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Notice of Appeal.

NOTICE OF APPEAL.

Filed June 30, 1927.

To J. S. T. Stranahan Ely, Esq., attorney of
plaintiff.

SIR:

10

TAXE NOTICE, That the defendant, Mary Livese,
hereby appeals to the New Jersey Supreme
Court from the judgment of the District Court
of the Fourth Judicial District of the County of
Bergen, rendered in the above-stated action on
the 18th day of June, 1927.

Dated, June 27, 1927.

COLLINS & CORBIN,
Attorneys of Defendant.

20

Service acknowledge this 28th day of June,
1927.

J. S. T. STRANAHAN ELY,
Attorney of Plaintiff.

30

40

State of Demand.

STATE OF DEMAND.

Filed February 9, 1927.

10 Plaintiff demands of the defendant the sum of five hundred dollars, for that whereas, the said defendant on the eighth day of February, in the year of our Lord one thousand nine hundred and twenty-seven, in the County of Bergen, is indebted to the plaintiff in the sum of five hundred dollars, for the price and value of goods sold and delivered by the plaintiff to the defendant at her request; and in the like sum of money for the price and value of goods bargained and sold by the plaintiff to the defendant at her request; and in the like sum of money for the price and value of work done, and materials
20 for the same provided by the plaintiff for the defendant at her request; and in the like sum of money for money lent by the plaintiff to the defendant for the use of the plaintiff and in the like sum of money for money paid by the plaintiff for the use of the defendant at her request; and in the like sum of money for interest due from the defendant to the plaintiff for the plaintiff having foreborn moneys due from the defendant to the plaintiff at the defendant's request for a long
30 time then elapsed; and in the like sum of money for money found to be due from the defendant to the plaintiff on account then and there stated between them; and the defendant afterwards, to wit: on the day and year last aforesaid, in the county aforesaid, in consideration of the premises respectively promised to pay the said several last mentioned moneys respectively to the plaintiff on request; yet the defendant disregarded her promises, and has not paid any of
40 the said moneys or any part thereof; and in the

State of Demand.

like sum on a book account, a true copy of which
 is hereunto annexed, marked schedule and
 hereby made a part hereof; and in a like sum
 upon certain promissory note of which
 the defendant the maker and the defend-
 ant endorser of which true cop
 hereunto annexed marked schedule and hereby 10
 made a part hereof.

Judgment will be claimed for the sum of five
 hundred dollars and — cents together with law-
 ful interest and costs of suit.

J. S. T. STRANAHAN ELY,
 Plaintiff's Attorney.

SCHEDULE.

20

Notice to Defendant: The following is a bill
 of particulars of the demand and copy of the
 book account, whereon the annexed demand is
 founded.

Mary Livese To William Zakutynski, Dr.,
 To account stated\$608.26

Plaintiff waives the excess over five hundred
 dollars, in order to be within the jurisdiction of
 the District Court. 30

The suit is brought to recover the amount due
 thereon.

J. S. T. STRANAHAN ELY,
 Attorney for Plaintiff.

40

State of Demand.

258 Moonachie Ave.
Moonachie.
2595

Fourth Judicial District Court
of the County of Bergen.

10 William Zakutynski,
Plaintiff,

vs.

Mary Livese,
Defendant.

	Demand	\$500.00
	Costs	3.60
	Mileage	1.20
	Listing Fee	
20	Atty. Fee	25.00
	Total	

Returnable, March 7th, 1927.
Summons and State of Demand.

To the Defendant:

30 Take Notice, that the plaintiff demand that the defendant shall file written specification of defenses intended to be made in said action on or before the time specified for appearance in the process issued in said cause.

Set-off and Recoupment.

SET-OFF AND RECOUPMENT.

Filed April 4, 1927.

The defendant hereby gives notice that at the trial of the above-stated cause she will seek to respectively set off and recoup damages from the plaintiff because of a payment made to plaintiff for defendant and because of the failure of the plaintiff to carry out the contract upon which this cause of action is founded in the following particulars, to wit: 10

Cash paid to plaintiff by H. T. Barr for account of defendant\$ 5.00

Constructing new floor in cellar; repairing plastering inside cellar walls; furnishing and setting wash pole; relaying new walk from street; relaying new walk from rear of house to garage; constructing new foundation under garage, new floor in garage, leveling up same, adjusting four garage doors, constructing and hanging two new garage doors; painting garage, removing fence and resetting on correct line; and ten (10) loads fertilizer\$495.00 20

By means whereof the defendant suffered damage in the sum of500.00 30

COLLINS & CORBIN,
Defendant's Attorneys.

Transcript of Clerk's Docket.

TRANSCRIPT OF CLERK'S DOCKET.

Filed August 30, 1927.

No. 2595.

10 THE DISTRICT COURT OF THE FOURTH
JUDICIAL DISTRICT.

COUNTY OF BERGEN.

WILLIAM ZAKUTYNSKI, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Upon</i>
<i>vs.</i>		<i>Contract.</i>
MARY LIVESE, <div style="text-align: right;"><i>Defendant.</i></div>		<i>Demand</i>
		\$500.00

20

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

Before Joseph Furrey, Esq., Acting Judge.
Ely, pl't'ff's atty.
McIntyre of Collins & Corbin, def't's atty.

COSTS.

	County	Al.
30 Summons	\$1.50	
Service and return ..		.60
Mileage		1.20
Listing fees	1.50	
Attorney's fee, 5%...		18.25
File Appeal & Bond.	1.00	
Copy of Docket .....	.50	
Postage .....	.29	

40 A summons was issued tested March 2, A. D. 1927, returnable March 14, A. D. 1927, at 9:30 o'clock in the forenoon at the Court Room of

Transcript of Clerk's Docket.

said Court in Bergen County. The Constable, or Sergeant-at-Arms, returned with the Summons as follows, viz: I served the within Summons March 8, A. D. 1927, on Mary Livese, the defendant, by reading the same to her and delivering to her a copy thereof.

S. E. STURTEVANT,
Sergeant-at-Arms.

10

Plaintiff's demand was filed February 9, A. D. 1927.

Defendant's set-off or counter-claim was filed April 4, A. D. 1927, by N. Demerest Campbell for five hundred dollars.

June 13, A. D. 1927, the plaintiff appeared and the defendant appeared, the trial of the cause was proceeded with as follows: On the 18th day of June, 1927, judgment was rendered for three hundred and sixty-four dollars and ninety-five cents debt, \$364.95, and twenty-three dollars and five cents cost, \$23.05, with allowance made to defendant of one hundred and thirty-five dollars and five cents, \$135.05.

20

On the part of the defendant notice of appeal filed June 30, 1927, and bond filed July 2, 1927.

Whereupon it is on this 18th day of June, A. D. 1927, by this court considered and adjudged that said William Zakutynski, plaintiff, recover against said Mary Livese, defendant, the sum of three hundred and sixty-four dollars and ninety-five cents debt and twenty-three dollars and five cents cost of suit.

30

Witness for defendant, George H. Babcock.

I certify this to be a true copy.

GUS FAUPEL,

(SEAL)

Clerk.

40

Judgment.

JUDGMENT.

FOURTH JUDICIAL DISTRICT COURT.

COUNTY OF BERGEN.

10	WILLIAM ZAKUTYNSKI, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>On Contract.</i> <i>Judgment.</i>
	<i>vs.</i>		
	MARY LIVESE, <div style="text-align: right;"><i>Defendant.</i></div>		

The above action is based on the common counts to recover the sum of \$500.00 for work done and materials furnished.

20 The defendant filed her set-off and counter-claim for the sum of \$495.00.

The Court finds after giving due consideration to the testimony of the respective parties and their witnesses and making an inspection of the work and materials that there is some merit in the set-off and counter-claim but not to the extent as the exhibits of the exhibit produced by the defendant at the trial would seem to indicate. The expert produced by the defendant gave estimates of figures which were very high considering the cost of material and labor to replace or repair the defective work.

30 As a result of these considerations the Court finds a valid claim of the defendant in her set-off and counter-claim as against the claim of \$500.00 of the plaintiff and allows the same to the extent of \$135.05 and renders judgment in favor of the

Judgment.

plaintiff in the sum of \$364.95 and directs the clerk to enter the same accordingly.

(Signed) JOS. A. FURREY,
Acting Judge.

Dated, June 18th, 1927.

GUS FAUPEL,
(SEAL) Clerk.

10

20

30

40

*Specification of Determinations.***SPECIFICATION OF DETERMINATIONS
AND DIRECTIONS APPEALED FROM.**

Filed August 31, 1927.

NEW JERSEY SUPREME COURT.

10

WILLIAM ZAKUTYNSKI,
Plaintiff-Appellee,
vs.
MARY LIVESE,
Defendant-Appellant.

*Action
at Law.
Specification
of Deter-
minations
and
Directions
Appealed
From.*

20

The defendant, Mary Liveise, defendant-appellant herein, herewith files her specification of determinations and directions in the District Court of the Fourth Judicial District of Bergen County, with respect to which she is dissatisfied in point of law.

30

1. Said Court erred in admitting certain bills in evidence, when the same should have been excluded upon one or more of the following grounds, to wit, said bills were:

- (a) Hearsay.
- (b) Not proven to be reasonable.
- (c) Admitted without proper foundation for their admissibility being laid.
- (d) Irrelevant, immaterial and incompetent.

40

2. Said Court erred in that, without proof or foundation therefor, the Court stated on the record as follows:

“The bills in question cover items for materials used on a series of independent

Specification of Determinations.

jobs, the cost of none of which, as far as the Court can observe, amount to five hundred dollars.”

3. Said Court erred in refusing to strike out, when thereunto moved, certain testimony as follows:

“Q When did you build that sidewalk? 10

A I built that sidewalk in September.

Q And in January it was all cracked up?

A Yes.

Q Can you tell us why it was cracked up?

A Yes.

Q Why? A Miss Livesey moved, and a big heavy truck passed over it.

Q Did you see the truck pass over? A I never seen it. I could prove it through the driver. 20

Q Where did the truck pass over the sidewalk? A Passed on the crossway.

Q Did you see the truck pass over? A No, sir.

Mr. McIntyre: I ask that that part of his testimony be stricken out, about the truck passing over.

The Court: I will allow it.

Mr. McIntyre: Exception.” 30

4. Said Court erred in rendering judgment for the plaintiff without any evidence to support the same.

5. Said Court erred in rendering judgment for the plaintiff in the sum of \$364.95, in the absence of certain and definite evidence to support the same.

6. Said Court erred in rendering judgment for fixed and substantial damages for the plain- 40

Specification of Determinations.

tiff, when only nominal, if any damages, should have been awarded at all.

7. Said Court erred in allowing defendant \$135.05 on the recoupment, when there was fixed and certain evidence to support a more substantial allowance.

10

8. Said Court erred in rendering judgment contrary to the evidence.

9. Said Court erred in rendering judgment contrary to the law.

10. Said Court erred in that sitting as a jury and having elected to "go and see the job" before rendering decision, rendered its decision having seen only part of the job.

20

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

Service of copy of the within specification of determinations and directions appealed from, acknowledged this 29th day of August, 1927.

Attorney of Plaintiff-Appellee.

30

40

William Zakutynski, direct.

TESTIMONY.

Filed July 9, 1927.

DISTRICT COURT OF THE FOURTH
JUDICIAL DISTRICT.

COUNTY OF BERGEN.

10

WILLIAM ZAKUTYNSKI, <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> MARY LIVESEY, <div style="text-align: right;"><i>Defendant.</i></div>	}
---	---

Ridgewood, N. J., June 13, 1927.

20

Before Hon. Joseph A. Furrey, Acting Judge.

Appearances:

J. S. T. Stranahan Ely, Esq., for the plaintiff.

Howard F. McIntyre, Esq. (Collins & Corbin, Esqs.), for the defendant.

(H. Richard Woebse, stenographer, sworn.)

WILLIAM ZAKUTYNSKI, the plaintiff, being
duly sworn, testifies as follows:

30

Direct examination by Mr. Ely.

Q Mr. Zakutynski, you did some work for Miss Livesey? A Yes.

Q She told you what to do, and you went ahead and did it, bought the materials, etc.? A Yes, sir.

Q With reference to the sink, are these your records so far as the sink is concerned, and if so, what was the amount of that particular item?

40

William Zakutynski, direct.

Is the bill of Black for material used in the sink \$57.75? A \$57.75.

Q Lemort, \$1.86 for plumbing fittings; Lemort, \$10.91 for plumbing fittings; labor, \$89.48; is that right? A Yes, sir.

10 Q For porch leaders—top soil, \$5? A Yes.

Mr. Ely: I might as well offer all of them in evidence.

Mr. McIntyre: I object.

The Court: What is the total amount?

Mr. Ely: Porch leaders—this also includes items, etc., pipe leader, planting hedge, shrubs, putting on top soil, grading and seeding lawn. The total is \$165.

20 The Court: That includes labor and materials?

Mr. Ely: Yes.

The Court: Are there other items for labor and materials?

Mr. Ely: Yes. For the water pump, the total is \$158.

The Court: Water pump, \$158.

30 Mr. Ely: Garage, \$525. Painting and general repairs in cellar, \$50.46. This is on the cellar in Jackson avenue, including coal bin, repairs in cellar, \$180.

By the Court.

Q Was there any written contract at all? A None at all.

Q What did Miss Livesey say to you?

Mr. McIntyre: I object, unless the time is fixed, your Honor.

40 The Court: It is just an inquiry.

William Zakutynski, direct.

Mr. Ely: To painting garage, planting rose bed and shrubbery, \$106.

By Mr. Ely.

Q These bills which are included in here for materials, are these bills against you for the materials used for these particular jobs? A All against me. Of course, I take all in my name for Miss Livesey said—

10

Q What did she say to you about buying materials? A If I take the job, she said she didn't want to bother with anything. I should take care of everything, to buy all materials in my name. All bills will come in my name, and come to me.

Q These are the bills? A Yes.

20

Mr. Ely: I will offer the bills.

Mr. McIntyre: I object to the offer of the bills, on the ground, first, that they are hearsay. Secondly, that the time of this alleged conversation has not been fixed. Further, I think they are not proper evidence, and should be excluded. This action is brought on a book account, and this is not a book account of the plaintiff made in the regular course of business. I can't see under what theory these bills are in evidence. It does not appear how much work was done, or how the money was spent. I urge that they are not properly proven.

30

Mr. Ely: Under the agreement, Mr. Zakutynski was to buy the materials and they were to be used on these jobs, and Miss Livesey was to pay for them. These are the materials, he says these are the bills, and the

40

William Zakutynski, direct.

materials were used. The actual bills are here.

Mr. McIntyre: They are purely hearsay. No agreement has been proven. The witness has testified that he spoke to Miss Livesey, but the time was never fixed.

10

Mr. Ely: I can fix the time.

By Mr. Ely.

Q About when was it that Miss Livesey told you to do this work? A That was on June 3rd.

Q Of what year? A 1926.

20

Mr. McIntyre: I further urge the defense of the Statute of Frauds. The bills for the materials exceed \$500, and there is no written contract or agreement shown. The witness testified merely that on or about June 3, 1926, he spoke to Miss Livesey. That was an oral agreement; that is past. These bills, exceeding the statutory amount, cannot be admitted unless there is a written contract offered as a foundation for the admission of the bills.

(Argument.)

30

The Court: The bills in question cover items for materials used on a series of independent jobs, the cost of none of which, as far as the Court can observe, amount to \$500.

By Mr. Ely.

Q These goods stated in these bills, did you purchase these materials? A Yes, sir.

40

Q What happened to the materials? A I bring them to Jackson avenue and use them on the work.

William Zakutynski, direct.

The Court: I will allow them.

Mr. McIntyre: May I have an exception against the admissibility of these bills offered in evidence, on the following grounds: first, they should be excluded by reason of the statute of frauds. There is no foundation laid for the admissibility of these bills, in that there is no written agreement as a basis for the proof of any amount exceeding \$500, as required by the statute of frauds; further that the bills have not been proven to be reasonable bills; further, there is no authority from the defendant to the plaintiff to purchase the materials, the bills for which have been offered in evidence; upon the further ground, that the defendant is purely a collateral party to the transaction between the witness-plaintiff and the material men, who are the debtors of this witness-plaintiff; further, that no written agreement has been offered in evidence as a foundation for the admissibility of any of the bills, except as evidence of work, labor and services. On these grounds, I respectfully urge that the bills be excluded from evidence, the bills as representing materials as testified to by this plaintiff; upon the further ground, that the bills are purely hearsay; these bills were not rendered by plaintiff; they were rendered to him; plaintiff is the buyer, and the bills were rendered to the plaintiff. If they can be made binding upon the defendant we respectfully urge it does not appear in the record so far adduced.

The Court: We have the point here, were the charges reasonable? I think that with

William Zakutynski, direct.

the exception of having counsel bring out that point, I will allow the exception.

By Mr. Ely.

10 Q How long have you been in the contracting business, doing these general jobs? A I have been doing jobs for people for over eighteen years.

Q Have you been buying materials during this period, this kind of materials for use on jobs? A I buy all kinds of materials.

Q Are these prices reasonable, the prices you paid for these materials? Are they fair and reasonable? A They are fair. If anyone can prove they can get them cheaper—

20 Q Are these reasonable prices? A Reasonable prices.

Mr. McIntyre: The witness testified that the prices he paid were reasonable prices. That is no test of the reasonableness of the charges. We respectfully urge that the original set of bills has not yet been proved, and we urge that the bills for materials be excluded from evidence.

