromard		11.25	
		<hr/>	
		29.33	
Credit			
1 K290 5' 6"	3.36		
1 K999 1¼" Trap .....	.58		
1 K900 1¼" do	1.61	5.55	10
		<hr/>	
		23.78	
NOV. 16			
1 Cont. waste w/ 2" N. P. trap.....		4.75	
1 Sink strainer .....		.40	
1 2 x 1¼ N. P. trap		1.75	
1 ¾ x 4 brass nipple .....		.15	
6 ¾" Brass ells .....	.13	.78	
2 ¾" " cplgs.....	.13	.26	
3 ¾ x ½ brass tees.....	.22	.66	
1 1 x ¾ black bushing .....		.05	
2 ½" brass plugs .....	.08	.16	
2 1" Service check valves.....	1.50	3.00	
		<hr/>	
		11.96	
NOV. 19			20
1 Pr. ¾" N. P. supplies.....		1.10	
1 1½" N. P. trap.....		.85	
1 Pr. basin cocks		1.80	
1 Pr. N. P. sink bibbs		1.80	
2 P. O. plugs .....		.80	
1 pr. ¾" N. P. C. I. angle valves.....	.65	1.30	
		<hr/>	
		7.65	
NOV. 19			
1 Church Mag. seat		6.00	
1 Pr. ¾" N. P. supplies		1.10	
2 ½" brass unions .....	.38	.76	
1 2 x 3 Galv. nipples .....		.15	
1 2" Drg. ell .....		.32	
2 ¾" N. P. ells .....		.30	
1 1 x ¾ Galv. ell .....		.20	30
		<hr/>	
		8.83	
NOV. 20			
4 L. ½" Brass pipe 48# .....	.24	11.52	
Contract			
July 31 Merchandise.....		215.00	
Aug. 31 "		300.00	
Sept. 30 "		275.00	
Nov. 30 "		758.00	
		<hr/>	
		\$1548.00	
Aug. 30 Mdse.		39.20	
SEPT. 13			
96 ft. ¾" Brass pipe 120#.....	.23	27.60	
Sept. 24 Mdse.		1.18	40

Complaint—Schedule B.

SCHEDULE "B."

Newark, N. J.

Nov. 27, 1928.

STOP NOTICE

To Mr. Louis Zapeikov:

- 10 You are hereby notified that Morris Huckman is justly indebted to us, in the sum of One Thousand Forty Dollars and Twenty one Cents (\$1040.21) for materials furnished by us to him and used in the erection of the two story brick building, now being erected on the land owned by you and situated at #243 Madison Ave., Newark, N. J., pursuant to the contract made between you and him; and you are further notified that we have demanded payment from the said Morris
- 20 Huckman of the said sum of money, so owing to us as aforesaid, and that he has refused to pay same or any part thereof; and you are therefore required to retain the amount, so due and claimed by us, out of the amount owing by you on said contract, or that may hereafter become due on said contract, and pay the same to us.

Signed JOSEPH GRUNT.

To the Within Named Defendants:

- 30 In case the within summons and complaint are served upon you personally, then TAKE NOTICE that if you intend to make a defense to this action, you must file an affidavit of merits within ten (10) days from the date of service thereof upon you, and must file your answer within twenty (20) days from the date of such service, and in default of the filing of such affidavit and answer, judgment will be entered against you.

MICHAEL G. ALENICK,

Attorney of Plaintiff.

AFFIDAVIT OF MERITS.

ESSEX COUNTY CIRCUIT COURT.

JOSEPH GRUNT, trading as West
Side Plumbing Supply Com-
pany,

Plaintiff,

vs.

LOUIS ZAPEIKOV and MAURICE
HUCKMAN,

Defendants.

*Action
at Law.*

*Affidavit
of Merits.*

10

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

20

LOUIS ZAPEIKOV, of full age, being duly sworn on his oath, according to law, deposes and says that he is one of the defendants in the above stated cause, and he believes that he has a just and legal defense to the said action on the merits of the case.

LOUIS ZAPEIKOV.

Subscribed and sworn to before me
this 10th day of January, A. D.
1929.

30

NATHAN KRAUSS,
An Attorney at Law of N. J.

40

**ANSWER OF DEFENDANT,
LOUIS ZAPEIKOV.**

ESSEX COUNTY CIRCUIT COURT.

10	JOSEPH GRUNT, trading as West Side Plumbing Supply Com- pany, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		
	LOUIS ZAPEIKOV and MAURICE HUCKMAN, <div style="text-align: right;"><i>Defendants.</i></div>	}	<i>Answer of Defendant, Louis Zapeikov.</i>

20 Defendant, Louis Zapeikov, residing in the City of Newark, in the County of Essex and State of New Jersey, answering the complaint filed herein, says that:

ANSWER TO FIRST COUNT.

1. He admits paragraph 1 of the first count.
2. He admits paragraph 2 of the first count.
3. He admits paragraph 3 of the first count.
- 30 4. He has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 4, 5, 6 and 7 of the first count of the complaint and leaves the plaintiff to his proof.
5. He denies the whole of paragraph 8 of the first count.
6. He admits the receipt of the notice referred to in paragraph 9 of the first count of the complaint, but says that the same was received by him at 5:45 o'clock in the afternoon of No-
40 vember 27, 1928.

Answer of Defendant, Louis Zapeikov.

7. He neither admits nor denies the allegations contained in paragraph 10 of the first count.

8. He admits paragraph 11 of the first count.

9. He denies paragraph 12 of the first count.

10. He contends and says that paragraph 13 of the first count of the complaint does not concern him.

10

FIRST SEPARATE DEFENSE TO
FIRST COUNT.

By way of separate defense this defendant says:

1. He is not indebted to the plaintiff in any sum whatsoever.

2. At the time that he, this defendant, received the stop notice referred to in paragraph 9 of the first count of the complaint, there was no money due to the contractor, Maurice Huckman, upon the job mentioned in the complaint, this defendant having paid to the said contractor, Maurice Huckman, the full balance to which he, the said contractor, was entitled under the terms of his said agreement, said payment having been made at 1 o'clock in the afternoon of the said 27th day of November, 1928, and this defendant did receive from him, the said Maurice Huckman, a duly executed general release of any and all claims at the time of the making of the said final payment and by reason thereof, this defendant contends and says that there was no money due to the said contractor at the time of the service of said stop notice and hence prays that this suit may be dismissed as against him.

20

30

FRANKEL & DISTLER,
Attorneys for Defendant, Louis Zapeikov.

40

REPLY.

ESSEX COUNTY CIRCUIT COURT.

10	JOSEPH GRUNT, trading as West Side Plumbing Supply Com- pany, <div style="text-align: right;"><i>Plaintiff,</i></div>	} <i>Action at Law.</i>
	<i>vs.</i>	
	LOUIS ZAPEIKOV and MAURICE HUCKMAN, <div style="text-align: right;"><i>Defendants.</i></div>	} <i>Reply to An- swer of De- fendant, Louis Zapeikov.</i>

20 Plaintiff replying to the answer filed by the
defendant Louis Zapeikov says that:

1. He joins issue with said answer.
2. He denies the allegations contained in paragraphs 1 and 2 of the first separate defense to the first count.

MICHAEL G. ALENICK,
Attorney for Plaintiff.

30

40

SUBSTITUTION OF ATTORNEY.

ESSEX COUNTY CIRCUIT COURT.

JOSEPH GRUNT, trading as West Side Plumbing Supply Com- pany,	}	<i>Plaintiff,</i>	<i>Action at Law.</i>	10
LOUIS ZAPEIKOV and MAURICE HUCKMAN,		<i>Defendants.</i>	<i>Substitution of Attorney.</i>	

We hereby consent to the substitution of Philip
J. Schotland, Esq., as attorney for the defendant,
Louis Zapeikov, in our place and stead. 20

Dated November 7, 1929.

FRANKEL & DISTLER,
Attorneys for Defendant, Louis Zapeikov.

30

40

TESTIMONY.

ESSEX COUNTY CIRCUIT COURT.

October 31, 1929.

10

JOSEPH GRUNT, trading as West
Side Plumbing Supply Com-
pany,

*Plaintiff,**vs.*

LOUIS ZAPIEKOV and MAURICE
HUCKMAN,

*Defendants.**Action
at Law.*

20

Before Hon. WORRALL F. MOUNTAIN, J., and a
Jury.

For the plaintiff appears Michael Alenick (by
Milton M. Unger); for the defendants appear
Frankel & Distler (by Charles Frankel).

A jury is called and sworn.

Mr. Unger opens for the plaintiff.

30 Mr. Frankel opens for the defendants.

Mr. Unger: I offer in evidence an agreement
for building between Louis Zapiekov and Mau-
rice Huckman, dated June 28, 1928, covering
building at No. 243 Madison avenue, Newark,
the execution of which is admitted.

(Same is marked Exhibit P. 1.)

Mr. Unger: Will counsel admit that our claim
has been established against Huckman, by a
judgment in this Court?

40

Joseph Grunt, direct.

Mr. Frankel: I assume that the judgment is of record.

Mr. Unger: That judgment, if I am right, also establishes the fact that these goods were used in this house.

Mr. Frankel: I have no way of stating that all the merchandise claimed in the plaintiff's bill was in fact used in this building; it may be that some of the merchandise was removed from the premises. 10

(Argument.)

Mr. Unger: I am able to prove it.

JOSEPH GRUNT, the plaintiff, sworn.

Direct examination by Mr. Unger.

Q You are the plaintiff in this case? A Yes, sir. 20

Q What is your business? A Plumbing supplies.

Q Where? A 16th avenue, Newark.

Q How long have you been in that business? A Eleven years.

Q Do you know Maurice Huckman? A Yes, sir.

Q Is he a plumber? A Yes, sir. 30

Q Were you asked by him to furnish materials for a house at No. 243 Madison avenue? A Yes, sir.

Q Did you receive a list of the materials that were wanted for the building? A Yes, sir.

Q From whom did you get that list? A Maurice Huckman.

Q Are you familiar with this account annexed to the complaint, showing those items? A Yes, sir. 40

Joseph Grunt, direct.

Q Do you know whether or not that represents the items which he ordered? A Yes, sir.

Q Did you, after they were ordered, deliver them to the building? A Yes, sir.

Q Did you see them there afterwards? A
10 Yes, sir.

Q All of them? A Yes, sir.

Q How much was the original estimate for, in dollars and cents? A \$1,548.

Q Were there any extras ordered by him? A Yes, sir.

Q Amounting to how much? A Amounting up to \$2,048.21.

Q Now, who ordered this stuff of you? A Mr. Huckman.

Q Before you delivered this stuff in the
20 building did you see Mr. Zapiekov? A Zapiekov came over to see me.

Q Talk up louder. Did you talk about these materials? A Yes, sir.

Q Now, you tell us what was said. A November 6—

Q When was that? A July 6, 1928 Mr. Zapiekov came over to my house in the morning and asked me if I have a figure from Mr. Huckman to do a certain job. I said, "Yes." He
30 said, "How much would it amount to?" I told him what the materials will amount to, \$2,000. "Well," he says, "I want you to deliver the pipe and fittings because the masons are waiting for the plumber." I said, "Mr. Zapiekov, do you know that Mr. Huckman hasn't any credit with me, he pays here always for cash, he never had any credit with me, his credit is only \$4 or \$5 and this job will amount to \$2,000 and I cannot send it in his name." He says, "Don't
40 worry about the money, because I am going to

Joseph Grunt, direct.

pay the money. Mr. Huckman is getting for the plumbing work, \$1,500 and then will get \$1,500 on the completion of the job. You deliver the material and I will take care of you, I will pay you before I pay Huckman." I delivered the same day, before Huckman told me to deliver the material, I delivered some material. Then, I did work again and Mr. Zapiekov came to me and asked me to deliver and if I told him if the extra contract isn't signed by Huckman then I would like a guarantee for it, and he said "My word is just as good as my signature." 10

Q Where was this? A In my place. And he said, "Send it again, material," and I sent it up. Then, on the 17th of July we sold him again merchandise. Mr. Huckman signed on the 17th because Mr. Zapiekov asked me to deliver, but after the 17th when he signed he took the materials himself and delivered the materials to the job. 20

Q Did you keep on delivering stuff? A Yes, sir.

Q When did you get any money? A We got a check on November 19th or 18th.

Q Who did you get that check from? A My son got it from Mr. Zapiekov. 30

Q How much was that check for? A \$1,000.

Q Had you yet finished delivering all the stuff for the job? A Around the 24th or 25th.

Q Did you go to Mr. Zapiekov and see him on the 20th of November after you got that \$1,000 from him? A Mr. Zapiekov came over to my office.

Q Before he came to your office did you get any paper from Mr. Huckman? A Yes, sir. 40

Joseph Grunt, direct.

Q Did you have that paper with you when Mr. Zapiekov came? A Yes, sir.

Q I show you a paper signed by Maurice Huckman dated November 20, 1928, and I ask you if that is the paper? (Indicating) A Yes, sir.

10

Mr. Frankel: I haven't interposed an objection to counsel's questions although I think a good many are leading. I would ask your Honor to suggest to counsel to please not lead the witness. I think when counsel asks names and dates, I think that all this is leading.

Mr. Unger: I am not aware that I have asked any leading questions.

20

Q When did you get this paper from Mr. Huckman? A In the morning.

Q The morning of what day? A November 20.

Q Did you have it with you when Mr. Zapiekov came? A Yes, sir, I had it in my office.

Q What did you do or say to him in respect to that paper? A I gave him the order and told him that the order was for \$900 for Mr. Huckman and that I wished that he would give me a check. He read it over and he gave me back that order and said, "I am not going to pay any money until the job is entirely completed."

30

Q Did you show him that paper? A Yes, sir.

Q Did he read it? A Yes, sir.

Q Did you tell him what you testified to as to what he said? Did you tell him what it was? A Yes, sir.

40

Joseph Grunt, direct.

Q What did he say about giving any money out? A He said that he did not tell me he would give me any money. He said that when the job is entirely completed then he will pay the balance of the money.

Q Did he tell you how much he was holding back at that time? A No, sir. 10

Q Are you sure that you showed him that paper? A Yes, sir.

Q And he read it? A Yes, sir.

Mr. Unger: I offer this paper in evidence.

Mr. Frankel: No objection.

(Same is marked Exhibit P. 2.)

(Exhibit P. 2 read to the jury.) 20

Q You did not get that \$900 that day? A No, sir.

Q Then, did you keep on furnishing the balance? A Yes, sir.

Q When did you complete your delivery of merchandise? A About the 24th or 25th of November.

Q Did you get your money from Huckman at that time? A No, sir. 30

Q Did you then go to Zapiokov again? A On the 27th.

Q What time of day? A Around six o'clock in the evening.

Q Did you serve him with any paper? A Yes, sir.

Mr. Unger: I call for a stop notice dated November 27, 1928.

Mr. Frankel: We produce it. 40

Joseph Grunt, direct.

Q I show you a paper dated November 27, 1928, marked "Stop Notice," and I ask you if that is the paper. A Yes, sir.

Q You handed that to— A Mr. Zapiekov.

Q What time of day? A In the evening around six o'clock.

10 Q Did you leave it with him? A Yes, sir.

Q Did he take it? A Yes, sir.

Mr. Unger: I offer this paper in evidence.

(Same is marked Exhibit P. 3.)

Mr. Frankel: No objection.

(Exhibit P. 3 read to the jury.)

20 Q What did Mr. Zapiekov say when you served him with that notice? A He says he paid out that money, he hadn't any money.

Q Did he say when he paid it out? A No.

Q Did you ask him when he paid it out? A He said that Mr. Huckman didn't have money for wages always and he had to give him money for his wages.

30 Q Did you remind him of the notice you had given him on the 20th? Did you say anything about that to him? A Yes, I said, "Do you remember I gave you a notice and you promised to pay me every cent?" He said "I never promised you."

Q He denied it? A Yes, sir.

Q This was on the 27th of November? A Yes, sir.

Q Did he tell you at what time of day or when he paid out that money? A No.

Q Did you, after the 27th of November, go around and look at this house? A Yes, sir.

40 Q Did you examine the plumbing work there? A Yes, sir.

Joseph Grunt, cross.

Q When did you go there? A About the 21st of December.

Q The following month? A Yes, sir.

Q When you went there at that time was anyone living in the house? A No, sir.

Q Was the plumbing work in the house done at that time? A No, sir. 10

Q Tell us what was not done? A The sink faucet was not on; there was no water in the sink. The gas was not connected, no shower curtain, the radiators were not connected, the seat was not on the toilet. They were built-in radiators on the wall but they were not connected.

Q How much in dollars and cents was the value of the work you found on that date was not yet completed? A Probably \$100 or more. 20

Q This was a month after you served the notice? A Yes, sir.

Q Then, do you say the plumbing work at that time was or was not completed? A No, sir.

Q Did you ever get any part of this \$1,046.21 from either Mr. Huckman or Mr. Zapiekov? A No, sir.

Q It is still owing to you? A Yes, sir.

Cross examination by Mr. Frankel.

Q You have done business with Mr. Zapiekov? A Yes, sir. 30

Q He has been in the building trade a long time, hasn't he? A I don't know if he is in the building game, but he came to me to buy once in a while some small items.

Q You have done plumbing for Mr. Zapiekov on other jobs, haven't you? A No, sir.

Q Are you sure of that? A Probably a very, very long time ago I done a little job for him 40

Joseph Grunt, cross.

once or twice. Very long ago, about fifteen, fourteen or twelve years ago.

Q So, on July 6, 1928, you knew Mr. Zapiekov quite well? A Yes, sir.

10 Q You say on that morning he came to your place of business? A Yes, sir.

Q And he talked with you concerning your contract with Huckman? Is that right? A Yes, sir.

Q Had you already signed a contract with Huckman at that time? A No.

Q What makes you so certain that the date was July 6, 1928? A Because I remember.

Q When did you actually make your contract with Mr. Huckman? A I didn't state I ever made a contract with Huckman.

20 Q You said you had a contract? A I had estimates signed on the 17th.

Q The 17th of July? A Yes, sir.

Q Didn't you tell Mr. Zapiekov on July 6, 1928, that you had made a contract with him? A I didn't say I made a contract, I said I figured a job for him.

Q You had not yet made a contract? A No, sir.

30 Q You want us to understand that on that day he promised to protect you as regards your money? A Yes, sir.

Q As a matter of fact, didn't Mr. Zapiekov tell you, whatever date, July 5th or 6th or later that you should get orders from Mr. Huckman if you wanted him to take care of your money on that job. Didn't he tell you that? A I don't understand.

40 Q As a matter of fact, didn't Mr. Zapiekov tell you in the conversation you say he had with you, suggest to you that you should get orders

Joseph Grunt, cross.

from Mr. Huckman for the payment of money, if you wanted him to protect you? A He told me after that, not at that time, he told me I should get an order for the money, when I asked for the money when the material was delivered, to get an order from Mr. Huckman.

Q Are you sure he didn't tell you that before? A No, sir. 10

Q He told you to get orders before? A After the material was delivered I asked Mr. Zapiokov for the money, I asked him for money and he told me I should get an order from Mr. Huckman.

Q Did you get an order from Mr. Huckman? A Yes.

Q For \$1,000? A Yes.

Q Do you remember the date when that order was obtained by you? A I don't remember the date. 20

Q How long after this job was started? Do you remember? A I don't remember exactly. Two or three months, I don't remember when he gave me that first order.

Adjourned until Friday, November 1, 1929,
at 10 A. M.

30

40

Joseph Grunt, cross.

SECOND DAY.

November 1, 1929.

Met pursuant to adjournment.

Counsel present as before stated.

10

JOSEPH GRUNT, plaintiff, recalled.

Cross examination (continued) by Mr. Frankel.

Q On November 8, 1928, you delivered to Mr. Zapiekov the order signed by Huckman in which Mr. Huckman ordered Mr. Zapiekov to pay to the West Side Plumbing Company the sum of \$1,000 out of the \$1,500 fixture payment, is that right?

20 A My son delivered it.

Q Did you see this paper (indicating)? A Yes, sir.

Q You recognized Mr. Huckman's signature on that paper? A I can't tell you exactly. I don't recognize it exactly.

Q You don't recognize it? A No, sir.

Q This paper is on your own stationery, isn't it? A Yes, sir.

30 Q Was that drawn in your place of business?
A Yes, sir.

Q Did you see Mr. Huckman sign it? A Yes, sir.

Q Now, you recognize the signature? A I can't recognize the signature.

Q Anyway, you delivered this to Mr. Zapiekov? A My son delivered it.

Q Do you know when this was delivered? A It was delivered about the time when I got the \$1,000.

40

Joseph Grunt, cross.

Q When you delivered this you got the \$1,000 check at one and the same time? A Yes, sir.

Mr. Frankel: I ask to have this paper marked for identification.

(Same is marked D. 1 for identification.) 10

Q Now, on November 27th, you served a stop notice on Mr. Zapiekov? A Yes, sir.

Q I show you Exhibit P. 3. This is the paper which you served on Mr. Zapiekov at about six o'clock on November 27th? A Yes, sir.

Q Did you serve him with any other paper that night? A I guess it was a copy of the order. I am not sure.

Q A copy of which order? A A copy of Mr. Huckman's order. 20

Q On November 20th? A Yes, sir.

Q A copy of this order P. 2? A Yes, sir.

Q Would you recognize that copy if I showed it to you? A Maybe, yes.

Q Is this a copy of that order on November 20th? A Maybe this is the one I gave him. I don't remember exactly.

Q I show you Exhibit P. 2, a copy of which you said you gave to Mr. Zapiekov on the 27th of November, along with this stop notice, Exhibit P. 3, and I ask you to compare this copy with the original and I ask you if that is a copy and if that is the paper which you gave to Mr. Zapiekov on the 27th, a stop notice? A That isn't the exact copy. My son made this up to show Mr. Zapiekov that he had an order from Mr. Huckman. 30

Q What I want to know is whether this is the very paper you gave to Mr. Zapiekov? 40

Joseph Grunt, cross.

Mr. Unger: Will you specify what you mean by "this"?

10 Q The paper I am showing to you now. It has on top the words "copy" and it bears the date November 20, 1928, addressed to Louis Zapiekov. It says, "Dear sir: I hereby order you to pay to the West Side Plumbing Company the sum of \$900 for materials delivered to your premises at No. 243 Madison avenue, Newark, and deduct same from payment due me in accordance with agreement between us. Signed by Maurice Huckman." Is this the copy you gave to Mr. Zapiekov with the stop notice? A My son made this up that he should give it to him and I presented it to Mr. Zapiekov.

20 Q You do not know whether this is the paper? A I am not sure, but I guess it is.

Q Will you tell us it is? A Well, I'll say it is.

Mr. Frankel: I offer this paper for identification.

(Paper is marked D. 2 for identification.)

30 Q So that on November 27 you gave Mr. Zapiekov a copy of the order of November 20 that you had from Mr. Huckman, is that right? A Yes, sir.

Q So, when you told us before that on the 20th of November you gave Mr. Zapiekov a notice on the 20th, that was not so, was it? A It was so.

40 Q What kind of a notice did you give Mr. Zapiekov? A I gave the original order of Mr. Huckman to Mr. Zapiekov when Mr. Zapiekov was in my place. I gave him the order and

Joseph Grunt, cross.

I told him, "Zapiekov, I want to get a check," and he read it over and gave it to me back and he said, "I will not pay out any money until the job will be entirely completed." I gave him the original.

Q You gave him the original? A Yes, sir.

Q When was it you gave him the original?

A On the 20th of November.

Q How did you get it back? A He didn't want to take it. He read it over and gave it to me back and said "I will not pay out any money until the job will be entirely completed."

Q So, when you served him with this copy of this notice, you only made up a copy? A Yes, sir.

Q You have served orders before? A What kind?

Q Orders signed by contractors to owners authorizing the owners to deduct money? A Yes, sir.

Q You know that the owner cannot pay unless he gets the original signed notice, don't you?

Mr. Unger: That is objected to.

The Court: I sustain the objection.

Q Why didn't you give Mr. Zapiekov the original? A Because I wanted to keep it.

Q When you gave him the original order on November 8, didn't you—showing you now D. 1 for identification—you gave Mr. Zapiekov this original, didn't you? A Yes, sir, when he gave me the check.

Q In other words, when you gave him this order he immediately gave you a check? A Yes, sir. Of course, my son gave it to him.

Joseph Grunt, cross.

Q Weren't you there? A No, he went to his home.

Q So, what you are now saying is not what you know yourself? A No.

Q What you are testifying to of what happened with reference to the order of November 8 being served, you do not know that of your own knowledge, do you? A My son gave him the order and he got a check. I wasn't present when he got the check.

Q You were not present at that time? A No, sir.

Q Yet you know that when this order of November 8 was served on Mr. Zapiekov you received a check immediately, is that right? A Yes, sir.

Q You told us yesterday that you knew Mr. Zapiekov quite well? A Yes, sir.

Q You could take his word for anything. Didn't you tell us that? A I thought so.

Q Why was it necessary then for you to get an order if you had his promise he would pay you? A Because Mr. Zapiekov told me to get an order.

Q He did tell you to get an order? A Yes, sir.

Q Have you your original estimate here? Is a price on it? A I don't think this is the original. The original is a white sheet. I guess my son has got it.

Q Is this the estimate you made up (indicating)? A Yes, sir.

Q Will you identify it, please? A Yes, sir.

(Paper is marked by consent, Exhibit P. 4.)

Q This estimate bears the date of July 17, 1928? A Yes, sir.

Joseph Grunt, cross.