30 The Court: The Court will take the view that if they were unreasonable, he would have objected to them and not paid for them.

The Court will allow them, and allow you an exception.

Q Miss Livesey paid you on account of this sum \$731? A \$731.

Q Which leaves a balance due you of \$608.26? A \$608.26.

40 Q These are your records as to the labor (indicating)? A Yes.

William Zakutynski, cross.

Q And the hours used on each? A Yes.

Mr. Ely: I offer them in evidence. That is our case.

(Bills received in evidence and marked Exhibits P. 1 to P. 7 inclusive.)

10

Cross examination by Mr. McIntyre.

Q You completed your work, as you agreed to do? A We completed work.

Q You completed the job? A Yes; completed the job.

Q Will you tell us again what those jobs were? There were a lot of jobs, weren't there, that you were to do? A Yes.

Q You were to fix the sink; you were to fix the doors, and you were to install the pump, weren't you? A Not the doors.

20

Q Will you tell us all the work that you were supposed to do? What work were you supposed to do for Miss Livesey? A First, Miss Livesey call up me through the telephone. Other people—

Q What people? A Mr. John Currey, from East Rutherford, if he knew anybody could do the work for Miss Livesey. Mr. Currey represented me to Miss Livesey, and I went over on a Sunday morning to look at it. She showed me what to do, and I said I go and do that.

30

Q Wait a minute— A Just a second. Her job was to repair cellar at Moonachie. That was \$35. I got that job cash. Next job, she would like to have sink and bathtub in house. If I could buy any for reasonable prices, I was to try to. She says she don't like to buy any second-hand stuff, if I could buy off some for less price. I know business; attend all kinds of work, so I

40

William Zakutynski, cross.

went to Mr. Black in Rutherford and then I asked if he got it.

By the Court.

Q You say she said she didn't want any
 10 second-hand material? A No second-hand, but
 new stuff at a reasonable price. I went to Mr.
 Black at Rutherford and I got sink, it was to cost
 \$57.30. Before I bought this stuff I brought his
 book and I show Miss Livesey and she see this
 sink, and to have for so and so price. Miss
 Livesey see this. I bring that over. The next
 job was connecting water inside. If you want to
 spend money, I got to put in pump to bring water
 from well to the hydrant. Miss Livesey asked
 me how much that will be. I know a gentleman
 20 in Rutherford, he is superintendent from the
 pump works in Harrison. I could get the cheap-
 est pump complete for \$158. Miss Livesey says
 she is satisfied. I brought it and put it in. Fourth
 job was repair the cellar in Jackson avenue;
 that is plastering the floor and coal bin. That
 was \$180. I done that work. Miss Livesey
 asked me if I grade the place on Jackson ave-
 nue. Then I says, yes I do. I done that work.
 After I take job by job; give me not all money
 30 cash, only some part of money. She say, she
 ask if I come and build garage. I say, Miss
 Livesey, give me \$100 deposit on garage, if I put
 up, the garage. Miss Livesey says she is satis-
 fied.

Q You say that you talked with Miss Livesey
 on a Sunday morning at her house? A Yes.

Q On a Sunday morning was it? What was
 the date? A I can't remember that, the day I
 40 went over.

William Zakutynski, cross.

Q Was that on June 3, 1926? A Something like that. I couldn't say sure.

Q You went to Miss Livesey on a Sunday morning in June, is that right? A Something like that.

Q On a Sunday morning? A Yes, sir.

Q You and she had a talk about all this work that was to be done? A Not all work at once; we talked just for foundation work; next job she asked me to put in in Moonachie. 10

Q Foundation to garage or house? A House at Moonachie.

Q What was the agreed price for the fixing of the foundation of the house at Moonachie at that time, as agreed upon that Sunday morning?

A That was \$35.

Q To fix foundation? A Fix foundation. 20

Q Did you fix it? A Yes.

Q You are not bringing suit for that here today? A No; that was cash paid.

Q You were paid that? A Yes, I was paid cash.

Q When was the next time you saw Miss Livesey about the garage that was to be built?

A Garage was built in the last.

Q When was that? A In September.

Q You built it? A Yes. 30

Q Did the building department of Rutherford pass upon that garage? A Yes.

Q Have you a certificate from the building department of Rutherford certifying that that garage complies with all the requirements of the building code of the Borough of Rutherford? A I haven't.

Q Did Miss Livesey tell you that the garage was supposed to comply with all the requirements of the building code? A No. 40

William Zakutynski, cross.

Q She didn't tell you that? A No.

Q As a builder, when you put up a garage, don't you always get a permit? A If I need one.

Q Don't you always need one? A Not a certificate; we need just a permit.

10 Q Did you get a permit to put this garage up? A Yes.

Q When the garage was finished, did you have it inspected by the building department? A Yes.

Q Who was the inspector? A Mr. Hardy.

Q Did he give you a certificate that the garage complied with all the terms of the building code? Did he or did he not give you one? A I didn't need it.

20 Q Did you get one? A No.

Q Did you ask him for a certificate? A No, sir.

Q Did you complete all the work that you undertook to do for Miss Livesey? A Yes.

Q All completed? A Yes.

Q Did you build a sidewalk? A Yes.

Q What have you to say as to the condition of that sidewalk? Is it good or bad? A Good condition.

30 Q It is in good condition now? A Yes.

Q Was there any agreement as to the materials you were to use to build that sidewalk? A Yes.

Q What was the agreement? What materials were you supposed to use? Concrete, or stone, of what? A I never built the sidewalk, just the walk from the house. The city built that. I built the walk from the house to the gutter.

40 Q Was that built in a good, workmanlike manner? A Yes.

William Zakutynski, cross.

Q When did you last see this sidewalk that you built? A I seen it about January, when I came to collect the money.

Q January, 1927? A Yes.

Q What was the condition of the sidewalk at that time? A The sidewalk was cracked up.

Q When did you build that sidewalk? A I 10
built that sidewalk in September.

Q And in January it was all cracked up? A Yes.

Q Can you tell us why it was cracked? A Yes.

Q Why? A Miss Livesey moved, and a big heavy truck passed over it.

Q Did you see the truck pass over? A I never seen it. I could prove it through the driver.

Q Where did the truck pass over the side- 20
walk? A Passed on the crossway.

Q Did you see the truck pass over? A No, sir.

Mr. McIntyre: I ask that that part of his testimony be stricken out, about the truck passing over.

The Court: I will allow it.

Mr. McIntyre: Exception.

30

Q You built a garage, did you, for Miss Livesey? A Yes, sir.

Q What was the agreed price for the building of the garage? A \$525.

Q Did you complete the garage? A Yes, sir.

Q Were you paid for it? A No.

Q Have you seen the garage since you built it? A Yes, sir.

Q What would you say as to its condition? A It was all right.

40

William Zakutynski, cross.

Q Was there any agreement as to what materials were to be used in the building of that garage? A No agreement—

Q Was there any agreement as to what materials were to be used for the building of the garage? A Miss Livesey picked out the model
10 from the Harris Brothers' catalogue.

Mr. McIntyre: I ask that the answer be stricken out as not responsive. He should answer yes or no.

The Court: He may answer yes or no.

The Witness: No agreement.

Q You merely said that you would build a garage for \$525? Is that right? A Yes.

Q Were you to use cement in building that
20 garage, or concrete, or were you going to use cement blocks, or what? A Not cement block, no. The garage come ready made; just to build it up together. I build just foundation and floor.

Q When was that garage built? A In September.

Q 1926? A 1926.

Q When was it completed? A Completed two weeks after.

Q Have you seen that garage since it was
30 built? A Yes, sir.

Q What would you say as to its condition? A It was all right condition.

Q Have you seen the foundation since it was built by you? A Yes, sir.

Q What would you say as to the condition of the foundation? A It is all right.

Q All right? A Yes.

Q What materials were you to use in the building of the foundation of the garage? A
40 Stone and cement and sand.

William Zakutynski, cross.

Q What were you to use in the building of the garage? Was it cement block, or concrete, or what? A The garage is built of hardwood sections, what is in the catalogue.

Q It was built by sections? A Yes.

Q Where did you get the sections from? A From the Harris Brothers. 10

Q How much did you pay for the sections? A \$372. I paid \$372.

Q You dug a foundation, did you, later? A $16\frac{1}{2} \times 18\frac{1}{2}$.

Q What was the cost of the materials to build this foundation? A I got it here on the bill.

Q Will you please get it for us? A Well, I suppose so.

By the Court. 20

Q Was this garage made of frame, or what? A Made in sections, Harris Brothers.

Mr. Ely: Perhaps I can clear that up, if the witness will show the Court which garage it was.

The Witness: Here is the garage she got (indicating to Court from catalogue). She had this garage. 30

By the Court.

Q Was that metal or wood? A Wood.

Q Except the foundation? A Except the foundation and the floor.

Q This came in sections? A Yes.

Q But it is all wood? A All hard wood, and the tar paper inside; just like tile paper to keep the air in. 40

William Zakutynski, cross.

By Mr. McIntyre.

Q How big is the foundation? A $16\frac{1}{2} \times 18\frac{1}{2}$.

Q How deep? A 36 inches.

Q What is the cost of the materials for that foundation? A I got it here on the bill.

10 Q May I ask you to please refer to it?

Mr. McIntyre: For the purpose of the record, if the Court please, we don't concede what the witness is testifying to as evidential. It is merely for the purpose of cross examination.

A Material cost \$46, sand, cement and stone. Labor cost \$107. The garage complete cost \$525.

20 *By the Court.*

Q Pardon me just a minute. For how many cars was this? A Two-car garage.

By Mr. McIntyre.

Q You were also to put in an electric water pump for Miss Livesey for 200 Jackson avenue, or was it at Moonachie? A That was at Moonachie.

30 Q What was the agreed price for furnishing and installing the electric water pump? A \$158.

Q Did you buy the electric pump? A Yes.

Q How much did you pay for that? A I paid \$98 for the electric pump.

Q Did you install the pump? A I put it in.

Q What kind of pump was there before? Was there any pump there before? A Never was pump. There was just a hand pump.

40 Q When you put in this electric pump, did it work all right? A Yes.

William Zakutynski, cross.

Q No question about that at all, is there? A Well, if the fuses burn out, or electricity don't work, it doesn't work.

Q When you put in the electric pump, did you notice whether or not the hand pump was also working? A You could use it just as well.

Q When you put in the electric pump, did both pumps work just the same? A Yes.

Q When did you install the electric pump? A I put in that in July. I don't remember the date.

Q It was some time in July? A June or July.

Q 1926? A 1926.

Q How long did it take you to do that work? A It takes me about two days.

Q After you put it in, did you see whether it was done in a good, workmanlike manner? A Yes.

Q Did the pump work all right? A Yes, sir.

Q How much did you say the pump cost you? A \$158.

Q How much did you charge for the purchase of the pump? I mean for the pump itself and the labor to install it? What was your charge?

A I charge the pump complete.

Q How much? A \$158.

Q That was the cost of the materials, the pump itself and the labor? A Materials—all complete.

Q All complete? A Yes, sir.

Q \$158? A Yes, sir.

Q That is the cost of the pump and installing it? A Pump and material and labor.

Q \$158? A Yes, sir.

The Court: He said the pump itself cost \$98.

William Zakutynski, cross.

Q When you put the pump in, were you to connect any drains from the sink to the outside?

A Yes.

Q How much was that to cost? Was the whole job \$158? A The whole job was \$158.

10 Q That was to procure the pump itself, the installation of it and the connecting with the sink, etc.? A So the water runs through it.

Q That took you two days to do that? A Something like that with the man.

Q You also drained the water outside? A Yes.

Q Is this your writing (showing paper to witness)? A Yes.

Q It is dated? A July 26.

Q 1926? A 1926.

20 Q You sent this letter to Miss Livesey? That is a letter you wrote to Miss Livesey about the pump? A Yes.

Mr. McIntyre: I offer it in evidence as affecting the witness' credibility.

The Court: Any objection?

Mr. Ely: None at all.

The Court: What does the letter say?

30 Mr. McIntyre: The letter, which was written before the pump was in, says that the cost of the pump will be \$158 and the cost of doing the work \$40 additional, making a total of \$198. On the stand the witness has just testified that the cost of the pump, labor and material, was only \$158.

40 Mr. Ely: This letter says the pump will cost \$198, and he has only charged for it after he has put it in, \$158. This says he went to see the pump and it would cost \$198. In other words, he did it \$40 cheaper.

William Zakutynski, cross.

Mr. McIntyre: This letter dated July 26 is only to affect the witness' credibility.

Mr. Ely: I have no objection to marking it in evidence.

(Letter from William Zakutynski to Mary Livesey, dated July 26, 1926, received and marked Exhibit D. 1.)

10

Q How much was the sink, bathtub and pipe outfits to cost? A I have got it here—\$160.

Q How much was the gas range to have cost? A \$25, paying cash.

Q Cement, plastering, whitewashing and erecting a new coal bin? A \$180.

Q What kind of a coal bin was that? A Wood coal bin.

Q How big was it? A 32x48.

20

Q What was the cost of the lumber to install that coal bin? A Lumber cost \$15.84.

Q \$15.84 for the lumber? A Yes, sir. The strips cost \$1.25.

Q What then was necessary to complete that coal bin besides strips and the lumber? A That was plastering and the floor.

Q How much did that cost? A That is all complete. Here is the bill here, for cement, sand and the rest of the stuff.

30

Q How much labor was required to install that? A Labor required, \$60.82.

Q That makes \$77.91, and you have charged \$180 for that work? A There is more coming. There is my work coming to that.

Q More work. A That has got to come in—faucets, blocks.

Q On a coal bin you had faucets? A Not the coal bin; that was the cellar work.

40

William Zakutynski, cross.

Q Wood, cement, plastering, whitewashing and erecting a new coal bin \$180? A \$180.

Q You have an item for \$15.84 for lumber, is that right? A Yes, sir.

Q \$1.25 for strips and \$60.82 for sand, gravel, as I suppose for foundation for the coal bin; that
10 aggregates \$77.91, and you have charged \$180?
A Yes. Where is labor?

Q You have included the labor here. A Where?

Q How long did it take you to put up a coal bin? A Here it is: 38 bags of cement, \$30.42; two bags of soil—that comes outside.

Q We already had that item. We had \$60.62 for the foundation of the coal bin. You have charged \$60.82 for the material that was to go
20 for the foundation of the coal bin.

The Court: I understood that was for labor.

By the Court.

Q \$60.82 for labor; is that right? A Yes.

By Mr. McIntyre.

Q For lumber, strips and labor, you have ac-
30 counted for \$77.91, and you have charged \$180. How do you account for the disparity? A I charge here thirty-eight bags of cement, \$30.40. Two loads of top soil to keep water out of cellar, \$10.50.

Q That had nothing to do with the coal bin? A If the water from the outside runs to the foundation cellar, no use if I fix the cellar and water runs in. That spoils the job.

Q That didn't belong to the coal bin proper?
40 A That belong to the cellar.

William Zakutynski, cross.

Q You cannot include the last item of top soil to the coal bin. A That is to help. If you don't get the water to drain from the outside to the inside, it won't do no good to fix the cellar.

Q I am asking you if this item of \$10 is something which is chargeable to the coal bin? For cementing, plastering, whitewashing and erecting new coal bin you charged \$180. You have accounted for \$70.91. I am asking you how you account for the difference. What other elements are there to make up this amount which you have charged? A I figure this cellar, if they don't fix the outside it don't do no good to fix the inside, because my job may be all spoiled, if the place gets soaked inside. 10

Q Did you charge the item for top soil to the repair of the cellar? A Yes. 20

Q You are trying to charge it again now for the coal bin? A No.

Q We won't consider it here for the charge to the coal bin. What did you pay for cement, etc.? A \$30.40.

Q What else was to go in to make up this coal bin item? A Charge two loads of soil, \$10.50.

Q We have excepted that, I think. I don't think it properly belongs. A Two bags of lime.

Mr. Ely: I don't understand counsel. He has a bill there that he is reading from, and the bill says cement, plastering, whitewashing and making a new coal bin, but the coal bin is only one of the items. Of course, Zakutynski, the plaintiff, says that the top soil was necessary to avoid spoiling the inside of the cellar. Of course, it has nothing to do with the coal bin. We admit you don't have to put top soil outside to make a coal bin. 30 40

William Zakutynski, cross.

By Mr. McIntyre.

Q What else? A Two loads of lime, \$2.30.

Q Is that all? A Lumber on coal bin, \$17.62.

10 Q You have already told us that it cost \$15.84? A I add that together, that \$15.84, too. That comes together. Two or three bills come to that.

Q I asked you what the cost of lumber was, and you said \$15.84. A You ask me for one bill. I cannot answer on two bills.

Q I asked you for the cost of lumber necessary to put up the coal bin. How much for the lumber for the coal bin? A Here it is, complete.

Q How much? A \$17.62.

Q That is complete? A Complete lumber.

20 Q That doesn't include the item of \$15.84, does it? A No. We got more bills.

Q So that the lumber cost \$17.62 and \$15.84, is that right? Is it both or either one? A One, \$17.62.

Q We will cross out the \$15.84. Is that right? A Right.

Q Is that all that was necessary to fix the coal bin? A All material cost \$60.62.