Q You told us that you had a conversation with Mr. Zapiekov on July 6? A Yes, sir.

Q You said he came to your place of business? A Yes, sir.

Q This estimate, however, was not made up? A He says it was not.

Q Was not made up until July 17? A No. 10

Q You told Mr. Zapiekov how much this job would come to? A Yes, sir.

Q How much did you tell him the job would come to? A Over \$2,000.

Q As a matter of fact, however, your estimate was \$1,548, wasn't it? A Yes, sir.

Q How did you know the job would go over \$2,000? A Because my boy gave me a list of the material to figure on and then when we figured it out we knew how much it came to to cover the fittings and plumbing needs on the job. You can't tell in the beginning, but we estimated the regular material amounts to so much, and then the extras amount to one-quarter or one-third more and I told him that it would amount to about over \$2,000. 20

Q Do you remember where this conversation was? A At my office.

Q Are you sure of that? A Yes, sir.

Q So, you told him on July 6 that the job would come well over \$2,000? A Yes, sir. 30

Q Yet, your estimate was not made up until July 17, was it? A No, sir.

Q That conversation, you say, took place on July 6? A Yes, sir.

Q I show you the last page of this estimate. Explain to me how it happens that the last item on that paper is written in pencil, whereas the other items are all written on a typewriter. It is for a white shower curtain. A I cannot explain that, my son can explain that better. 40

Joseph Grunt, cross.

Q He wrote it in? A I suppose so. He will tell you about this.

Q When was that written in, do you know?

A My son will tell you about that.

Q Which son? A Right there (indicating). He was taking care of the office.

10 Q You don't know when that item was written in? A No.

Q Have you no knowledge of when it was written in? A No, sir.

Q What is the amount of the contract? Did you have a contract? A We made up a contract, but it wasn't signed.

Q The contract between you and Huckman was never signed? A No.

20 Q The estimate comes to \$1,416.40? A This is the material on this list.

Q Your original estimate is \$1,416.40, isn't it? A The estimate is marked right here (indicating).

Q You said the contract was never signed? A No.

Q Your estimate happens to be, as you computed it, on the bottom of the page, \$1,416.40. Isn't that so? A Probably this is the figure.

30 Q Not probably, what is it? A I can't tell you what this figure means. My son can explain that.

Q Explain to me what the amount of the July 31 charge, \$215 which is added to \$1,548, the amount of the contract, explain that to me. A This is the extras for July.

Q Then, why did you strike a balance by deducting \$215 from \$1,548, which shows a balance of \$1,333? Why did you deduct it? A If you take so much, it comes to so much.

40 Q This is charged against the contract? A Yes, sir.

Joseph Grunt, cross.

Q The next item is August 31st, \$300, so that left a balance of merchandise to be delivered of \$1,033? A Yes, sir.

Q The next item charged is September 30th, \$275? A Yes, sir.

Q That left a balance of merchandise to be delivered of \$758? A I suppose so. 10

Q Don't you know? A This figure was all made by the bookkeeper and he can explain it better than I can.

Q You do not know anything about this? A He will explain everything.

Q You told us that it would take about \$100 to supply the little missing things? A To finish the work?

Q Don't ask me. You said that it would take \$100? A To finish that job. 20

Q What was necessary there to be finished, as you recall it? A Well, there was no faucet in the sink, not seats on the toilets, no tar paper, the radiators were not connected and I figured to finish the job it would be over \$100.

Q As a matter of fact, there was a shower curtain there, wasn't there? A No, there was no shower curtain.

Q You mean that when you were there you didn't see it? A No. 30

Q You did deliver it? A Yes, but he wanted to pick it out himself, a shower curtain, and he went down with my son to pick another one out.

Q So, there had been a shower curtain there but he didn't like the one he had and he wanted a different shower curtain? A Yes, sir.

Q The shower curtain you didn't consider an important detail in plumbing, did you? A It isn't important.

Q Now, you delivered a faucet for the sink? A Yes, sir. 40

Joseph Grunt, cross.

Q It had been in the house, hadn't it? A Yes.

Q The faucet you delivered was not the faucet that was ordered, was it? A It was the one in the contract, the one we figured on.

10 Q As a matter of fact, do you remember having a conversation with Mr. and Mrs. Zapiekov about the faucet at the time they gave you this payment of \$1,000. You remember that, don't you? A I wasn't there.

Q You know they held up the payment of that \$1,000 until such time as you would order to correct faucets. Do you remember that? A No, sir.

Q You say you did deliver a faucet? A I did deliver a faucet.

20 Q And it wasn't satisfactory or one that Mr. Zapiekov wanted and he would not let the plumber put it on, isn't that so? A Yes, sir.

Q So, he did have a faucet in the house, but the only thing was at the time you saw it it wasn't on? A It wasn't on, that's all I know.

Q You talked of toilet seats. You meant one toilet seat, didn't you? A There was two toilet seats.

30 Q They had seats there, didn't they? A Yes, sir.

Q You had delivered seats? A Yes, sir.

Q But they were not the proper seats, were they, to go with this toilet? A The same as we were supposed to deliver.

Q You say it was the seats you were to deliver? A Pardon me?

Q You say it was the seats which you were supposed to deliver? A Yes, sir.

40 Q The contract between Mr. Zapiekov and Mr. Huckman was for \$4,450, or \$4,500? This is a one-family house, isn't it? A Yes, sir.

Joseph Grunt, cross.

Q That is pretty good plumbing for a one-family house for that price, isn't it? A Yes, sir.

Q So you figured for this faucet, the toilet seat and the shower curtain would cost somewhere in the neighborhood of \$100? A I said to finish the job, the work and material would amount to \$100. 10

Q That is a reasonable sum, isn't it? I mean, that is not unreasonable, is it? A I wouldn't say reasonable or not, but that is the way I am figuring.

Q You thought for the owner to hold back \$100 he would be doing the right and proper thing? A I don't know what he would be doing.

Q You have supplied plumbing for a good many houses, haven't you? A Yes, sir. 20

Q It often happens that there is a little odd and end to be completed on a job? A Yes.

Q Is that any reason for withholding a man's money? A According to the contract. It depends on how the contract was made.

Q Did you ever read the contract between Mr. Zapiekov and Mr. Huckman? A Yes, sir.

Q Do you know what it calls for as a final payment? A Yes, sir. 30

Q The fourth payment, when all the work is finished to meet the approval of the owners? A Yes.

Q So, if the owner, as in this case, should decide that the job was completed— A No, sir.

Q Excepting for one or two minor details— A In one or two—there were lots of things to be finished. 40

Joseph Grunt, cross.

Q Would you say it is the proper and natural thing for the owner to do, to consider in his own mind that the contract is completed?

Mr. Unger: I object to the question as argumentative.

10 The Court: I sustain the objection.

Q That is, the plumbing contract is completed?

Mr. Unger: I object.

The Court: I sustain the objection.

Q You served the order of November 8, D. 1 for identification and you say that upon your serving this paper you received a check?
20

Mr. Unger: I object. He said his son served it.

Q Do you know when you got that check?
A I don't know when he got the check, but I know I deposited it on the 19th.

Q The 19th of November? A Yes, positively.

Q You signed a receipt for that payment of \$1,000? A My son signed the receipt.
30

Q This is the check you received (indicating). I show you a check, "Louis Zapiekov," under date of November 13, 1928 for \$1,000, pay to the order of Maurice Huckman. Is that the check? A This is the check.

Q This check was received by you? A Yes, sir.

Q You say you deposited it on the 19th? A Yes, sir.
40

Joseph Grunt, cross.

Q That is your son's receipt for \$1,000 (indicating)? A Yes, sir.

Mr. Frankel: I ask to have this receipt and check marked for identification.

(Receipt marked D. 3 for identification.)

(Check marked D. 4 for identification.)

10

Q The contract which was never signed came to \$1,548? A Yes, sir.

Q Your estimate shows \$1,416.40. How does it happen that after you received \$1,000 from Mr. Huckman or Mr. Zapiekov on or about November 19, that you claim a \$900 balance due you? A I don't understand.

Q You served a stop notice, a copy of an order for \$900 on November 27 on Mr. Zapiekov at six o'clock in the evening?

20

Mr. Unger: No, it calls for more than that, \$1,040.

Mr. Frankel: I withdraw the question.

Q You served on November 27, on Mr. Zapiekov a copy of an original order signed by Mr. Huckman which authorized Mr. Zapiekov to pay to your company— A West Side Plumbing Company.

30

Q The sum of \$900. Is that right? A Yes, sir.

Q At the same time you served a stop notice upon Mr. Zapiekov asking him to withhold—you said, "Maurice Huckman is justly indebted to you in the sum of \$1,040.21." A Yes, sir.

Q You asked Mr. Zapiekov to retain that amount. Is that right? A Yes, sir.

Q Was there more than \$900 due to you from Mr. Huckman? A At what time?

40

Joseph Grunt, re-direct—re-cross.

Q On November 27. A Yes, sir, \$1,040.

Q Why did you get an order of \$900? A This was on November 20. The material was not completed, the bills were not made out. We just got an order for the amount delivered, but on November 27 we got everything completed and the amount was \$1,040.

10 Q Tell us how you make that up. A What shall I tell you? I don't know what you mean. On November 20, when Mr. Huckman gave the order the material on the job was not completed. That is when we got the order for \$900. On November 27, when he gave that stop notice Mr. Zapiekov received, everything was completed and the amount was \$1,040.

20 *Re-direct examination by Mr. Unger.*

Q You said your original estimate was \$1,450? A \$1,540.

Q Did you furnish extra materials after the original estimate was given? A Yes, sir.

Q Is that what brought your amount up to \$2,113? A \$2,040.

Q You received \$1,000 from Mr. Huckman? A Yes, sir.

30 Q And there is \$1,040 coming to you? A Yes, sir.

Q So, that leaves a balance of that much after you furnished the extra work? A Yes, sir.

Re-cross examination by Mr. Frankel.

Q You entered judgment against Mr. Huckman for the amount of your bill? A Yes, sir.

40 Q That judgment was entered by default. Mr. Huckman did not appear? A No, sir.

Maurice Huckman, for Plaintiff, direct.

Q What efforts did you make to collect that money, any?

Mr. Unger: I object.

The Court: I sustain the objection.

10

MAURICE HUCKMAN, sworn in behalf of the plaintiff.

Direct examination by Mr. Unger.

Q You are here under a subpoena, are you not? A Yes, sir.

Q You were the contractor for the plumbing work on Mr. Zapiekov's house, No. 243 Madison avenue, Newark, New Jersey? A Yes, sir.

20

Q Are you the Maurice Huckman with whom he made a contract dated June 28, 1928, for \$4,450? A Yes, sir.

Q Under that contract the first payment was \$1,000. Did you get that payment? A Yes, sir.

Q The second payment was \$400. Did you get that? A Yes, sir.

Q The third payment was \$1,550. Did you get that? A Yes, sir.

Q The fourth payment was \$1,500. Did you get that from Mr. Zapiekov? A Not all of it.

30

Q Tell us what arrangement was made between you and Mr. Zapiekov relative to that \$1,500 payment. A He was ordered to pay the Trane Company for radiators, which amounted to a little over \$900, and he gave me \$500 in cash and the balance was left unpaid.

Q You had bought your radiators of the Trane Company? A That is the kind specified.

40

Maurice Huckman, for Plaintiff, direct.

Q You gave him, do I understand, an order to pay the Trane Company \$900? A It was an order in the beginning, but he afterwards guaranteed the Trane Company he was going to pay it.

10 Q How do you know he guaranteed it to the Trane Company? A Because they didn't want to deliver it until he did.

Q Did you see the guarantee? A He asked me for an order so he could give the guarantee.

Q Who? A Mr. Zapiekov.

Q Then, did Mr. Zapiekov take out of your final payment the amount of his guarantee to the Trane Company? A Yes, sir.

Q And deducted it from your money? A Yes, sir.

20 Q How much was that? A \$900, and I don't know what the figures are.

Q About \$900? A \$900 and some odd dollars.

Q That would leave a balance of \$600? A Yes, sir.

Q Did he give you that \$600? A No, not all. He gave me \$500.

Q By check to your order? A Yes, sir.

30 Q What day was that check given out? A As near as I can remember, on the 27th of November.

Mr. Unger: Will you produce that check? I would like all checks of November 27, 1928.

40 Q I show you a check dated November 27, 1928 made by Louis Zapiekov to Maurice Huckman for \$500, and I ask you if that is the check you received? A Yes, sir.

Maurice Huckman, for Plaintiff, direct.

Mr. Unger: I offer this check in evidence.

Mr. Frankel: No objection.

(Check is marked Exhibit P. 6.)

Q Did you cash that check? A No, sir.

Q What did you do with the money? A 10
Turned it over to Mrs. Zapiekov. Not all, but the biggest part of it.

Q In other words, you took that money and turned it back to his wife? A Yes, sir.

Q What for? A For money she had advanced me while I was waiting for this payment.

Q Money she had loaned you on this job? A Yes, sir.

Q Had she given any stop notice, that you know of, to her husband? A I couldn't say. 20

Q How much of the cash did you give her out of that \$500? A I think it was \$400, if I am not mistaken.

Q Did she give you that money in cash or by check? A Sometimes in cash and sometimes her own check.

Q Do you know where she got the money from? A No, sir.

Q How was it she advanced you the money? A 30
Because he didn't want to do it.

Q Did he refer you to his wife? A He said to her, "If you want to do it, you can," so she did.

Q He let his wife do it? A Yes, sir.

Mr. Frankel: I object to that and ask that it be stricken out as it is not what the witness answered.

Mr. Unger: I consent.

Maurice Huckman, for Plaintiff, direct.

Q Did he let his wife do it? A She did it right in my house.

Q I show you a check dated November 27, 1928, for \$879, made by Louis Zapiekov to your order and endorsed, "Pay to the order of Trane Company," and I ask you if that is the check you said you gave to Trane Company for about \$900?
10 A Yes, sir.

Q Is that the exact amount, \$879? A I wrote that in there myself.

Q Is that the check covered by the guarantee of Mr. Zapiekov? A Yes, sir.

Mr. Unger: I offer this check in evidence.

Mr. Frankel: No objection.

(Check marked Exhibit P. 7.)

20

Q That would dispose of \$1,379 out of \$1,500. I show you a check for \$75 made by Mrs. Zapiekov to your order dated November 27, 1928, and I ask you if you received that check (indicating)?
A Yes, sir.

Q What does that represent? A I think this represents the balance of what Mrs. Zapiekov gave me out of the \$500.

Q Did you cash this check and give that money to her? A No, that was my money.

Q You kept this \$75? A Yes, sir.

Q Did you have at this time any moneys coming from Mr. Zapiekov for extra work? A Yes, sir.

Q How much did that amount to? A In the neighborhood of—there was a dispute about that and I computed about \$200.

Q Did you ever get that? A No. There was more than that and I got some and he still owes me some.
40

Maurice Huckman, for Plaintiff, direct.

Q What time of day were these checks given you on November 27th? A Between 12 and 1 while he was home to lunch.

Q After that did you work on the job? A I was there a couple of times.

Q During the month of November? A I was there in November and I was there in December. 10

Q Finishing up? A The job was practically finished, but there were little odds and ends I had to do.

Q Things that were not finished on the 27th of November? A Yes, sir.

Q Did you meet Mr. Zapiekov on the job on December 18, 1928? A I think so, yes.

Q Did he at that time say to you whether or not he was going to give you a three days' notice to get off the job or finish the work? A He said something to that effect, but I didn't take much stock in it. 20

Q Can you remember what he said? A He said he wanted me to do the little things that were to be done and I didn't have a sink faucet to do it and I couldn't get a faucet to suit him. I didn't have the shower curtains he wanted, in fact, I never did put the sink faucet or the shower curtain on myself. 30

Q This was about the 18th day of December? A Yes, sir.

Q He hadn't yet moved into the house, had he? A No, sir.

Q Did you buy your plumbing material on this job from Mr. Grunt? A Yes, sir.

Q Did that amount to \$2,113? A No, sir.

Q What was the amount? A The original estimate was \$1,548, and there were extras. To explain all my figures, it would amount to \$300 or \$350. 40

Maurice Huckman, for Plaintiff, cross.

Q The exact amount you do not know? A No, but I know it wasn't that much.

Q You are aware, of course, that judgment has gone against you on the basis of those figures? A I am aware of it now, but I didn't think judgment would go against me, in fact,
10 when Mr. Zapiekov was in this case I thought it would be held up until this was decided.

Q You never made any payment on this job outside of the \$1,000? A That's right.

Q Which was received in November, 1928? A Yes, sir.

Cross examination by Mr. Frankel.

Q You were paid for these extras while you did them, weren't you? A Partly, not in full.
20

Q As a matter of fact, you were fully paid for the extras before you executed a release to Mr. Zapiekov, isn't that so? A No, not in full, and the fact I signed a release didn't make any difference. I would sign a release if he didn't pay me this. I trusted Mr. Zapiekov for anything.

Q This is the release you did sign for Mr. Zapiekov, is it (indicating)? A Yes, sir.

Q Do you remember when you signed that?
30 A The 27th day of November.

Q Where did you sign it? A In his house.

Q At what time of day? A Between 12 and 1 o'clock.

Q That was the time he gave you these various checks? A Yes, sir.

Mr. Frankel: I ask to have this paper marked for identification.

(Same is marked D. 3 for identification.)

Q Who was home when you got that? A
40 Mrs. Zapiekov and Mr. Zapiekov's son was there.

Maurice Huckman, for Plaintiff, cross.

Q You kept asking Mr. Zapiekov for your money a few days before that. You were always in need of money, weren't you? A I always could use it.

Q You kept after him for your money, didn't you, before the 27th of November? A Just what do you mean? 10

Q You asked him to advance some money to you, didn't you? A I asked him several times.

Q And he said he wouldn't do it? A That's right.

Q As a matter of fact, he personally didn't advance you any money? A That's right.

Q He told you he could not and would not do it? A That's right.

Q When you say Mrs. Zapiekov loaned you money, you do not mean for us to understand that he suggested that she should do it, do you? A I didn't say that. 20

Q Did you ask her for money? A I was there to ask him to advance me some money and he wouldn't give it and she did it.

Q How many years have you known Mrs. Zapiekov? A 17 or 18 years.

Q You would ask her for money if you needed it any time, wouldn't you? A I wouldn't say that. I wouldn't ask her for money unless I was sure I was in a position where she could get it back. She wouldn't give it to me under any condition. 30

Q You gave an order to Mr. Zapiekov to pay Mrs. Zapiekov this money, didn't you? A Certainly.

Q You felt that you would like to protect her for the \$500 she loaned to you? A Yes, the same as anyone else. The fact that she was Mrs. Zapiekov did not make any difference. 40

Maurice Huckman, for Plaintiff, cross.

Mr. Frankel: I ask to have these papers marked for identification.

(Same are marked D. 4 and D. 5 for identification.)

10 Q When did you first see Mr. Grunt regarding this estimate? A Sometime in June. One paper is supposed to be a copy.

Q Did you ever get this estimate (indicating)? A No, sir.

Q Did you ever see this particular estimate, showing you Exhibit P. 4? A No.

Q Have you your copy? A No.

Q Do you remember whether it was typewritten? A Yes, sir.

20 Q Was anything on it in pencil? A I can't recall.

Q Do you remember the amount of the estimate? A Yes, sir.

Q What was it? A \$1,540.

Q That was the amount of the contract? A Yes, sir.

Q Was there ever a contract between you? A No, sir. This is what we call buying merchandise on contract for a house, but we didn't ever sign up any agreements.

30 Q What do these various items mean, do you know? A That is merchandise he is supposed to furnish, whatever is on the three sheets, for so much money.

Q In other words, the final figure on this should tally with the contract? A Yes, sir. When he makes these charges monthly, the end of the contract and all tally up, to the amount of the original contract.

40 Q These statements on here do not tally with the amount of the contract, or estimate, do they? A I don't know.

Maurice Huckman, for Plaintiff, cross.

Q Look at it. A You mean the 6th of July here?

Q No, I mean the estimate here in pencil appears to be \$1,416.40. Does that jibe with the rest of it? A No, my estimate was \$1,558.

Q You think the extras came to \$300 or \$350? A Yes, sir. 10

Q You have obtained material this way besides from Mr. Grunt, haven't you? A Yes, I did some.

Q You know the Trane Company would not supply this merchandise unless it was guaranteed by Mr. Zapiekov? A I know that.

Q Did you supply anything from the Trane Company? A Yes, sir.

Q That cost \$435? A Yes, sir.

Q Mr. Zapiekov also guaranteed that, did he? A Yes, sir. 20

Q That has been paid? A Yes, sir.

Q This \$1,000 payment that you gave to the West Side Plumbing Company—do you know when that was made? A Early in November.

Q Was there any discussion about it, any reason why that payment should not have been made, to your knowledge? A That \$1,000 payment to me?

Q Yes, was there any question about that payment? A No. 30

Q Were you there when it was given over to Mr. Grunt? A No.

Q In other words, you left that check with Mr. Zapiekov to make payment for you to Mr. Grunt? A I left two checks, one for a boiler and one for Mr. Grunt.

Q Mr. Zapiekov paid Mr. Grunt \$1,000 and obtained a receipt for it? A Yes, sir.

Q Was there some question then about a faucet? A Yes, sir. 40

Maurice Huckman, for Plaintiff, cross.

Q What was that question? A It was a question between Mr. Zapiekov and myself as to what kind of a faucet he was to get. He thought he was entitled to a certain hand-hammered faucet and I thought he should get one according to the specifications, as specified, and the specifications didn't cover that, and I made out a list for Mr. Grunt to figure and I included a faucet in it that he should get according to the specifications, and when he finally got it he didn't want it and I said, "If you want another one you will have to pay the difference," and after we consulted for a while I didn't put the faucet on, he didn't want it.

Q Do you know whether he ordered a faucet from Mr. Grunt or not? A Yes, he did.

Q Do you know whether Mr. Grunt ordered the faucet for him? A I think so.

Q Did Mr. Grunt ever get that faucet for Mr. Zapiekov? A Yes, sir.

Q You delivered a toilet seat? Was it the one that was ordered? A The one I got Mr. Zapiekov didn't want.

Q And you agreed to get another one? A Yes, and in fact, we returned it to Mr. Grunt. We gave both seats back and he gave us one the same as he could get and agreed to get another one.

Q And so, you haven't got that yet? A Not that I know of.

Q The shower curtain, what kind of a shower curtain did you deliver? A The one delivered originally was a white duck curtain and that was specified with the plate number of the fixtures he ordered on the specifications but he seemed to think he should get an orchid one to match the toilet. It was such a small thing to argue about I said "All right," and in the meantime he had a white one.

Maurice Huckman, for Plaintiff, cross.

Q There was a curtain there all the time? A It was delivered with the merchandise.

Q This was a rather expensive bathroom, wasn't it? A Yes, sir.

Q It really should have an orchid curtain to go with the toilet, shouldn't it? A Yes, sir.

Q Was he justified in asking you for one to match the toilet? A He didn't specify it originally.

10

Q So, on November 27th, when you received your money, there was a white shower curtain there? A Yes, sir.

Q The faucet he had was not the faucet he wanted? A No.

Q And the toilet seat—there was a dispute as to that? A Yes.

Q What did you do about it when you got your money—about making an adjustment with him? A He held up the balance.

20

Q As far as the plumbing work was concerned, was it finished? A Practically.

Q Would you say it was finished? A Outside of the things I told you about. The gas range was to be connected but it never was.

Q You allowed him how much money? A I didn't allow him any money.

Q How much did he take off? A \$100 until I finished the rest of the things.

30

Q \$95? A About that.

Q You mean until such time as you would supply him with the proper shower curtain? A Until we supplied a faucet and fixed up the radiator grills; there were two or three extras to be put on and everything else was completed, I could have the money.

Q This was quite an expensive plumbing job for a one-family house, wasn't it? A Very.

40

Maurice Huckman, for Plaintiff, cross.

Q Holding back for odds and ends \$100 was not unreasonable, was it?

Mr. Unger: I object.

The Court: I sustain the objection.

10 Q Was your job substantially finished on November 27, 1929?

Mr. Unger: I object to that. That is for the jury to decide.

The Court: I sustain the objection.

Q You asked Mr. Zapiekov for your money, did you? A Yes, sir.

20 Q What did you say to him? A I says, "I want the money."

Q Why? A Because I thought I was entitled to it.

Q Did you tell him that you thought you were entitled to it? A Naturally. I came there for money and I must have asked him for it.

Q Did you tell him the job was finished? A Yes, I told him the job was finished and he kept telling me that it wasn't all finished, that's why he held up the \$100.

30 Q You thought it was finished? A I thought it was near enough for him to accept it.

Q You never did supply these odds and ends, did you? A I put the shower handles on and the grills on the radiators, but I never put the faucet on and I never connected the gas range.

Q You say you came back on this job some time in December? A I was there several times.

Q If you were called there today to look over the plumbing work, would you go?

40 Mr. Unger: I object.

Maurice Huckman, for Plaintiff, re-direct.

The Court: I sustain the objection.

Q Why did you go on December 18th, or whatever the date you say it was? A I don't just remember why.

Q Did you guarantee this job? A Yes, sir.

10

Re-direct examination by Mr. Unger.

Q You insisted it was finished, did you? A Yes, sir.

Q Mr. Zapiekov insisted that it was not finished? A Yes, sir.

Q You and he compromised the situation by allowing him to deduct \$95 or \$100 for the stuff which was not yet finished, and to make your payment at one o'clock that day? A I finished the rest.