30 Q Yes. We have that. A Mason cost \$44; helper cost \$31.18.

Q You told us before that \$60.82 was for labor. What was \$60.82 for? A Carpenter cannot do the mason work.

Q What was the \$60.82 for, for labor or material? A That is material.

Q What material? A Material on the cellar.

Q For the foundation for the coal bin? A Yes.

Q \$17.62 for lumber, is that right? A That comes together, all.

William Zakutynski, cross.

Q You mean the \$17.62 is included in the \$60.82? A All material, cement, sand, lumber and lime cost \$60.82.

Q \$1.25 for the strips? A No; that is together.

Q That is also included? A That is together.

Q How much for labor? A Mason cost \$44; helper cost \$31.18; carpenter cost \$44—labor cost \$119.18; material cost \$60.82; complete is \$180. 10

Q How many days was it necessary to use to put up this coal bin? A I don't figure on days. Sometime I work on one job; sometimes I work few hours on one job; if the job isn't dry, I go to another job.

Q How many days did it take to complete this coal bin? A I got it forty-four hours.

Q You were to furnish new leaders and to plant hedges and shrubs, top soil and grade and seed the lawn, weren't you? A Yes. 20

Q What was the agreed price for that? A I got that here, \$160.

Q \$160. A (After consulting paper.) \$165.

Q Where did you plant the hedge? A I plant the hedge on the front of Jackson avenue, to Lincoln avenue, from Lincoln avenue out.

Q Was that outside the building line, or was it inside the building line? A That has got to be thirty inches from the sidewalk. 30

Q Was it thirty inches from the sidewalk? A Yes.

Q Did you make a survey of the plot at 200 Jackson avenue? A Yes, sir.

Q Did you make a survey? A Yes.

Q From your survey the hedge was planted thirty inches within the building line, is that right? A From the sidewalk.

Q Well, the building line, was it? A The building line? 40

William Zakutynski, cross.

Q It was within the building line, was it, that the hedge was planted? A On the owner's property.

Q Did you have to tear up the sidewalk to plant the hedge? A No.

10 Q You planted the hedge first and then laid the sidewalk? A I never laid the sidewalk in the front.

Q How about the side? Did you lay that? A I laid the sidewalk on the side.

By the Court.

Q Pardon me. How long was the hedge in the front and on the side? A 150 feet.

20 Q Altogether? A Altogether. Fifty feet wide and fifty feet deep.

Q What kind of hedging was it? A California privet.

Q How old? A Three years old.

By Mr. McIntyre.

Q Did you put a new floor in the cellar? A Yes, sir.

Q When did you do that work? A At the same time I worked in the cellar on the coal bin.

30 Q How much did you charge for that? A That is charged with the cellar.

Q How much? A Charged with the coal bin and fixing the cellar, plastering and—

Q When was it done? When was that coal bin work done, cellar work? About when, if you know? A September 8th.

Q Of what year? A 1926.

Q Have you seen that cellar since you did the work? A No.

40 Q You haven't seen it since? A No.

William Zakutynski, cross.

Q After you completed the work you didn't go back to see the condition of it? A A month or a half afterwards I built the garage and I was in the cellar. The cellar was in good condition.

Q It was in good condition a month and a half after you saw the work and you say it was in good condition at that time; is that right? A Yes. 10

Q Did you install a clothes pole? A No.

Q You built a fence, didn't you? A Not a fence. I built a gate for roses. I plant the roses in the middle. That is gate for roses to climb on it.

Q How much did you receive altogether on account? A On which? 20

Q What was the total amount of your bill for all this work, labor and material? A My whole bills, all I had, was \$1,369.46.

Q How much did you receive? A I receive \$731.20.

Q You are absolutely sure about that, are you? A I received the \$30 for the alteration afterwards. It is on here, too.

Q In addition to the \$731.20 you received \$30 more; is that right? A Yes. I have a \$608.26 balance. 30

Q So that altogether you received \$761.20; is that right? A She owes me \$608.26.

Q What is the amount you received from Miss Livesey? A \$731.20.

By the Court.

Q Does that include the \$30 which counsel mentioned? A That includes this \$30.

Q It includes the \$30? A Yes. 40

William Zakutynski, cross.

Mr. McIntyre: Here is a series of checks, if the Court please, aggregating \$775.20—

Mr. Ely: I object to counsel stating on the record what the checks are. Show them to me, and I will see whether I will let them go in.

10

By Mr. Ely.

Q Was that \$35 paid (indicating check)? You spoke of \$30 that was paid on the first job you did. Is that the \$35? A Yes. That is the first job and paid cash, and never come to this paper.

Q That is not included in this? A No.

Mr. Ely: Then I object to that check.

The Court: Objection sustained.

20

Mr. McIntyre: I will offer the rest of the checks.

(Twelve checks, amounting to \$740.20, received in evidence, and marked Exhibits D. 2 to D. 13, inclusive.)

By Mr. McIntyre.

Q After you installed this pump and inspected it and said it was working O. K., in a good, workmanlike manner, did you ever come back and inspect it again? A Yes.

30

Q When was this? A Once in July, was stormy here, electric was shut off and fuses were burnt, and the pump don't work. Miss Livesey she called me down and I put fuses, put them on, and pump run.

Q Was that in July, 1926? A I can't remember. It was in June or July, or later.

Q Did you ever come after that to look the pump over again? A I was there again.

40

William Zakutynski, cross.

Q When was that? A I was to see three or four times; if the pump was new, never broke him in, once awhile it gets stuck, I went over. I would get the inside out and machine run.

Q How many times in all did you inspect that pump after you installed it? A I was three times special for that. After, if I was there on the job, if there was something I look at it. 10

Q If you looked at the pump was it because Miss Livesey asked you to come, or did you come of your own volition? A If there was fuses burnt out, Miss Livesey called me up.

Q Each time you came and looked at the pump was because Miss Livesey called you up? Each time you came here you found the fuses blown out? A No, sir.

Q What was wrong the other two times? A Pump run forty-eight hours without any stop. Motor was overheated. The pump motor was overheated. 20

Q You installed the motor, didn't you? A No.

Q Who installed the motor? A I put it in. The motor was put in at the factory with the pump.

Q The motor became overheated a lot of times? A Yes. 30

Q After the pump was put in, you came there about three times and looked it over? A Specially for that.

Q On one occasion you found the fuse blown out and the other two times the motor was overheated and the pump would not work? A No.

Q What did you do to repair that? A If the motor was overheated and the parts was overheated, I put in a new one.

Q A new motor? A No, no new motor, just a new part. 40

William Zakutynski, cross.

Q Did you anticipate that that would happen, that the motor would become overheated, when you agreed to install this pump? A Yes, I did.

Q You expected that to happen? A Sure, you can expect that at any time.

10 Q When was the last time that you saw this pump? A When Miss Livesey moved out from the house.

Q When? A In September.

Q You never saw it after that at all? A No, but pump never runs because electric power was off.

Q The reason it didn't run was because there was no power there? A Yes.

20 Q And September, 1926, was the last time that you saw the pump? That was the third time. Was it the third time you saw it? A If I work there I see the pump every day, if I was there.

Q In no event did you see it after September, 1926? A No, sir; I didn't see it.

Q You are sure about it? No mistake about that? A As soon as Miss Livesey was at Moonachie I never was in the place to look at it.

30 Q That was in September? A September or October. I don't remember exactly when she moved out; September 26th or 30th, something like that.

Q And you never saw the pump after that? A No, not after that.

Q I ask you if that is your signature here (indicating signature on paper), is it? A Yes.

Q Will you read that and tell us what it—

Mr. Ely: I object to counsel showing the witness something without showing it to me.

40 Mr. McIntyre: I beg your pardon. I am sorry.

William Zakutynski, cross.

Mr. Ely: I object to this being in evidence or being read into evidence.

By Mr. Ely.

Q That writing in ink wasn't there when you put it in, was it? A No.

10

Mr. McIntyre.

Q Is that your signature (indicating)? A Yes.

Q Did you write this? A Yes.

Q Do you know when you wrote this? A No, I don't.

Q Do you know when you put the lead pencil inscription on it? A I didn't put on the date.

Q Then you don't know when you wrote this lead pencil inscription of this paper? A No.

20

Q You wrote it? A I wrote it. I don't know which day.

Q Can't you tell us about what month it was? A I can't tell you; of course, no the last week or two weeks. This is two years.

Q Would you say this wasn't written in October? A Never.

Q You swear it wasn't written in October? A No.

Q It was never written then? A No.

30

Mr. McIntyre: That is all.

The Court: We will take a recess until 1:30 o'clock.

William Zakutynski, cross.

AFTERNOON SESSION.

Mr. McIntyre: May I recall the witness for further cross examination?

The Court: Certainly.

10 WILLIAM ZAKUTYNSKI, the plaintiff, recalled as a witness in his own behalf, testified as follows:

Cross examination (continued) by Mr. McIntyre.

Q When you built the coal bin, did you buy all new lumber for that, or was some of the coal bin there before you started to work on it? A I put a whole new coal bin in.

20 Q You put a whole new coal bin in? A Yes, except the doors.

Q And you used the doors of the old coal bin to put on the new one? A Yes.

Q You got new joists and boards? A Yes.

Q You put in new ones? A Yes.

Q What were the dimensions of that coal bin? How big was it? A How big?

Q Yes. A I never measured.

Q Where the old coal bin was you put up a new one? A Yes.

30 Q You used all new material with the exception of the doors? A With the exception of the doors.

Q How long and how wide was the coal bin, do you know? A About twenty-six feet long.

Q Yes. A And about ten feet wide.

Q How high? A Six foot high, and the strips on the top, to fill it in to the ceiling.

Q What kind of lumber did you use? A Ship block. That is what is used in the new houses, on the siding.

William Zakutynski, cross.

Q You got enough lumber for something over \$17, that was enough to pay for lumber to build that coal bin? A Yes, it was; new lumber to build the coal bin.

Q You didn't use any of the old material? A No, except the doors.

Q What color did you paint the garage? A Dark grey.

Q How many coats did you put on it? A Two.

Q When was the last time that you saw the garage? A When was the last time I seen the garage?

Q Yes. A I seen it three weeks ago by passing.

Q Was the original paint you put on the garage still on the garage? A I never was close to it, because the garage is on Lincoln avenue, and I pass on Jackson.

Q When you saw the garage three weeks ago, did it have the same paint on as originally? A I cannot say for sure, because I was sixty-five feet away.

Q You didn't inspect the paint to see how it took? A No.

Q You don't know the condition of the paint now? A Not now; not a day or two before, or not two weeks.

Q This is your signature, isn't it (indicating)? A Yes; that is my signature.

Q These are your figures here, are they? A Yes, that is my figure, but not the whole paper.

Q I am simply asking you whether these are your figures here (indicating)? A Yes, these are my figures.

Q And you wrote this letter here, too, didn't you (indicating)? A Yes, I send this together.

10

20

30

40

William Zakutynski, cross.

Q These two together? A In a long strip.

Q Can you tell us what this \$300 was for?

A I cannot say. If I got the rest of the strip I could say.

Q You say here \$408 for the garage. Is that right? Will you read that? A That say \$408,
10 but don't say for garage.

Q Read it. What does it say? A Without the garage that was; that isn't my writing; this is my writing (indicating).

Q The \$400 isn't your writing? A No.

Mr. McIntyre: I will read it: "I got the order to put up the garage"—

Mr. Ely: If the Court please, I object to Mr. McIntyre reading it aloud, if it isn't offered in evidence; of course, it goes in evi-
20 dence if he reads it aloud.

Mr. McIntyre: I do not propose to offer it until I read it. This is merely preliminary.

Mr. Ely. If he will offer the letter and the paper—

The Court: He intends to do that.

By Mr. Ely.

Q Is that all of the paper, or torn off? A
30 There is another sheet of that. Miss Livesey have that figure. I wrote all figures with the two pieces of paper, and I mailed it to Miss Livesey. There was two big pieces of paper.

By the Court.

Q Was there any writing on the other paper?

A Yes, sir.

Mr. Ely: I object to either part, without
40 all. It has been torn off.

William Zakutynski, cross.

The Court: Have you the other part?

Mr. McIntyre: This is very complete on the face. It is a mathematical computation and it can be connected with the other part of the letter here.

My Mr. Ely.

10

Q Was there some more of the paper? A Yes. It was longer than this was.

Mr. Ely: I object to offering a section of it. You can readily see there was something else to it. They just offer the bottom sheet. I object to just offering the bottom sheet.

The Court: Unless counsel wishes to produce the other part, I think the objection is well taken.

20

Mr. McIntyre: This is a computation of the estimates rendered by the witness. It is complete of its face. Whether there is another section, is immaterial.

The Court: There may be something in the other that will qualify these two figures.

Mr. McIntyre: These are figures already offered by the witness. I merely want to cross examine about one or two figures. He arrives at the same conclusion by two different ways. I offer this one as to credibility.

30

Mr. Ely: I object unless the other sheet is produced.

The Court: Unless you produce the part, the objection will be sustained.

Mr. McIntyre: May I cross examine further as to this?

The Court: Yes.

40

William Zakutynski, cross.

By Mr. McIntyre.

Q When did you write this letter? A I can't remember.

Q You don't remember when you wrote the letter? A It is dated on the one.

10 Q What makes you so sure there was another paper besides this? A Because I wrote the two. One was long and one was short.

Q You mean this is one whole complete sheet here? A This is complete, and the other one—

Q This is complete? A That is complete with the other one.

Q I am talking about the paper without any writing. A There is two together.

Q I am only asking you about this now. Is this (indicating) or not, one sheet of paper? A
20 Yes.

Q Where did you get this sheet of paper from? A From the book.

Q You told us that you wrote a letter. Part of the letter is this (indicating); is that right? A I wrote the two.

Q You say that one sheet was longer than the other. You got this apparently from one book, and the other page from another book? A This was out of the same book. I cut this one off
30 further.

Q You cut this off out of the book? A I took it out of the book.

Q You took this page out of the book, this sheet you say was longer than that? A It was longer than this.

Q Although they both came from the same book? A Yes. One I cut off, the other not

40 Mr. McIntyre: The witness says there are other figures on the part that he states is now

William Zakutynski, cross.

missing. The part I have here coincides exactly in results with the amount already proved. He states in his direct case he was paid \$731.20. There is a balance due of \$638.26—

The Court: He says there is a balance of \$608.26. 10

Mr. McIntyre: This shows a greater amount of \$638.26. If there weren't more figures, which he says there are, I can't see how the Court can place any credence whatsoever in the testimony of this witness. The purpose of this is to affect his credibility. This section is a complete computation in itself. It is in the witness' own figures, own handwriting. It shows an estimate of \$408 for the garage. His prior testimony was \$525. This was merely offered for the Court's consideration, to test the credibility of this witness. 20

The Court: A total difference in amount of \$30?

Mr. Ely: An even \$30.

Mr. McIntyre: There is a great disparity in the garage. Here he says it is \$408—

Mr. Ely: I object to counsel testifying what is in that paper. It is not in evidence. 30

The Court: The Court feels that if there is another part of the communication, whether it be an estimate or what-not, and you don't produce the entire sheet, it might work an injury to the plaintiff's case, inasmuch as there might be something in the paper attached which would qualify this difference.

William Zakutynski, cross.

Mr. McIntyre: We will offer it for what it is worth, subject to the Court's considering the witness'—

Mr. Ely: If he has the other part, let him produce it.

10 The Court: At least for the present, the Court will sustain the objection.

Mr. McIntyre: Exception, please.

The Court: Granted.

By Mr. McIntyre.

Q Did you ever speak to Mr. Johnson about that pump? A Well, yes.

Q Did he ever send a man there to inspect the pump? A Yes.

20 Q How many times? A Once.

Q When you say that, do you know? A I know he was there.

Q Were you there when this inspector inspected the pump? A No.

Q He came from the place where you bought the pump, didn't he? A Yes.

Q You sent for him, did you? A Yes.

30 Q Did Mrs. Serviss ever speak to you about the pump? A Mrs. Serviss told me Miss Livesey said if I work on place Jackson avenue, if I am there, and the pump stopped, I should go over and look what the trouble is on the pump.

Q How many times did you look when Mrs. Serviss told you? A Only once.

Q What did you find? A I find the spring—the motor was overheated and make the pump stop.

Q Did Miss Livesey ever speak to you about the pump? A Yes.

40 Q Did you ever get in touch with Mr. Johnson? A Yes, sir.

Motion for a Non-suit.

Q You spoke to him? A Yes.

Q How many times? A I spoke to him twice; one there was the fuses, and second time, and second time Mrs. Serviss—he spoke to Miss Livesey himself.

Q Did you ever tell Miss Livesey that Mr. Johnson told you he would make it all right? A 10
He said that the pump, if she don't like the pump, Miss Livesey, he would change it any time.

Q He told you that, did he? A Yes.

Q You told that to Miss Livesey? A Yes.

Q You were having trouble with the pump?
A No trouble, if the people know how to take care of it.

Mr. McIntyre: I move to strike out: "If 20
the people know how to take care of it."

The Court: So ordered.

Mr. McIntyre: I want to ask for a non-suit on the ground, first, that the only evidence here of any damages that the plaintiff claims he is entitled to, perhaps—this is merely for the purpose of the motion, we are not admitting it—being indefinite and uncertain, the plaintiff's suit must necessarily fail. 30

There has been some evidence of the cost of materials. It has developed that this is also very uncertain. The figures as testified to by the plaintiff and by different estimates and evidence offered do not agree. Unless the Court can show he is entitled to damages and can fix a definite sum certain, his action must naturally fail.

Further, there is no proof by writing, as is required under the statute, or that such 40

George H. Babcock, direct.

a contract existed. The witness has testified only that he agreed to do certain work. He testified he did some of the work. He didn't testify or prove that the value of his services were reasonable, or as to the amount. On that point, I respectfully urge that the plaintiff be non-suited.

10

There is some evidence, which was admitted over objection, of certain bills for material. I again urge it is merely hearsay, and should be excluded.

Upon these grounds we respectfully move the plaintiff should be non-suited.

The Court: Motion denied.

Mr. McIntyre: Exception.

20

GEORGE H. BABCOCK, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. McIntyre.

Q Where do you live, Mr. Babcock? A Lyndhurst, New Jersey.

30

Q What is your business? A General contractor.

Q You have been a general contractor for how long? A About thirty-five years.

Q As such, have you built and made alterations in dwelling houses? A I have, yes, in my business.

Q Have you built porches and cellars, and repaired the same? A Yes.

Q And made alterations in homes? A Yes.

Q Built and laid sidewalks? A Yes.

40

George H. Babcock, direct.

Q Have you built garages, brick and frame garages? A I have.

Q And altered the same? A Yes, sir.

Mr. McIntyre: Anything further required to qualify this witness?

Mr. Ely: With respect to what? 10

Mr. McIntyre: As an expert on the issues involved in this case.

Mr. Ely: You haven't asked him anything about electric pumps. I don't know whether Mr. Babcock knows anything about electric pumps. I am perfectly willing to admit he is qualified to testify about buildings, coal bins and garages, and things of that nature, but electricity is a somewhat technical subject, and I don't believe Mr. Babcock is familiar with that. 20

Mr. McIntyre: Mr. Babcock isn't going to testify as to the pump.

Mr. Ely: Then I have no objection.

Q Did you inspect the premises at 200 Jackson avenue, Mr. Babcock? A I did.

Q When was that? A The latter part of March of this year.

Q 1927? A 1927. 30

Q Did you inspect the cellar at that place? A I did.

Q And the sidewalks? A I did.

Q Did you also examine the garage and the foundation for it? A Yes.

Q And the paint on the garage? A I did.

Q What else did you examine and inspect around the premises 200 Jackson avenue, Rutherford, New Jersey? A I examined the cellar wall inside the house; the cellar floor, the walk 40

George H. Babcock, direct.

from the street, the walk from the house to the garage, the garage, the garage painting and foundation, and the doors in front of the garage.

Q You made this inspection at whose request? A That lady over there, Mrs. Livesey.

10 Q Do you know the purpose of that inspection, why you made it? A I made it as an estimate.

Q For what? A To repair the work.

Q Will you tell us as to the condition you found in the different parts of the premises which you inspected?

20 Mr. Ely: I object. Here is a man who makes an inspection over six months after the work is completed. There is no testimony before the Court at this time as to the condition in which it was left. There may have been an army of workmen there between the period it was completed and the time it was inspected. I think his evidence is not competent.

Mr. McIntyre: Subject to its being connected up, if the Court please.

30 *By the Court.*

Q Was it in March of this year that you inspected the premises? A Yes.

Mr. McIntyre: We can show by the defendant that no workmen touched the premises, and I think the Court will be satisfied. If we don't show it, this testimony may be stricken out.

40 Mr. Ely: Under the circumstances, I won't object.

George H. Babcock, direct.

By Mr. McIntyre.

Q Will you tell us the condition which you found? A On the sidewalk from the street line to the gutter, it was all busted up, and there is no footing under it. The frost pulled it up right out of the ground. That was the first place I inspected. 10

Q The sidewalk was bursted up from the ground? A Busted right through.

Q Did you look under it? A Yes. Nothing under it but dry ashes.

Q Is that the proper body or foundation for a concrete sidewalk? A No, sir.

Q What is the proper foundation? A Four inches of dry cinders, four inches of concrete and one-half of top dressing.

Q You inspected the door of the cellar, did you, of the premises? A I did. 20

Mr. Ely: So that we won't waste time, I don't know whether he said the sidewalk from the street line to the curb. I didn't understand that.

The Witness: The piece of sidewalk from the main sidewalk to the curb, to the street.

Mr. Ely: About three feet in length?

The Witness: Yes. 30

Q How about the rest of the sidewalk? A The sidewalk from the house to the garage?

Q Yes. A It was all shot, all gone, all crumbled away. There is nothing there at all.

Q Did you examine the bed where that sidewalk was laid? A No bed under it; only dry ashes.

Q What is the proper bed for a concrete sidewalk? A Four inches of concrete. 40

George H. Babcock, direct.

Q Did you find evidence of that present? A No, sir.

Q Did you examine the floor of the garage? A Yes. It had the same condition.

Q The same condition as both sidewalks? A Yes.

10 Q There was no foundation for the under bed laid? A No.

Q Did you examine the coal bin? A I examined the floor in the coal bin; the concrete floor in the coal bin, I examined that.

Q What have you to say as to that? A At some places three-quarter inches, one-eighth, you could pick it out your finger.

20 Q What is the foundation that is required for such a flooring? A Same as the sidewalk.

Q You found no such body there? A Just a skim of sand and cement there.

Q I show you an article and ask you if you know what that is? A I do know.

Q You do know? A I know where it came from.

Q Where? A Off the side wall and the cellar.

30 Q Will you describe the contents of that, if you can? A Very little cement there, I can tell you that.

Q Will you exhibit to the Court just the tenacity of that by breaking it? A Yes (witness breaks piece).

By the Court.

Q Where did this come from? A Off the side wall on the inside of the cellar.

40

George H. Babcock, direct.

By Mr. McIntyre.

Q What would you say as to the workmanship of this particular article? A I should say it was rotten.

Q Would you say that would last for any considerable period? A It is all falling off now. You can pick it off with your fingers. 10

Q What is the usual time it should last? A It should last indefinitely.

Q That is not a usual thing for a cellar wall to crack like that in six months? A No, sir.

Q I show you another article and ask you if you know what that is? A That is from the sidewalk.

Q What have you to say as to the workmanship? A There is no workmanship there at all. 20

Q How about the condition of the cement? A No cement hardly there at all.

Q Is that the usual way that the sidewalk or cellar wall should go after six months? A No, sir.

Q What have you to say as to the workmanship of the cellar wall and floor? A No workmanship there at all.

Q What would you say would be the reasonable cost of replacing that cellar wall and the cellar floor? A \$75. 30

Q To repace the cellar wall? A Yes.

Q What will be the reasonable cost of replacing the cellar floor with proper material and workmanship? A \$75, I think.

Q Did you make an estimate? A I did.

Q Have you the estimate with you? A Yes.

Q I will ask you to refresh your mind from it. A Yes, sir. "Plastering cellar wall, \$26." 40

George H. Babcock, direct.

By the Court.

Q Twenty-six dollars? That is for replacing the cellar wall? A Parts where this came off from.

By Mr. McIntyre.

10

Q Did you know what this paper is (handing paper to witness)? A Yes.

Q Did you write this, Mr. Babcock? A No. I can just about lift my hand; that is all.

Q Who did write this? A My wife.

Q Where? A In the house.

Q In the house at Jackson avenue? A In my house.

By Mr. Ely.

20

Q How long after you had looked at the premises? A The same night I had looked at it.

Mr. McIntyre: I will withdraw this for the present.

By Mr. McIntyre.

Q I show you a paper and ask you if you know what that is? A Certainly.

30

Q Did you inspect all the items there? A I did.

Q And after reading them, did you sign that paper? A Yes.

Q That is your signature? A Yes.

Q The contents of that paper were dictated by you? A By me.

Q What is that paper? What does it represent? A It represents the work to be done at Jackson avenue.

40

(Mr. Ely examines original and copy.)

George H. Babcock, direct.

Q What would be the reasonable cost for the new floor in the cellar? A \$75.

Q And to repair the plastering on the cellar wall inside? A \$26.

Q And to furnish a new wash pole and set it in concrete?

10

Mr. Ely: I object.

Mr. McIntyre: I withdraw the last question for the present.

Q And a new walk from the street to the sidewalk? A \$13.

Q How much did you estimate for putting a foundation under the garage, a new floor in the garage, and leveling up same, and for adjusting four garage doors and putting in two new doors? A \$305.

20

Mr. Ely: I object.

The Court: As to what phase of it?

Mr. Ely: As to the doors.

Q Did you inspect the doors of the garage? A Yes.

Q What have you to say as to the doors? A The doors—the building being out of level, the doors were all smashed up.

30

Q The building was out of level? A Four inches out of level.

Q What test did you apply? A I used a level.

Q When you say a level, what do you mean? A A spirit level.

Q That indicated what to you? A The building was four inches out of level.

Q Because of that the doors were— A The doors were broken.

40

George H. Babcock, direct.

Q The doors could be repaired? Were new doors necessary? A New doors were necessary.

10 Mr. Ely: I still object. There is no evidence of the doors being broken, only a conclusion as to how they got broken.

The Court: I will allow it, subject to its being connected up.

Q You inspected the paint on the garage, did you? A Yes.

Q Did you observe it? A Yes.

Q And the fence? A I did.

Q What have you to say as to the location of the fence with respect to the building line?

20 A The fence is off the line, I should think as near as I can remember, about eighteen inches.

Q To correct that what would it be necessary to do with it? A To reset it.

Q To take up the fence and reset it? A Yes.

Q What have you to say as to the condition of the paint on the garage? A The only paint that is on it today is the original coat that came with the garage. That is light blue.

Q What have you to say as to its condition?

30 A The paint?

Q Yes. A It simply disappeared, if there was ever any on.

Q Would you say that the garage needed a new coat of paint? A I should say it did.

Q To paint the garage, to move the fence and reset the same on the line, what would you say was a reasonable charge for that? A \$26.

Q Did you observe any wash pole? A There was no wash pole there.

40 Q What would be a reasonable charge for that?

George H. Babcock, cross.

Mr. Ely: I object. There is nothing before the Court showing that there should have been a charge for it.

Mr. McIntyre: I withdraw it, that is, for the present. We will show that there was a charge made for it. May I ask him now, to save time?

10

The Court: Yes.

Q What would be a reasonable charge for furnishing a wash pole and setting the same in concrete? A \$25.

Q Are all these charges reasonable? A They sure are.

Q These charges include what? A Labor and material.

Q What is the aggregate of all of these charges? A The what? 20

Q What is the total? A \$507.

Q That is a reasonable charge, you say? A Yes, sir.

Cross examination by Mr. Ely.

Q Were you given an order to go ahead with this work? A No.

Q Have you ever been? A No.

30

Q Have you been now? A No, sir.

Q Were you paid for making this estimate? A No, sir.

Q Were you paid to come into court? A I haven't been paid yet.

Q What have they agreed to pay you to come into court? A We have made no agreement yet.

Q But you expect to be paid? A I expect to be paid for my time.

Q The condition in the floor of the coal bin which you testified to would not prevent you 40

George H. Babcock, cross.

from using it for coal? A It would let the water in. There is nothing to keep the water out. Just as well not have anything there at all.

Q Is the house very low? A Not more than any other. It is two feet out of the ground.

10 Q Is it in a swamp section? A I should say not. It is a sandy section.

Q Would a truck going over the sidewalk break it up? A It should not if you put it on right.

Q Would it have broken that one up? A No.

20 Mr. McIntyre: I do not think that this is proper cross examination. The cross examination should be limited to the direct examination. There is no evidence here of any truck passing over the sidewalk.

Q So far as the floors and doors of the garage are concerned, did they use it for a garage? A I believe so.

Q You believe so? Did you see an automobile in it? A I am not sure whether there was an automobile in there or not. I think I did see an automobile in there.

Q You were there? A Oh, yes.

30 Q You don't remember whether there was a machine? A I don't, no. The machine may have been out.

Q Was it out or not? A I wouldn't want to say.

Q You don't know? A No.

Q Did you look in the garage? A Yes.

Q You looked at the floor of the garage? A Yes.

40 Q You saw it was in terrible condition? A Yes.

George H. Babcock, cross.

Q But you didn't see whether there was an automobile in there or not? A I don't remember whether there was an automobile standing there or not.

Q Did you go all over the floor? A It may have been out at the time. I wouldn't say.

Q You don't know? A No. 10

Q You inspected it carefully, but you don't know whether there was an automobile in there or not? A I think there was an automobile in there.

Q Was there any coal in the cellar? A No.

Q Wasn't any coal in the coal bin? A No.

Q Was it empty? A There was some wood lying around.

Q Did they ever have coal in the coal bin? A The only thing you can tell would be the coal dirt. 20

Q There was black dirt there? A Yes.

Q There had been coal put in? A Yes.

Q But there was no coal left? A Not when I was there.

Q As far as the doors of the garage were concerned, were they open or closed? A Closed.

Q There are two sets of double doors? A Yes.

Q Could they have been broken by somebody running into them, and leaving them open in a wind? Would that break them? A I presume they could be broken that way. 30

Q What breaks did you notice? A The building had settled down so far, you had to pry the doors open.

Q But they might have been broken by leaving them open, and having them fly back and forth, might they not? A The panels were split. They couldn't be opened. 40

George H. Babcock, cross.

Q Hinges loose on them? A Yes. The hinges were loose.

Q The hinges were loose? A Yes.

Q What were the doors worth on that garage, just the doors? A They were worth around twenty dollars a pair.

10 Q So twenty dollars of that three hundred dollars is for the doors; is that correct? A Right.

Q How much would it cost to fix the foundation? A Sixty-five cents a square foot.

Q How many square feet were there there? A You know the size better than I do.

Q Those two items compose the three hundred and five dollars, the doors and the sixty-five cents per square foot? A Yes.

20 Q You do it by the square foot? A Yes.

Q Why, in order to fix the floor of that garage would you have to build a whole new foundation? Couldn't you just put a layer over the top? A You would have to raise the building up and fix the foundation. I couldn't find any foundation under it. We had to jack it up on the outside.

Q How much was it worth to fix the concrete floor? A Sixty-five cents a square foot.

30 Q Why is it worth sixty-five cents to put another coating on? A Another coating wouldn't do any good. You have to take the other up.

Q You have got to knock the whole thing off? A That is the only way I would do.

Q Isn't it possible to cut it jaggedly down three or four inches? A That would take longer than to take it up.

Q Is it cracked? A Bulged up all over.

40 Q How do they get a car in there? A I don't know. I didn't see they had a car in there.

Mary Livesey, direct.

Q And you say the fence was off the building line? A Yes.

Q How do you know where the building line is? A I went by the surveyor's stakes.

Q When were the surveyor's stakes put there? A They were fresh-looking stakes, to me. 10

Q You think they had been there all winter? A No, sir.

Q So, if you were a contractor and were hired to do some work on a place and there were no stakes, would you just estimate where the building line was? A I would find out first whether I was right or not.

Q How would you do that? A I would get a surveyor and have him make a survey. 20

The Court: This fence, is that the privet fence as being out of line?

Mr. McIntyre: The fence which the plaintiff agreed to put up.

The Court: Is that the privet fence around the premises?

Mr. McIntyre: It is a board fence or slap fence.

30

MARY LIVESEY, the defendant, being duly sworn, testified as follows:

Direct examination by Mr. McIntyre.

Q You are the defendant in this case, Miss Livesey? A Yes.

Q Did you have an agreement with the plaintiff, Mr. Zakutyski, to do some work for you in or about the last year or so? A I did. 40

Mary Livesey, direct.

Q Did you make a memorandum of the work to be done, with the charges therefor, that was agreed upon between you and the plaintiff? A I did.

Q Have you the memorandum with you? A Yes.

10 Q Made in your own handwriting? A Yes.

Q When was it made? A At the time the estimates were made.

Q Will you please refresh your mind from the memorandum, just the work to be done, and the prices that were to be charged?

Mr. Ely: I would like to see the memorandum and examine her.

20 *By Mr. Ely.*

Q Is this the memorandum? A This is it, and this is a fuller account; this is a short statement of the amount; this is a description of what was said at the time, perhaps rather fully, and these are the figures (indicating).

Q You say you made this at the time? A Yes.

Q At what time? A Each date.

Q On each date? A Yes, sir.

30 Q Where did you get this, Miss Livesey? A In this book.

Q Each day as you gave him an order you took the same piece out and wrote it in? A Yes.

Q These entries were not made at the same time? A No.

Q They were not? A No.

Q Not all written with the same pencil? A I don't know about the pencil; whatever pencil I had handy.

40

Mary Livesey, direct.

Q You took whatever pencil you had handy, and these weren't made at the same time? A Yes.

Q When was this made (indicating)? A This was taken from it to show me quickly what the figures were.

Q It was taken from this (indicating)? A These are the details. I will read you the first one— 10

Q You took this from that (indicating)? A Exactly. I made two.

Q You made all those entries first, and then you made this from that (indicating)? A Each time I wrote these down, I took that slip of paper (indicating), and then I copied the exact facts, just the figures; just the important things in the estimate. 20

Q Were the copies which you kept in the same book? A This July 8th I wrote on July 8th, and I wrote on the other, too. I kept this paper (indicating), so I could see it quickly. This showed me the full details (indicating), the details that we talked about, and what he agreed to do, and items of certain kinds.