20

Q At that time the toilet seat was not on? A No.

Q And the gas range had not been connected? A No, sir.

Q There were some grills missing on the radiators? A They were not screwed on.

Q The sink faucets had not been put on? A No, sir.

Q The shower curtain, Mrs. Zapiekov wanted, had not been supplied? A The shower curtain was there on the premises but had not been put on.

30

Q When you got your payment on November 27th, you knew, didn't you, that you had given an order on November 20th to pay Mr. Grunt \$900? A Yes, sir.

Q And Mr. Grunt knew of it? A I don't know whether he knew it or not.

Q Did you tell it to him? A No.

0

Allen Levan, direct.

Q You had given an order on November 20th to him? A If my recollection is right, I gave him both orders at the same time. I don't know how they come to be different dates.

10 Q I show you one dated November 20, 1927, and I ask you if that is the one you gave him on that date, Exhibit P. 2. Is that right? A Yes, sir.

Re-cross examination by Mr. Frankel.

Q The toilet seat was there?

Mr. Unger: Haven't we been all over that?

Mr. Frankel: I will withdraw the question.

20

ALLEN LEVAN, sworn in behalf of the plaintiff.

Direct examination by Mr. Unger.

Q You are connected with the Trane Company? A Yes, sir.

30 Q What is their business? A Manufacturers of heating equipment.

Q Did it furnish anything for the house of Mr. Zapiekov on Madison avenue? A Yes, sir.

Q What? A Concealed radiators and necessary equipment.

Q Who were the radiators ordered by? A Ordered both by Mr. Huckman and Mr. Zapiekov. Originally specified by Mr. Zapiekov.

40 Q Did your company receive from Mr. Zapiekov any guarantee of payment of this account? A We did.

Allen Levan, cross.

Q What became of the guarantee? A It was given to us and held until we received the money and returned to Mr. Zapiekov.

Mr. Unger: Will counsel produce that, please?

Mr. Frankel: We haven't it. 10

Q You say it was surrendered? A Yes, sir.

Q I would like you to produce the guarantee signed by Mr. Zapiekov? A It must be filed then, at the factory.

Q Do you know the date of the guarantee? A Approximately the time the order was received.

Q When was that? A June 29, 1928, the order was received.

Q That was Mr. Zapiekov's guarantee guaranteeing this account? A Yes. He withheld the money and paid it to the Trane Company. 20

Q Did your company give any stop notice to Mr. Zapiekov? A No.

Q I show you a check for \$879 dated November 27, 1928, and I ask you if that check came to Trane Company? A Yes, sir.

Q What was it in payment of? A The complete amount of our order. 30

Cross examination by Mr. Frankel.

Q You wrote to Mr. Zapiekov under date of November 9, 1928, did you not? A We did.

Q You told him that you were serving a stop notice on him? A Yes, sir.

Q You requested your money, didn't you? A Yes. I think we wrote him a previous time.

Q You had written before, on July 25th? A Yes, sir. 40

Jane Weisman, direct.

Q You received your money? A Yes, not promptly, but shortly after.

Q You executed a general release, did you?
A We did.

Q Your business is conducted where in Wisconsin? A LaCrosse, Wisconsin, with a local office in Newark, New Jersey.

JANE WEISMAN, sworn in behalf of the plaintiff.

Direct examination by Mr. Unger.

Q You are the bookkeeper for the West Side Plumbing Company? A Yes, sir.

20 Q You have charge of their books of account? A Yes, sir.

Q I show you a paper marked Exhibit P. 4, and I ask you what that is? A That is an estimate.

Q In reference to whose account? A Maurice Huckman.

Q On what job? A Mr. Zapiekov's.

Q Does that cover all the plumbing materials which were ordered by Mr. Huckman for that job? A As per his list.

30 Q Does that cover all the plumbing materials? A Yes, sir.

Q Were any plumbing materials ordered by him subsequent to that time? A Yes, sir.

Q I mean extra work. A Before this?

Q No, previous. A Yes.

Q I show you a number of sheets and I ask you what those are. A Pick-up sheets.

Q What does that mean? A That means that beside the material on that sheet he ordered
40 this stuff.

Jane Weisman, direct.

Q Are these the original records? A Yes, sir.

Q Did you transcribe those records on the ledger sheets? A Yes, sir.

Q Is this the ledger sheet I show you? A Yes, sir.

Q Is that a copy in your handwriting (indicating)? A Yes, sir. 10

Mr. Unger: I offer these sheets and the ledger sheet in evidence.

(Same is marked Exhibit P. 8.)

Q Referring to these, can you tell us the total amount of materials purchased by Huckman, including the original estimate and the extras, referring to the original complaint, can you tell that? I want to know the total amount of the material altogether? A The contract was \$1,548 and the material he took was \$565.27. 20

Q \$2,113.27? A Yes, sir.

Q What credit was Mr. Huckman entitled to? A \$353.58 on November 19th.

Q What is that for? A Part of his \$1,000 payment on November 14th. Credit \$1.85.

Q What is that for? A For merchandise returned on August 30th, \$70.86. 30

Q What for? A For returned merchandise.

Q What else? A August 13th, 35 cents, also returned merchandise.

Q Did you give him credit for the \$1,000 which he paid on November 19th? A Yes, sir.

Q That makes a total credit of how much? A \$353.58 from \$1,000.

Q Why do you subtract that? A That is the amount of the credit that his contract shows. 40

Jane Weisman, direct.

Q Can you total the credits he was entitled to? He is entitled to one credit of \$1,000? A Yes, sir.

Q Plus \$1.85 for merchandise and \$70.86? A Yes, sir.

Q And 35 cents? A Yes, sir.

10 Q That makes a total of how much of all the credits? A \$107.06.

Q That deducted from \$2,113.27 leaves \$1,040.21. Is that the amount open here on your books? A Yes, sir.

Q Do you know Mr. Zapiekov? A Yes, sir.

Q When did you first see him in connection with this job? A With this job?

Q Yes. A He came into our office on July 6th.

20 Q What for? A He asked Mr. Grunt whether he was going to deliver on the job what Mr. Huckman gave him a list on.

Q Tell us what the conversation was between the two men? A Mr. Zapiekov came into our office on July 6th and he asked Mr. Grunt whether he figured on a job for his house on Madison avenue and Mr. Grunt said, "Yes," and he said "What do you think the material will amount to?" and he said "Over \$2,000," and Mr. Grunt said—Mr. Zapiekov said, "Are you going to deliver it?" He said, "Well, Mr. Huckman hasn't any credit here, I won't deliver it for him." Mr. Zapiekov said "It is all right, I will take care of you on the first payment that Mr. Huckman has to get. I will give you \$1,000 and then I will take care of you on the rest."

30

Q Was Mr. Zapiekov back in your place after that? A Yes, on July 12th.

Q What for? A He wanted the stuff to be delivered and Mr. Grunt said that he didn't have

40

Jane Weisman, cross.

the contract signed. He said "All right, my word is as good as my bond."

Q Who said that? A Mr. Zapiekov.

Q What were they talking about? A Mr. Zapiekov wanted the stuff delivered. He said that the job was being held up and Mr. Grunt delivered some merchandise on that job. 10

Q Did Mr. Grunt say anything about not delivering the balance? A I beg your pardon?

Q Did Mr. Grunt say anything to Mr. Zapiekov about not delivering the balance? A At that time?

Q Yes. A No.

Q Now, later on did Mr. Zapiekov come there at any other time? A Yes, he came at numerous times.

Q What for? A Regarding the job. 20

Q Did he come there about November 20th? A Yes, sir.

Q What was he there for on that occasion? A He came in for something and Mr. Grunt brought him into the office and handed him a paper to read.

Q Who did? A Mr. Grunt handed Mr. Zapiekov a paper.

Q Do you recognize the paper? A Yes, sir.

Q I show you P. 2 and I ask you if this is the paper (indicating)? A Yes, sir. 30

Q What did Mr. Grunt do with that paper? A He handed it to Mr. Zapiekov to read and Mr. Zapiekov read it and returned it to Mr. Grunt and said "I will give you this when the job is completed and that is when I will pay out."

Cross examination by Mr. Frankel.

Q How long have you been with Mr. Grunt?

A Almost four years. 40

Jane Weisman, cross.

Q You know all about this transaction, do you? A Yes, sir.

Q You know they met on the 6th of July and you were present at that conversation, were you? A Yes, sir.

10 Q That, you say, was in the office? A Yes, sir.

Q You were present at the subsequent conversation later in July? A Yes, sir.

Q You were also present on November 20th when this paper was shown to Mr. Zapiekov? A Yes, sir.

Q You were there when the check for \$1,000 was delivered, too? A No.

20 Q You have given credit on this account to Mr. Huckman for 35 cents on August 13th, \$70.-76 and \$1.85 on November 14th? A Yes, sir.

Q Are those all the credits Mr. Huckman was entitled to? A Yes, sir.

Q Are you sure of that? A Yes, sir.

Q You know that practically all the pipes and things were taken off that job, don't you? A No.

30 Q You know that no credit is given on this account for pipes and things returned? A I don't know.

Q Yet, you say this is the balance due \$1,040? A Yes, sir.

Q You talk about a \$353 item. What was that for? A That was part of the payment that was applied on his pick-up account, part of the \$1,000 payment applied on Mr. Huckman's pick-up account.

Q What do you mean by "pick-up" account? A These slips here (indicating) mean pick-up account.

40

Jane Weisman, cross.

Q I don't understand that. A This is merchandise taken beside the contract, that was the merchandise on the contract.

Q This bill you have which comes to \$2,113, doesn't that include the pick-up? A Yes, sir.

Q Why didn't you give him credit for \$353? A We gave him credit for \$1,000 on his bill account. 10

Q Why didn't you give him a \$353 credit on the pick-up? A I did give him that.

Q Out of what? A On the pick-up account.

Q The whole account includes the pick-up and the contract, doesn't it? A Yes.

Q You charged him with \$1,548 on the contract? A Yes, sir.

Q You charged him with various extra items on pick-ups, didn't you? A Yes, sir. 20

Q Did you get \$353? A We got \$1,000.

Q You did not get \$353? A No, we got \$1,000 and deducted the \$300.

Q These are the only credits you know of? A Yes, sir.

Q This conversation that took place on July 6th. A Yes, sir.

Q Do you know what day of the week it was? A I don't remember.

Q Was it a Monday? A I don't remember. 30

Q Was it a Tuesday? A I don't remember.

Q It may have been on Friday? A I don't remember.

Q But you know it was the 6th day of July? A I do.

Q Why do you remember it was the 6th day of July? A I just happen to remember that date.

Q You didn't write it down anywhere, did you? A No. 40

Carl Benna, direct.

Q You just know it was the 6th day of July?

A Yes, sir.

Q But you don't know whether it was a Monday, Tuesday, Wednesday, Thursday or Friday?

A No.

10 Q You are sure you told us everything that Mr. Zapiekov said to Mr. Grunt on the 6th day of July in your place of business. Is that right?

A Yes, sir.

Q And you are positive it was the 6th day of July? A Yes, sir.

Q You said that he would pay him out of that first payment made to Huckman? A I said he would pay him the payment on the first payment he made to Huckman.

Q Are you sure of that? A Yes, sir.

20 Q How much did he say that he would pay Mr. Grunt out of the first payment he made to Mr. Huckman? A \$1,000.

Q What time of day was in on the 20th you say Mr. Zapiekov came to your place of business and was shown this order marked P. 2? What time of day was it on November 20th you say Mr. Zapiekov came to your place of business and was handed this notice or shown this notice by Mr. Grunt in your presence? A About ten

30 o'clock.

Q On November 20th? A Yes, sir.

CARL BENNA, sworn in behalf of the plaintiff.

Direct examination by Mr. Unger.

Q You are employed by Mr. Grunt? A Yes, sir.

40

Carl Benna, direct.

Q What do you do there? A Driver for the West Side Plumbing Company.

Q Did you make delivery of the materials to Mr. Zapiekov's house on Madison avenue? A Yes, sir.

Q Have you checked the items in the exhibits which have been introduced here and which are made up of the original estimate and what Miss Weisman has called the pick-up sheets? Have you checked those through? A Yes, sir. 10

Q Can you state whether or not you made deliveries to the Zapiekov house of all that material? A Yes, sir.

Q Were you in charge of the truck? A Yes, sir.

Q Were you in the store on November 20, 1928? A Yes, sir. 20

Q Was Mr. Zapiekov there on that day? A Yes, sir.

Q I show you a paper marked Exhibit P. 2 and I ask you whether or not you saw that paper on that day? A I cannot say for sure that it was that paper, but I was there when Mr. Zapiekov handed Mr. Grunt a paper and read it over.

Q Who handed the paper to whom? A Mr. Grunt handed it to Mr. Zapiekov. 30

Q You saw Grunt hand Zapiekov a paper? A Yes, sir.

Q Did Zapiekov read it? A Yes, sir.

Q Do you know what was said by Mr. Zapiekov or Grunt at the time when that paper was handed over? A Mr. Zapiekov read the paper and said to Mr. Grunt, when the job is completed he would pay the money and not before.

Q Do you know what job they were talking about? A Yes, the Madison avenue. 40

Carl Benna, cross.

Q Were you with Mr. Grunt on the 27th of November when the stop notice was served? A No, sir.

Q You were not there? A No, sir.

10 Q Did you go to Mr. Zapiekov's house on Madison avenue at any time after the 20th of November to look over the work? A Yes, sir.

Q When did you go there? A December 21st.

Q At that time had the plumbers' work been completed? A No, sir.

20 Q What had not been completed? A The gas range connected, the sink faucets were not on, the toilet seat was not on and shower curtain was not on and the radiator covers were not on and the handles on the shower were not on.

Cross examination by Mr. Frankel.

Q You are a driver, aren't you? A Yes, sir.

Q You are also an inspector? A No, sir, I am not an inspector.

Q So you made a visit to this house? A I took Mr. Grunt up there and went through the house with him.

30 Q You went there for the purpose of getting evidence?

Mr. Unger: I object to that as not a fair question.

Q How long have you been employed by Mr. Grunt? A Five and a half years.

Q You deliver all the merchandise on this job? A Yes, sir.

40 Q Did you take away any material? A I don't recall of any.

Carl Benna, cross.

Q Do you remember taking a truckload of stuff away? A I can't recall.

Q You only know you delivered it? A Yes, sir.

Q You are sure you saw Mr. Zapiekov at Mr. Grunt's place of business on the 20th? A Yes, sir. 10

Q What time of day was it? A Sometime in the morning, the forenoon. I can't remember exactly what time of day it was.

Q You don't remember what time? A No.

Q You are sure that Mr. Zapiekov was there though on November 20th? A Yes, sir.

Q And you heard this conversation? A Yes, sir.

Q Who else was there? A The bookkeeper was there, yes. 20

Q Who else was there? A Mr. Grunt.

Q Anyone else? A Not beside myself.

Q You don't know what time of day it was, do you? A I don't recall, no, sir.

Q You saw a piece of paper passed between them? A Yes, sir.

Q How close were you to Mr. Zapiekov? A I was about 6 to 8 feet away.

Q What is this, a large office? A No, sir. I was standing in the doorway between the store and the office. 30

Q Did you go out every day on the truck? A Yes, sir.

Q What time did you generally go out? A All hours, it depended on how busy we were.

Q You are out every day, aren't you? A Yes. Half the day, and half the time I work behind the counter.

Q You generally go out mornings, don't you? A Sometimes, it depends upon the orders. 40

Maurice Grunt, direct.

Q You don't remember what you did that day, do you? A No, I don't recall offhand.

Q You don't remember what you did that day? A No.

Q You don't know what time you did go out with the truck that day, do you? A I can't
10 remember what time I went out. I know I was there the better part of the day, though.

Q Did you go out that day on the truck? A I couldn't say for sure whether I did or not.

Q Were there any other jobs that you had to deliver merchandise to on that day? A I don't recall.

Q You don't recall? A No.

Q Do you know anything else you did on that day, November 20th?

20

Mr. Unger: I object.

The Court: I sustain the objection.

MAURICE GRUNT, sworn in behalf of the plaintiff.

Direct examination by Mr. Unger.

30 Q Your father is Joseph Grunt? A Yes, sir.

Q You are in business with him? A Yes, sir.

Q Counsel on the other side has asked your father why it is that the estimate is \$1,548 and the total is \$1,640, and your father has said that you know more about this than he does. Can you explain that? A Yes, that is the cost.

Q That is the cost to you of the merchandise? A Yes.

Q And \$1,548 is the selling price? A Yes,
40 sir.

Maurice Grunt, direct.

Q Were you with your father on the 27th of November when a stop notice was served? A No, sir.

Q You were not there? A No, sir.

Q You were not present on the 20th of November when the first notice was served? A No, sir. 10

Q Were you present in the early part of the year when Mr. Zapiekov had any conversation with your father about a check? A No, sir.

Q Did you have a conversation with him? A Well, I got the first payment from Mr. Zapiekov.

Q When was that? A About November 19.

Q That was the \$1,000 payment? A Yes, sir. 20

Q Was any other payment beyond that ever made on this job? A No, sir, that is the only payment that was made.

Q Before the 27th of November when the stop notice was served, did you have a conversation with Mr. Zapiekov? A Well, at the time I got the first payment.

Q What did he say at that time? A When I got the job I presented him with the second order and I told him that I wanted to find out about the balance of the amount I had coming because the job was nearly completed. 30

Q What did he say? A He said, "I know you have money coming, but I won't pay out any money until the job is completed."

Q When was this? A About November 19.

Q You received this check for \$1,000 on the 19th? A Yes, I received it, yes.

Q Are you about your place of business there all the time? A Well, most of the time. 40

Maurice Grunt, direct.

Q You saw Mr. Zapiekov on that day on November 19? A Well, I am not sure whether it was the 19th or the 18th.

Q Where did you see him when you received that check? A Where?

10 Q Yes. A At home.

Q That is the time you say you had a conversation with him? A Yes, sir.

Q It was on the 19th when you received the check and you signed the receipt, did you? A Yes, sir.

Q That was the time you had your conversation with Mr. Zapiekov? A Yes, sir.

Q At his home? A Yes, sir.

Q This is the receipt you signed? A Yes, sir.

20 Q This is the check you received, D. 3 for identification (indicating)? A Yes, sir.

Q And the receipt D. 4? A Yes, sir.

Q It was at that time that you mentioned to him that you had some more money coming. Is that right? A Yes, sir.

30 Q Did he tell you to get an order? A I don't remember whether he told me to get an order. What he did tell me, I asked him about the money and he said "I won't pay Huckman before I pay you."

Q Did he tell you to get an order? A I don't remember.

Q You did get an order the next day from Huckman, didn't you? A Yes, sir, on the 20th.

Q You didn't see Mr. Zapiekov on the 20th of November, did you? A No, I didn't see him then.

40 Q The next time you saw him was on November 27. Isn't that right? A No.

Maurice Grunt, direct.

Q Who served the stop notice and copy of that order on November 20? A I think my dad and another brother of mine.

Q Is he here? A No.

Q You never saw Mr. Zapiekov after the 19th? A Well, I did see him after the 19th, but not relative to this. 10

Q You went to Mr. Zapiekov to the Standard Fixture Company regarding the faucet, did you? A Yes, sir.

Q You could not get that faucet, could you? A Which one?

Q The particular one that was wanted. A We furnished the faucet as the contract specified, but he wanted a hammered brass faucet, but we couldn't get it, no.

Q When was this order of November 8 served on Mr. Zapiekov? A When I got the first payment. 20

Q You mean on November 19, the very same day? A November 19.

Q You mean that you brought this paper, D. 1 for identification up to him on the 19th, and he gave you a check then and there? A The check was already made out. He probably knew I had the order.

Q The check is dated November 13. A That is what I say, when I went there the check was already made out. 30

Q Didn't he receive this order about November 8? A No, I gave him the order when I got the check.

Q When did you go with him to the Standard Fixture Company people? A Before I got the check.

Q Wasn't it the same day? A I believe it was either the same day or a day previous. 40

Motion for a non-suit.

Q You do not remember when the November 8 order was served, do you? A I delivered that order when I got the check.

Q There was a dispute about whether he ought to pay this because of the faucet, wasn't there? A There was no dispute at all.

10 Q Why did you go with him to the Standard Fixture Company? A To help him along. He wanted a special curtain and a special faucet and he could get it, as far as we were concerned.

Q Your father came to see Mr. Zapiekov prior to the receipt of this check for \$1,000, did he not? A What is that?

20 Q I say that your father went to see Mr. Zapiekov prior to your receiving this check for \$1,000? A I don't know, but I heard about that.

PLAINTIFF RESTS.

30 Mr. Frankel: I respectfully move for a non-suit on the ground that the plaintiff, by his own witnesses, and particularly the plumbing contractor, according to his story of what he says, testified that the building and the contract was completed and he insisted on his money and received payment of his money with the exception of an adjustment of \$95 or \$100. Therefore, the contract having been completed and we not being served with a stop notice, and they having a release from the contractor, testified to by their own witnesses, we feel that we should be excused in this suit and a non-suit should be entered.

40 The Court: I will deny the motion.

Louis Zapiekov, direct.

(Defendants' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.)

LOUIS ZAPIEKOV, one of the defendants, 10
sworn.

Direct examination by Mr. Frankel.

Q What is your business? A Real estate.

Q Did you build a home for yourself at No. 243 Madison avenue, Newark? A Yes, sir.

Q Which is the job in question? A Yes, sir.

Q You made your payments to Mr. Huckman? A According to the contract. 20

Q Did you pay him by check? A Yes, sir, by check.

Q Have you all of your checks? A Yes, sir.

Q Will you produce them? A (Witness does as requested.)

Q Each time you made a payment you got your receipt for the payment? A Yes, sir.

Q Are these the receipts (indicating)? A Yes, sir. 30

Mr. Frankel: I offer these receipts in evidence.

(Same are marked Exhibit D. 6.)

Q These are all the checks (indicating)? A Yes, sir.

Mr. Frankel: I offer these checks in evidence.

(Same are marked Exhibit D. 7.) 40

Louis Zapiekov, direct.

Q They total to how much? A About \$4,355.

Q In other words, there is a balance of how much now? A \$95.

Q What happened about that \$95? A He had let it stay back.

10 Q Who? A The plumber, until I received the right things called for in the specifications.

Q When did you pay Mr. Huckman the balance of this money? A On the 27th of November.

Q You don't know what time of day it was? A It was about one o'clock.

Q Did he execute a general release to you? A Yes, sir.

20 Q Is this it (indicating)? A Yes, sir.

Mr. Frankel: I offer D. 3 for identification in evidence.

(Same is received and marked in evidence Exhibit D. 3.)

(Exhibit D. 3 read to the jury.)

Q When this job was completed did you pay Mr. Huckman the money? A Yes, sir.

30 Q Did you, during the times you made any payments to Mr. Huckman, make them in accordance with the contract? A What?

Q I say, did you, during the times when you made your payments to Mr. Huckman always make them in accordance with your contract? A Yes, sir.

Q Your first payment under the contract was \$1,000? A Yes, sir.

Q You made that? A Yes, sir.

40 Q When did you give him that payment? A I can't remember. I have the check there.

Louis Zapiekov, direct.

Q I mean with relation to the work that was done. A As specified in the contract, when the roofing is put on—

Q Did you stick to this contract when you made your payments? A Yes, sir.

Q When you made the second payment the contract called for a \$400 payment, when the showers are set and ready for tiling? A And two bath-tubs delivered. 10

Q You wanted the bath-tubs and showers delivered when you made that payment? A Yes, sir.

Q The third payment was to be made when all the fixtures were set? A When all the fixtures were delivered. Delivered or set—I think it was when they were delivered.

Q That was then the third payment you paid to Mr. Grunt? A Yes, sir. 20

Q What day was that payment in relation to the time you paid Mr. Huckman to pay Mr. Grunt? A I think on the 23d. No, the check would show what date.

Q The check of Mr. Huckman for \$1,000, which was later delivered to Mr. Grunt, is dated November 13? A The 13th.

Q Did you receive any notice from Mr. Grunt, the West Side Plumbing Company, of an order to pay to the West Side Plumbing Company, signed by Huckman? A Yes. 30

Q I show you D. 1 for identification, a paper dated November 8, and I ask you if you remember receiving that paper? A Yes, sir.

Q When did you get it? A I got it before the payment.

Q How long before, do you know? A I couldn't tell you what date, maybe the 15th or about the 9th or 10th. 40

Louis Zapiekov, direct.

Q Who delivered this paper to you? A I think Mr. Grunt himself, the old man, if I am not mistaken.

Q When he delivered this paper to you did you give him a check? A No, sir.

10 Q Why didn't you give him a check? A Because the material was not delivered at that time.

Mr. Frankel: I offer this paper marked D. 1 for identification in evidence.

Mr. Unger: No objection.

(The same is marked Exhibit D. 1.)

20 Q What did he do or say? A He said to me, "I have to have money, I have to meet a note." I said I wouldn't do it. He said "Take my word." I said I wouldn't take anyone's word because Mr. Huckman was in it. I said "If that was a dealing between you and me I would take your word," and he went home.

30 Q What, if anything, was done regarding the fixture? A Then Mr. Grunt's son came on the 19th, if I remember right, came to me for a check and I told him I couldn't give him a check because I haven't the right fixtures. He came with his machine and he took me and my wife over to the Standard Fixture Company and we had the specifications with us and saw what fixtures we wanted and we selected the fixtures, and he gave an order to the Standard Fixture Company to get those fixtures, because it takes time, and he brought us home, back again, and I gave him a check and he gave me a receipt.