Q Were these in his presence? A Sometimes he was present, and perhaps sometimes it would be just after he had given me the figures, and then I wrote them down. 30

Q Did you ever write any of these papers in his presence? A Yes.

Q You did? A Yes, sir.

Q Also in the book at the same time? A Yes.

Q In his presence? A Yes.

Mr. McIntyre: We are not offering this in evidence; merely to refresh the witness' 40

Mary Livesey, direct.

recollection, on account of the many items involved. We would like this to assist us.

By Mr. McIntyre.

10 Q Can you tell us what work was agreed to be done, and the prices? A Yes. On July 8th, he agreed to supply a second-hand bathtub and sink for \$35. On July 10th, he agreed to put in some plants. He agreed to do that work for some fertilizer he was to take from the place.

Q Did he agree to install an electric pump, bathtub and sink? A For \$233.

Q To install a gas range? A Gas range for \$25, and an electric pump, and connection with the bathroom sink, for \$198.

20 Q Did he agree upon a new floor in the cellar, to fix the cellar wall, and to repair the coal bin? A \$108, on August 6th.

Q Did he agree to repair the leaders? A Yes.

Q What was the amount of that. A \$18.

Q To repair the radiators? A Yes, \$45. September 3rd.

Q Did he agree to set up a wash pole and erect it in concrete? A Yes.

30 Q What was the charge for that, do you remember? A \$30.

Q To make walks from the street sidewalk and from the house to the garage? A \$41.50.

Q To build a frame garage? A \$408.

Q To paint the garage three coats? A \$55.

Q To build a wire fence? A \$31.60.

Q Electrician, lighting garage? A \$30.

40 Q New floor in the cellar, repair the cellar, and walls, and repair coal bin? A I have just taken that out. That is \$108.

Mary Livesey, direct.

Q Upper street door, to put in new glass? A \$11.10. That was September 3rd.

Q To put a lock on the door, street door? A Yes.

Q How much was that? A The whole of the door was \$11.10.

Q. Was that to include the padlock on the coal bin, repair the door bell and the lock on the upper street door, and glass on the door? A Yes. 10

Q That was to cost \$11.10? A Yes; that is it.

Q That included making the lower door open and shut properly? A Yes.

Q Did you make any payments to the plaintiff on account of this work? A Yes. I paid \$35 on July 8th, for the bathtub and sink. That was paid in advance. He sent them over about two days after that. 20

Q What was the total amount you paid on account of this agreement? A \$775.20.

Q Do you know the total amount of the cost for this work? A No. I haven't got the total with me. I put it on that paper, with the items. I haven't got the total here. The bills that I refused to pay amounted to \$246. I remember that, that he demanded and I refused. 30

Q What have you to say as to the character of the work? I mean with respect to the workmanlike manner in which it was done; that is, including all the elements involved, the cellar walls, the cellar floors, the garage, the garage foundation, the electric pump, etc.? A About the pump, I don't know what the trouble with it was, but I do know it never worked. I was there for three months. I had to get water from the neighbors. It didn't work itself, and it took away the water that I had had before. 40

Mary Livesey, direct.

Q Before this electric pump was installed, what kind of a pump did you have for the purpose of drawing water? A A hand pump. The electric pump didn't work at all; it just worked a while for a few hours.

10 Q Did you tell Mr. Zakutynski about the pump? A Yes.

Q You spoke to him personally? A I did, and I wrote him.

Q What did he say to you, when you complained about the electric pump? A He said he would go and see Mr. Johnson. He said that Mr. Johnson would make it all right.

20 Q Did you get in touch with Mr. Zakutynski through any other source? A I telephoned Mrs. Serviss repeatedly, and I asked her to tell him when he was working at 200 Jackson avenue to come over to the Moonachie place to fix the pump, as it was out of order.

30 Q I show you a paper and ask you what this is? A On October 21, I was away, and I had told Mr. Zakutynski before that the pump was out of order. I had either 'phoned him or had written, I don't know, but he didn't come. I was away, and when I came back I found this paper sticking in my door, and I wrote the date on it, and said it was stuck in the door. This was under what Zakutynski wrote, and October 21st was the date I wrote it.

Mr. McIntyre: That accounts for the writing in ink. I will now offer the paper in evidence.

By Mr. Ely.

Q Did you put the date on that? A I did.

Q When? A Right away, when I got it.

40

Mary Livesey, direct.

Q. You always put a date on when you find a letter? A. Every time a person sends me a letter without a date, I put it on myself.

Q. You put the date on that little slip of paper? A. Right away.

Q. In ink? A. Yes.

10

(Paper received and marked Exhibit D. 14.)

Q. Did you have anybody at your place making repairs between the time that Mr. Babcock made the inspection for you and the time the repairs were made by Mr. Zakutynski? A. I had no repairs made at all, except—pardon me—except the door. I had a carpenter come and fix Mrs. Serviss' door, because she could not shut it.

20

Q. Was that a minor or a major job? A. That was only \$4.

By the Court.

Q. Do you mean the door to the garage? A. No. Mrs. Serviss' floor door. She told me it wouldn't work at all.

By Mr. McIntyre.

30

Q. Do you know what this article is (handing piece of cement to witness)? A. Yes, this came from the wall.

Q. Of the cellar? A. Of the cellar, and this came from the floor, and this came from the sidewalk (taking out two other pieces of cement from bag).

Q. What is this (indicating)? A. That came from the floor.

40

Mary Livesey, direct.

Q Will you manipulate that, if you please? (Witness does so, and piece of cement breaks).

Q Do you know what this is (indicating)?

A This is from the back sidewalk, from the walk from the kitchen to the garage. This I can break, too.

10 Q Do you know what this is (indicating)? A That is from the same place.

Q Was this the material and the workmanship that was used by the plaintiff Mr. Zakutynski pursuant to your agreement or understanding?

A They are.

Q Is this what you bargained for? What did you bargain for? A He told me concrete sidewalk and concrete walk.

20 Q Did you say that you withheld some payments on him? A Yes. I paid him \$775.20 altogether for those things, and the amount in excess of the agreement, the amount that I withheld was \$246. I moved from the Moonachie place on December 30th—

Q When you say Moonachie, what work was done there? A The pump and the gas stove, and the bath and sink. They were put in. I didn't leave there until December 30th.

30 Q What work was done at Rutherford? A The garage; the cellar, \$108 for the cellar. The work in Rutherford was the cellar repaired, the coal bin, the garage, the sidewalks, clothes pole, and the painting of the garage. He agreed to give it three coats for \$55, and he agreed to put up a fence for \$31.60.

Q While he was doing this work, were you located at the premises 200 Jackson avenue, or were you at some other place? A I was at the old place.

40 Q Where was that? A 258 Moonachie avenue, Moonachie.

Mary Livesey, cross.

By the Court.

Q Where is Moonachie? A Near Woodridge station.

By Mr. McIntyre.

Q Did you have any conversation with Mr. Zakutynski as to how he was to do this work, whether he was to do it or to sublet it? A He said he was to do it personally. 10

Q Did you ever see any masons or laborers working there? A No.

Q Were you ever there when the work was going on? A Once in a while I was there and I saw him. I saw him working there myself. I didn't see him put down the floors.

Q You took these specimens from the cellar wall and the cellar floor and the different parts of the premises, you yourself? A I did. 20

Cross examination by Mr. Ely.

Q Do you recall getting a letter from me, do you, about this claim? A I think I got a letter from you.

Q Shortly after that letter, you put an envelope and check into the mail addressed to Mr. Zakutynski, didn't you? A You are speaking of that \$200, are you? I want to know what you are talking about. 30

Q I just want you to answer my question. After you received my letter, did you put a check in an envelope and mail it to Mr. Zakutynski? A It was long after.

Mr. McIntyre: I object to this, on the ground that it is immaterial.

(Argument.)

40

Mary Livesey, cross.

By the Court.

Q Was there any letter accompanying the check? A No. Just paper.

(Argument.)

10 Mr. McIntyre: I will withdraw my objection. You may proceed about the \$200.

By Mr. Ely.

Q That was on January 11th, when you sent that? A You wrote a letter long before that.

Q At that time you were living in the Jackson avenue house, is that correct? A Just moved there.

Q You moved there in December, didn't you? A The end of December.

20 Q What day in December? A December 30th.

Q When was the electric pump installed in your Moonachie house? A It was in the fall.

Q What was the exact date of its installation? A I can't tell you the date it was when it was first installed. He first came and tried to put it in the new bungalow; then he couldn't do that, and then he made holes in the pantry, and found it wouldn't work there. He spent a lot of time to try to make it work. He thought it would work.

30 Q When? A The exact day of the putting in of the pump I didn't put down.

Q You didn't put that down? That is one thing you skipped? A Not the exact day it was put in.

Q Was it in October? A Yes, attached in October—wait a minute now, I will see. I can't carry all those details in my head. I will have to

40

Mary Livesey, cross.

look. "September 30th: Mr. Zakutynski connected pump with the sink and bathtub."

Q September 30th? A Yes.

Q So that the time this was put in, it was only three weeks after the pump had been installed?

A Whatever time it is, I haven't figured the number of weeks. The pump was out of order from the time it was connected. It was of no use at all.

10

Q Was it in before that at any time? Was it in before September 30th? A The pump was put in by the old pump, but it wasn't connected for a long time afterward.

Q It wasn't connected until September 30th?

A Whether it was connected or not, I didn't have the water from the pump.

Q You had plenty of water up until September 30th? A No. As soon as the pump was put in the water was stopped.

20

Q You said it wasn't put in? A It was put in, but not connected with the bungalow. It was connected at the old house.

Q It wasn't connected to the new bungalow, but it was connected to the old house? A That is the trouble; I hadn't written down the date.

Q Which house did you live in? A The new bungalow.

30

Q Which house did you live in? A The new bungalow.

Q When was that bungalow built? A It was built in 1924.

Q How did you previously get water? A Carried it over.

Q You always had to carry water? A Then I had to carry water. I didn't object to carrying it.

Q Who lived in the old house? A Nobody.

40

Mary Livesey, cross.

Q And so, for about two years, you say that from 1924 on, you always had to carry water from the old house? A Oh, yes. I didn't mind that any. Don't you see the difference between having water to carry and not having it to carry?

10 Q But you always carried water? You carried water previously to this time? A Surely. I will admit that.

Q The pump was in there three months after it was connected, that is, from September 30th until the 30th of December, approximately three months? A Yes. That is right.

Q During that time, you had to carry water? A I had to go to the neighbors.

Q How far were the neighbors? A I just can't tell you the distance. It is quite a tramp.

20 Q. A thousand feet? A Probably.

Q For three months you lived in the house and had to walk a thousand feet to get water? A Not all of the time. We could get a small stream, about a pan full, after pumping I don't know how long. That change was made by the electric pump.

Q Yes, with that inconvenience, you did after the 30th of September, pay Mr. Zakutynski nearly two hundred and fifty dollars, isn't that so?

30

Mr. McIntyre: I object to this line of testimony. There is no evidence of a certain amount paid after the date stated.

The Court: The checks are in evidence.

Q After the 30th of September, with that great inconvenience about the pump you had asked him to put in, and which didn't work at all, you paid him two hundred and fifty dollars? A Because he continually promised to have it set

40

Mary Livesey, cross.

right. He said Mr. Johnson would make it right. He said it wasn't his fault; that it was Mr. Johnson's fault.

Q Also considering the fact that previous to that time you had paid him some six hundred dollars? A Previous to when?

Q Previous to the 30th of September? A 10
Because I didn't know that the work in Rutherford was bad at that time. You see, if the work in Rutherford was good, he was entitled to be paid for that. He said that Mr. Johnson of the Worthington Pump Works had promised to make it all right. He repeatedly told me that.

Q Did you ever speak to Mr. Johnson? A I talked with Mr. Zakutynski.

Q You never knew Mr. Johnson? A Only from him. He was calling Mr. Johnson up about it. 20

Q When you moved to the Rutherford house, were the doors of the garage broken? A I noticed that only about ten days after I moved there. I was away very much.

Q They were broken when you saw them? A Yes.

Q. Did you attempt to get a cow and keep a cow there? A I didn't attempt. I could keep her as long as I wanted to. 30

Q That was the first part of your difficulty with the Borough of Rutherford, that you wanted to keep a cow there, and they wouldn't give you a permit? A A There was no difficulty.

Q Did you live in that house during the winter? A In what house?

Q The Jackson avenue house. A From December 30th.

Q Were cars kept in the garage? Have you a car in the garage? A I have no car. 40

Mary Livesey, re-direct.

Q Did someone else keep cars in the garage?

A Mr. Barr put his car in, I think.

Q Mr. Barr used the garage? A He only used it in November and December. He has gone away.

10 Q Nobody used it? A No.

Q You had coal in the coal bin? A No. I hadn't any coal in the coal bin. I just had enough coal in to get along with.

Q You didn't put coal in the coal bin? A Only a little bit.

Re-direct examination by Mr. McIntyre.

20 Q Before this coal bin was put in, the coal bin that was agreed upon to be done by Mr. Zakutynski, what was there in your cellar? Did you have a coal bin in there before? A No.

Q Tell us about that \$200—let me ask you this first: How many times have you been to this court upon this very case? A I came here in April, and Mr. Campbell wasn't here, and I waited. Another time I appeared and Mr. Zakutynski sent word he could not come, and he had his lawyer put it off—

30 Mr. Ely: I object to this line of testimony as hearsay.

Mr. McIntyre: She was here several times, and Mr. Campbell wasn't here.

40 Q Just tell the Court now, Miss Livesey, about that \$200. A Mr. Ely had written to me repeatedly about settling the suit, and wrote to Collins & Corbin, too, and Mr. Zakutynski wrote to me at the same time, and he came in on the 8th of January—I remember the date, and he

Mary Livesey, re-direct.

asked me. I said, "You have an attorney. You had better settle through him." He said, "No, I have nobody at all." I said, "Mr. Ely." He said, "No." "Well," I said, "that is interesting. How could he be writing to Collins & Corbin if he didn't know about it?" He said, "You can settle with me, and leave all the bother out." I said, "If you will write down that you have nothing to do with Mr. Ely, and say nothing about his writing to Collins & Corbin, or me, I will settle it to avoid any more delay or bother. There is bad work in Moonachie, but I suppose your work is all right here. I haven't had a chance to see it. If you want to settle in full for \$200, rather than to waste the time, I will give you that." I told him it would be a settlement in full, and I would write that on the back of the check and I would send it to him as soon as I got my money for the property in Moonachie. He said, "Yes, I will do that."

I sent the check for \$200, and wrote on the check "Payment in full" Soon after the check was gone, I looked at the work. I found that the doors of the garage were hard to open. I found the cellar floor all wet from the water coming in, where he was supposed to have fixed it. The cellar walls came off in pieces. The floor was bad, and the coal bin, that was seemingly the most miserable stuff of all put in.

I began to regret, of course, very much that I paid the \$200. I was foolish in having done that. I went over to my bank. I said, "I want to stop payment of that \$200. I did it under a misunderstanding." The young man looked up the check. He said it was in, and he showed it to me. My endorsement was scratched off in back. I was astounded. He said, "He had no right to do

Mary Livesey, re-direct.

that. I will find out from the bank that sent this to us how he came to do that." The result was that Mr. Zakutynski had to pay me back the \$200.

Q Have you got the letter from the bank with respect to the check? A I have it here (producing a letter).

10 Q Is that the letter you received? A That is the letter. Shall I read it?

Q You said that Mr. Zakutynski told you he was not represented by Ely & Ely, although you had received a letter from them. You asked him, you said, to write that down? A I did.

Q Was that written down? A He said for me—

Q Was it written down? A Yes.

20 Q Was it signed by Mr. Zakutynski? A It was.

Q Was it read to and explained to him? A Yes.

Q Have you got that with you here? A I have.

Q I ask you if that is it (indicating)? A That is it, and there is his signature there.

Q That is dated January 8, 1927? A Yes.

Mr. McIntyre: Our case is closed.

30 *By the Court.*

Q Who wrote the body of this note? A I did, at his request, because he wanted a real settlement.

Q When did you receive this letter from Ely & Ely? A I can't tell you. It was long before that. I hadn't moved.

Mr. Ely: December 14th was my letter.

40 The Court: This letter of January 13, 1927, addressed to Miss Livesey, signed by

Mary Livesey, re-direct.

your client Mr. Zakutynski, is that his acknowledgement of the check for \$200?

Mr. Ely: I presume it is.

The Witness: Yes.

Q When did you say, Miss Livesey, that you inspected the Rutherford job? A Early in January, I think I went to the bank on the 18th of January. It was between the time I signed the check and that, that I saw the condition of the place.

10

Q Have you the check here? A No.

Mr. McIntyre: It just says, "Endorsement stricken out." There is a letter from the bank.

Q You don't remember the date you issued the check? A No. I could get it from my stubs. I haven't got my check book with me.

20

Mr. Ely: I think that is the envelope. It says January 11th.

The Court: The check was cashed?

Mr. Ely: It was cashed, but due to being endorsed "Received Payment in Full," and Mr. Zakutynski scratching that off, that made an alteration in the check, and it was returned.

30

The Court: Did he return the \$200?

Mr. Ely: Oh, yes. He thought if he could scratch out "Received Payment in Full" it would be a payment on account; so he did that. He gave back the \$200.

(Summation by counsel.)

The Court: The Court is inclined to think that it would be better satisfied to go

40

Certificates of Judge and Stenographer.

and see the job. I can arranged it some day this week, if counsel want to do that. I will reserve decision.

10 (Pursuant to arrangement with counsel, the Court fixed Wednesday, June 15, 1927, at 3 o'clock P. M., for an inspection of the premises at No. 200 Jackson avenue, Rutherford, New Jersey.)

20 I, JOSEPH A. FURREY, Acting Judge of the District Court of the Fourth Judicial District of the County of Bergen, at Ridgewood, New Jersey, do hereby certify that the foregoing is a transcript of the evidence given upon the trial of the case of William Zakutynski *v.* Mary Livesey, on June 13, 1926, as certified by H. Richard Woebse, the stenographer appointed to report such evidence stenographically.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, this 30th day of June, 1927.

(L. S.)

JOS. A. FURREY.

30 I, H. RICHARD WOEBSE, a stenographer duly appointed to report stenographically the evidence given before the District Court of the Fourth Judicial District of the County of Bergen, at Ridgewood, New Jersey, do hereby certify that the foregoing is a true and correct transcript of the evidence given on the 13th day of June, 1927, before Hon. Joseph A. Furrey, Acting Judge of the District Court of the Fourth Judicial Court of Bergen County, in said matter.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, this 29th day of June, 1927.

(L. S.)

H. RICHARD WOEBSE.

40

Exhibit P. 1.

EXHIBIT P 1.

LEMORT BROS.

Hardware, Paints, Oils, Stoves & House
Furnishings.

Paterson & Boiling Springs Aves.

East Rutherford, N. J., 10/25-6

10

M

No. 200 Jackson Ave Ruth

1 Gal Gloss White Paint	4.25
1 " #363 Paint	4.00
1/2 pt 467 " .....	.35
1 Brush	1.75
1 qt Linseed Oil .....	.35

\$10.70

20

Balance	1.65
12 H. T. Roses	4.80
24 Climbing Roses	9.60

\$16.05

Oct 25/1926

30

40

Exhibit P. 1.

INTERBOROUGH COAL & SUPPLY
COMPANY

Nos. 2-14 Paterson Ave., opposite Carlstadt
Station

No. 14183

East Rutherford, N. J., Nov. 1, 1926

Sold to Zakurnsky

Address 200 Jackson Ave. R.

Cloth

2 Cement2.00

Total2.00

Driver J. G.

Terms C O D

Paid George

Keep This Ticket

Driveway's Used at Purchasers Risk

Bills due when presented. Interest after 30 days
2 per cent if paid in 10 days—net after 10 days.

C. V. SOLEY COMPANY

Incorporated

Sash—Glass—Doors—Screens

Rutherford, N. J., October 30, 1926

Sold to B. W. Zakutynski,

		Price	Amount	Daily Total	Credits
Oct. 18	6 Pcs. 4x4 12-0 Fir		5.76		
	450 Lin. Ft. 1x3 Pine		16.88		
	7 Pcs. 2x4x14-0 Fir		3.27		
	10 " 1x2x10-0 Spruce Furring Lath		1.00	26.91	

(Stamp) Paid C. V. Soley Co.

Exhibit P. 1.

Oct. 12, 1926 I cemented the flats—put up a fence for roses—planted roses and painted the garage on 200 Jackson Ave. Ruth.

Materials for job.

Cement—sand—ashes	\$5.00	
Lumber for sketch for roses.....	26.91	10
roses cost.	16.05	
Paint for garage	10.70	

—————
\$58.66 total

Labor	\$58.66 total	
16 hrs. to paint the garage	\$16.00	
4 hrs. to cement the flats	4.00	
27 hrs. to make rose sketch & plant the roses	27.34	

—————
47 hrs.106.00 20

47 hrs.

30

40

*Exhibit P. 2.***EXHIBIT P. 2.**

LEMORT BROS.

Hardware, Paints, Oils, Stoves & House
Furnishings.

Paterson & Boiling Springs Aves.

10

East Rutherford, N. J., 9/13 1926

M
No. 539 Central Ave

	Ru.
2— $\frac{1}{2}$ x4 Galv Nipple	.20
2— $\frac{1}{2}$ x6	.30
2— $\frac{3}{4}$ x5 $\frac{1}{2}$	.34
4— $\frac{3}{4}$ Gal Elb	.40
1— $\frac{1}{2}$ Plug	.05
20 1— $\frac{1}{2}$ H E Bibb	1.15
2 pc 8 $\frac{1}{2}$ x $\frac{3}{4}$ |	
2 " 23x $\frac{1}{2}$ |	1.00
1 " 17x $\frac{3}{4}$ |	
Threading	
	3.44

30

40

Exhibit P. 2.

LEMORT BROS.

Hardware, Paints, Oils, Stoves & House
Furnishings.

Paterson & Boiling Springs Aves.

East Rutherford, N. J., 9/2 1926

M.....		10
No. 539 Central Ave.		
2 pc 1/2"x7 ft Galv Pip	1.29	
1 length 3/4 Galv Pipe	2.20	
1 pc 3/4x3'6" Galv Ppe.	.49	
1 pc 1/2x3'6" |		
1 pc 1/2x2'0" |	.58	
1—1/2x45" elbow	.10	
1 #2 S S R P Shovel	1.60	
x1 Steel tape 14 eosol.	2.25	
x6 Hooks & Eyes	.08	20
x4 ft 3" Galv leader	.52	
1 Pack 00 Steel wool	.10	
	<hr/>	
	9.21	

Material for pump and outfit.

pump cost.	84.00	
outfit cost	12.64	30
	<hr/>	
	\$96.64	

Labor 37 hrs.

Helper gets. \$24.36

plummer gets. \$37.00

Labor cost.	\$61.36
material cost.	96.64
	<hr/>
	\$158.00 total

37 hrs.

40

Exhibit P. 3.

EXHIBIT P. 3.

	Material on the garage cost	\$372.00
	One model "B" Garage 16'6x18'6.	
	Foundation and floor material	46.00
		<hr/>
10		\$418.00
	Labor cost \$107.	\$107.00
	Labor 66 hrs.	418.00
		<hr/>
		\$525.00 total
	Helper gets \$.65 an hr. works 66 hrs.	43.00
	Carpenter gets \$1.00 an hrs. 64 hrs.	64.00
		<hr/>
	price for labor	\$107.00
	\$418.00 material for garage.	
	107.00 cost of labor.	
20		<hr/>
	\$525.00 total cost.	
	66 hrs.	

East Rutherford, N. J., Jan. 1 1927

Mr. B. W. Zakutynski,
Job 200 Jackson ave

30 To WILLIAM TUMA, Dr.
Truckman

Telephone: 4448 144 Orchard Street

1926

	Oct. 4. 11½ Hours truck crtg dirt @ 300	4.50
	1 load ashes. @ 750	7.50
	7 2 loads sand 10 yds @ 175.	17.50
	12. 11½ Hours truck crtg dirt @ 300	4.50
	Nov 1 2 loads dirt for filling @ 600	12.00
		<hr/>
40		\$46.00

Exhibit P. 3.

Branch Office Sales Ticket

HARRIS BROTHERS COMPANY

Knickerbocker Road and Grant Avenue
Cresskill, New Jersey

All orders taken subject to delays from unavoidable causes, etc. 10

Charge to Godfrey,
B. W. Zukitynski
539 Central Ave.
Town Closter N. J.

This order is No. 56613
9-25-26

PLEASE REMEMBER:

In referring to your purchase, always mention this number. 20

Form	Amount
Remittance	\$40.00

Catalog	Lot. No.	Quantity	Articles	Price	Total
	38G-50	1	Model "B" Garage 16-6x18-6 Green Roofing Swinging Doors		372.00
			Terms: \$50.00 Before Del'y Balance at \$35.00 per month NO ERECTION B. W. Zakutyński.		30

Exhibit P. 3.

THIS AGREEMENT Made and Entered into this 24th day of September A. D. 1926, by and between HARRIS BROTHERS CO., a corporation, party of the First part, hereinafter called the seller, and B. W. Zukitynski of the City or Town of 539 Central Ave. Closter, County of....

10 , and State of New Jersey, party of the Second part, hereinafter called the purchaser

WITNESSETH

FIRST. The seller agrees to sell and purchaser agrees to purchase the following described property to-wit One Model "B" Garage 16'6x18'6

20 SECOND. The purchaser agrees to pay to the seller the sum of Three Hundred Seventy-Two Dollars (\$372.00) in the following manner: \$40.00 Cash with order, receipt of which is hereby acknowledged, Check for \$10.00 to be mailed; the balance \$322.00 as evidenced by promissory note of even date hereof, payable in ten parts, nine payments being at the rate of \$35.00 and the tenth and last payment at \$7.00, beginning November 15th, 1926, and thereafter on the fifteenth day of each succeeding month until paid.

30

40

Exhibit P. 4.

EXHIBIT P. 4.

CASH SALES: Julius Roehrs Co.

Rutherford N. J., Sept 18 1926

858

Salesman Cash	Amount \$.....	10
2 Linden lare	\$8.00	
Paid		
Gus		

**INTERBOROUGH COAL & SUPPLY
COMPANY**

Nos. 2-14 Paterson Ave., opposite
Carlstad Station 20

No. 12890 East Rutherford, N. J., Sept 1926

Sold to Mrs

Address 200 Jackson ave R

6 Cement P	4.80
15 Pipe 3"	5.40
31 Fittings els T.	2.88

Total	13.08
-------------	-------

Terms C. O. D. 30

KEEP THIS TICKET
Driveway's Used at Purchasers Risk

Exhibit P. 4.

East Rutherford, N. J. 192

M.
200 Jackson

To WILLIAM TUMA, Dr.
Truckman

10 Telephone: 4448 144 Orchard Street
2 load sand @ 525 10.50
1 load dirt 150 1.50

12.00

Paid 12.00
Mrs. Tuma

20 Materials cost to fix the pipe leaders—plant
hedge and shrubs—put top soil—ingrade and seed
lawn

top soil. \$ 5.00
pipe leaders 5.40
hedge and shrubs 23.00
grass seeds 1.40

\$34.80

cut tree down 7.00

30 fix the washpole 5.00

\$46.80 total

Labor 71 hrs.

Helper gets. \$47.20 47.20

Gardener gets. 71.00 71.00

46.80 total

\$165.00

Labor 71 hrs.

40

Exhibit P. 5.

EXHIBIT P. 5.

Sept. 27, 1926

1 door bell	\$ 2.50	
1 furnace clock	2.25	
6 porcelain stove handles 15c each. ....	.90	
1-25 transformer .....	.65	10
4 length Gal. pipe with coupling 2½"	10.00	
	<hr/>	
	\$16.60	
electrician	30.00	
glass to front door .....	.41	
faucet to boiler	1.65	
	<hr/>	
	\$48.66	
lock for coal bin .....	.90	
part to electric meter .....	.90	20
	<hr/>	
	\$50.46	

East Rutherford, N. J. Dec. 11 1926

Mrs. Livsey

Moonachie Ave Moonachie N J

EAST RUTHERFORD ELECTRIC CO.

Electrical Contractors 30

House Wiring and Fixtures

Repairing 32 HERMAN ST.

Jobbing Given Prompt Attention

Wiring garage in Rutherford as

per Contract\$30.00

E. R. Electric Co.

S. Marunaro Prop.

Exhibit P. 5.

WILLIAM BLACK & CO.

Wholesale Retail Hardware
 Mill Supplies Auto Accessories Paints and Oils
 Furniture House Furnishings

38 Park Ave.

10 All quotations subject to strikes & other contingencies beyond our control.

Rutherford, N. J., September 27, 1926

Sold to B. M. Zakutynski 200 Jackson Avenue,

Terms..... Rutherford, New Jersey
 1926

Sept. 27	1 Door bell	2.50
	1 Furnace clock	2.25
20	6 Porcelain stove handles 15c .....	.90
	1-25 Transformer .....	.65
	4 Lengths Galv pipe 36" threaded with coupling 2 1/2"	10.00
	6 Fuses 5c .....	.30

16.60

30 Received Payment
 September 27, 1926
 M. Walsh
 Wm. Black & Company

Exhibit P. 6.

EXHIBIT P. 6

Errors must be noted and corrected on receipt of material

COOPER LUMBER COMPANY
Rutherford and Lyndhurst, N. J.

10

5859 Date, Sept 9 1926
 Delivered to Willie
 For 200 Jackson Ave Rfd
 Driver John Loaded by Rudy
 12 pcs 2x4-8 FIR 3.84
 24 " 1x10-12 NCKDSL.12.00

 15.84

C. O. D.
KEEP THIS TICKET

20

Errors must be noted and corrected on receipt of material

COOPER LUMBER COMPANY
Rutherford and Lyndhurst, N. J.

9517 Date 10/30/1926
 Delivered to Cash 30
 For
 Driver Self Loaded by Bob
 10 1 1x10 WP #1 1.25

Paid
KEEP THIS TICKET

40

Exhibit P. 6.

Errors must be noted and corrected on receipt of material

COOPER LUMBER COMPANY
Rutherford and Lyndhurst, N. J.

5878 Date, Sept 10 1926

10 Delivered to Cash
For
Driver Loaded by Rudy.
42 1 ft 1x2 Spr.53
Paid

KEEP THIS TICKET

INTERBOROUGH COAL & SUPPLY CO.
Nos. 2-14 Paterson Ave., opposite Carlstadt
Station

20

No. 13262 East Rutherford, N. J., Sept. 23 1926

Sold to E W Zakuinsky

Address 200 Jackson Ave. R.

10 Cement P. 8.00

Total 8.00

Driver JG

Terms COD

KEEP THIS TICKET

30

Driveway's Used at Purchasers Risk

40

Exhibit P. 6.

INTERBOROUGH SUPPLY COMPANY

Nos. 2-14 Paterson Ave., opposite Carlstadt
Station

No. 13748 East Rutherford, N. J., Oct 14 1926

Sold to Cash.

Address 200 Jackson Ave. R.

10

10 Cement P. 8.00

Total 8.00

Driver J.G.

Terms COD

KEEP THIS TICKET

Driveway's Used at Purchasers Risk

INTERBOROUGH COAL & SUPPLY
COMPANY

20

Nos. 2-14 Paterson Ave., opposite Carlstadt
Station

No. 13093 East Rutherford, N. J., Sept 18 1926

Sold to Zakuinski

Address 539 Central Ave. C.

12 Cement p. 9.60

Total 9.60

30

Driver J.G.

Terms COD

KEEP THIS TICKET

Driveway's Used at Purchasers Risk

Exhibit P. 6.

Sept. 3, 1926 I started the job. on 200 Jackson Ave. Rutherford.

	38 bags of cement	30.40
	2 loads of sand	10.50
	2 bags of lime	2.30
		<hr/>
10		\$43.20
	Lumber for coal bin	17.62
		<hr/>
		\$60.82 total

44 hrs. labor.

	Masoner gets. \$44. for 44 hrs.	\$ 44.00
	Helper gets. \$31.18 for 44 hrs.	31.18
	Carpenter gets. \$44. for 44 hrs.	44.00
		<hr/>
		\$119.18
20		60.82
		<hr/>
		\$180.00

44 hrs. labor.

30

40

Exhibit P. 7.

EXHIBIT P. 7.

LEMORT BROS.

Hardware, Paints, Oils, Stoves & House
Furnishings.

Paterson & Boiling Springs Aves.

East Rutherford, N. J., 8/20 1926 10

M.		
No. 539 Central Ave		
Del Moonachie Ave		
2 ps 1/2" Galv Pipe Threaded	|.....
47" long.	|.....
2 pc 1/2"x20" in	|.....	1.25
2 Lgth 1/2" Galv Pipe	.....	3.40
2 Lgth 1" Blk "	.....	4.80
x2—3/4 Couplings16
x1—1/2" Tee10
x1—1" R. J. Bib	1.00
x4—1/2" Couplings20
		\$10.91
Amnt CS		
Store at House		

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Exhibit P. 7.

LEMORT BROS.

Hardware, Paints, Oils, Stoves & House
Furnishings.

Paterson & Boiling Springs Aves.

East Rutherford, N. J., 8/23 1926

10	M	
	No. 539 Central Ave.	
	x6— $\frac{3}{4}$ Elbs .....	.60
	x1— $\frac{3}{4}$ Tee .....	.12
	x1—1" Tee .....	.14
	12"x $\frac{3}{4}$ Galv Pipe | .....	
	3'4"x $\frac{3}{4}$ " " | .....	
	14"x $\frac{3}{4}$" " " | .....	
	14"x $\frac{1}{2}$" " " | .....	
	Threaded. | .....	1.00
20		\$1.86

W. J. CLARK & CO.

21 Park Avenue

Plumbing Rutherford, N. J., Sept 26 1926 Steam
Tinning Sold to B. W. Zakutzniski Hot Water
and Moonachie Ave and
30 Gas Fitting Moonachie Hot Air Heating

All accounts rendered monthly. :: Kindly make
remittance during current month.

1 Sink & Bath tub	46.00
Bath & sink fixtures	7.25
Pipe & cutting	4.50
	\$57.75

Paid W J Clark & Co

Exhibit P. 7.

Sept. 3, 1926 I made all the figures of the sink—
bathtub—pipe fitting out.

1 sink and bathtub	\$ 46.00	
bath and sink fixtures	7.25	
pipe and cutting	4.50	
pipe and outfit	12.77	
	<hr/>	10
	\$ 70.52 total	

Labor 54 hrs.