Q For \$1,000 dated the 19th of November?

40 A Yes.

Louis Zapiekov, direct.

Q Then, did he order these correct fixtures for you? A Yes, sir.

Q Did you ever get them? A No, sir.

Q When did you first talk to Mr. Grunt regarding Mr. Huckman and your job? A I was talking to Mr. Grunt, I think it was, if I am not mistaken, in July, before he started the job, I met Mr. Grunt on the sidewalk. 10

Q Where? A On 16th avenue.

Q Yes. A And Mr. Grunt told me, "I think I am going to deliver material on your building."

Q Yes. A "The only thing I am hesitating to do business with Mr. Huckman." Then, I told him, "If you want to secure yourself, do like the rest do, get an order from Mr. Huckman and give it to me and when his payment is due it will be taken and given to you." He answered me, "I don't want to hurt his feelings," and he begged me I should not mention this conversation to Mr. Huckman. Then, I walked away. 20

Q That was on the street on 16th avenue? A Yes, sir.

Q Was anything said about how much the fixtures were coming to? A Nothing at all.

Q Did Mr. Grunt tell you that it would be well over \$2,000? A Nothing at all. 30

Q Did you know how much it would be? A No, sir.

Q Did you guarantee to pay him \$2,000? A I didn't guarantee nobody.

Q What do you mean by that statement? A Nobody. There was more than one contractor, so nobody.

Q You did not guarantee the Trane account?

A By written order from Mr. Huckman. 40

Louis Zapiekov, direct.

Q You mean that you got an order from Mr. Huckman? A Yes, and there is another one I got from Mr. Kent.

Q You received an order from Mr. Huckman to pay the Trane Company, did you? A Yes, sir.

10 Q July 23, 1928? A Yes, sir.

Mr. Frankel: I offer this order in evidence.

Mr. Unger: No objection.

(Same is marked Exhibit D. 8.)

Q You received that order and you subsequently paid on it? A I had the signed order after I accepted it.

20 Q You paid them out of the final payment? A Yes.

Q The amount of their bill was \$879.11? A Yes, sir. I didn't pay them, Huckman made out the check.

Q You made all these checks payable to Huckman? A Yes, sir. And he endorsed it and left it in my possession.

30 Q This check of \$879.11, dated November 27, 1928, this was made by you to the order of Maurice Huckman? A Yes, sir.

Q And this was made payable to the order of Trane Company and signed by Huckman? A Yes, sir.

Q This check was made out on the 27th of November? A Yes, sir.

Q At what time of day? A About one o'clock.

Q That was the time Mr. Huckman gave you the release? A Yes, sir.

Louis Zapiekov, direct.

Q At that time had you been served with any stop notice by the West Side Plumbing Company or Mr. Grunt? A Nobody.

Q You had not yet received the stop notice from him? A No, sir.

Q Then, you had not been served with an order under date of November 20 at the time you made the check payable to Mr. Huckman? A No, sir. 10

Q When did you first see this paper, Exhibit P. 2 dated November 20? A I didn't see this paper at all.

Q You never saw that paper? A No, sir.

Q This is the order of November 20 signed by Huckman? A I never saw that.

Q You never saw that original paper? A No, sir. 20

Q Did you ever get a copy of that paper? A I don't know.

Q I show you D. 2 for identification and I ask you when you first saw that paper? A This here paper was delivered to me on the 27th.

Q Of November? A Yes, sir.

Q At what time? A At 5:45, I think, in the afternoon. 30

Q Did you get anything with that paper? A Another notice.

Q Is this it? I show you Exhibit P. 3? A Yes, I have it marked.

Q At 5:45 P. M.? A Yes, sir.

Q On the 27th of November, 1928? A Yes, sir.

Q There is no written signature? A No.

Q This is the paper you received? A Yes, sir, at the same time both. 40

Louis Zapiekov, direct.

Mr. Frankel: I offer in evidence D. 2 for identification, and I ask that it be linked up with Exhibit P. 3.

Mr. Unger: No objection.

(D. 2 for identification is marked Exhibit D. 2.)

10

Q Now, you say you never saw the original of this paper which is marked Exhibit D. 2? A No, sir.

Q On November 20, 1928? A No, sir.

Q But you did get this paper on November 27 at 5:45 P. M.? A Yes, sir.

Q With the stop notice? A Yes, sir.

Q That is D. 2? A Yes, sir.

Q At the time you were served with that
20 stop notice and the copy, the signed copy or typewritten copy of this notice or order of November 20, 1928, you had already paid Mr. Huckman? A Yes, sir.

Q And you had received Mr. Huckman's release? A Receipt, too.

Q You received his receipt for the payment? A Yes, I have the receipt.

Q This check for \$879.11 had already been signed by Mr. Huckman and endorsed over from
30 Mr. Huckman to the Trane Company? A Mr. Huckman directed me how to make the check out, and there was more than one at that time.

Q I am asking about this check? A Yes, sir.

Q He asked you to forward it to the Trane Company? A No, he wanted to take it himself over and I said "Leave it here, I want to get a release from them," so he left it.

Q Did you advance any money to Mr. Huckman against his contract before his time for pay-
40 ment? A No.

Louis Zapiekov, direct.

Q Did Mr. Huckman ever ask you to advance him any money? A Yes, several times.

Q But you did not advance him any money?

A I told him plain that I wouldn't give him a nickel until his time is due.

Q You did not give him any money until his contract was due? A No, sir. 10

Q When you finally paid him, were you satisfied that the job was completed? A Yes, sir, otherwise he wouldn't get his payment.

Q Did you think that the \$95 you withheld was a reasonable allowance for what was to be finished by you? A I thought it is plenty for it.

Q Now, tell us exactly what that \$95 represented? A It wasn't exactly \$95. I told him to leave that \$95 until those things were delivered. It wouldn't just take that much. 20

Q You had a shower curtain which wasn't the one you ordered, is that right? A Yes, sir.

Q You had a faucet which wasn't the one you ordered? A Yes, sir.

Q And you had a toilet seat which wasn't the one you ordered? A They brought it and I wouldn't accept it and they took it back, and there was other items, little spares on the flushometers. 30

Q Are you familiar with plumbing? A Yes, sir.

Q Did you put on the faucet? A I did not, I had someone put it on.

Q Could you screw on the flushometer? A Yes, sir.

Q Was the gas range connected? A The gas range he didn't want to connect. I didn't want to put the floor covering down until the opening was through and I couldn't hold him back on the gas range, he was supposed to include that, and it 40

Louis Zapiekov, direct.

took him to connect the gas range until February. I wouldn't put that gas range in because it was damaged.

Q Do you know this young lady who just testified? A She is a bookkeeper in the office. I saw her several times there.

10 Q Do you remember seeing her on July 6th, remember seeing her? A I wouldn't say I saw her on July 6th. I saw her several times when I used to come in the store to buy something.

Q You have done business with Mr. Grunt? A Yes, all the time, and I still do now.

Q How long have you known Mr. Grunt? A About fifteen to eighteen years, or more than that.

20 Q Did you have a conversation with Mr. Grunt on or about July 6th, wherein you guaranteed or promised you would withhold this money for Mr. Grunt? A No, sir.

Q Were you in the place of business of the West Side Plumbing Company on the 20th day of November, 1928? A I couldn't say that. I don't know what day I came in there. I couldn't say when. I never kept a record of when I go in there.

30 Q On the 19th of November, 1928, you paid this check of \$1,000 to the West Side Plumbing Company. Is that right? A Yes, sir.

Q Did you tell the son anything, or did he tell you anything about the balance of the money coming to Grunt? A He told me there was some money coming to him, so, I told him— First, he says, "How much does Huckman get?" I told him "His payment will be about \$1,500, but he wouldn't get much out of it because he has to pay out some bills." He asked me exactly how much will be left and I told him that I didn't know
40 how much.

Louis Zapiekov, direct.

Q Did you tell him to get an order? A I didn't tell him anything. It is up to him to get an order.

Q On the 19th, when you had this conversation with the boy he did not have any order for any balance of money coming to him, did he? A On the 19th he got a check. 10

Q On the next day, do you remember whether you saw Mr. Grunt? A Not that I can say. I don't think I was there.

Q Do you remember the driver? A Yes, sir.

Q Did you have a conversation with Mr. Grunt in the presence of this driver regarding the guaranteeing of the money on the 20th? A No, sir.

Q Did you see him there on any occasion? A Sometimes I used to see him, he was in back of the counter. 20

Q That day, after you paid this \$1,000, did you go to his place of business? A No, sir.

Q Are you sure of that? A That was the next day. I am sure about that.

Q Are you positive of that? A Yes, sir.

Q Now, did you ever do any business on Saturday? A No, sir.

Q Tell us why? A I keep my religion. 30

Q You keep your religion on Saturday? A On every holiday.

Q You are a Hebrew? A Yes, sir.

Q You never do any business on Saturday? A No, I wouldn't pay any checks or anything.

Q Would you talk business on Saturday? A No, sir. My payments I pay on Friday.

Q You never do any business on a Saturday? A No, sir. 40

Louis Zapiekov, cross.

Cross examination by Mr. Unger.

Q You say that you did not do any business on Saturday. November 20, 1928 was on a Tuesday? A I don't know.

10 Q Your lawyer asked you if you do business on a Saturday? A No.

Q You do not want us to understand that November 20th was on a Saturday, do you? A No.

Q Your last payment on this contract was \$1,500, as you know? A Yes, sir.

Q I understood you to say that when you made that payment on the 27th of November, you were satisfied the job was completed? A Yes, sir.

20 Q That is what you said? A To my satisfaction.

Q If you were satisfied the job was completed why did you hold back any money at all? A That is because I did not like the material.

Q Then there were certain things and material that you did not like on that day? A All the right kind I was supposed to get.

30 Q On that day you knew that your sink faucets had not been connected? A I wouldn't let them.

Q That was not done well? A I had it in my possession.

Q Of course, that was part of his contract, to connect them up, wasn't it? A There is nothing to do. The faucet was not on.

Q That was part of his work? A Yes, sir.

40 Q The toilet seat was not installed, at least, the kind you wanted wasn't there? A There was a cheap one. He didn't figure the right one.

Louis Zapiekov, cross.

Q The grills on some of the radiators were not on at that time? A They were on and the painter took them off.

Q They were not screwed on? A They were not all on, only a few.

Q Mr. Huckman himself says there were some that had not been put on. A It was on, but the painter had to paint the inside and he would have removed them all if I hadn't caught him in time. 10

Q Then, the shower curtain was not to your satisfaction, was it? A No.

Q Whether these were or were not on, you still held back this amount of money until such time as you were perfectly satisfied with the job? A No, not with the job, when he delivered me those things. 20

Q Mr. Huckman says he was there in the month of December, 1928, and you told him that you would give him three days, or something like that to get off the job, if he did not finish up? A For what purpose?

Q I am asking you if that is right? A Not what I know.

Q He is mistaken about that? A No.

Q You did not pay him any money after that day, did you? A No. 30

Q You have never given him any part of that \$95? A Not a penny.

Q I understand you to say that when you paid out this money on the 27th of November you had not yet received the stop notice for \$1,041 which has been put in evidence here. Is that right? A Right.

Q You had not received any notice on the 20th of November that there was any money coming to Mr. Grunt? A No. 40

Louis Zapiekov, cross.

Q So, on the 27th of November when you paid out these moneys, you not alone had not received the stop notice but didn't know that Mr. Grunt had anything else coming from the job? A No, Mr. Grunt claimed all the time that he owed him some money, but what has that to do with me.

10 Q When did you find that out? A When I used to come in the store to get some things he says, "When is Huckman's payments due?" and I said "I don't know."

Q You said that you had told Grunt if he wanted to protect himself that he must get an order? A That was before he started the job.

Q You intended that should continue right through the job, didn't you, that he should get authorizations at any time? A If he would get
20 orders then I would know how to pay.

Q Assuming that he had obtained an order at the time, then, you would protect Grunt to that extent? A Yes, sir.

Q That would be true in respect to the last payment of \$1,041? A Yes, sir.

Q In respect to the last payment for \$1,041, you would have protected Grunt if he had had an order for it? A If he had an order and I would see there was enough money to pay I would
30 accept that order.

Q You could not very well accept an order of \$1,041 and get clear yourself, could you, in this case? A How could I?

Q You had already obligated yourself to pay to the Trane Company \$879.11? A Correct.

Q You had given a guarantee, your own guarantee in writing? A Yes, sir.

Q And you were perfectly liable for that. Is that right? A If I asked an order from Mr.
40 Huckman, I would be.

Louis Zapiekov, cross.

Q You had guaranteed it as early as July? A Yes.

Q You intended to take that \$879 out of some payment of Huckman's? A I would make Huckman pay.

Q You did intend that it should come out of some payment? A I would hold it out. 10

Q And you did? A Yes, sir.

Q You made sure that Huckman did not get it, because you got him to endorse the check to the Trane Company and you kept the check? A Yes, sir.

Q You had \$879.11 in your possession after the stop notice was served. Isn't that right? A Trane Company come for the check and I refused to give it.

Q How did they get it? A After they delivered to me the release. 20

Q When was that? A They brought me the release, I would like a release.

Q When was it you gave them the check? A Some time after.

Q A couple of months after? A I don't know how long.

Q The check seems to have been paid on the 2d of January, 1929? A I don't know when the check was paid. 30

Q It was after you got that stop notice from Grunt that the check was paid, isn't it? A The check was paid before the stop notice.

Q You had the check in your possession? A Yes.

Q Then, it was not paid? A Yes, because I couldn't use that check, it was endorsed by Mr. Huckman.

Q That money was in your possession then, wasn't it? A It was a check. 40

Louis Zapiekov, cross.

Q That money was still in your possession, in your bank account? A Yes.

Q The Trane Company didn't have the check?

A At that time it did not.

Q You owed the money to them? A The money was in the bank.

10 Q You had the stop notice at that time, too, didn't you? A The stop notice was later, yes.

Q You paid the Trane Company in order to get yourself out of it, because you had previously given to the Trane Company your guarantee that you would pay it? A I paid every one.

Q Isn't that why the Trane Company was paid, because you had guaranteed them? A With Huckman's consent.

20 Q I do not care whether it was or not. You paid that because you had guaranteed it? A Yes, sir.

Q Did the Trane Company ever serve you with a stop notice? A They did.

Q Show me it. A It is right there (indicating). There were letters right along.

Q I want to know whether you got a stop notice from the Trane Company? A It must be there.

30 Q Is this what you call a stop notice (indicating)? A Yes, it says plain.

Q That is your idea of a stop notice? A Yes, sir.

Mr. Unger: I ask to have this letter marked for identification.

(Same is marked P. 9.)

40 Q This is the only stop notice you received from Trane Company? A I had other letters there.

Louis Zapickov, cross.

Q Have you any more? A I don't know. I paid them right along.

Q Is this the paper you refer to? A No, sir, that is only the order.

Q There appears to be no more. Now, I want to know whether you paid the Trane Company the \$879 because of this paper which you call a stop notice or because you had guaranteed the account? A Both ways. 10

Q Because of both? A They stopped the order as it says, stop notice.

Q You paid it because you had gotten this paper and because you had guaranteed the account? A I didn't pay, Huckman made out the check.

Q You dictated it? A No, he himself. 20

Q Huckman didn't get it? A No.

Q Why did you separate a check which Huckman kept on the last payment and give him one in a \$500 payment? A That was the way he wanted it.

Q That is the way he wanted it, \$500 separate? A That is the other one.

Q Did you hear him testify that he gave that back to your wife? A I don't know whether he did or not. 30

Q Do you know whether your wife had advanced him any money on this job? A I knew she advanced him some money.

Q Did she ever give you any stop notices? A Yes, sir.

Q Where are they? A It was no set notice, it was an order.

Q I want to know whether you ever got a stop notice from your wife to pay to her any money on this job? A No, sir. 40

Louis Zapietkov, cross.

Q When the payment of August 23, 1928, \$1,000 was made, this is the check, I understand, you gave him? A That must be the first payment.

Q Did you get the money back? A No.

10 Q What is your endorsement on the back of that check for, "L. Zapietkov"? A No, that is not.

Q Do you know how your name came to be put on the back of that check? A No, sir.

Q Is this the first time that you ever saw that name on the back of that check? A I see the name on there, but that is not my signature.

Q I say is this the first time that you ever saw your name on the back of that check? A No.

20 Q When was your name on the back of that check before? A When it came back from the bank.

Q Did you ask anyone who put your name on the back? A No.

Q You don't know how your name happened to be put on the back of that check? A I couldn't tell you.

30 Q Here is a check for \$400, representing one of the payments. How does your name happen to be on that? A Because he couldn't cash it so I had to endorse it that he should go to the bank and get the cash.

Q Huckman couldn't cash it? A Because they wouldn't recognize him in the bank.

Q Isn't that the same thing that you did with this one? A No, sir, that is not my signature.

Q Didn't you endorse these checks and take this money back to reimburse yourself for money owing to you? A No, sir.

40 Q You didn't do the same thing on this one, give the money back to your wife on that.

Louis Zapietkov, cross.

You made this one for \$500 separate so that you could give your wife back her money? A He ordered me to do it that way.

Q You say you never saw this letter of November 20, 1928, which Mr. Grunt says he delivered to you and which you read and returned to him? A I did not.

10

Q You are positive about that? A Positive.

Q I think you said that on the 19th of November he had gotten his \$1,000 check? A Yes, sir.

Q You are sure that you did not have that letter at the time of that payment on the 20th, it was the following day? A What?

Q I say that you are sure that you did not have that letter at the time of the payment on the 20th? A I am not sure about that.

20

Q I think you said you were sure that you were not in his store so that he had spoken to you on the 20th of November? A I wasn't there.

Q Are you positive of that? A I am positive of that.

Q Did you buy any goods in his store on the 20th of November and sign a receipt for them? A I sign a receipt?

30

Q Did you? A I don't think so, maybe my boy.

Q Is that your signature? That is your initial "L. Z.," isn't it? Those are your initials? A It looks to me—

Q That bill is November 20, 1928, isn't it? That bill shows on that day you bought two small cans of "Blue Seal" at 35 cents a can. Blue seal is something used to clean off pipes, isn't it? A Yes, sir.

40

Maurice Zapiekov, direct.

Q Do you say now that you were not in his store on the 20th of November? A I can't understand how I was.

Q Do you say now that you were not in his store on that day? A It looks like I was. I had no business there except to get the Blue Seal, maybe we were stuck.

10

Re-direct examination by Mr. Frankel.

Q Did you see any pipe go back? A Yes, sir.

Q How much, do you know? A I didn't count them.

Q What day was a lot of pipe taken away from the premises? A Some pipes, sewer casting pipes.

20 Q You do not know how many times pipe went back, do you? A I saw once a big lot.

Q You do not know what month it was, do you? A No.

MAURICE ZAPIEKOV, sworn in behalf of the defendants.

Direct examination by Mr. Frankel.

30

Q You are a son of Louis Zapiekov, the defendant in this case? A Yes, sir.

Q On November 20, 1928, did you order this Blue Seal? A Yes, sir.

Q You signed for it? A Yes, sir.

Q Your father was not with you, was he? A No, sir.

Q Were you home on November 19 when a check was given to Grunt's son, the \$1,000 check?

40 A No, sir.

Maurice Zapiekov, direct.

Q When you came to the place of business of Mr. Grunt on the 20th for this Blue Seal, did you receive an order or notice for your father? A No, sir.

Mr. Unger: We do not claim he received any notice.

10

Q Were you present when the stop notice was served on your father on November 27? A Yes, sir.

Q Who served it? A Mr. Grunt walked in with the son, I forget his first name.

Q How many pieces of paper did your father get? A Two.

Q You would recognize them, would you? A Yes, I even made a comment on them.

Q What was that? A I said that there were two different dates on them, one was dated the 27th and one was dated the 20th, and both were handed to him on the same day.

20

Q Who saw that, too? A My father.

Q Did you mark any of those papers? A My father put the time on the back.

Q What time were they served on you? A 5:45 and 6 o'clock.

Q You know that these two papers were handed to your father at one and the same time? A Absolutely.

30

Q Were you home earlier in the day when Mr. Huckman was there to receive his money? A Yes, sir.

Q What time of day did he get his money? A Oh, before I got out of school, about 12 o'clock. I was up there about one o'clock, about, that day, 12:30 to one o'clock.

Q Did you see him sign this release that was exhibited here? A Yes, sir.

40

Maurice Zapiekov, cross.

Q Were the checks made out at that time?

A What checks?

Q The checks to Huckman on November 27.

A They were made out at that time.

10 Q It was almost six o'clock in the evening when you were served with a stop notice and got that order? A Correct.

Q Did you ever see this paper of November 20, the order? A No, sir. The only thing I saw it copied, that typewritten signature of Huckman's.

Q That was given to you at the time you just specified? A Yes, sir.

Q On the 27th late in the evening, about 5:45 P. M.? A Yes, sir.

20 Q This order of November 8, 1928, did you see that? A I remember seeing it around the place.

Q You don't remember when? A I don't remember exactly, I know we had it before we gave the check.

Cross examination by Mr. Unger.

30 Q Notwithstanding the fact that your father says he signed his name, or his initials on this paper on November 20, you say you signed it?

A Absolutely.

Q How did you sign it? A Two initials.

Q Write on this piece of paper the way you signed them. A (Witness does as requested.)

Q Is that the way you signed? A Yes, sir.

Q That doesn't look like this, does it? A No.

Q Did you ever buy any other material in that store and sign for it? A Yes, sir.

40 Q Do you always sign "L. Z."? A No, sir.

Maurice Huckman, for Defendants, direct.

Q How do you usually sign? A My own name in full and if I am in a hurry just the two initials.

Q That is your signature, isn't it, "M. Z."?
A Yes, sir.

Q That is the way you sign? A Not all the time. 10

Q Sometimes you sign "M. Z." and sometimes "L. Z."? A Yes, sir.

Q Do you know whose those two writings are, "L. Z." and "M. Z."? They do not look very much alike, do they? A Not according to that.

Q You weren't there on the 20th, were you?
A I remember specifically I got two cans of Blue Seal. 20

Q You do not want to swear that you did that, do you? A I am sure I would.

Q Yes, I know that. You have sworn that you signed "L. Z." on November 20, 1928 where it is marked on this paper. A I am not absolutely sure and I won't swear to it.

Mr. Unger: I offer these papers in evidence.

(Same are marked P. 10, P. 11 and P. 12.) 30

MAURICE HUCKMAN, recalled in behalf of the defendants.

Direct examination by Mr. Frankel.

Q Mr. Zapiekov made you your payments under the contract all the way through, is that right? A Yes, sir. 40

Maurice Huckman, Defend'ts, cross—re-direct.

Q Did he stick to his contract in making you your payments? A Yes, sir.

Q He advanced you no money, did he? A No, sir.

Cross examination by Mr. Unger.

10

Q How do you account for the presence of his signature on the back of your check of August 21, 1928 in the sum of \$1,000? A I gave it to his wife and maybe she deposited it.

Q What would you give a check back to his wife for? A I owed her most of the money at that time and I gave her the check back.

Re-direct examination by Mr. Frankel.

20

Q Do you know? A I may have. That is the only way I can account for his name being on there. It must have been the check I endorsed and gave to her.

Q This check does not bear Mrs. Zapiekov's signature, does it? A Yes.

Q Do you know it is not his signature? A Absolutely.

30

Q You don't know how that came to get on that check? A No, I couldn't say surely how it got on there, but if his name was on there I must have given it to her and she endorsed perhaps the name and deposited it.

Q On the date of that check there was a payment due you at that time? A Yes, but she advanced me the money and by the time the payment was due I owed most of the money to her.

Q This was August 23? A Yes, sir.

Q This payment was due to you? A Yes, sir.

40

Q And you got it? A Yes, sir.

Maurice Huckman, Defend'ts, re-cross—re-direct.

Q What has Mrs. Zapiekov to do with this, you got your money? A Yes, I got it from Mr. Zapiekov when it was due.

Re-cross examination by Mr. Unger.

Q Did you pay it to her? A As near as I can remember and from the name on the back of the check I think it must have been given that way. 10

Mr. Frankel: I object and ask that that be stricken out.

A I got the check from Zapiekov on that day.

Q Then, you paid back to his wife what you owed her? A Yes.

Q You gave her the check? A Yes, and she gave me the difference. 20

Q She had been advancing you money? A She had been loaning me money.

Q Ahead of the time and as against this payment? A Yes, sir.

Q And this was to reimburse her? A Yes, sir.

Re-direct examination by Mr. Frankel.

Q Under your contract you were to get \$1,000 when the rough plumbing was in? A Yes, sir. 30

Q This check represents that payment, does it? A Exactly.

Q You got it on August 3, 1928 and signed a receipt for it? A Yes, sir.

Q Did you pay anyone else with the moneys you got out of this \$1,000? A Sure.

Q Did you use any of this money for your own personal use? A Why, certainly. 40

Maurice Huckman, for Defendants, re-direct.

Q You were entitled to payment, were you not? A I was.

Q Was there any piping taken back from this place of business? A Yes, sir.

Q You got no credit at the time of this account? A I didn't look through the accounts.
10

Mr. Unger: I object to this as not rebuttal.

The Court: I sustain the objection.

Mr. Frankel: I called him as my own witness.

Mr. Unger: Then I will withdraw the objection.

Q How much should you be credited with
20 for the return of the piping? A I remember one time we picked up a lot of steam pipe and soil pipe and soil fittings we did not use and his truck came and took it away.

Q How much piping was it? A I am under the impression he did issue a credit for that.

Q How much? A I think that was a credit of \$73. I think that covers that return.

Q Was there any other pipe returned? A
30 A few small credits during the time of the job.

Q Then, that included the credit for the pipe returned? A It was brass pipe, too, that was credited. I didn't see the credit for that.

Q You signed an order for \$900 on or about November 20, 1928. Was there due to Mr. Grunt the sum of \$900 on that day? A No.

Q There was not? A No, in fact, when I gave him an order I gave it to him for a little more than I thought would be due him at that time. I didn't think it would be that much.
40

Maurice Huckman, for Defendants, re-cross.

Q So, on November 20, you didn't even know as you owed him \$900, but gave him an order for \$900? A Yes.

Q Do you think you got all the credits you were entitled to? A No. I haven't looked to see but I don't think they are there.

10

Re-cross examination by Mr. Unger.

Q You have no books or records showing the account? A No, but I can refresh my recollection.

DEFENDANT RESTS.

Mr. Unger: I offer in evidence P. 10 for identification which contains the signature of Maurice Zapiekov. I offer in the first place P. 11 for identification containing the initials of L. Z. 20

(The same are marked Exhibits P. 10 and P. 11.)

(Mr. Frankel sums up for the defendant.)

(Mr. Unger sums up for the plaintiff.)

30

40

CHARGE TO JURY.

The Court charges the jury as follows.

MOUNTAIN, *J.*:

10 This is an action brought under the Mechanics' Lien Law by material men who furnished materials to a contractor on a building job and the action, so far as you are concerned, is against the owner.

20 In this case the fact that judgment has been taken by the plaintiff against the other co-defendant by default, Mr. Huckman, hasn't anything to do with your decision and should not bias you one way or the other. I am not going to discuss all the testimony, but I will try to give you a background from which, perhaps, you can consider it and come to a just decision.

30 In the State of New Jersey, under our Mechanics' Lien Law, land upon which a building has been erected, under a written contract between an owner and a contractor, is liable to the contractors' lien alone provided that the contract between the contractor and owner has been filed with the County Clerk. That is sort of a protective measure. If the owner of property, not knowing all the material men and sub-contractors, and being desirous of dealing only with one man, takes the contract he makes with the principal contractor and files it with the County Clerk before any work is done, then, that land and building is not subject to a lien except by the contractor alone. What is going to happen when a material man is disappointed with somebody who furnishes, we will say, the contractor with materials and is unpaid? Of course, if he is alert, he will go down, if he hasn't already done so, to the County Clerk's office and fa-

40

Charge to Jury.

miliarize himself with the contract, because that contract usually contains a statement indicating when the various payments will be made on it and he knows that under the law he is protected by those payments because if he is unpaid and a contractor refuses to honor his request for money, he can file a stop notice, so-called, with the owner, and if there is a payment under that contract which has not been made by the owner to the contractor, when the owner gets that stop notice he is required and is justified in retaining the amount of money indicated by that stop notice, out of the next payment made to the contractor. He should notify the contractor he has received a stop notice and the contractor and the material men find out what the difference is between them, but the owner holds on to the money. If they fight it out in court and there is an adjudication, he pays it, but he cannot pay it in the face of a stop notice nor can he pay any other payments on which there is a stop notice and the reason is, as you can see, that if the material man goes to the contract on file in the County Clerk's office, he can see, as in the building in this case, how much is going to be paid to the contractor and can govern his work and deliveries accordingly.

10

20

30

If a contractor, or if an owner anticipates these payments it throws the material man and the plans based on a contract, completely out. In this case it seems to the Court that if you answer two questions you probably will come in with a verdict at once, provided the questions are easy to solve and are questions of fact. The Court cannot decide any questions of fact.

The plaintiff insists that there was money in the hands of the owner when he served a notice

40

Charge to Jury.

upon the owner, and the first question is "Did he serve a notice, and when?" After you have answered that question, then the second question is "At the time was the defendant indebted to Huckman the contractor on the contract?" In other words, if you find a notice was served, then, **10** your next step, I would think, would be this. If this notice was served on the defendant on that day, did the defendant owe Huckman any money under the terms of their contract or not? If he did, then your judgment should be for the plaintiff.

Without going into the details the defendant denies that the notice was served and denies that there was any money due. The plaintiff insists that when the notice was served there was money due and that a certain material man known as **20** the Trane Company had a check handed to it or, rather, had a check made out to it, but it was not actually delivered, which was in the possession of the defendant when the stop notice was served. I think that was the contention of the plaintiff, and the plaintiff indicated by testimony given that a check was drawn by Zapiekov to Huckman, endorsed by the latter to the Trane Company, and then handed back to Zapiekov for the purpose of **30** getting a release for it from the Trane Company. If he had a check in his possession after the stop notice was given, he had no right to negotiate the check; he had money then in his possession belonging to Huckman. The money was in the bank, and if you find that, of course, your judgment might be different.

Charge to Jury.

The plaintiff has asked me to charge you and because the requests cover the law, I will not go further into it.

I will refuse the first request.

I will charge the second.

“2. If you find that the defendants Louis Zapiekov, in advance of the terms of the plumbing and heating contract with Maurice Huckman, paid any moneys on such contract, then I charge you that the owner, Louis Zapiekov, the defendant here, is liable to the material man, Mr. Joseph Grunt, the plaintiff herein, in the same manner as if no such payment had been made, if the amount still due to the contractor, Maurice Huckman, after the making of said payment, should be insufficient to satisfy the material men who have served stop notices. 10
20

“3. The rights of the plaintiff, the material man in this case, cannot be impaired or defeated by an advance payment on the contract price.”

“4. The rule of law is that laborers or material men giving notices in accordance with the provisions of the third section of the Mechanics' Lien Act have priority and preference in the disposition of moneys due and to grow due upon a contract over any persons claiming said money or any part thereof by reason of order or orders thereon or assignments thereof, and if you find that Mr. Zapiekov paid out from the last payment due to Mr. Maurice Huckman on the plumbing contract, the sum of \$879.11 to The Trane Company because of a guarantee which he had previously made to The Trane Company, then he, Zapiekov, is answerable to the plaintiff in this case, if the plaintiff served Mr. Zapiekov with a 30
40

Plaintiff's Requests to Charge.

stop notice because Mr. Zapiekov had no right to reimburse himself for moneys which he paid on account of the guarantee to The Trane Company or to any other person or firm, to the detriment of the plaintiff."

10 (The jury retires.)

Mr. Unger: I respectfully pray an exception to your Honor's refusal to charge the plaintiff's requests as requested.

Mr. Frankel: I respectfully pray a general exception to the charge on the ground that the Court did not inform the jury of the doctrine of substantial performance.

Exception noted as ground of appeal.

20 And then I respectfully pray a special exception on the ground of the Court's remarks where the Court said it had no right to negotiate the check which was made to the order of the Trane Company and for the reason stated by the Court.

Exception noted as ground of appeal.

I respectfully pray an exception to the Court's charging the second, third and fourth of the plaintiff's requests to charge.

Exception noted as ground of appeal.

30 Plaintiff's Requests to Charge are as follows:

1. If you, gentlemen of the jury, find that the plumbing and heating work on the building at 243-245 Madison avenue, Newark, New Jersey, was not completed on November 27, 1928, and that the defendant Louis Zapiekov made payment to the defendant Maurice Huckman, the contractor, on that day, then I charge you, that the defendant Louis Zapiekov, is liable to the plaintiff in

40

Plaintiff's Requests to Charge.

the same manner as if said defendant Louis Zapiekov, had not made the payment to Maurice Huckman.

(Denied.)

2. If you find that the defendant Louis Zapiekov, in advance of the terms of the plumbing and heating contract with Maurice Huckman, paid any moneys on such contract, then I charge you that the owner, Louis Zapiekov, the defendant here, is liable to the material man, Mr. Joseph Grunt, the plaintiff herein, in the same manner as if no such payment had been made, if the amount still due to the contractor, Maurice Huckman, after the making of said payment, should be insufficient to satisfy the material men who have served stop notices.

10

(Charged.)

20

3. The rights of the plaintiff, the material man in this case, cannot be impaired or defeated by an advance payment on the contract price.

(Charged.)

4. The rule of law is that laborers or material men giving notices in accordance with the provisions of the third section of the Mechanics' Lien Act have priority and preference in the disposition of moneys due and to grow due upon a contract over any persons claiming said money or any part thereof by reason of order or orders thereon or assignments thereof, and if you find that Mr. Zapiekov paid out from the last payment due to Mr. Maurice Huckman on the plumbing contract, the sum of \$879.11 to The Trane Company because of a guarantee which he had previously made to The Trane Company, then he, Zapiekov, is answerable to the plaintiff in this case, if the plaintiff served Mr. Zapiekov with a

30

40

Plaintiff's Requests to Charge.

stop notice because Mr. Zapiekov had no right to reimburse himself for moneys which he paid on account of the guarantee to The Trane Company or to any other person or firm, to the detriment of the plaintiff.

(Charged.)

10

20

30

40

POSTEA.

ESSEX COUNTY CIRCUIT COURT.

58428 JOSEPH GRUNT, trading as West Side Plumbing Co., <p style="text-align: right;"><i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> LOUIS ZAPEIKOV, <p style="text-align: right;"><i>Defendant.</i></p>	}	Action at Law. On Verdict by a Jury. Judgment Entered No- vember 1, 1929.	10
--	---	--	----

Damage	\$1,040.21	
Costs	104.82	
Total	\$1,145.03	20

MICHAEL G. ALENICK, Att'y of Plaintiff.

This action was tried before Judge Worrall F. Mountain with a jury at the Essex Circuit Court on November 1, 1929.

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

They find in favor of the plaintiff, Joseph Grunt, trading as West Side Plumbing Co., and against the defendant, Louis Zapiekov, for the sum of one thousand forty dollars and twenty-one cents (\$1,040.21) damage. 30

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of one thousand forty dollars and twenty-one cents (\$1,040.21) damage and costs which are taxed at one hundred four dollars and eighty-two cents making in the whole the sum of one thousand one hundred forty-five dollars and three cents. 40

Postea.

Judgment entered and signed November 1, 1929.

10 ORDERED that the verdict rendered by the jury on November 1, 1929 be moulded so as to include interest of \$52.01 which is computed from the date summons was issued to trial date, making the total amount of the judgment \$1,092.22. Order filed November 25, 1929.

WILLIAM S. GUMMERE,
Judge.

JOHN H. SCOTT,
Clerk.

Book 109 Circuit Court Judgments, page 006.

20

30

40

NOTICE OF APPEAL.

ESSEX COUNTY CIRCUIT COURT.

JOSEPH GRUNT, trading as West Side Plumbing Co., <i>Plaintiff,</i> <i>vs.</i> LOUIS ZAPEIKOV, <i>Defendant.</i>	}	<i>Action at Law.</i> <i>Notice of Appeal.</i>	10
--	---	---	----

To MICHAEL G. ALENICK, Esq.,
 Attorney of Plaintiff,
 24 Branford Place,
 Newark, N. J., or to whom it may concern: 20

SIR:

Please take notice that Louis Zapeikov, the defendant in the above entitled cause, appeals to the New Jersey Court of Errors and Appeals in the last resort in all cases from the whole of the judgment entered in this cause.

PHILIP J. SCHOTLAND,
 Attorney for and of Counsel with Defendant,
 Louis Zapeikov. 30

Service of a copy of the within notice of appeal is hereby acknowledged this 20th day of November, 1929.

M. G. ALENICK,
 Attorney for Plaintiff.

GROUNDS OF APPEAL.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10	JOSEPH GRUNT, trading as West Side Plumbing Co., <i>Plaintiff-Appellee,</i> <i>vs.</i> LOUIS ZAPEIKOV, <i>Defendant-Appellant.</i>	} <i>Appeal from Essex County Cir- cuit Court.</i> } <i>Grounds of Appeal.</i>
----	---	---

20 Appellant specifies the following grounds why the judgment rendered in the above entitled cause should be reversed:

1. Because the learned trial Judge denied the application of appellant for a non-suit.
2. Because the Court erred in charging the jury:

30 "Without going into the details the defendant denies that the notice was served and denies that there was any money due. The plaintiff insists that when the notice was served there was money due and that a certain material man known as the Trane Company had a check handed to it or, rather, had a check made out to it, but it was not actually delivered, which was in the possession of the defendant when the stop notice was served. I think that was the contention of the plaintiff, and the plaintiff indicated by testimony given that a check was drawn by Zapiekov to Huckman, endorsed by the latter to the Trane Company, and then handed back to Zapiekov for the purpose of getting a release for it from the Trane Company. If he had a check in

40

Grounds of Appeal.

his possession after the stop notice was given, he had no right to negotiate the check; he had money then in his possession belonging to Huckman. The money was in the bank, and if you find that, of course, your judgment might be different."

3. Because the Court erred in charging the jury: 10

"If you find that the defendant Louis Zapiekov, in advance of the terms of the plumbing and heating contract with Maurice Huckman, paid any moneys on such contract, then I charge you that the owner, Louis Zapiekov, the defendant here, is liable to the material man, Mr. Joseph Grunt, the plaintiff herein, in the same manner as if no such payment has been made, if the amount still due to the contractor, Maurice Huckman, after the making of said payment, should be insufficient to satisfy the material men who have served stop notices." 20

4. Because the Court erred in charging the jury:

"The rights of the plaintiff, the material man in this case, cannot be impaired or defeated by an advance payment on the contract price."

5. Because the Court erred in charging the jury: 30

"The rule of law is that laborers or material men giving notices in accordance with the provisions of the third section of the Mechanics' Lien Act have priority and preference in the disposition of moneys due and to grow due upon a contract over any persons claiming said money or any part thereof by reason of order or orders thereon or assignments thereof, and if you find that Mr. Zapiekov paid out from the last payment due to Mr. Maurice Huckman on the plumbing contract, the sum of \$879.11 to the 40

Grounds of Appeal.

10 Trane Company because of a guarantee which he had previously made to the Trane Company, then he, Zapiekov, is answerable to the plaintiff in this case, if the plaintiff served Mr. Zapiekov with a stop notice because Mr. Zapiekov had no right to reimburse himself for moneys which he paid on account of the guarantee to the Trane Company or to any other person or firm, to the detriment of the plaintiff."

6. Because the verdict of the jury is not supported by the evidence and is contrary to the charge of the Court.

Dated December 4, 1929.

PHILIP J. SCHOTLAND,
Attorney for and of Counsel with Appellant.

20

Service of a true copy of the within Grounds of Appeal is hereby acknowledged this 4th day of December, 1929.

MICHAEL G. ALENICK,
Attorney for and of Counsel with Appellee.

30

40

Exhibit P. 1.

Exhibit P. 1.

THIS AGREEMENT, MADE the twenty-eighth day of June, in the year of our Lord One Thousand Nine Hundred and twenty eight

BETWEEN Luis Zapeikov of the city of Newark in the County of Essex and State of New Jersey party of the First Part; 10

AND Maurice Huckman of the city of Newark in the County of Essex and State of N. J. party of the Second Part:

WITNESSETH, FIRST, The said party of the Second Part does hereby for himself his heirs, executors and administrators, covenant, promise and agree to and with the said party of the First Part, his heirs, executors, administrators or assigns, that said party of the Second Part, his heirs, executors or administrators, shall and will for the consideration hereinafter mentioned, on or before the first day of October 1928 well and sufficiently erect and finish the general heating and plumbing work new Building 243 245 Madison Ave. agreeably to the Drawings and Specifications made by Siegler & Greenberg and signed by the said parties and hereunto annexed, within the time aforesaid, in a good workmanlike and substantial manner, under the direction of the said owner, to be testified by a writing, or certificate under the hand of the said owner 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 heating and plumbing works of the said BUILDING mentioned in the plans and Specifications for the sum of four thousand four hundred 20 30 40

Exhibit P. 1.

dollars (\$4400) plus a bonus of fifty dollars making a total of four thousand four hundred and fifty dollars (\$4450) providing the contractor finishes the job without delaying the other contractors.

10 AND the said party of the First Part does hereby, for himself his heirs, executors and administrators, covenant, promise and agree, to and with the said party of the Second Part, his 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 party of the Second Part as specified, well and truly pay or cause to be paid unto the said party of the Second
20 Party his executors, administrators or assigns the sum of four thousand four hundred and fifty dollars (\$4450) lawful money of the United States of America, in manner following: \$1000 when all heating and plumbing roughing and water and gas pipes are installed and tested, and boiler set. second payment: \$400 when two tubs are set and showers are set ready for tiling. third payment: \$1550. when all other plumbing fixtures are set. fourth payment: \$1500. when
30 all work is finished to meet the approval of owner.

PROVIDED, That in each of the said cases a certificate shall be produced, signed by the said
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 Contractor ; neither shall it exempt the Contractor from liability to replace work if it be afterwards discovered to have been done ill or not according to the Drawings and Specifica-
40 tions, either in execution or materials.

Exhibit P. 1.

AND IT IS HEREBY FURTHER AGREED BY AND BETWEEN THE SAID PARTIES:

FIRST.—The Architect shall furnish to the Contractor all drawings or explanations of drawings as may be necessary to illustrate the work to be done, and the Contractor shall conform to the same as part of this contract, so far as they may be consistent with the original Drawings and Specifications, and all plans must be furnished to the Contractor at the time of signing contract. 10

SECOND.—The Contractor, at **own** proper costs and charges, to provide all manner of materials and labor, of every description, for the due performance of the work as per Specifications herewith submitted.

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 affect 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. 20

FOURTH.—Should the Contractor, 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' notice in writing being given, to finish the said works, and the expense shall be deducted from the amount of the contract. 30

FIFTH.—Should any dispute arise respecting the true construction or meaning of the Drawings or Specifications, the same shall be decided by and decision shall be final and conclusive; but should any dispute arise respecting the true value of 40

Exhibit P. 1.

the extra work, or of the work omitted, the same shall be valued by two competent persons—one employed by the Owner , and the other by the Contractor , and those two 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.

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

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

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 Con-
40

Exhibit P. 1.

tractor 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
 shall, without the written consent of the Owner ,
 have authority to vary, alter, amend or change
 this contract, or any of the Plans and Specifica-
 tions herein referred to. 10

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 20
 thereof, together with the specifications accom-
 panying 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 building situate
 before any work is done or materials furnished
 for said building , then and in that case the
 said Contractor 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 such build- 30
 ing and the land whereon the same is erected,
 releasing their lien on said building and the
 land whereon the same 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.

Exhibit P. 1.

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.

(L. S.) LOUIS ZAPEIKOV

10

(L. S.) MAURICE HUCKMAN

Signed, Sealed and Delivered
in the presence of

John Sing

AGREEMENT FOR BUILDING

20

Louis Zapeikov
with
Maurice Huckman

Dated, June 28 1928

30

40

Exhibit P. 3.

Exhibit P. 3.

Newark, N. J., Nov. 27, 1928.

STOP NOTICE

To Mr. Louis Zapeikov:

10 You are hereby notified that Morris Huckman is justly indebted to us, in the sum of One Thousand Forty Dollars and twenty One Cents (\$1040.21) for materials furnished by us to him and used in the erection of the two story brick building, now being erected on the land owned by you and situated at #243 Madison Ave., Newark, N. J., pursuant to the contract made between you and him; and you are further notified that

20 we have demanded payment from the said Morris Huckman of the said sum of money, so owing to us as aforesaid, and that he has refused to pay same or any part thereof; and you are therefore required to retain the amount, so due and claimed by us, out of the amount owing by you on said contract, or that may hereafter become due on said contract, and pay the same to us.

Signed West Side Plumbing Supply Co.

By M Grunt.

30

40

Exhibit P. 4.

Exhibit P. 4.

PHONE TERRACE 0996

TERMS, NET CASH

ESTIMATE
 WEST SIDE PLUMBING SUPPLY CO.
 All Kinds of
 Plumbing and Steam Supplies
 38-40 SIXTEENTH AVENUE

NEWARK, N. J., July 17, 1928

10

NAME—M. Huckman

Examine your list carefully. We shall furnish only such material as specified herein.

Our responsibility ceases for material delivered after same has been put off on the side walk. This quotation is for immediate acceptance and after duly accepted by us, this quotation or any part thereof cannot be cancelled or altered by you except with our written consent.

Any material not delivered within 2 months from above date, is subject to cancellation at our option. We agree to furnish new materials for any materials defective thru manufacture and guaranteed by the manufacturer. We assume no personal responsibility for any damage caused by such defective material.

20

If for any reason we are unable to furnish such certain materials as this quotation calls for. We reserve the right to credit your account for the amount charged by us in this quotation.

We also reserve the right to cancel the balance of such materials due on this list even though some part or parts of it may have been delivered if the customer does not pay according to the terms stated herein.

All verbal statements, promises, etc. are void except if agreed by us in writing. Any change in the size, character, etc. of the materials in this quotation, after agreed by us, is at your expense.

Title and ownership of the goods delivered shall remain in Jos. Grunt until same is paid for in full. Payments are not subject to any discounts.

We will not recognize any claims for materials if such claims are made more than 2 days after date of delivery of such materials.

30

AMOUNT—\$1548.00

No. 1078

We agree to supply the material specified herein for the sum of.....to premises No. 243 Madison Ave Newark, N. J. the owner being L. Zapiekov under the conditions set forth above and included in this estimate.

1 20x24 F117 G. Orchid Lavatory	30.00	30.00	
1 K701 York Chromard ftg. Ochid C. H.	12.23	12.23	
1 pr. ¾" Supply pipes Chromard K792	3.20	3.20	
1 1¼" P Trap Chromard K960	2.15	2.15	
1 5'6" Woodmere P2332 Sea Green Tub	82.20	82.20	40

Exhibit P. 4.

	1 K300 Fitting Chromard S. G. C. H.	16.70	16.70
	1 5'6" Woodmere 2392 Orchid Tub	76.92	76.92
	1 #99 Fitting Chromard Orchid V.	63.11	63.11
	1 P5015 Closet Sea Green Chromard finished ftgs.	51.70	51.70
	1 K111 Fitting Chromard Finish		67.94
	1 Glass shower door with chromard finish frame		125.00
	3 P2600 Devoro closets w/ Chromard Flush valves		
10	1 Green 30.33	60.66	60.66
	1 Orchid	25.12	25.12
	1 White		
	1 L.D. Sphon Action 1 1/4" Closet	4.00	4.00
	1 F.F. & Bolts	.18	.18
	1 White Seat	2.80	2.80
	1 Sloan Valve flushometer		8.00
	1 18x24 P3847 Lavatory	8.20	8.20
	1 Pr. Basin Cocks Chromard 1.59		3.18
	1 Chromard N.P. Trap 1 1/4"	2.15	2.15
	1 Popey Waste K760 Chromard	3.25	3.25
	1 2 part P7300 Wash Trays	39.57	39.57
	4 Wash Tray Bibbs .32		1.28
	1 22x60 P6660 Acid Resisting Sink	54.85	54.85
	1 K888 S. Combination fitting	19.24	19.24
	1 P6961 V.C. Garbage Container	10.68	10.68
	1 K759 Strainer Chromard	.48	.48
20	1 K960 1 1/2" P Chromard Trap	2.75	2.75
	1 22x27 Sea Green Lavatory F117	35.27	35.27
	1 K701 York Comb. w/ S.G. China Handles & Chromard finish	12.23	12.23
	1 K792 3/8" Chromard Supply Pipes	3.20	3.20
	1 K960 1 1/4" P Chromard Trap	2.15	2.15
	1 50 gal. Ever Hot Copper Water heater		192.37
	20 ft. 5" S.H. Pipe E.H. 4 lghts 5.50	22.00	
	15 ft. 5" D.H. do 3 lghts 5.70	17.10	
	120 ft. 4" S.H. do 14 lghts 4.20	58.80	
	35 ft. 4" D.H. do 7 lghts 4.40	30.80	37.14
	Less 62 1/2-10-10-5%	128.70	1,059.90
	No. 1079		
30	3 4" TYs 1.40	4.20	
	2 4x4x2 Side Outlets 3.25	6.50	
	4 4" Ys 1.40	5.60	
	4 5x4 Ys 1.70	6.80	
	2 4" P Traps 1.85	3.70	
	5 4" Sweeps 1.55	7.75	
	8 4" Cleanouts .28		2.24
	2 4x3 Ys 1.25	2.50	
	6 4" 1/8 Bends .75	4.50	
	3 4x2 Tapped TYs 1.55	4.65	
	2 4" 1/4 Bends .85	1.70	
	2 5x4 Reducers		
	Less 47 1/2-10-10-5% .75	1.50	19.96
		49.40	

Exhibit P. 4.