To open the trench cost	35.48	
pipe and fitting work	54.00	
	<hr/>	
	\$ 89.48	
	70.52	
	<hr/>	
	\$160.00	
\$25. gas range included with the 54 hrs.		20

OPINION OF SUPREME COURT.

Filed May 3, 1928.

NEW JERSEY SUPREME COURT.

No. 417, January Term, 1928.

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<p>WILLIAM ZAKUTYNSKI, <i>Plaintiff-Appellee,</i> <i>vs.</i> MARY LIVESE, <i>Defendant-Appellant.</i></p>	}
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Appeal from District Court, Fourth Judicial District, Bergen County.

Submitted January 27, 1928; decided May 3, 1928.

Before Justices Parker, Minturn and Campbell.

For appellant, Charles W. Broadhurst.

For appellee, J. S. T. Stranahan Ely.

Per Curiam:

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This was an action for labor and materials furnished and delivered for various prices of work performed by appellee for appellant.

The total demand was \$608.26, of which all above \$500 was waived. There was a counter-claim for \$495 for defective work. The judgment is in favor of appellee for \$364.95 being the amount of his claim of \$500 less \$135.05 under appellant's counter-claim.

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The cause was heard and determined by the Judge of the District Court sitting without a jury.

Opinion of Supreme Court.

We are asked to reverse and set aside this judgment:

1. Because it was error to admit into evidence certain bills against the appellee marked Exhibit P. 1 to P. 7, for the reasons:

(a) They were hearsay.

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(b) The prices charged were not proven to be reasonable.

(c) Because being in excess of \$500 the transaction is in violation of the statute of frauds.

(d) They are irrelevant, immaterial and incompetent.

We think the admission of these bills was not error. The mere introduction of them with nothing more would have been error and would have transgressed the rule against hearsay and self serving evidence, but here they were used much as a book or memorandum of account, the items testified to having been purchased and used in and about the work of appellant and that the prices charged were reasonable. This we think took them out of the prohibited rule. The statute of frauds was not violated, because and if for no other reason none of the bills amounted to the sum of \$500.

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2. Because there was no legal evidence to support the judgment. We find, however, that there was legal evidence supporting it.

3. Because certain evidence respecting the breaking of a sidewalk was hearsay and the Court erred in refusing to strike it out.

No doubt this evidence was based upon hearsay, but it was all brought out by the attorney for the appellant upon cross examination and

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Opinion of Supreme Court.

while notwithstanding this it very properly should have been stricken out by the trial judge yet we do not find it to have been error prejudicial to appellant not to have done so.

10 4. Because the Court erred in inspecting only one of the premises after electing to inspect the entire work.

This does not appear to be so. The trial judge spoke of it as "the job" referring to the garage on Jackson avenue, Rutherford. That was inspected and furthermore there is nothing showing that the balance of the work was not inspected.

The judgment below is affirmed.

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RULE OF AFFIRMANCE.

Filed May 7, 1928.

NEW JERSEY SUPREME COURT.

No. 417, January Term, 1928.

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WILLIAM ZAKUTYNSKI, <i>Plaintiff-Appellee,</i> <i>vs.</i> MARY LIVESE, <i>Defendant-Appellant.</i>	}	<i>On Appeal.</i> <i>Rule on</i> <i>Affirmance.</i>
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This cause having been duly submitted on brief at the present term of this court by J. S. T. Stranahan Ely, of counsel for plaintiff-appellee, and Charles Broadhurst, of counsel for the defendant-appellant, and the Court having considered the same, and finding no error in the record or proceedings in the District Court of the Fourth Judicial District of the County of Bergen;

It is thereupon ORDERED and ADJUDGED that the judgment of the District Court of the Fourth Judicial District of the County of Bergen, be affirmed with costs; and that the record be remitted to the District Court of the Fourth Judicial District of the County of Bergen, to be proceeded with in accordance with this judgment and the practice of said court.

Entered May 7, 1928.

On motion of

J. S. T. STRANAHAN ELY,
 Attorney for Plaintiff-Appellee.

A true copy. FRED L. BLOODGOOD,
 Clerk.

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NOTICE AND GROUNDS OF APPEAL.

Filed May 19, 1928.

NEW JERSEY SUPREME COURT.

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WILLIAM ZAKUTYNSKI,
*Plaintiff-Respondent.**vs.*MARY LIVESE,
*Defendant-Appellant.**In Tort.**On Appeal
from
Supreme
Court.**Notice and
Grounds of
Appeal.*

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To J. S. T. Stranahan Ely, Esq., attorney of
plaintiff-respondent.

SIR:

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

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1. The Supreme Court erred in refusing to reverse the judgment of the District Court of the Fourth Judicial District of the County of Bergen for one or more of the reasons advanced before the Supreme Court for such reversal.

Dated May 12, 1928.

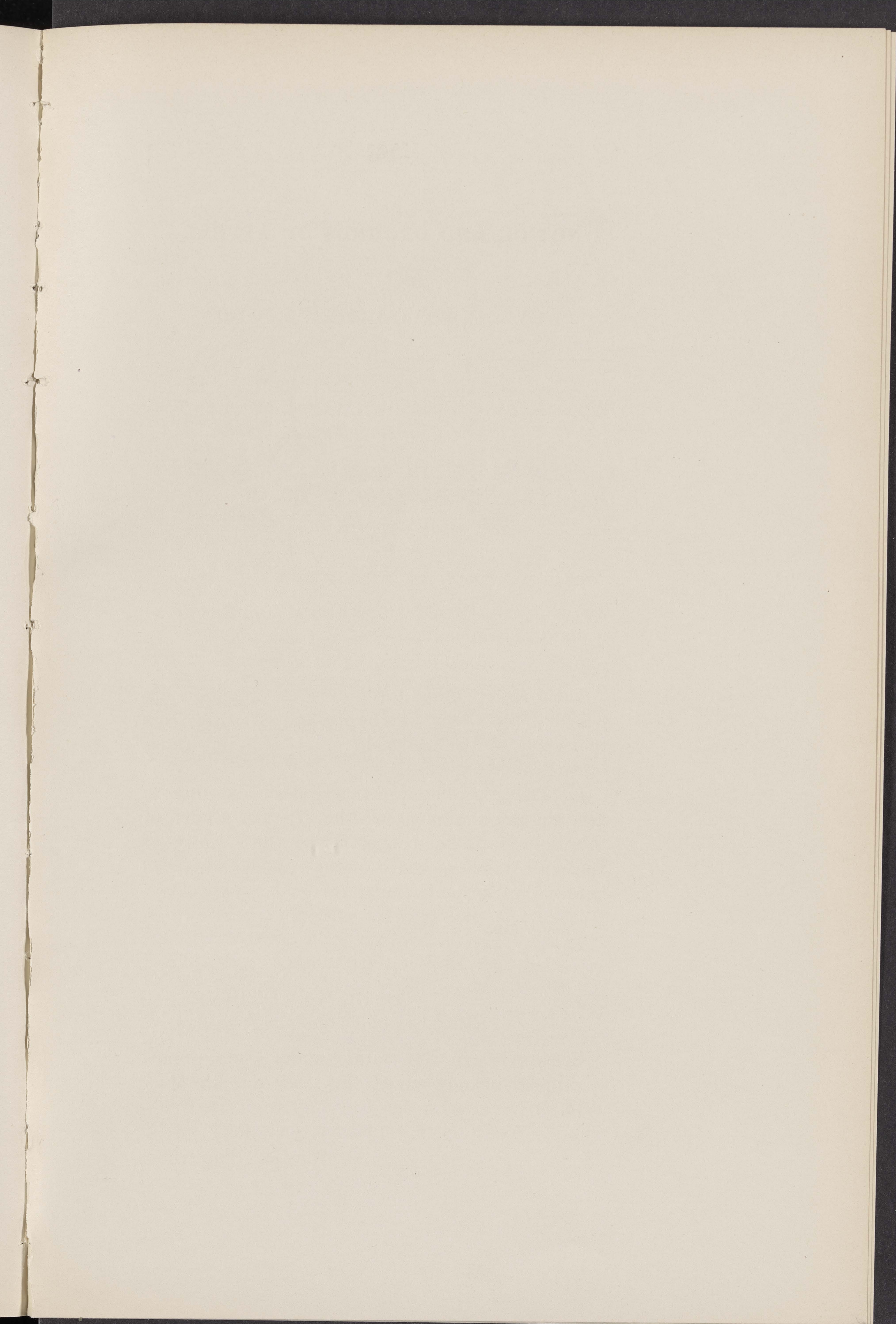
Respectfully yours,

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

Service of copy of within notice and grounds of appeal acknowledged this 15th day of May, 1928.

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J. S. T. STRANAHAN ELY,
Attorney of Plaintiff.



5381.10

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

WILLIAM ZAKUTYNSKI, <i>Plaintiff-Appellee,</i> <i>vs.</i> MARY LIVESE, <i>Defendant-Appellant.</i>	}	<i>Action at Law. On Appeal from Supreme Court.</i>
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BRIEF OF COLLINS & CORBIN IN BEHALF OF DEFENDANT-APPELLANT.

(1)

Statement of the Case.

This appeal brings before this Court for review a judgment entered in the District Court of the Fourth Judicial District of the County of Bergen, allowing the plaintiff-appellee (hereinafter called the plaintiff), damages on his direct case and the defendant-appellant (hereinafter called the defendant), damages on the recoupment.

Plaintiff sued the defendant on the common counts, annexing to the state of demand a schedule and copy of book account in the sum of \$608.26, waving excess of any amount over \$500 (pp. 2 and 3). Defendant filed a recoupment claiming \$495 by way of set-off (p. 5). Plaintiff claimed balance of \$608.26 was due on account of contract for work, labor and materials furnished to the defendant at the defendant's request and for repairs to the defendant's property at 200 Jackson avenue, Rutherford, N. J., and at 258 Moonachie avenue, Moonachie Bergen County, N. J. (pp. 13-19). Defendant claimed defects in the work done and that the materials furnished were of inferior quality, stating that it would

cost \$495 to remedy the defects in the work and furnish proper materials.

The case was tried before the Court without a jury and after the testimony was in the Court reserved decision, stating that before rendering the same the work should be inspected. The Court viewed the premises at 200 Jackson avenue only, and rendered judgment in favor of the plaintiff in the sum of \$364.95, allowing the defendant \$135.05 on the recoupment (p. 89).

Specifications of Determinations and Directions Appealed From.

Of the specifications of determinations and directions appealed from, numbers 1 and 3 will be argued together and likewise, numbers 4, 5, 7, 8 and 9, and number 10 separately. Numbers 2 and 6 will not be argued.

(3)

BRIEF OF THE ARGUMENT.

I.

The Trial Judge erred in the admission of evidence.

(a)

In Admitting Exhibits P. 1 to P. 7.

Plaintiff sued on the common counts (pp. 2 and 3), and testified that he did some work for defendant at her request and purchased certain materials in his own name, to be used in the work (pp. 13, 14 and 15). Evidence by way of bills for these materials (Exhibits P. 1 to P. 7 inclusive, pp. 79-97), was received over objection

(pp. 15-19). We urge that these bills were improperly received, because the plaintiff testified (p. 15, lines 9-20), that the bills for materials used on these particular jobs were against him and all the bills would come to him in his name. Inspection of the exhibits does not indicate that these bills were rendered to William Zakutynski, plaintiff, and hence they are not corroborative of his testimony, upon which theory in part they were received.

The objection made at the trial and herein repeated is that these bills were:

- (1) Hearsay.
- (2) Not proven to be reasonable.
- (3) Admitted without proper foundation for their admissibility being laid.
- (4) Irrelevant, immaterial and incompetent.

(1) These bills were hearsay, because the probative force depends in whole or in part on the competency and credibility of some person other than the witness by whom it is sought to produce it. Proof of the contents of these bills depends for their probative force not upon the plaintiff, but upon those who render the bills. Under the title "Evidence" 22 C. J. on written hearsay, beginning at page 207, we find:

"A statement otherwise objectionable as hearsay, does not become competent, because it has been reduced to writing."

Continuing on page 209:

"Where the form is mercantile, as in the case of accounts of sales or of work, general invoices, inventories, *receipts*, commerce reports, books of account, and where the form is more fugitive, as in the case of letters."

(2) The bills were not proven to be reasonable. Upon this feature of the evidence the Court stated (p. 18, line 29):

“The Court will take the view that if they (the bills) were unreasonable, he (plaintiff) would have objected to them and not paid for them.”

after plaintiff had testified (p. 18, lines 19-20), that the prices paid were reasonable prices. Reasonable price has been defined in *Acebal v. Levy*, 10 Bing. 376, 383; 3 L. J. C. 984; Moore and S. 217, 25 E. C. L. 180, as follows:

“Reasonable price in contracts of sale is such price as the jury, upon the trial of the cause shall under the circumstances decide to be reasonable.”

Here the Court as a matter of law held the prices to be reasonable. This we urge was erroneous, inasmuch as it was a jury question.

(3) The contract sued on was oral; plaintiff testified that there was no written agreement at all (p. 14, lines 35-36). Plaintiff endeavors to charge defendant with his debt without any written agreement or promise as is required by the Statute of Frauds where the debt is in the amount of \$500 or over.

(4) For the reasons set forth under argument “a” *supra*, the bills were irrelevant, immaterial and incompetent.

(b)

In Admitting Hearsay Evidence on the Part of the Plaintiff.

We quote testimony verbatim (p. 22, line 36; p. 23, line 29), which was received by the Court as evidence, and this we urge to be error:

“A I never built the sidewalk, just the walk from the house. The City built that.

I built the walk from the house to the gutter.

“Q Was that built in a good workman-like manner? A Yes.

Q When did you last see this sidewalk that you built? A I seen it about January, When I came to collect the money.

“Q January, 1927? A Yes.

“Q What was the condition of the sidewalk at that time? A The sidewalk was cracked up.

“Q When did you build that sidewalk. A I built that sidewalk in September.

“Q And in January it was all cracked up? A Yes.

“Q Can you tell us why it was cracked up? A Yes.

“Q Why? A Miss Livesey moved, and a big heavy truck passed over it.

“Q Did you see the truck pass over? A I never seen it. I could prove it through the driver.

“Q Where did the truck pass over the sidewalk? A Passed on the crossway.

“Q Did you see the truck pass over? A No, sir.

“Mr. McIntyre: I ask that that part of his testimony be stricken out, about the truck passing over.

“The Court: I will allow it.

“Mr. McIntyre: Exception.”

In the case of *Hartman v. Dobar*, 51 Vroom, p. 250, which was a civil suit for damages for assault and battery, plaintiff claimed loss of profits from a certain contract, because of the injuries received. In the opinion of MINTURN J., at page 251, the Court says:

“The plaintiff’s testimony that he had a contract for the Delaware street job, upon which he would realize a profit of \$30 or \$35 was shown upon cross examination to be incorrect. The fact was, that he had merely submitted a bid for the work, which had not been accepted and that he was not, therefore,

in a position to claim profit on it. The defense moved to strike out this testimony upon that ground at the first opportunity after it was developed upon cross examination, and the refusal of the Court to do so, was injurious error to the defendant; for we must assume that the jury under the Court's refusal to strike out, accepted this testimony as furnishing a proper element of damage and included the estimated amount of profit in their verdict."

Similarly in the case of *sub judice*, the Court in refusing to strike out this testimony, must have accepted it as furnishing a proper element in determining its judgment. That the sidewalk was all cracked up is not denied, but the Court in allowing defendant only \$135.05 damages on the recoupment instead of \$495 as claimed, must be assumed to have considered that this condition of the sidewalk was not due to inferior materials and an unworkmanlike job, but due to a truck of the defendant passing over this sidewalk, of which latter assertion there was no legal evidence. The plaintiff admitted that the sidewalk was cracked up and in the absence of the testimony, which we urge the Court erroneously received the Court should have considered this condition of the sidewalk as a proper element of damage and have included the same in its verdict on the recoupment.

II.

There was no legal evidence to support the judgment.

The judgment of the Court is stated as follows:

"The Court finds a valid claim of the defendant in her set-off and counterclaim as against the claim of \$500 of the plaintiff and allows the same to the extent of \$135.05

and renders judgment in favor of the plaintiff in the sum of \$364.95 and directs the clerk to enter the same accordingly" (pp. 8-9).

This was an action on contract (pp. 2 and 3), and to support the Court's judgment it was necessary that there should be certain and definite evidence adduced. Plaintiff insisted on the contract price (pp. 10-19). Defendant's evidence was to the effect that it would require the sum of \$495 to properly complete the work (pp. 48-61). We quote from 17 C. J. under the title "Damages," last half of Paragraph 90, Subdivision 4, at page 758:

"However, where actual pecuniary damages are sought, there must be evidence of their existence and extent, and some data from which they may be computed. No substantial recovery may be based on mere guesswork or inference; without evidence of facts, circumstances, and data justifying an inference that the damages awarded are just and reasonable compensation for the injury suffered, and when compensatory damages are susceptible of proof with approximate accuracy and may be measured with some degree of certainty they must be so proved even in actions of tort."

And again in C. J., Vol. 9, under the title, "Building and Construction Contracts" Par. 230, at page 891, we find:

"In accordance with the rules applicable in other civil actions, the verdict or findings must be based on and supported by the evidence before the jury, or court, if the case is tried without a jury; must find all facts essential to a recovery or grounds of defense."

Further, in the same volume under the same title, Par. 235, at page 894, we note:

"The contract must be sufficiently certain and definite for the jury to understand its

provisions, and the damages to be recovered for the breach must be shown with reasonable certainty and not left to speculation or conjecture.”

There is no evidence whatsoever in the case to support the finding that the plaintiff is entitled to \$364.95 on its claim of \$500 after allowing the defendant \$135.05 on the recoupment. The judgment is clearly speculative and conjectural, arrived at arbitrarily without definite or certain evidence to support the same.

Nor can the judgment be said to be based on the doctrine of substantial performance. What constitutes substantial performance is laid down in C. J. Vol. 9, under the title “Building and Construction Contracts,” Paragraph 79, at page 741, as follows:

“There is a substantial performance where a variance from the specifications of the contract is inadvertent or unintentional and unimportant, and is one by which the building or structure as a whole is not impaired; where the building or structure is actually used after it is erected for its intended purpose; where the defects can be remedied by the owner without any great expenditure; and without material damage to other parts of the structure, and may without injustice be compensated for by deductions from the contract price.”

The doctrine of substantial performance as understood in our State and as decided in the case of *Feeney v. Bardsley*, reported in 37 Vroom, at page 239, lays down the rule that substantial performance entitled the contractor to the contract price, where the work is substantially performed, less a fair allowance to make good the defects in the performance of the contract, even though the contractor has failed to complete the work in some minor particulars.

Again in the opinion of MINTURN *J.*, in the case of *Braunworth v. Verona*, reported in 94, N. J. L., at page 194, we note:

“There was testimony in the case from which a jury might reasonably infer the substantial completion of the contract. As a fact, the plant as plaintiff left it and at the time of the trial, and for almost two years, was in practical operation without any extensive expenditure upon it by the borough, and if any expenditure were necessary to complete it in any contract detail, quite apparently the item involved in the estimation of a jury might not be said to materially diminish the practical efficiency or completion of the plant, and the cost of such detail could easily have been estimated by the jury under the testimony.

“Under our cases this situation presented a jury question, as to whether there had been a substantial completion of the work, due allowance being made by the jury for the failure of plaintiff to make good in such details of the contract as were evidenced by proper proof. *Feeny v. Bardsley*, 66 N. J. L. 239; *Dyer v. Lintz*, 76 *Id.* 204; *Jersey City v. Flynn*, 74 N. J. L. Eq. 104; *Anderson v. Odd Fellows Assn.*, 84 N. J. L. 176.”

The foregoing and an examination of the cases cited, unequivocally indicate that substantial performance contemplates completion of the contract, excepting some minor and unimportant details.

Again, may we quote from *Crouch, et al. v. Gutman*, reported in 31 N. E., at page 271, from the opinion of BRADLEY, *J.*, at page 274, as follows:

“The cost of completion of work, by remedying defects or supplying omissions in it to meet the requirement of a contract, may be so great as to preclude the conclusion of substantial performance. In *Flaherty v. Miner*, 123 N. Y. 382, 25 N. E. Rep. 418, where the

damages allowed were upwards of 17 per cent. of the contract price, the court suggested (without deciding) that if it had appeared 'without dispute that such a substantial portion of the work remained undone, and objection had been properly taken, it may well be that the plaintiff could not have recovered upon the theory of a substantial performance.' ”

As against the claim for \$500 the Court allowed \$135.05, which indeed is almost one-fourth of the amount claimed. Certainly this ratio would indicate that the Court did not find as a fact, that the work was completed except in some minor and unimportant details. Indeed, as stated in the opinion of BRADLEY, J., in the case of *Crouch v. Gutman*, cited *supra*, this ratio would seem to destroy the contract entirely. The Court in its judgment (p. 8), states as follows:

“The Court finds after giving due consideration to the testimony of the respective parties and their witnesses and making an inspection of the work and materials that there is some merit in the set-off and counterclaim but not to the extent that the exhibits produced by the defendant at the trial would indicate. The expert produced by the defendant gave estimates of figures which were very high considering the cost of material and labor to replace or repair the defective work.”

The defendant produced the only evidence of cost of material and labor to replace or repair the defective work and in the absence of any other testimony the defendant's evidence could not be legally rejected. The statement by the Court in its judgment warrants the assumption that the Court arrived at its decision by speculation and conjecture.

Now, the question as presented by the record is the same as if the plaintiff had alleged sub-

stantial instead of complete performance, because that is the basis upon which the plaintiff recovered. In this posture of affairs and since the Court rejected the defendant's evidence as to the cost of material and labor to replace or repair the defective work, then the burden was on the plaintiff to prove the cost of remedying the unsubstantial defects, where substantial performance was shown. In the case of *Spence v. Ham*, 57 N. E. 412, Syllabus No. 2, it is stated:

"In an action by a building contractor for a balance due him on the contract, the burden is on the plaintiff to prove the cost of remedying unsubstantial defects, where substantial performance is shown; and a finding, that plaintiff was entitled to judgment for the reason that defendant did not prove the cost of remedying such defects, was error."

VAN, J., writing the opinion in the *Spence v. Ham* case, cited *supra*, states:

"The referee found that the contract in question had been substantially performed by the plaintiff, yet he also found certain omissions and defects for which he allowed compensation to the defendant and certain other omissions and defects, for which he allowed no compensation, because the defendant did not prove what it would cost to complete the contract in this regard, thus upon the face of the report the question arises whether the burden was upon the contractor or the owner to show what it would cost to remedy the defects."

Continuing on page 414, the opinion states:

"The one who fails in fully performing and who invokes the doctrine of substantial performance must furnish the evidence to measure the compensation for the defects, that is, the substitute for his failure to do as he agreed. The referee, therefore, inadvertently committed an error of law when he found that the defendant would have been en-

titled to a greater allowance on account of defective performance, if he had proved and claimed what it would cost to complete the contract strictly according to its terms, as it was for the plaintiff, not for the defendant to furnish the evidence to measure the allowance for omissions and defects.”

And again on page 414, the opinion states:

“When the plaintiff shows that he performed his contract, he is entitled to judgment for the contract price; but when he shows that he performed his contract except that through inadvertence he omitted to do some unsubstantial things, he is not entitled to recover anything until he shows that the things omitted if worthy of any attention whatsoever, can be supplied for a comparatively small sum, in which event he can recover the contract price after deducting that sum.”

III.

The Trial Court erred in inspecting only one of the premises after electing to inspect the entire work.

Plaintiff claims for work and labor and for materials furnished to the defendant's premises at 200 Jackson avenue, Rutherford, N. J., and 258 Moonachie avenue, Moonachie, N. J. (p. 16, lines 38-40; p. 19, lines 34-36; p. 68, lines 39-40). Before rendering decision the Court decided “to go and see the job (p. 77, lines 39 and 40; p. 78, lines 1-3).” Notwithstanding, the Court decided to view the work he only inspected one of the premises, namely, 200 Jackson avenue, Rutherford, N. J. (p. 78, lines 8-12). We contend that the Court could not properly render its decision without inspecting *all* the work done and materials furnished as claimed by the plaintiff. With respect to an inspection or examination of

the premises by a jury as an aid in ascertaining the truth of any matter in dispute between the parties, under the Evidence Act, Comp. Stat. 2229, Par. 30, or to view any place to enable the jury to better understand the evidence given in the cause under the Jury Act, Comp. Stat., p. 2976, Pars. 31, 35, may we quote from the opinion of CHANCELLOR WALKER, deciding the case of *Garland v. Furst Store*, reported in 93 L. at p. 127 p. 135 and p. 136, as follows:

“Under this charge the jurors were permitted to arrive at a verdict upon their personal knowledge or experience, and to be, in effect, witnesses before their co-jurors. This does not touch the question of the evidential effect of an inspection or view of given premises, or whether or not in a case where an inspection or view is had the verdict may not be set aside as against the weight of the evidence or because there was no legal evidence given on the trial which would support it.

“The question being an open one in this state we are at liberty to adopt that principle which we think more consonant with reason and better calculated to serve the ends of justice.

“In *Seaverns v. Lischinski*, 181 Ill. 358, Chief Justice Cartwright observed that it had never been held in Illinois that a jury might return a verdict upon their own knowledge unsupported by other evidence, whether such knowledge was acquired in or out of court by a view or otherwise, and a verdict based exclusively on knowledge so acquired would be set aside for want of substantial evidence to support it; that a verdict unsupported by sworn testimony upon disputed facts has always been successfully challenged, whether there was a view or not, and if a jury had disregarded such evidence, or there was none which a reasonable person might believe and act upon, the verdict should be set aside.”

We respectfully submit, that the Court as is demonstrated by the authorities cited and quoted *supra*, erred and the judgment should therefore, be reversed.

IV.

Conclusion.

For these reasons we respectfully submit that the judgment of the District Court of the Fourth Judicial District of the County of Bergen should be reversed and a *venire de novo* awarded.

January Term, 1928.

CHARLES W. BROADHURST,
Of Counsel.

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

New Jersey Court of Errors and Appeals

WILLIAM ZAKUTYNSKI,
Plaintiff-Appellee,

vs.

MARY LIVESE,
Defendant-Appellant.

*On Appeal
from Affirm-
ance in New
Jersey Su-
preme Court.*

On Contract.

BRIEF OF PLAINTIFF-APPELLEE.

Preliminary Statement.

The plaintiff brought this action on the six common counts on contract to recover the sum of \$608.26, waiving the excess over \$500 in order to be within the jurisdiction of the District Court. The action was brought to recover compensation for the price and value of work done and materials for the same provided by the plaintiff to the defendant, at her request. This was made up of a number of repair jobs and some new work on premises owned by the defendant in Moonachie and in Rutherford.

The defendant called the plaintiff in June of 1926, and requested him to supply materials and labor for the installation of plumbing. This the plaintiff completed.

Later some plants and grading were ordered and installed.

Later an electric pump and bathtub and sink were installed.

Later a gas range was installed.

Next a new floor in the cellar and a coal bin were ordered and installed.

Leaders were then repaired.

Radiators were then repaired.

Later a sidewalk was ordered and installed.

A fence was ordered and built.

Finally a garage was ordered, built, painted and wired.

In other premises of the defendant, cellar walls and coal bin were constructed.

Several minor jobs were also ordered and done and during the course of the work payments were made on account, leaving always a balance due. The time of the transactions lasted from June of 1926, until late in the fall of the same year, at which time the balance due the plaintiff claimed by him, was the sum of \$608.26. After several demands for money had been made, the plaintiff received a check for \$200 in the mail marked "paid in full," However, plaintiff refused to accept it as a payment in full and this money was never received by the plaintiff.

The plaintiff demanded a written specification of defenses and none was filed. However, at the trial a recoupment in the sum of \$500 was filed by the defendant alleging defective work.

The trial judge heard all the evidence and reserved decision until he had visited and inspected each and every part of the work claimed defective by the defendant. After the trial, the trial judge visited the premises of the defendant and in the presence of all the witnesses, the litigants and the attorneys of both plaintiff and defendant, inspected the work and after having actually seen the work in controversy and the defects claimed, the trial judge rendered a verdict allowing the defendant's recoupment in the sum of \$135.05, and rendered judgment in favor of the plaintiff in the sum of \$364.95.

This case was heard in the February term in the New Jersey Supreme Court on an appeal from the District Court of the Fourth Judicial District, of the County of Bergen and decision of the lower court was affirmed.

1.

We contend that there was no error in admitting certain bills in evidence.

The defendant objected to the admission of certain original bills of material on the ground that these records were hearsay. The plaintiff testified before the admission (p. 15, l. 15, State of Case to l. 18), that the defendant had ordered him to buy materials in his own name for these jobs and have the bills come to him. He further testified (p. 16, l. 35) that he purchased the materials and used them on the defendant's work. He further testified (p. 18, l. 39) that the bills represented his records. All of this testimony removes any element of hearsay in that the testimony of the witness shows his instructions to purchase in his own name, for her, and under such instructions he did purchase and deliver to defendant and presents the original inventory of the purchase to her, and the witness who personally purchased and personally delivered the goods was in court subject to cross examination by the defendant.

The Court withheld the admission of the bills until it was shown that the prices were reasonable. The witness was qualified and testified (p. 18, ll. 8 to 20) that the prices were reasonable.

As a foundation for the admissibility, the plaintiff testified as to his agreement to purchase what was necessary and the defendant later

(p. 64, l. 8, to p. 65, l. 10) admitted the truth of the agreement, and nearly all the bills and cost prices set forth on them were the same.

2.

We contend that no harmful error was made by the Court stating on the record as follows, "the bills in question cover items for materials on a series of independent jobs, the cost of none of which, so far as the Court can observe, amounts to \$500."

Before making the above statement the Court heard argument of counsel and looked at the bills. Both the argument of counsel and the bills showed the above statement to be correct.

Further, no objection was made at the time of trial to the above statement by counsel for the defendant nor was exception taken, and counsel cannot set up alleged error on appeal until exception is taken at the time of trial.

3.

We contend that no harmful error occurred in the Court refusing to strike out certain testimony.

This testimony (p. 23, ll. 1 to 22) was brought out by counsel for the defendant on cross examination. In moving to strike out such testimony no reason was offered by counsel. The witness testified that he did not see a truck pass over the sidewalk. However, he may have seen or had first-hand knowledge of this in some other way. There was no jury in this case and the answer brought out by counsel for the defendant could have done no harm whether stricken out or allowed to remain. Appellant cannot complain

of hearsay testimony where elicited by himself on cross examination. 138 A 519. *Hagen v. West Englewood Tr. Co.*

4-5-6.

We contend that there was evidence to support the verdict.

Under this heading we will take up the fourth, fifth and sixth specification of determinations appealed from as they are quite similar and apply to the same question of evidence.

The evidence of the plaintiff was very positive and definite and supported the verdict. On direct examination, plaintiff produced his records (p. 19, l. 19) and exhibits (P. 1 to P. 7 inclusive) after having previously testified (p. 18, l. 38) that these were his records of labor and materials furnished to the defendant, and that the work had been completed by him. The whole testimony of the plaintiff concerns work and materials which he furnished, and in his cross examination (p. 19 to p. 47) counsel for defendant went into great detail as to the agreement between the litigants and the actual commission of the work, and counsel for defendant was unable to shake the plaintiff in any respect, although this cross examination covers nearly 30 pages of the State of Case.

Secondly, in defendant's case, she admitted (p. 64, l. 8, to p. 65, l. 10) fourteen items of work on which she says the price was agreed, and these fourteen items total \$1,352.20. She paid on account of this sum \$775.20. The difference between these two sums, \$577, cannot be denied by the defendant at this time as she admitted them very definitely in her own direct examination. Certainly, upon this certain evidence alone,

the Court could have rendered judgment for the plaintiff after having calculated the recoupment claimed.

Thirdly, the Court actually visited the work itself and inspected all the details of the job and all of the defects claimed by the defendant. These defects were pointed out by the defendant herself to the Court in the presence of all the litigants and witnesses, and upon these facts the Court could have and did render a just and lawful verdict.

7.

We contend that there was no error in the allowance of \$135.05 on the recoupment.

While it is true that there was no evidence to support a much larger verdict on the counter-claim, all of this evidence forms a part of the testimony of one, George H. Babcock. The Court after having cross examined this witness and seeing his demeanor on the stand might have believed his story only in part or not at all.

“The Court finds after having given due consideration to the testimony of the respective parties and their witnesses and making an inspection of the work and materials that there is some merit in the set-off and counter-claim, but not to the extent as the exhibits produced by the defendant at the trial would seem to indicate. The experts produced by the defendant gave estimates which were very high considering the cost of material and labor to replace or repair the defective work.” From the above we can readily see that the Court weighed the testimony of the expert, George H. Babcock, and found that it could not give full credence to his testimony and

that the inspection of the work and materials showed a much smaller claim on the recoupment.

8 and 9.

We contend that there is no error in the specifications 8 and 9.

We do not wish to duplicate and our arguments that no error lies in eight and nine, would be merely duplications of those set forth under points 4, 5 and 6, which we have already treated.

The presumption is that the Judge below found such facts as will support the judgment that was rendered. Such findings are not reviewable if there is any testimony to support them. *Lapat v. Erie R. Co.*, 71 N. J. L. 377.

10.

We contend that there is no error in the Court "going to see the job" before rendering a decision nor can the defendant take advantage of such a specification of determination.

At the time the Court elected to inspect the premises, it was by arrangement with counsel and no objection nor exception was taken. The defendant cannot, therefore, set this up as error. There is nothing in the State of Case which shows that the Court did not see the whole of the work, and in fact, the Court did while making its inspection, on several occasions, ask the defendant to show him everything, all defects, and before the Court left the premises, he asked the defendant if he had seen everything and she replied that all the defects had been shown. The defendant cannot now in this court set up that all defects were not inspected by the Court, nor is there any exception taken in the State of Case.

The findings of fact by the lower court will be presumed to rest on common proof when nothing appears to the contrary. *Gore v. Herring*, 72 N. J. L. 423; *Home Coupon Exchange Co. v. Goldfarb*, 87 N. J. L. 146.

We submit that the material facts support the findings of the Court below, which judgment should be affirmed by this Honorable Court, and the defendant's appeal dismissed.

Respectfully submitted,

JST. STRANAHAN ELY,
Attorney of and Counsel with Appellee.

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