1 Bale Oakum			3.75
250 # Pig Lead		.06 $\frac{3}{4}$	16.88
4 4" 10x10 lead bends		1.20	4.80
4 4" Brass ferrules		.32	1.28
2 1 $\frac{1}{2}$ " P. lead traps		.45	.90
1 2" P. lead trap			.71
1 2" Solder nipple			.25
2 1 $\frac{1}{2}$ " do		.17	.34
30 # Solder		.28	8.40
60 ft. 1 $\frac{1}{2}$ " Brass pipe	182 $\frac{1}{2}$ #		
40 ft. 1 $\frac{1}{4}$ " do	102 $\frac{1}{2}$ #		
100 ft. 1" do	185 #		
100 ft. $\frac{3}{4}$ " do	120 #		
	590 #	.19 $\frac{1}{8}$	113.04
100 ft. $\frac{1}{2}$ " do	100 #	.20	20.00
1 1 $\frac{1}{2}$ " Brass Gate Valve			1.25
3 1" do		.70	2.10
12 $\frac{1}{2}$ " do		.36	4.32
6 $\frac{3}{4}$ " Stops		.39	2.34
100 # Galv. Ftgs. $\frac{3}{4}$ to 2"		.11	11.00
60 ft. 2" Galv. Pipe		.17	10.20
80 ft. 1 $\frac{1}{2}$ " do		.12 $\frac{1}{2}$	10.00
36 ft. 3" Black Pipe		.28	10.08
35 ft. 2 $\frac{1}{2}$ " do		.21	7.35
120 ft. 2" do		.13	15.60

10

1,326.69 20

No. 1080			
200 ft. 1 $\frac{1}{4}$ " Black pipe		.08	16.00
400 ft. 1" do		.06	24.00
150 ft. $\frac{3}{4}$ " do		.04	6.00
Steam Fittings			30.00
10 # Pipe Joint cement		.14	1.40
4 Sq. Ft. Sheet lead	16 #	.09 $\frac{1}{2}$	1.52
3 $\frac{1}{2}$ " Sill cocks w/ N.P. Loose Keys		.40	1.20
1 K290 Chromard Rod & Curtain White Curtain			9.59

1,416.40

Amt of contract	1548—	
July 31 charged	215—	30
Balance	1333—	
Aug. 31 charged	300—	
Balance	1033—	
Sept. 30 charged	275—	
Balance	758	
Nov. 30 charged	758	
Charged in full		

40

Exhibit P. 6.

Exhibit P. 6.

(Check)

LOUIS ZAPEIKOV

Real Estate & Fire Insurance Broker

93-95 Avon Avenue

10

No. 10489

Newark, N. J. Nov 27 1928

Pay to the order of Maurice Huckman

Five hundred 00/100.....Dollars

Louis Zapeikov.

Merchants and Newark Trust Company

Newark, N. J.

\$500 00/100

20

(Endorsements)

Maurice Huckman

Rubin Epstein

(Usual bank stamps)

30

40

*Exhibit P. 7.***Exhibit P. 7.**

(Check)

LOUIS ZAPEIKOV

Real Estate & Fire Insurance Broker

93-95 Avon Avenue

10

No. 10490

Newark, N. J. Nov 27 1928

Pay to the order of Maurice Huckman

Eight hundred and seventy nine 11/100... Dollars

Louis Zapeikov.

Merchants and Newark Trust Company

Newark, N. J.

\$879 11/100

20

(Endorsements)

Pay to the order of Trane Co.

Maurice Huckman

(Usual bank stamps)

30

40

Exhibit P. 8.

Exhibit P. 8.

Sheet No.....

Account No. H 5

Terms

Rating B

Credit Limit L. Zapielsor

NAME Morris Huckman

ADDRESS 54 16th Ave

Newark, N. J.

10

	DATE 1928	FOLIO	DEBITS	✓	CREDITS	BALANCE
	July 6	221	84	✓		
	9	222	1.50	✓		
	31	234	4.59	✓		
	6	221	32.40	✓		
			39.33			
	Aug. 1	236	10.19	✓		
	1	236	2.50	✓		
	1	236	1.89	✓		
	2	237	3.22	✓		
	4	238	.18	✓		
	4	238	16.88	✓		
	6	239	22.71	✓		
	6	239	.99	✓		
20	8	240	1.26	✓		
	8	240	6.48	✓		
	8	240	2.59	✓		
	9	241	8.88	✓		
	9	241	5.88	✓		
	10	242	.38	✓		
	13	243	2.95	✓		
	7	239	.20	✓		
	13	243		✓		35
	14	244	1.71	✓		
	14	244	.32	✓		
	14	244	2.92	✓		
	14	244	9.50	✓		
	15	245	.20	✓		
	15	245	1.40	✓		
	16	246	15.81	✓		
	16	246	2.00	✓		
30	Aug. 17	247	6.07	✓		
	18	247	9.81	✓		
	20	248	1.91	✓		
	20	248	5.69	✓		
	20	248	1.08	✓		
	21	249	56.55	✓		
	21	249	.27	✓		
	22	250	11.23	✓		
	22	250	.90	✓		
	22	250	.18	✓		
	23	251	5.60	✓		
	23	251	.75	✓		
	23	251	1.44	✓		
	24	251	11.52	✓		
	27	253	4.16	✓		
40	27	253	12.40	✓		

Exhibit P. 8.

DATE	FOLIO	DEBITS	✓	CREDITS	BALANCE
27	253 ✓	1.00			
28	254 ✓	1.90			
24	251 ✓	2.00			
29	255 ✓	1.40			
29	255 ✓	2.63			
30	256 ✓	2.97			
30	256 ✓			70.86	
10	242 ✓	2.20			
15	245 ✓	23.94			
30	257 ✓	4.75			
30	257 ✓	29.20			10
		361.92		71.21	290.71
Sept. 11	264 ✓	4.64			
11	264 ✓	.80			

Account No. H 5
 NAME Morris Huckman
 ADDRESS 54 16th Ave
 Newark, N. J.

Sheet No.....

Terms
 Rating
 Credit Limit

DATE	FOLIO	DEBITS	✓	CREDITS	BALANCE
Sept. 12	264 ✓	3.12			
13	265 ✓	3.63			20
13	266 ✓	5.93			
13	266 ✓	.30			
13	266 ✓	27.60			
13	266 ✓	1.60			
13	266 ✓	7.50			
17	267 ✓	3.20			
26	274 ✓	.75			
26	274 ✓	.12			
11	264 ✓	2.50			
24	296 ✓	1.18			
		424.79		71.22	
Nov. 19	C96	353.58			
12	10 ✓	5.29			
12	11 ✓	18.84			
13	11 ✓	8.97			
13	11 ✓	25.20			30
14	12 ✓	2.00			
14	13 ✓	1.85			
15	13 ✓	13.05			
15	13 ✓	23.78			
16	14 ✓	11.96			
19	16 ✓	7.65			
19	16 ✓	8.83			
20	17 ✓	11.52			
1 as of					
7/24 J 32		3.39			
		565.27		426.64	138.63

*Exhibit P. 9.***Exhibit P. 9.**

Established 1885

Reuben N. Trane

Jas. A. Trane

THE TRANE COMPANY

10 General Offices and Factory La Crosse,
Wisconsin, U. S. A.

A. P. Livar, Mgr. Newark Office
31 Central Ave. Phone: Mitchell 1604

Newark, New Jersey, November 9, 1928

Mr. Louis Zapeikov,
93 Avon Ave., Newark, N. J.

Dear Sir:

20 Today we received a statement from the factory showing that up to November list the Morris Huckman account of \$881.03 was still open, and the thirty day terms expired on the last portion of the shipment on October 11th. This letter will serve as your Stop Notice in accordance with our agreement with you to see that our account is fully satisfactory before paying Mr. Huckman.

There is also \$12.00 additional charges due this office for transportation charges that we paid to accommodate Mr. Huckman.

30 With kindest regards, we are

Yours very truly,

The Trane Company

A. P. Livar,

Newark Office Manager

APL:MW

Exhibits P. 10, P. 11.

Exhibit P. 10.

L Z

Exhibit P. 11.

Telephone Terrace 0996

10

Received in good order from
WEST SIDE PLUMBING SUPPLY CO.
Joseph Grunt, Prop.
Jobbers in
Plumbing, Gas and Steam Supplies
38-40 Sixteenth Avenue

Newark, N. J., Nov. 20 1928

C 4272

20

Sold to L. Zapekov

Address

Shipped to

Goods sold with the understanding that I will furnish new material for any proving defective through manufacture. But under no circumstances shall I be under liability of any kind for any labor or consequential damages involved.

Examine goods before signing. My responsibility ceases after goods are signed for.

30

No order or Part Thereof, can be cancelled or material returned without my written consent.

Prices subject to change without notice
10% will be charged for handling Returned Goods.

Sidewalk Delivery Only

Your Order No.Billed by.....

Terms—2% 10 days Net 30 days

2 Small Cans Blue Seal 35 70

L Z

Sign and Return Original

40

Received by

Exhibit P. 12.

Exhibit P. 12.

Telephone Terrace 0996

Received in good order from
WEST SIDE PLUMBING SUPPLY CO.

10

Joseph Grunt, Prop.
Jobbers in
Plumbing, Gas and Steam Supplies
38-40 Sixteenth Avenue

Newark, N. J., Nov. 27 1928

C 4406

Sold to L. Zapekov

Address

Shipped to

20

Goods sold with the understanding that I will furnish new material for any proving defective through manufacture. But under no circumstances shall I be under liability of any kind for any labor or consequential damages involved.

Examine goods before signing. My responsibility ceases after goods are signed for.

No order or Part Thereof, can be cancelled or material returned without my written consent.

Prices subject to change without notice

10% will be charged for handling Returned

30

Goods.

Sidewalk Delivery Only

Your Order No.Billed by.....

Terms—2% 10 days Net 30 days

1	1/2"	Brass 45	15
1	1/2"	" Close Nipp.	10
1	3/4x1/2	" Bush	15

— 35

M. Zapeikov

Sign and Return Original

40

Received by

Exhibit D. 1.

Exhibit D. 1.

Telephone Terrace 0996 Joseph Grunt, Prop.

WEST SIDE PLUMBING SUPPLY CO.

Jobbers in

Plumbing and Steam Supplies

Office

Warehouse

10

38-40 Sixteenth Avenue

356 South 8th Street

Newark, N. J., November 8th 1928.

To Mr. L. Zapiekov,
93 Avon Ave., Newark, N. J.

Dear Sir:

In consideration of the West Side Plumbing Supply Co., delivering the plumbing fixtures to your premises at 243 Madison Ave., Newark, N. J., I hereby order you to pay the West Side Plumbing Supply Co., the sum of One Thousand Dollars, and deduct same from my payment of \$1500.00 due me when fixtures are delivered.

20

Signed The Huckman Co.
Morris Huckman.

30

40

Exhibits D. 2, D. 3.

Exhibit D. 2.

Copy

Nov. 20th 1928.

10 To Mr. L. Zapeikov,
93 Avon Ave., Newark, N. J.

Dear Sir:

I hereby order you to pay to the West Side Plumbing Supply Co. the sum of Nine Hundred Dollars for materials delivered to your premises at #243 Madison Ave., Newark, N. J. and deduct same from the payment due me in accordance with the contract made between us.

Signed The Huckman Co.
By Morris Huckman.

20

Exhibit D. 3.

Newark N J Nov 19 1928

Received from Morris Huckman
One Thousand and no/100.....Dollars
\$1000 00/100

30

Joseph M. Grunt.

40

Exhibit D. 3.

Exhibit D. 3.

To all to whom these Presents shall come or may concern, Greeting:

KNOW YE, THAT I, MORRIS HUCKMAN, residing at #54-56 16th Ave. in the city of Newark, County of Essex, and State of New Jersey, for and in consideration of the sum of ONE DOLLAR and other good and valuable considerations lawful Money of the United States of America, to me in hand paid by Louis Zapeikov, of the city of Newark, County of Essex and State of New Jersey, have remised, released and forever discharged, and by these Presents do, for myself, my heirs, executors and administrators, remise, release and forever discharge the said Louis Zapeikov his heirs, executors and administrators, of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, in law or in equity which against him, the said Louis Zapeikov, I ever had, now have or which against him, the said Louis Zapeikov, I or my heirs, executors or administrators, hereafter can, shall, or may have, for, upon or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of these Presents.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the twenty seventh day of November in the year of Our Lord One Thousand Nine Hundred and twenty-eight

MAURICE HUCKMAN (L. S.)

Exhibit D. 3.

Signed, Sealed and Delivered
In the Presence of

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

10 BE IT REMEMBERED, That on this day of
November in the year of Our Lord One Thousand
Nine Hundred and twenty-eight before me, the
subscriber, a Master in Chancery of New Jersey
personally appeared MORRIS HUCKMAN who, I
am satisfied, is the grantor mentioned in the
within Instrument, to whom I first made known
the contents thereof, and thereupon he acknowl-
20 edged that, he signed, sealed and delivered the
same as his voluntary act and deed, for the uses
and purposes therein expressed.

Master in Chancery of New Jersey.

RELEASE.

MORRIS HUCKMAN
To
LOUIS ZAPEIKOV

Dated, November 27th 1928.

30

40

Exhibit D. 4.

Exhibit D. 4.

(Check)

LOUIS ZAPEIKOV
Real Estate & Fire Insurance Broker
93-95 Avon Avenue

10

No. 10444

Newark, N. J. Nov 13 1928

Pay to the order of Maurice Huckman
One thousand 00/100.....Dollars
Louis Zapeikov.

Merchants and Newark Trust Company
Newark, N. J.

\$1000 00/100

20

(Endorsements)

Pay to the order of
West Side Plumbing Supp. Co.
Maurice Huckman
(Usual bank stamps)

30

40

Exhibits D. 4, D. 5.

Exhibit D. 4.

Phone Terrace 3254

Automobile Liability Fire & Accident Insurance
Plate Glass, General Liability and Public
Insurance

10

L. ZAPEIKOV

Real Estate and Fire Insurance Broker
243-45 Madison Avenue

Newark N J, Nov 23 1922

Mr. L. Zapeikov

You are hereby authorized to pay to M. Zapeikov the sum of seventy five \$75.00 and deduct from my last payment.

20

Maurice Huckman.

Exhibit D. 5.

Newark N. J. Nov 4 1928

Mr. Louis Zapeikov

You are hereby authorized to pay to the order of Mrs. M. Zapeikov the sum of Four hundred and Twenty five \$425.00 and deduct from my last payment.

30

Maurice Huckman

40

Exhibits D. 6, D. 7.

Exhibit D. 6.

Nov 27 1928

Received from L. Zapeikov
Fourteen hundred and fifty four 11/100 Dollars
Fourth payment for plumbing & steamheating
for 243-5 Madison Ave.

10

Maurice Huckman

\$1454 11/100

Exhibit D. 7.

(Check)

LOUIS ZAPEIKOV
Real Estate & Fire Insurance Broker
93-95 Avon Avenue

20

No. 10488

Newark, N. J., Nov. 27, 1928.

Pay to the order of Maurice Huckman
Seventy five 00/100.....Dollars
Louis Zapeikov.

Merchants and Newark Trust Company
Newark, N. J.

30

\$75 00/100

(Endorsements)

Maurice Huckman
Smart Shoppe Inc
(Usual bank stamps)

40

Exhibit D. 8.

Exhibit D. 8.

July 23, 1928

Mr. Louis Zapeikov,
93 Avon Ave., Newark, N. J.

10 Dear Sir:

You are hereby authorized to pay to the Trane Company the sum of \$879.11 and charge same to my contract with you.

Respectfully yours,

Morris Huckman.

20

30

40

New Jersey Court of Errors and Appeals

JOSEPH GRUNT, trading as WEST SIDE PLUMBING Co., <i>Plaintiff-Appellee,</i> <i>vs.</i> LOUIS ZAPIEKOV, <i>Defendant-Appellant.</i>	}	<i>Action at Law. On Appeal from Essex County Circuit Court.</i>
---	---	---

BRIEF OF DEFENDANT-APPELLANT.

Facts.

On June 28, 1928, Louis Zapiekov, defendant-appellant and Maurice Huckman, a plumbing contractor, entered into a written contract for the general heating and plumbing work to be supplied in the erection of a house that Zapiekov was building for himself at No. 243 Madison avenue, Newark, N. J. (Exhibit P. 1, State of Case, pp. 117-122). On June 29, 1928, this contract with specifications was filed in the Essex County Clerk's office. The contract price was \$4,450 to be paid in installments, the fourth and last installment to be \$1,500 "when all work is finished to meet the approval of the owner." This appeal involves only this installment, as the due date of the other installments had arrived and they had been paid long before the stop notice was served by Joseph Grunt, plaintiff-appellee, which stop notice alleged a claim of \$1,040.21 for plumbing supplies and is the foundation of Grunt's claim in this suit.

Maurice Huckman, in order to perform his contract with Zapiekov, had to buy certain material from The Trane Company of New York. Not being able to pay cash nor to purchase on

credit, the following arrangement was entered into in order to procure said material. Huckman gave to The Trane Company an order dated July 23, 1928, which was served on Zapiekov and which authorized him to pay \$879.11, the amount due to them, out of the contract price (Exhibit D. 8, State of Case, p. 142). Around the time of this order Zapiekov personally guaranteed in writing to The Trane Company the amount of their bill. Under this double protection of order and guarantee, The Trane Company supplied the necessary material.

Joseph Grunt, plaintiff-appellee, also supplied material to Huckman for the plumbing work in this building. For part of what he supplied he received an order from Huckman and was paid by Zapiekov out of a prior payment under the contract. There was due him for the rest a balance of \$1,040.21. This latter sum he demanded from Huckman who refused to pay. On November 27, 1928, Grunt served on Zapiekov a stop notice for \$1,040.21 (Exhibit P. 3, State of Case, p. 124). Grunt, himself, on direct examination established the time as around six o'clock in the evening (State of Case, p. 29, ll. 33-34 and p. 30, ll. 8-9). He further testified that Zapiekov on receiving this notice said that the money was already paid (State of Case, p. 30, ll. 20-21). Being unable to collect it either from Huckman or Zapiekov, he brought this suit against both. Huckman allowed judgment to go against him by default and took part in this case as a witness, under subpoena by the plaintiff, testifying as to how and when the final payment was made and as to when he finished his work.

On November 27, 1928, between 12 and 1 o'clock, when, as he says, he knew he could find Zapiekov home for lunch he went to Zapiekov's

home and demanded his money (State of Case, p. 51, ll. 1-3). In answer to a question by plaintiff's counsel he states the situation:

“Q You insisted it was finished, did you?

A Yes, sir.

Q Mr. Zapiekov insisted that it was not finished?

A Yes, sir.”

(State of Case, p. 59, ll. 13-16.)

The provision of the contract was “\$1,500 when all work is finished to meet the approval of the owner,” and so Huckman had to get Zapiekov's approval of his work. Certain items, such as a few faucets, a shower curtain, and the like, as supplied, were not up to the specifications called for in the contracts. Huckman and Zapiekov agreed that there should be an allowance of about \$95 for these items, and on that basis adjusted their accounts.

Zapiekov had been served prior to November 27, 1928 with an order in favor of The Trane Company for \$879.11 (Exhibit D. 8, State of Case, p. 142); with an order in favor of M. Zapiekov for \$75.00 (Exhibit D. 4, State of Case, p. 140); and with an order in favor of Mrs. M. Zapiekov for \$425.00 (Exhibit D. 5, State of Case, p. 140). The consideration for the order of The Trane Company has been set forth above, that for Mrs. Zapiekov's order was money loaned to Huckman.: He explained this on the witness stand:

“Q You asked him to advance some money to you, didn't you?

A I asked him several times.

Q And he said he wouldn't do it?

A That's right.

Q As a matter of fact, he personally, didn't advance you any money?

A That's right.

Q He told you he could not and would not do it?

A That's right.

Q When you say Mrs. Zapiekov loaned you money, you do not mean for us to understand that he suggested that she should do it, do you?

A I didn't say that.

Q Did you ask her for money?

A I was there to ask him to advance me some money and he wouldn't give it and she did it.

Q How many years have you known Mrs. Zapiekov?

A 17 or 18 years.

Q You would ask her for money if you needed it any time, wouldn't you?

A I wouldn't say that. I wouldn't ask her for money unless I was sure I was in a position where she could get it back. She wouldn't give it to me under any condition.

Q You gave an order to Mr. Zapiekov to pay Mrs. Zapiekov this money, didn't you?

A Certainly.

Q You felt that you would like to protect her for the \$500. she loaned to you?

A Yes, the same as anyone else. The fact that she was Mrs. Zapiekov did not make any difference."

(State of Case, p. 53, ll. 11-40.)

Payment of these orders came out of the final payment due Huckman. A check for \$500. was made out to Huckman's order. This check is Exhibit P. 6 (State of Case, p. 128) and is indorsed in blank by Huckman. He testified that he delivered it to Mrs. Zapiekov to pay his debt to her and got back from her the difference of \$75.00 (State of Case, p. 49, ll. 9-16, and p. 50, ll. 26-31). A check for \$879.11 was made out to Huckman's order; indorsed by him to the order of The Trane Company and left with Zapiekov to be delivered by him to The Trane Company. Zapiekov carried out this arrangement and de-

livered the check, receiving in return a general release (State of Case, p. 61, ll. 26-30, and p. 62, ll. 3-4). This check was presented and paid in due course. The remainder of the \$1,500.00 due as the fourth payment was unpaid, being allowed by Huckman for the unsatisfactory materials. As evidence of the satisfaction of all claims against Zapiekov, Huckman executed and delivered to him a general release, thus sealing the transaction (Exhibit D. 3, State of Case, p. 137).

Five hours later Grunt served Zapiekov with the stop-notice for \$1,040.21 and demanded that sum. He was informed that Huckman had been paid in full and that there were no funds with which to honor the stop-notice.

On the trial of this case the plaintiff had a verdict for the full amount of his claim, viz: \$1,040.21 with interest. It is from the judgment entered thereon that defendant takes this appeal.

ARGUMENT.

I.

The first ground of appeal to be argued by appellant is:

1. Because the learned trial judge denied the application of appellant for a non-suit (State of Case, p. 114, ll. 21-22).

Exception was duly taken to this ruling, and noted on the record (State of Case, p. 77, l. 3).

It was not contended at the trial, nor will it be argued here, that the stop-notice served by plaintiff was defective in matter of form. Appellant's contention is that, as a matter of law, plaintiff's proofs did not entitle him to recover anything from appellant. It was absolutely necessary for the plaintiff, in order to maintain his action, to

prove that at the time he served this stop-notice the liability of Zapiekov to Huckman had not yet matured; that is, that the payment was not yet due; failing this, his stop-notice was a mere order without benefit from the fifth section of the Mechanics' Lien Law. (Compiled Statutes 1910 Ed., Vol. 3, p. 3298.) That this is necessary has been the law of this state ever since 1898 when the case of *Slingerland v. Binns*, 56 N. J. Eq. 413, 39 Atl. 712 was decided by this Court. The rule as there stated by Mr. Justice Dixon is:

“This enactment, we think, affords a reasonably clear indication of a legislative purpose to give to persons entitled to serve the statutory notice an inchoate lien upon the liability of the owner under the contract, until that liability matures according to the terms of the contract, such lien to become perfect on service of the notice before the liability matures, but to expire on such maturity if no notice has been given for a notice served after maturity derives no aid from this provision.”

This has been repeatedly quoted and the doctrine applied in later cases, see:

Bayonne Building and Loan Association v. Williams, 57 N. J. Eq. 503, 42 Atl. 172, reversed in 59 N. J. Eq. 617, 43 Atl. 669 (1899);

Person v. Herring, 63 N. J. L. 599, 44 Atl. 753 (1899);

Taylor v. Reed, 68 N. J. L. 178, 52 Atl. 579 (1902);

Cicalese v. Fortunato, 92 N. J. Eq. 329, 112 Atl. 508 (1920);

Passaic-Bergen Lumber Co. v. Peterson, (Not yet officially reported) 147 Atl. 198 (1929).

The case of *Bayonne Building and Loan Association v. Williams* (*supra*), is peculiarly parallel to the case at bar. In that case the building was

only substantially completed, and the stop-notice served after this substantial completion. There were also stop-notices and orders served before, and the question before the Court was whether a stop-notice served by one Conklin, after completion took precedence over orders served before. The learned Vice-Chancellor held that it did and took as its date the day the same claimant had served a mere order. In reversing this decision this Court held:

“As the respondent Conklin served no notice before the final payment fell due under the contract, his lien expired, he must stand simply as the holder of an order, and subject to all claims under duly-served notices and under orders presented before his own.”

Plaintiff was required, therefore, to prove that on November 27, 1928 the liability of Zapiekov to Huckman had not yet matured under the terms of their contract. Upon examination of the plaintiff's proofs on this point we find this. He first proved the contract between Zapiekov and Huckman (Exhibit P. 1, State of Case, pp. 117-122) proving thereby when the fourth payment (the one in dispute) was due “fourth payment: \$1,500 when all work is finished to meet the approval of owner” (State of Case, p. 118, ll. 29-30). He called Huckman, the contractor, who testified that on November 27, 1928, at 1 P. M., when he got his payment and gave a release, certain items were unsatisfactory.

“Q At that time the toilet seat was not on?

A No.

Q And the gas range had not been connected?

A No, sir.

Q There were some grills missing on the radiators?

A They were not screwed on.

Q The sink faucets had not been put on?

A No, sir.

Q The shower curtain, Mrs. Zapiekov wanted, had not been supplied?

A The shower curtain was there on the premises but had not been put on."

(State of Case, p. 59, ll. 21-34.)

Plaintiff, himself, and his driver Carl Benna testified that they inspected these premises on December 21, 1928, and that these very items were still not there.

"Q When did you go there?

A About the 21st of December.

Q The following month?

A Yes, sir.

Q When you went there at that time was anyone living in the house?

A No, sir.

Q Was the plumbing work in the house done at that time?

A No, sir.

Q Tell us what was not done?

A The sink faucet was not on; there was no water in the sink. The gas was not connected, no shower curtain, the radiators were not connected, the seat was not on the toilet. They were built-in radiators on the wall but they were not connected."

(State of Case, p. 31, ll. 1-17.)

"Q When did you go there?

A December 21st.

Q At that time had the plumbers' work been completed?

A No, sir.

Q What had not been completed?

A The gas range connected, the sink faucets were not on, the toilet seat was not on and shower curtain was not on and the radiator covers were not on and the handles on the shower were not on."

(State of Case, p. 70, ll. 11-20.)

No proof was offered as to the condition of the building at a date later than this, therefore so far

as appears in this case the building was substantially completed by 1 P. M. November 27, 1928 or never. Finally plaintiff proved the time of the service of the stop-notice which he served personally.

“Q I show you a paper dated November 27, 1928, marked ‘Stop Notice,’ and I ask you if that is the paper.

A Yes, sir.

Q You handed that to—

A Mr. Zapiekov.

Q What time of day?

A In the evening around six o’clock.”

(State of Case, p. 30, ll. 1-9.)

The law in this state is that if the contractor performs his contract substantially the owner must pay the full contract price less a fair allowance to make good to him for the defects of performance.

Feeney v. Bardsley, 66 N. J. L. 239, 49 Atl. 443;

Dyer v. Lintz, 76 N. J. L. 204, 68 Atl. 908.

This Court ruled in *Bayonne Building and Loan Association v. Williams* (*supra*), that the date on which the building was found to be substantially completed by the Vice-Chancellor as a question of fact, was the date of the maturity of the owner’s obligation to the contractor; and that a stop-notice served thereafter was late. Stated as applicable to the instant case, if plaintiff proved what defendant admitted, that is, substantial performance on November 27, 1928 at 1 P. M. he proved his stop-notice at 6 P. M. was late and ineffectual.

On the other hand, if he failed to prove substantial performance at this time he, having proved the same unfinished state of affairs at a much later date and offering no proof that it was ever completed, failed to establish an enforce-

able claim of the contractor against the owner subject to his stop-notice. This would be equally fatal, for the statute provides that on the service of a stop-notice the owner shall withhold the amount claimed:

“out of the amount owing by him or them on the contract or that thereafter may become due from him or them on such contract.”

(Compiled Statutes 1911 Ed. Vol. 1, p. 1851, Section 126-3.)

The force of this enactment is that the contractor must have earned his money, and the cases so hold:

“The owner cannot be compelled to pay to the workman or materialman any moneys which, by force of his contract, he was not compellable to pay to the contractor. Upon notice given, the workman or materialman, to the extent of his demand, takes the place of the contractor, so that, if the owner, as against the latter, can withhold the payment of the moneys earned, he can do so in like manner, against the demands of the former. *The test is, whether a suit for the money in question will lie by the contractor against the owner. If it will not, the owner is not liable to a suit by the workman or materialman.*”
Per Chief Justice Beasley in *Reeve v. Elmen-dorf*, 39 N. J. L. 125 at 130.

which doctrine was followed and the ~~italic~~^{italicized} portion quoted in:

Kirtland v. Moore, 40 N. J. Eq. 106, 2 Atl. 269;

Blauvelt v. Fuller, 66 N. J. L. 46, 48 Atl. 538,

and the doctrine restated in *Brunnetti v. Grandi*, 89 N. J. Eq. 116, 104 Atl. 139:

“In such an action it is, however, necessary for the plaintiff to prove that there is a sum due from the owner to the contractor. Such an action will not lie until the amount is due under all the terms of the contract.”

These authorities made it necessary for plaintiff to plead and prove Huckman's right to his money at some time. He pleaded it in the complaint

"11. The contractor at all times after the making of the contract duly substantially performed all things by the contract required to be performed to entitle him to payments therein stipulated.

12. At the time of the service of the said notice aforesaid, there was due and owing to the said defendant, Maurice Huckman, from the said defendant, Louis Zapiekov, the sum of \$1,500 in accordance with the terms of the contract aforesaid."

(State of Case, p. 4, l. 38 to p. 5, l. 12.)

and then proved it as on November 27, 1928, at 1 P. M. at the latest; and proved service of his stop-notice at 6 P. M.; that is, five hours later. Later is too late according to the cases:

"If the stop-notice can be served one day after the contractor is entitled to his payment it may be served six months after, and thus the Court of Appeals has declared to be ineffective."

Per Bergen, V.-C., in *Edge v. McClay*, 72 N. J. Eq. 216, 64 Atl. 969.

It is submitted that plaintiff did not prove the absolute *sine qua non* of his case on stop-notice; but on the contrary, by his own witnesses and out of his own mouth established that at best under the rule of *Slingerland v. Binns* (*supra*), and *Bayonne Building and Loan Association v. Williams* (*supra*):

"his lien expired he must stand simply as the holder of an order."

If we assume that recovery might be had under these pleadings on an order, the plaintiff, nevertheless, failed to prove that case. To main-

tain a suit on a late stop-notice as an order, it is necessary to prove moneys in the owner's hands at the time of service, due to the contractor and not previously assigned by him by orders or detained by stop-notices.

“Upon the whole, it seems well settled that while a claimant who serves his stop-notice after the owner's liability to the contractor has matured still has the benefit of his notice, so far as it entitles him to stand in the shoes of the contractor and recover from the owner any moneys then due from the owner to the contractor, to the extent of the claimant's demand, yet such a belated stop-notice has no retroactive effect, and does not entitle the claimant to any benefit of the provisions of section 5 of the act. *His rights are subject to all payments previously made by the owner to the contractor, all stop-notices previously served, and other prior assignments, without regard to the time when, or the order in which, such prior payments or assignments were made, or stop-notices were served.*” Per Mr. Justice Pitney (afterwards Chancellor) in *Taylor v. Reed*, 68 N. J. L. 178, 52 Atl. 519.

With this statement of the law as the test, let us see what money this stop-notice order could affect. First any allowance made by the contractor to the owner for unfinished work is money the contractor admitted was not due to him. Therefore the claimant who is entitled “To stand in the shoes of the contractor and recover from the owner any moneys then due from the owner to the contractor” can have no claim to such money. In the second place any money paid by the owner to the contractor in advance of the terms of the contract are no longer subject to this claimant. Having proven on his own case his stop-notice was served after the maturity of the owner's obligation, the claimant eliminated from the case, under the rule of *Slingerland v. Binns*

(*supra*), all liability for advance payments. Both of these conclusions rest on the rule so succinctly stated by Chief Justice Beasley in *Reeve v. Elmendorf (supra)*:

“The test is, whether a suit for the money in question will lie by the contractor against the owner. If it will not, the owner is not liable to a suit by the workman or materialman.”

What has been paid cannot be sued for.

In the third place as to the \$500.00 which was paid by means of the check Exhibit P. 6 (State of Case, p. 128) which was delivered to Huckman and by him turned over to Mrs. Zapiekov. This money satisfied the order of November 4, 1928 (Exhibit D. 5, State of Case, p. 140) which had been served on Zapiekov, and the balance was returned to Huckman by Mrs. Zapiekov. As to the \$75.00 check (Exhibit D. 7, State of Case, p. 141), this was in satisfaction of the order of November 23, 1928. Both these payments Zapiekov was obligated to make for he had to make sure that the orders he had accepted were satisfied. As to both these payments plaintiff's stop-notice order was ineffective for

“his rights are subject to all payments previously made by the owner to the contractor, all stop-notices previously served, and other prior assignments, without regard to the time when, or the order in which such prior payments or assignments were made, or stop-notices were served.” *Taylor v. Reed (supra)*.

Zapiekov had delivered these checks and Huckman had indorsed them over and delivered them and so far as Zapiekov was concerned the matter was closed.

The balance of \$879.11 is the last item to be considered. This sum, as has been related above, was paid by check to Huckman's order (Exhibit

P. 7, State of Case, p. 129) which he took and indorsed to The Trane Company, and then re-delivered to Zapiekov for him to pay to The Trane Company. This check was in Zapiekov's possession at 6 P. M. on November 27, 1928 when Grunt served his stop-notice order. It was for the exact amount of the order of July 23, 1928 in favor of The Trane Company with which Zapiekov had been previously served. Appellant contends that, by making this check to Huckman and allowing him to indorse it to The Trane Company, this money was actually paid out before Grunt's stop-notice order was served. But it is unnecessary for appellant to maintain this position at this point. It is sufficient that a prior order was served to discharge this money from any hold by plaintiff.

Blauvelt v. Fuller, 66 N. J. L. 46, 48 Atl. 538.

In that case the building was completed on August 28, 1899. On June 24, 1899 the owner had been served with an order for \$500.00 in favor of one John T. Lyman. On August 28, 1899 the owner paid to the contractor the full contract price less \$500.00 which the statement of facts in the report says "was retained by the defendant, with which to pay the Lyman order, and that was the reason for the retention of that money." That, \$30.00 for extra work, which the contractor was entitled to, also was retained. On September 9, 1899 the plaintiff served what purported to be a stop-notice on the owner, who still had in his hands the \$530.00 above mentioned. The Circuit Court sent up this finding of facts, and plaintiff applied for judgment. The Supreme Court entered judgment for the plaintiff for \$30.00. This sum the Court held was clearly the contractor's money in the owner's hand on September 9, 1899. But the \$500.00

did not go to plaintiff. Mr. Justice Gummere (now Chief Justice) wrote the opinion of the Court. Chief Justice Depue and Justices Dixon, Gummere and Collins were the justices sitting. As to the \$500.00 he said this:

“The controversy in the case is over the sum of \$500, retained by the defendants upon their final settlement with Nicholas, the contractor, for the purpose of paying Lyman the money due him, and which the defendants were directed to pay by the order of June 24, 1899. By the service of their stop notice the plaintiffs took the place of the contractor to the extent of their claim. They acquired no higher or other rights to the fund in question than the latter had. ‘The test is,’ as was said by this court in *Reeve v. Elmen-dorf*, 38 N. J. Law, 130, ‘whether a suit will lie by the contractor against the owner. If it will not, the owner is not liable to a suit by the material man.’ Applying this test, it becomes plain that the plaintiffs cannot sustain their action so far as the \$500 fund is concerned. *By the order of June 24th, supplemented by the action of the defendants and the contractor upon the final settlement of their account on August 28th, the latter became divested of all right in or title to said fund, and the defendants thereafter held it subject to the call of Lyman. Brill v. Tuttle*, 81 N. Y. 454. On the facts found, plaintiffs are entitled to judgment for the sum of \$30.’”

It is submitted that the cited case is an exact parallel with the case at bar in all but one particular; namely, in the cited case the owner retained the \$500.00 cash and of this there can be no doubt. He had it when the plaintiff served notice. Whereas in the case at bar a check had been made for the sum, the check had been indorsed, and the owner held it under orders from the payee to deliver it to the indorsee. There may be doubt whether the owner retained this money or not, but there can be no doubt that even if

he did, the fact that it was subject to a prior order discharged it from liability to plaintiff's notice.

It is respectfully submitted, that the facts pleaded and proved by plaintiff; namely, service of a stop-notice five hours after substantial completion of the building and the maturity of the owner's liability to the contractor, a full settlement between contractor and owner whereby all prior orders were paid, all allowances due the owner agreed upon and all claims against the owner released by the contractor, all five hours before the plaintiff's service, did not entitle plaintiff to recover anything against the owner, and that a non-suit should have been entered.

II.

The second ground of appeal which appellant will argue is:

2. Because the Court erred in charging the Jury, "If he had a check in his possession after the stop-notice was given, he had no right to negotiate the check; he had money then in his possession belonging to Huckman."

(State of Case, p. 114, l. 40 to p. 115, l. 4.)

Exception was duly taken to this charge and noted on the record (State of Case, p. 108, l. 26).

Appellant contends that this charge is erroneous in two particulars. First because it concluded as a matter of law the question whether the giving of this check by Zapiekov to Huckman paid the debt to Huckman or not. To charge that as a matter of law "he then had money in his possession belonging to Huckman" after his

delivery of the check, is contrary to the decided cases in this state:

“And a check or promissory note, either of the debtor or a third person, received for a debt, is not payment if not itself paid, *except in cases where it is positively agreed to be received as payment.*” Per Chancellor Zabriske in *Freeholders of Middlesex v. Thomas & Martin*, 20 N. J. Eq. 39.

and see opinion by Mr. Justice Magie in *Swain v. Frazier*, 35 N. J. Eq. 326 where he says in speaking for this Court:

“The vice-chancellor further held the acceptance of the promissory note of a debtor for his pre-existing debt, will not operate as a discharge or satisfaction of the debt, unless the creditor agrees that such shall be its effect.”

and after considering the authorities among which he cites *Freeholder v. Thomas (supra)*, he says:

“The rule on this subject applied by the vice-chancellor seems, therefore, to be entirely satisfactory.”

There is always the question, did the creditor agree to receive it as payment? On this point there was very persuasive evidence that the parties so agreed. Huckman gave a general release. Further than that he indorsed it to the order of a third person and left it with Zapiekov to pay to that third person. He used it as his money to pay his debt for materials he had ordered. Zapiekov's guarantee to The Trane Company did not discharge Huckman's liability to them for what he had purchased there. It merely gave them two debtors to look to for payment.

This charge was also erroneous for the reason that it did not properly state the law applicable to this \$879.11, whether it was tied up in a check

or not. As pointed out in the case of *Blauvelt v. Fuller (supra)*, since the stop-notice was served after maturity, the question was, had this money been appropriated by any prior order on Zapiekov? Had the order of July 23, 1928 (Exhibit D. 8, State of Case, p. 142) not been served by The Trane Company, then Zapiekov might be holding Huckman's money to discharge his own guarantee. But if the order was served, there could be no question that it took precedence over the late stop-notice. The charge of the learned trial judge completely disregards this phase of the case. If the charge were correct, surely then the \$500.00 unquestionably withheld in the *Blauvelt* case was subject to the late stop-notice. But the decision of the Court was to the contrary.

It is worthy of notice in this connection that the learned trial judge had previously charged what appellant contends was proper on this point:

“In this case it seems to the Court that if you answer two questions you probably will come in with a verdict at once, provided the questions are easy to solve and are questions of fact. The Court cannot decide any questions of fact.

The plaintiff insists that there was money in the hands of the owner when he served a notice upon the owner, and the first question is ‘Did he serve a notice, and when?’ After you have answered that question, then the second question is ‘At the time was the defendant indebted to Huckman the contractor on the contract?’ In other words, if you find a notice was served, then, your next step, I would think, would be this. If this notice was served on the defendant on that day, did the defendant owe Huckman any money under the terms of their contract or not?’
(State of Case, p. 105, l. 33 to p. 106, l. 13.)

This is directly in line with the rule laid down by Chief Justice Beasley in *Reeve v. Elmendorf* (*supra*).

“The test is, whether a suit for the money in question will lie by the contractor against the owner.”

and the other cases cited above to the same effect. Although appellant contended in the first point there was no evidence to support a finding that such suit would lie, still that was the question. Even if it was not on the facts so clearly in appellant's favor as to render its submission to the jury error, it surely was not clearly enough against appellant that the Court should decide it. The Court did precisely this in that portion of the charge to which appellant excepted.

It has been decided that an erroneous charge is not cured by being coupled with a proper one unless the erroneous position is specifically withdrawn.

Collins v. Central Railroad Company of N. J., 90 N. J. L. 593, 101 Atl. 287;

State v. Parks, 96 N. J. L. 360, 115 Atl. 305;

Gerli v. Washington Piece Dyeing & Finishing Co., (Not yet officially reported) 146 Atl. 344.

This is even more true when the error was committed in what the Court said last. The confusion caused in the minds of the jury by leaving them a question of fact and then withdrawing it could only be rectified by the most careful and explicit correction. It is submitted therefore that this portion of the charge was erroneous and highly prejudicial to defendant-appellant.

III.

The third, fourth and fifth grounds of appeal will be argued together. They are

3. Because the Court erred in charging the jury: "If you find that the defendant Louis Zapiekov, in advance of the terms of the plumbing and heating contract with Maurice Huckman, paid any moneys on such contract, then I charge you that the owner, Louis Zapiekov, the defendant here, is liable to the material man, Mr. Joseph Grunt, the plaintiff herein, in the same manner as if no such payment has been made, if the amount still due to the contractor, Maurice Huckman, after the making of said payment, should be insufficient to satisfy the material men who have served stop-notices."

4. Because the Court erred in charging the jury: "The rights of the plaintiff, the material man in this case, cannot be impaired or defeated by an advance payment on the contract price."

5. Because the Court erred in charging the jury: "The rule of law is that laborers or material men giving notices in accordance with the provisions of the third section of the Mechanics' Lien Act have priority and preference in the disposition of moneys due and to grow due upon a contract over any persons claiming said money or any part thereof by reason of order or orders thereon or assignments thereof, and if you find that Mr. Zapiekov paid out from the last payment due to Mr. Maurice Huckman on the plumbing contract, the sum of \$879.11 to The Trane Company because of a guarantee which he had previously made to The Trane Company, then he, Zapiekov, is answerable to the plaintiff in this case, if the plaintiff served Mr. Zapiekov with a stop notice because Mr. Zapiekov had no right to reimburse himself for moneys which he paid on account of the guarantee to The Trane Company or to any

other person or firm, to the detriment of the plaintiff.”

(State of Case, p. 115, l. 9 to p. 116, l. 12.)

Exceptions were duly taken to these charges and noted on the record (State of Case, p. 108, l. 28).

The charges set out in the third and fourth grounds of appeal are plaintiff's second and third requests. By both the jury is instructed that the plaintiff's rights could not be impaired by advance payments and that Zapiekov must pay over. This would be true had not Grunt proved his stop-notice was served five hours after the completion of the building and the maturity of Zapiekov's obligation to Huckman. In such a case the law is directly contrary to this charge.

Slingerland v. Binns, (*supra*), decided that after maturity the materialman's inchoate lien expires and that

~~and that~~

“a notice served after maturity derives no aid from this provision”

referring to the fifth section of the statute.

Taylor v. Reed (*supra*), laid down the rule that

“His rights are subject to all payments previously made by the owner to the contractor, all stop-notices previously served, and other prior assignments, without regard to the time when, or the order in which, such prior payments or assignments were made.”

The charge as given completely ignored these rules and they were most applicable to a case where the whole defense was that the payment was due when made, and that orders had been served before the stop-notice was served. The jury was left without guidance on the law in respect to this important distinction, and in fact

instructed that there was no such distinction. A late stop-notice was held equal to a timely one.

The same error runs through that portion of the charge which is appellant's fifth ground of appeal and was plaintiff's fourth request. There, too, a prior order is held inferior to late stop-notices whereas the contrary is the law. In addition to this there is in the charge that:

“Zapiekov is answerable to the plaintiff in this case, if the plaintiff served Mr. Zapiekov with a stop-notice because Mr. Zapiekov had no right to reimburse himself for money which he paid on account of the guarantee to The Trane Company or to any other person or firm to the detriment of the plaintiff.”
(State of Case, p. 107, l. 39 to p. 108, l. 8.)

In the first place it was not the fact that Zapiekov reimbursed himself for moneys paid to The Trane Company. No one claimed that he had paid anything. He held back the money to pay in the future. In the second place it is not the law that once the time for the payment arrives, insofar as it is not tied up by prior orders, assignments and stop-notices, that it is not the contractor's money to do with as he pleases. Nowhere has it been decided he must leave it with the owner, or hold it himself, to take care of subsequent stop-notices. He may take it and pay debts not connected with this building, he may give it to charity, he may throw it in the street, he may use it to pay to the owner a debt arising out of another transaction, in short he may do with it as he pleases. The late stop-notice is of benefit to the server only in

“so far as it entitles him to stand in the shoes of the contractor and recover from the owner any moneys then due from the owner to the contractor”
Taylor v. Reed (supra).

Huckman had the legal right to let Zapiekov keep this money to protect him on his guarantee to The Trane Company. However he took a check for it and indorsed it over to them, thus protecting himself as well. He then released Zapiekov from all claims by him, Huckman. Grunt in his shoes, therefore, had absolutely no claim at all against Zapiekov.

This charge was directly contrary to law and also greatly prejudicial to the defendant-appellant.

IV.

The last ground of appeal is:

6. Because the verdict of the jury is not supported by the evidence and is contrary to the charge of the Court.

(State of Case, p. 116, ll. 13-15.)

The verdict, as finally entered, was for \$1,092.22, being the full amount of plaintiff's claim with interest. The uncontradicted evidence was that \$500.00 had been paid to Huckman and paid over by him to pay his debt to Mrs. Zapiekov. The only money absolutely unpaid was the allowance of about \$95.00. The status of the \$879.11 has been discussed at length above, but on this point will be considered as in defendant's hands as the learned trial judge charged it was. The full amount of the fourth payment was \$1,500.00. Deducting from this the \$500.00 which was paid out, but \$1,000.00 could be subject to this stop-notice even in the light most favorable to plaintiff. The learned trial judge nowhere throughout his whole charge in any way indicated to the jury that the \$500.00 was also subject to plaintiff's stop-notice. Defendant's liability in this case is not original. He can be liable for no greater amount than is properly tied up in ac-

cordance with the statute. The verdict therefore for \$92.22 more than the amount subject to any verdict was clearly erroneous. It demonstrates how far afield the jury went, and that they did not understand that they were confined to, at the very utmost, a verdict for \$1,000.00, and that they did not realize the question was not how much was due to Grunt, which was admitted, but how much of that was due from Zapiekov. This verdict is on its face unsupportable in law.

It is respectfully submitted that the judgment appealed from should be reversed.

Respectfully submitted,

PHILIP J. SCHOTLAND,
Solicitor for and of Counsel
with Defendant-Appellant.

New Jersey Court of Errors and Appeals

JOSEPH GRUNT, trading as West Side Plumbing Co., <i>Plaintiff-Appellee,</i> <i>vs.</i> LOUIS ZAPEIKOV, <i>Defendant-Appellant.</i>	}	<i>Action at Law. On Appeal from Essex County Cir- cuit Court.</i>
---	---	---

BRIEF OF PLAINTIFF-APPELLEE.

By this appeal Louis Zapeikov, the defendant-appellant, seeks to reverse a judgment rendered against him in the Essex County Circuit Court in a suit upon a stop notice which was given pursuant to the mechanics' lien law. The plaintiff-appellee contends that the judgment was proper and should be affirmed.

Facts.

The defendant, Louis Zapeikov, built a new house for himself on Madison avenue in Newark, New Jersey. He engaged Maurice Huckman to do the heating and plumbing work for \$4,450.00 by a written contract dated June 28, 1928 and filed in the Essex County Clerk's Office on June 29, 1928. By the terms of this contract, Huckman was to receive payment in the following manner:

- \$1,000.00 When all heating and plumbing roughing and water and gas pipes are tested and boilers set.
- 400.00 When two tubs are set and showers are set ready for tiling.
- 1,550.00 When all other plumbing fixtures are set.

1,500.00 When all work is finished to meet
the approval of the owner.

\$4,450.00

The agreement further provided that the work was to be performed in a good, workmanlike and substantial manner "under the direction of said owner, to be testified by a writing, or certificate under the hand of the said owner." * * * (Case, 117, ll. 31-34.)

Huckman proceeded with his work and bought his materials from Joseph Grunt, the plaintiff.

On November 20, 1928, the plaintiff received from Huckman, the plumbing contractor, an order requiring Zapeikov, the defendant, to pay to the plaintiff the sum of \$900.00 on account of the purchase price of the plumbing materials. This order was served upon the defendant on the same day, viz., November 20, 1928 (Case, 28, ll. 25-40; Case, 65, ll. 22-35).

Thereafter, plaintiff demanded payment from Huckman and Huckman refusing to pay, the plaintiff on November 27, 1928, served upon the defendant a stop notice for \$1,040.21 which was the amount then owing to the plaintiff.

The last payment due under the filed contract was \$1,500.00 and if this stop notice of November 27, 1928, had been honored there would have been sufficient moneys to take care of the plaintiff's claim. However, the defendant informed the plaintiff that a few hours previously, on that day, he had made a settlement with Huckman, the contractor, and he had no funds available for the amount of the stop notice. Hence, this suit.

The testimony as will be more fully outlined hereafter, clearly indicates that the plumbing and

heating contract was not finished on November 27, 1928, and in fact was not entirely finished on December 21, 1928, but was finished some time thereafter, and the alleged settlement which the defendant and Huckman testified to took place on November 27, 1928, constituted an advance payment by Zapeikov to Huckman.

About the time that the contract for the plumbing and heating work was given to Huckman by the defendant, the defendant signed a guarantee to The Trane Company guaranteeing the payment of the sum of \$879.11 for heating apparatus purchased by Huckman. The evidence developed on the witness stand indicates that on November 27, 1928, a check for \$879.11 was drawn by the defendant to the order of Maurice Huckman, the contractor, and by the latter endorsed to The Trane Company. The significant part, however, of this check transaction was that it was not delivered to The Trane Company nor deposited until January 2, 1929, which indicates that for that time at least, the money represented by that check was in the possession and control of the defendant.

No pretense is made by the defendant that he had received any other stop notices than the one that was served upon him by the plaintiff in this case. What the defendant contended was that he had received orders for the payment of money in favor of Mrs. Zapeikov and an order which later became a guarantee in favor of The Trane Company and his further contention was that the stop notice of the plaintiff came after the building was finished and after the money had already been disbursed.

The case was presented to a jury who determined the disputed questions of fact and rendered a judgment for \$1,040.21 plus interest

in favor of the plaintiff. That this judgment was justified from all the facts in the case will be shown by a discussion of the following points which will also refute the contentions asserted by the appellant.

POINT ONE.

The learned trial court was correct in denying the application for a non-suit and leaving the case in the hands of the jury to determine.

I.

The first ground of appeal urged by the appellant is that the trial judge erred in denying his application for a non-suit. This ground is untenable and why will be seen presently.

No one will quarrel with the proposition of law that questions of fact, when a jury is sitting in a case, are for the jury to decide.

In the case at bar, there were a number of questions of fact which it became the peculiar province of the jury to pass upon. Two of them were, as was pointed out by the learned trial judge, in his charge (Case, 106, ll. 1-8), and are here paraphrased:

1. When did the plaintiff serve a stop notice?
2. At the time of the service of this stop notice was the defendant indebted to Huckman, the contractor, on the contract?

The testimony of the plaintiff bears out the fact that the stop notice was served upon the defendant on November 27, 1928 (Case, 30, ll. 1-11).

Q I show you a paper dated November 27, 1928, marked "Stop Notice," and I ask you if that is the paper. A Yes, sir.

Q You handed that to— A Mr. Zapeikov.

Q What time of day? A In the evening around six o'clock.

Q Did you leave it with him? A Yes, sir.

Q Did he take it? A Yes, sir.

This is corroborated by the defendant himself, who testified as follows (Case, 83, ll. 30-40):

Q Did you get anything with that paper?

A Another notice.

Q Is this it? I show you Exhibit P. 3? (P. 3 is the stop notice.) A Yes, I have it marked.

Q At 5:45 P. M.? A Yes, sir.

Q On the 27th of November, 1928? A Yes, sir.

Q There is no written signature? A No.

Q This is the paper you received? A Yes, sir, at the same time both.

However the meaning of the word "when" in question "When did the plaintiff serve a stop notice" has a broader significance than the date itself. It has reference to that point of time mentioned in the contract as the time when the contractor would be entitled to receive his money.

Examining the testimony from that standpoint, we find that the question presented was whether or not the plumbing and heating job was finished, for unless it was finished the contractor would not be entitled to receive the \$1,500. payment and if the stop notice was served before this job was finished then it would have to be honored when the contractor became entitled to receive and the owner became obligated to pay the \$1,500.00 under the terms of the contract and the stop notice would then take precedence over orders, guarantees and the like. Surely, that was a jury question.

What is the evidence as to whether or not the work was finished on November 27, 1928?

In his direct examination, the plaintiff testified, (Case, 30, ll. 36-40; Case, 31, ll. 1-28):

Q Did you, after the 27th of November, go around and look at this house? A Yes, sir.

Q Did you examine the plumbing work there? A Yes, sir.

Q When did you go there? A About the 21st of December.

Q The following month? A Yes, sir.

Q When you went there at that time was anyone living in the house? A No, sir.

Q Was the plumbing work in the house done at that time? A No, sir.

Q Tell us what was not done? A The sink faucet was not on; there was no water in the sink. The gas was not connected, no shower curtain, the radiators were not connected, the seat was not on the toilet. They were built-in radiators on the wall but they were not connected.

Q How much in dollars and cents was the value of the work you found on that date was not yet completed? A Probably \$100 or more.

Q This was a month after you served the notice? A Yes, sir.

Q Then do you say the plumbing work at that time was or was not completed? A No, sir.

Q Did you ever get any part of this \$1,046.21 from either Mr. Huckman or Mr. Zapeikov? A No, sir.

Q It is still owing to you? A Yes, sir.

Huckman, the plumbing contractor, also testified that the work was not finished on November 27, 1928 (Case, 51, ll. 4-33).

Q After that did you work on the job? A I was there a couple of times.

Q During the month of November? A I was there in November and I was there in December.

Q Finishing up? A The job was practically finished, but there were odds and ends I had to do.

Q Things that were not finished on the 27th of November? A Yes, sir.

Q Did you meet Mr. Zapeikov on the job on December 18, 1928? A I think so, yes.

Q Did he at that time say to you whether or not he was going to give you a three days' notice to get off the job or finish the work? A He said something to that effect, but I didn't take much stock in it.

Q Can you remember what he said? A He said he wanted me to do the little things that were to be done and I didn't have a sink faucet to do it and I couldn't get a faucet to suit him. I didn't have the shower curtains he wanted, in fact, I never did put the sink faucet or the shower curtain on myself.

Q This was about the 18th day of December? A Yes, sir.

Q He hadn't yet moved into the house, had he? A No, sir.

On cross examination, Huckman testified as follows (Case, 57, ll. 20-38; Case, 58, ll. 1-15):

Q What did you do about it when you got your money—about making an adjustment with him? A He held up the balance.

Q As far as the plumbing was concerned, was it finished? A Practically.

Q Would you say it was finished? A Outside of the things I told you about. The gas range was to be connected but it never was.

Q You allowed him how much money? A I didn't allow him any money.

Q How much did he take off? A \$100 until I finished the rest of the things.

Q \$95? A About that.

Q You mean until, such time as you would supply him with the proper shower curtain? A Until we supplied a faucet and fixed up the radiator grills; there were two or three extras to be put on and everything else was completed, I would have the money.

Q Holding back for odds and ends \$100 was not unreasonable, was it?

Mr. Unger: I object.

The Court: I sustain the objection.

Q Was your job substantially finished on November 27, 1928?

Mr. Unger: I object to that. That is for the jury to decide.

The Court: I sustain the objection.

Huckman also testified (Case, 59, ll. 12-33):

Q You insisted it was finished, did you?

A Yes, sir.

Q Mr. Zapeikov insisted that it was not finished? A Yes, sir.

Q You and he compromised the situation by allowing him to deduct \$95.00 or \$100 for the stuff which was not yet finished, and to make your payment at one o'clock that day?

A I finished the rest.

Q At that time the toilet seat was not on? A No.

Q And the gas range had not been connected? A No, sir.

Q There were some grills missing on the radiators? A They were not screwed on.

Q The sink faucets had not been put on? A No, sir.

Q The shower curtain, Mrs. Zapeikov wanted, had not been supplied? A The shower curtain was there on the premises but had not been put on.

Carl Benna, a witness for the plaintiff, was asked (Case, 70, ll. 8-20):

Q Did you go to Mr. Zapeikov's house on Madison avenue at any time after the 20th of November to look over the work? A Yes, sir.

Q When did you go there? A December 21st.

Q At that time had the plumbers' work been completed? A No, sir.

Q What had not been completed? A The gas range connected, the sink faucets were not on, the toilet seat was not on and shower curtain was not on and the radiator

covers were not on and the handles on the shower were not on.

That the plumbing and heating work was not finished was indicated likewise by the testimony of the defendant (Case, 85, ll. 20-40; Case, 86, ll. 1-3):

Q You had a shower curtain which wasn't the one you ordered, is that right? A Yes, sir.

Q You had a faucet which wasn't the one you ordered? A Yes, sir.

Q And you had a toilet seat which wasn't the one you ordered? A They brought it and I wouldn't accept it and they took it back, and there was other items, little spares on the flushometers.

Q Are you familiar with plumbing? A Yes, sir.

Q Did you put on the faucet? A I did not, I had someone put it on.

Q Could you screw on the flushometer? A Yes, sir.

Q Was the gas range connected? A The gas range he didn't want to connect. I didn't want to put the floor covering down until the opening was through and I couldn't hold him back on the gas range, he was supposed to include that, and it took him to connect the gas *until February*. I wouldn't put that gas range in because it was damaged.

All this testimony and more which appears in the State of the Case presented for consideration a question of fact as to whether or not the job was finished on November 27, 1928.

The judge necessarily was obliged to leave it to the jury to determine. When the jury subsequently brought in a verdict in the plaintiff's favor, it must have found as a corollary, that the work was not quite finished no November 27, 1928 and that the service of the stop notice on that day was timely.

Now as to the other inquiry, suggested by the trial court: "At the time of the service of the notice, was the defendant indebted to Huckman, the contractor, on the contract?"

From the foregoing excerpts of the testimony, it is clear that money was due and to grow due to Huckman, the contractor, from the defendant. It is also manifest that at the time of the service of the stop notice the liability of Zapeikov, the defendant to Huckman, has not yet fully matured under the terms of the contract. At the very least, it raised a factual question, which the jury, from the evidence presented, were perfectly justified in finding in favor of the plaintiff.

If we apply the principle above enunciated to the situation above set out, the conclusion is inevitable that the questions were purely jury questions and the court had no alternative but to refer them to the jury for determination.

Aside from this, however, there came before the jury for consideration a number of other facts and circumstances which impelled it to find in favor of the plaintiff.

To begin with, the plaintiff related on the witness stand that on July 6, 1928, he had a conversation with the defendant, Zapeikov, in the course of which the Huckman plumbing and heating contract was discussed and the defendant stated (Case, 27, ll. 3 and 15):

"You deliver the material and I will take care of you, I will pay you before I pay Huckman. * * * My word is just as good as my signature."

This conversation was corroborated by plaintiff's bookkeeper, Jane Weissman, who testified as follows (Case, 64, ll. 24-36):

"Mr. Zapeikov came into our office on July 6, 1928 and he asked Mr. Grunt whether

he figured on a job for his house on Madison avenue and Mr. Grunt said 'Yes', and he said 'What do you think the material will amount to?' and he said 'Over \$2,000,' and Mr. Grunt said,—Mr. Zapeikov said, 'Are you going to deliver it?' He said, 'Well, Mr. Huckman hasn't any credit here, I won't deliver it for him.' Mr. Zapeikov said, 'It is all right, I will take care of you on the first payment that Mr. Huckman has to get. I will give you \$1,000 and then I will take care of you on the rest.' "

Even the defendant admits that he had a conversation with the plaintiff in the month of July, 1928, for his testimony takes this form (Case, 81, ll. 7-21):

Q When did you first talk to Mr. Grunt regarding Mr. Huckman and your job? A I was talking to Mr. Grunt, I think it was, if I am not mistaken, in *July*, before he started the job, I met Mr. Grunt on the sidewalk.

Q Where? A On 16th avenue.

Q Yes. And Mr. Grunt told me, "I think I am going to deliver material on your building.

Q Yes. A The only thing I am hesitating to do business with Huckman." Then, I told him, "If you want to secure yourself, do like the rest do, get an order from Mr. Huckman and give it to me and when his payment is due it will be taken and given to you." * * *

Bearing in mind that the defendant virtually guaranteed the plaintiff's account, or at least, upon the defendant's assurance to the plaintiff that the defendant would take care of him, if the plaintiff would obtain an order for money from Huckman, the testimony which developed at the trial in connection with service of the \$900. order of November 20, 1928, throws a glare of suspicion upon the bona fides and candor of the defendant's conduct. It will be recalled that the

testimony was that Huckman gave Grunt an order on Zapeikov for \$900. on November 20, 1928 and on that very day, in the place of business of the plaintiff, Grunt handed this order, P. 2 (Case, 123) to Zapeikov, who read it and turned it back to Grunt. This comes from the mouth of three witnesses, the plaintiff (Case, 28, ll. 28-34), the bookkeeper, Jane Weissman (Case, 65, ll. 30-36) and the driver Carl Benna (Case, 69, ll. 36-38). The defendant at first denied, and vehemently so, that he was in the place of business of the plaintiff on November 20, 1928 and denied receiving the order for the payment of the \$900. on that day. His testimony was (Case, 83, ll. 12-21):

Q When did you first see this paper, Exhibit P. 2 dated November 20? A I didn't see this paper at all.

Q You never saw that paper? A No, sir.

Q This is the order of November 20 signed by Huckman? A I never saw that.

Q You never saw that original paper? A No, sir.

Q Did you ever get a copy of that paper? A I don't know.

Q I show you D. 2 for identification and I ask you when you first saw that paper? A This here paper was delivered to me on the 27th.

Q Of November? A Yes, sir.

Q At what time? A At 5:45, I think, in the afternoon.

Also, Case, 87, ll. 15-27:

Q Did you have a conversation with Mr. Grunt in the presence of this driver regarding the guaranteeing of the money on the 20th? A No, sir.

Q Did you see him there on any occasion? A Sometimes I used to see him, he was in back of the counter.

Q That day, after you paid this \$1,000., did you go to his place of business? A No, sir.

Q Are you sure of that? A That was the next day. I am sure about that.

Q Are you positive of that? A Yes, sir.

Likewise, Case, 89, ll. 33-40:

Q I understand you to say that when you paid out this money on the 27th of November you had not yet received the stop notice for \$1,041 which has been put in evidence here. Is that right? A Right.

Q You had not received any notice on the 20th of November that there was any money coming to Mr. Grunt? A No.

And Case, 95, ll. 4-11:

Q You say you never saw this letter of November 20, 1928, which Mr. Grunt says he delivered to you and which you read and returned to him? A I did not.

Q You are positive about that? A Positive.

Later on, when cross examined, it appeared that the defendant had been in the plaintiff's establishment on November 20, 1928, to buy some Blue Seal cleaning preparation and signed a receipt for the purchase (Case, 95, ll. 22-40; Case, 96, ll. 1-10).

Q I think you said you were sure that you were not in his store so that he had spoken to you on the 20th of November? A I wasn't there.

Q Are you positive of that? A I am positive.

Q Did you buy any goods in his store on the 20th of November and sign a receipt for them? A I sign a receipt?

Q Did you? A I don't think so, maybe my boy.

Q Is this your signature? That is your initials "L. Z." isn't it? Those are your initials? A It looks to me—

Q That bill is November 20, 1928, isn't it? That bill shows on that day you bought two small cans of "Blue Seal" at 35 cents a can. Blue Seal is something used to clean off pipes, isn't it? A Yes, sir.

Q Do you say now that you were not in his store on the 20th of November? A I can't understand how I was.

Q Do you say now that you were not in his store on that day? A It looks like I was. I had no business there except to get the Blue Seal, may be we were stuck.

These flagrant inconsistencies in the defendant's testimony probably induced the jury to find that his testimony was not reliable, or credible and they were consequently justified in disregarding it or minimizing its probative force and value.

When the case is reduced to its essence, what stands out in beacon-like lucidity is this:

Zapeikov had received notice from Grunt the plaintiff that money was due him from Huckman. Zapeikov, previously in July, 1928 had guaranteed *in writing* to the Trane Company the payment of \$879.11 for material which Huckman had purchased from it. In order to save *himself* from any loss, Zapeikov attempted to strike an account with Huckman, obtained a release from him and considered himself free. This happened on November 27, 1928 before all of Huckman's work was completed.

On page 92 of the State of the Case, ll. 13-21, the following appears in the cross examination of Zapeikov:

Q You paid the Trane Company in order to get yourself out of it, because you had previously given to the Trane Company your guarantee that you would pay it? A Paid every one.

Q Isn't that why the Trane Company was paid, because you had guaranteed them? A With Huckman's consent.

Q I don't care whether it was or not. You paid that because you had guaranteed it? A Yes, sir.

The Trane Company *never served a stop notice* upon Zapeikov (Case, 61, l. 23). They simply had an order and a guarantee (Case, 61, ll, 18-22). Nor did Mrs. Zapeikov serve a stop notice (Case, 93, l. 38).

This rather lengthy discussion of the facts is in order to convince the court beyond a doubt that factual questions existed which became the duty of the jury to resolve.

II.

Now, as to the law.

While counsel for the appellant under Point I of his brief cites a number of cases and sets forth correct excerpts therefrom, nevertheless, those citations are not strictly pertinent, for the reason that counsel has based his entire argument upon a wrong hypothesis. His foundation being shattered, his argument crumbles. His whole brief is wrapped around the bald statement that at the time plaintiff served the stop notice upon the defendant the latter's liability to Huckman had already matured. This is not the fact. The converse is the real situation and there was substantial evidence to support the jury's findings.

In commenting upon the purpose of the Mechanics' Lien statute, which was "to secure to mechanics and others payment for their labor and materials in erecting any building," the case of *Kreutz v. Cramer*, 64 E. 648, cites the decision

of the court of appeals in *Mayer v. Mutchler*, 21 Vr. 162, "which declared that the third section made it the duty of the owner, when a stop notice was served upon him, to retain from any moneys then due or which might thereafter become due to the contractor a sufficient amount to answer the notice."

In *Stone Post Co. v. Corcoran*, 80 L. 549 (S. C.) the situation was that the contractor abandoned the job and the owner finished it. At the time of the abandonment, there was due to the contractor, from the owner a \$200. balance on the second payment and the whole \$500 of the third payment. A stop notice had been filed by the plaintiff. Although it cost the owner more money to finish the building and the amount offset the contract price, nevertheless the court held that the plaintiff (stop notice claimant) was entitled to recover.

In *Smith v. Dodge & Bliss Co.*, 59 E. 584 (E. & A.) Van Syckel, J., in Par. 1 of the syllabus, makes this legal pronouncement:

"1. The inchoate lien acquired by materialmen and workmen under the third section of the act of March 14th, 1895 (Gen. Stat. p. 2073) cannot, by force of the fifth section of the latter act, be impaired or defeated by an advance payment on the contract price or by a secret arrangement between the contractor and the owner, unless such arrangement is authorized and provided for in the contract as filed."

The proposition of law laid down by the case of *Slingerland v. Binns*, 56 E. 413 (E. & A.) Dixon, J. (Decided December 28, 1898) as stated in the syllabus is:

"Under the fifth section of the supplement to the Mechanics' Lien Law approved March 15, 1895 (Gen. Stat. p. 2073) workmen and

materialmen creditors of the builder, who serve notices upon the owner in accordance with the statute, thereby secure, with respect to any moneys thereafter growing due upon the contract according to its terms, a right to payment in preference to the right of persons to whom the contractor had assigned such moneys before the notices were served."

In construing section 5, Justice Dixon, says:

"In substance it directs that the owner shall not in any way discharge his liability to pay under the contract, until, according to the terms of the contract, the time to do so has arrived, in order that until that time such liability may be preserved for the benefit of workmen and materialmen who serve the statutory notice. * * *"

The emphasis laid by the appellant upon the statement contained in *Reeve v. Elmendorf*, 38 L. 125, that:

"The test is whether a suit for the money demanded will lie by the contractor against the owner; if it will not, the owner is not liable to a suit by the materialmen,"

is somewhat misleading, because our point is that despite the fact that as between Huckman and Zapeikov, no suit might lie, nevertheless under Section 5 of the Mechanics' Lien Law a creditor who has not been paid, has a right to maintain an action on stop notice, because the fifth section makes the owner "liable in the same manner as if no such payment had been made."

In the case of *Person v. Herring* (E. & A.) 63 L. 599, cited by the appellant in his brief, the Court of Errors and Appeals in paragraph 2 of the syllabus says (Lippincott, J.):

"In a trial before the court or trial judge without a jury, upon the question when the written and filed contract under the provisions of the Mechanics' Lien Law between

the owner and the contractor was completed and performed according to its terms, or when the building therein provided for was completed, or when demand was made and notice given, in order that the court ascertain whether the payments on such contract were in advance of its terms, the finding of facts are not reviewable upon writ of error. The only question upon which a review can be had on error is whether the facts so found are sufficient to sustain the judgment. The court on error will not settle the disputed facts of such trial."

In *Taylor v. Reed*, 68 L. 178 (S. C.) Pitney, J. on (p. 184) says:

"The result of these decisions is that when the final payment matures and becomes due it must be applied first to satisfy the stop notices previously served in the order of their priority and any money then remaining is at the disposal of the contractor, who is entitled to collect and receive the same from the owner."

In *Kirtland v. Moore*, 40 E. 106 (Ch.) Van Fleet, V.-C., Par. 4 of the syllabus states:

"4. Under a building contract containing a clause that the work shall be done under the direction and to the satisfaction of a particular person, to be testified by a writing or certificate under his hand, no right to the money earned under the contract accrues, and no action can be maintained to recover it until the certificate is procured or the contractor is entitled to it."

Appellant places great reliance upon the case of *Blauvelt v. Fuller*, 66 L. 47. However, the distinction which is to be observed between the cited case and the one at bar is that in the cited case there was a definite finding of fact that the building mentioned in the complaint was erected and finished on a day certain and that the contractor had been paid in full after completion

and before any stop notice was served, whereas in the instant case the question as to when the building was completed was a jury question and was left to them and the verdict they rendered indicated that the money had been disbursed by Zapeikov before the time called for in the contract and that he even had money available *after* service of the stop notice which he *diverted* to the Trane Company.

POINT TWO.

The court was right in charging the jury "If he had a check in his possession after the stop notice was given, he had no right to negotiate the check; he had money then in his possession belonging to Huckman."

The trial court in making the foregoing statement in his charge to the jury had in contemplation the uncontradicted testimony of Mr. Livar, the manager of the Trane Company, and of Huckman, the contractor, as well as the testimony of the defendant, to the effect that a check had been drawn by the defendant to the order of Huckman for \$879.11, had been endorsed by Huckman to the order of the Trane Company and then handed back by Huckman to the defendant who held it from November 27, 1928, until January, 1929.

Huckman having handed back to Zapeikov, Zapeikov's own check, there was no change in the status of the latter's bank account. The defendant, Zapeikov, still had and continued to exercise dominion and control over the funds represented by that check of \$879.11. Not having negotiated the check before service of the plaintiff's stop notice, certainly, after the service

of the stop notice, the defendant could not do so except at his peril.

Mindful that the order and guarantee were given to the Trane Company about June 29, 1928 (Case, 61, l. 18), and before a single payment became due to the contractor, Huckman, the inquiry arises, why did not the defendant pay the Trane Company the money due them out of the first, second or third installment? Why did he wait until the time that the fourth and final installment was nearly due?

Counsel for appellant in presenting his argument under Point II still insists that the stop notice was served after maturity (appellant's brief 18, l. 2) when such is not the fact. Consequently, his argument, based on this false premise, must fail.

The fact that Huckman signed a release of mechanics' lien plays no important part when viewed with the other angles of the case. Huckman did not attach much weight to it, for he said (Case 52, l. 24):

“ * * * the fact I signed a release didn't make any difference. I would sign a release if he didn't pay me this. I trusted Mr. Zapeikov for anything.”

POINT THREE.

The law supports the charges to the jury made by the trial court and to which the defendant excepted.

The charges to the jury to which the defendant took exception and which comprise Point III of his brief (appellant's brief, p. 20) are almost verbatim restatements of the law as set out in Sections 3, 4 and 5 of the Mechanics' Lien Law.

Moreover, support for these charges are found in the following rather recent cases:

In the case of *J. D. Loizeaux Lumber Company v. Steinberg*, 102 L. 15, the Supreme Court holds (Par. 5 of the syllabus):

“When service of a stop notice by a materialman under the Mechanics’ Lien Law is made upon the owner before the last payment is due to the contractor, under the provisions of a filed contract, the owner cannot avoid responsibility to the server of the notice by anticipating the final payment, and making it before the notice was served.”

Moreover, it construes the Fifth Section of the Act, and states (p. 22):

“ * * * The fifth section of the act provides that, if the owner shall in advance of the terms of the contract pay any moneys on such contract, the owner shall be liable to the materialmen in the same manner as if no such payment had been made, if the amount still due to the contractor after the making thereof shall be insufficient to satisfy the materialmen who have served stop notices. It was held by the Court of Errors and Appeals in the case of *Smith v. Dodge & Bliss Co.*, 59 N. J. E. 584, in dealing with this phase of the statute, that inchoate liens acquired by materialmen and workmen under the third section of the statute cannot be impaired or defeated by an advance payment on the contract price.”

The Court of Errors and Appeals in the case of *Somers Lumber Company v. Kaufman*, 102 L. 60, the opinion in which was written by Justice Trenchard,

1. “Section 5 of the Mechanics’ Lien Act (Pamph. L. 1898, p. 539) makes the owner, in case he pays an installment of the contract price in advance of the time when by the contract it comes to be due, liable to any claimant who serves a stop notice before such installment comes to be due.”

2. "Where a building, contract, duly filed in the county clerk's office, provided that all payments should be made upon the certificate of the architect named therein, the owner is liable to a party furnishing labor or materials, who served notice prior to the issuance of any such certificate, to the full amount of his claim, not exceeding the full amount of such advance payments."

3. "A judgment entered upon a directed verdict and brought up for review will be affirmed if correct upon any legal ground, although the reason advanced by the court below is erroneous."

In the case at bar although the owner was to issue a certificate, nowhere in the testimony does it appear that he did. Applying to the instant case the principle of law laid down in *Somers Lumber Co. v. Kaufman, supra, viz.,*

"The failure to obtain the architect's certificates before the payments were made constituted those payments as advances made before they become due, according to the terms of the contract."

it follows that the payment made by the defendant was an advance payment and left the owner still liable to the plaintiff as if the payment had not been made. See also *Schindel v. Muenks*, 104 L. 223, where a stop notice was served almost two years after the completion of a building and a recovery was allowed.

POINT FOUR.

The verdict of the jury is supported by the evidence and is in conformity with the charge of the court.

The evidence was undisputed that the last payment called for by the contract was \$1,500. The court's charge instructed the jury that a stop

notice took precedence over an order or assignment made by the contractor. So that, the orders given to Mrs. Zapeikov by Huckman were subordinate to the plaintiff's stop notice. That being the case there was more than enough money on hand to take care of the plaintiff's claim, which the verdict finally established totalled \$1,092.22.

Conclusion.

This case presented a factual situation, which the jury, having listened to the testimony and having observed the demeanor of the witnesses on the stand, correctly appraised. The law was clearly and carefully expounded by the trial judge and properly applied.

It is respectfully urged that the verdict having gone in favor of the plaintiff ought to be affirmed.

Respectfully submitted,

MICHAEL G. ALENICK,
Attorney for and of Counsel
with Plaintiff-Appellee.

