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Notice of Appeal.

**Bergen County Circuit Court.**

Served February 16, 1927.

Filed February 21, 1927.

SALVATORE ROSCO,  
Plaintiff,

vs.

FRANK FIGARRO and ANNIE  
FIGARRO,  
Defendants.

10  
Action at Law  
Notice of  
Appeal.

To FEDER & RINZLER, ESQS. :  
Attorneys of Plaintiff.

20

Take Notice that the defendants do hereby appeal to the New Jersey Court of Errors and Appeals in the last resort in all causes from the whole and every part of the final judgment entered in the above entitled cause, in favor of the plaintiff and against the defendants.

Take further notice that the following are the grounds of appeal of the defendants in the above entitled cause:

30

1. Because the learned Judge denied a motion of defendants directed to plaintiff's opening to the jury and asking for a dismissal on the ground that said opening stated a cause at variance with the pleadings, in that such opening alleged a contract in the latter part of October, 1925 for an uncompleted part of the brick work on a certain building for the sum of Seven Hundred and Twenty-five (\$725.) Dollars, whereas the pleadings alleged a contract on or about June 10, 1925 for the entire

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Notice of Appeal.

brick work at the price of Eleven Hundred and Fifty (\$1150.) Dollars.

10 2. Because the learned Judge denied a motion of defendants directed to plaintiff's opening to the jury asking for a dismissal on the ground that the case stated in the opening was not the case alleged in the pleadings, and on the further ground that defendants came to court prepared to try the case set forth in the pleadings and were not prepared to defend the case stated in the opening.

20 3. Because at the close of plaintiff's case the court denied a motion of defendants asking the court to dismiss plaintiff's case on the ground that the case proved was not within the pleadings, but was variant therefrom in date, amount of work and consideration.

4. Because the learned Judge ruled that it was clear from the complaint that the work contracted for was not a new job but was the completion of other work.

5. Because the learned Judge ruled the date of the contract as set forth in the pleadings was immaterial.

30 6. Because the learned Judge ruled there was no material variance between the pleadings and the proof.

7. Because the learned Judge at the close of the testimony denied a motion of defendants asking for dismissal on the ground of variance between the case proved and the case alleged.

LOUIS A. COWLEY,  
Attorney of Defendants.

40 Dated February 16, 1927.

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Served March 3, 1927.  
Filed March 4, 1927.

SALVATORE ROSCO,  
Plaintiff-Appellee,

vs.

FRANK FIGARRO and ANNIE  
FIGARRO,  
Defendants-Appellants.

Action at Law  
Grounds  
of Appeal.

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To FEDER & RINZLER, ESQS. :  
Attorneys of Plaintiff-Appellee.

Take Notice that the following are the grounds of appeal of the defendants in the above entitled cause:

20

1. Because the learned Judge denied a motion of defendants directed to plaintiff's opening to the jury and asking for a dismissal on the ground that said opening stated a cause at variance with the pleadings, in that such opening alleged a contract in the latter part of October, 1925 for an uncompleted part of the brick work on a certain building for the sum of Seven Hundred and Twenty-five (\$725.) Dollars, whereas the pleadings alleged a contract on or about June 10, 1925 for the entire brick work at the price of Eleven Hundred and Fifty (\$1150.) Dollars.

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2. Because the learned Judge denied a motion of defendants directed to plaintiff's opening to the jury asking for a dismissal on the ground that the case stated in the opening was not the case alleged

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*Grounds of Appeal.*

in the pleadings, and on the further ground that defendants came to court prepared to try the case set forth in the pleadings and were not prepared to defend the case stated in the opening.

3. Because at the close of plaintiff's case the court denied a motion of defendants asking the court to dismiss plaintiff's case on the ground that the case proved was not within the pleadings, but was variant therefrom in date, amount of work and consideration. 10

4. Because the learned Judge ruled that it was clear from the complaint that the work contracted for was not a new job but was the completion of other work.

5. Because the learned Judge ruled the date of the contract as set forth in the pleadings was im- 20 material.

6. Because the learned Judge ruled there was no material variance between the pleadings and the proof.

7. Because the learned Judge at the close of the testimony denied a motion of defendants asking for dismissal on the ground of variance between the case proved and the case alleged.

8. Because the learned Judge in his charge to the jury stated his ruling was, "it was not material when the contract was made;" whereas in fact the date of the contract was material. 30

9. Because the defendants were misled to their injury by the variance between the case proved and the case alleged in the pleadings.

LOUIS A. COWLEY,  
Attorney of Defendants-Appellants.

40 Dated March 2, 1927.

**Summons**

Issued February 8, 1926.

**Complaint.**

BERGEN COUNTY CIRCUIT COURT.

SALVATORE ROSCO,  
Plaintiff,

vs.

FRANK FIGARO and ANNIE  
FIGARO,  
Defendants.

Action at Law  
Complaint.

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Plaintiff, residing in the City of Passaic, in the County of Passaic and State of New Jersey, says that:

1. On or about June 10th, 1925, the plaintiff was and still is a builder and contractor and engaged particularly in the mason contracting work in the Cities of Passaic and Garfield, New Jersey.

2. On or about the aforesaid date, the said plaintiff did agree to and with said defendants to do and perform the brick laying work only on the building situate at and known and designated as No. 141 Malcolm Avenue, in the City of Garfield, New Jersey, which said building belonged to said defendants. 30

3. On or about the aforesaid date, the said plaintiff proceeded to complete said brick laying work on said building, and in accordance with said 40

*Complaint.*

arrangement with said defendants did complete said brick laying work, for which said defendants became obligated to pay said plaintiff the sum of Eleven Hundred and Fifty (\$1150.00) Dollars, on which sum said defendants paid said plaintiff the sum of Four Hundred and Twenty-five (\$425.00) Dollars, leaving a balance due and owing said plaintiff in the sum of Seven Hundred and Twenty-five (\$725.00) Dollars.

10

4. Although said plaintiff has duly demanded the payment of said balance sum, said defendants have failed and refused and still fail and refuse to pay the whole or any part thereof.

Wherefore judgment will be asked in the sum of Seven Hundred and Twenty-five (\$725.00) Dollars, together with lawful interest and costs of suit.

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FEDER & RINZLER,  
Attorneys of Plaintiff.

30

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**Answer.**

BERGEN COUNTY CIRCUIT COURT.

Filed March 8, 1926.

SALVATORE ROSCO,  
Plaintiff,

vs.

FRANK FIGARO and ANNIE  
FIGARO,  
Defendants.

Action at Law 10  
Answer.

The defendants, Frank Figaro and Annie Figaro residing in the City of Garfield, County of Bergen and State of New Jersey, answering the bill of complaint say that:

20

1. They are without knowledge of and neither affirm nor deny the allegations of paragraph one of the complaint.

2. Paragraphs two and three of the complaint are denied.

3. The allegations of paragraph four are denied, but defendants further answering say that they now refuse to pay the demands of plaintiff.

30

LOUIS A. COWLEY.  
Attorney of Defendants.

40

Testimony.

BERGEN COUNTY CIRCUIT COURT.

SALVATORE ROSCO,  
 Plaintiff,  
 vs.  
 10 FRANK FIGARO and ANNIE  
 FIGARO,  
 Defendants.

} Action at Law

Hackensack, N. J., October 26, 1926.

Before HONORABLE NEWTON H. PORTER, Judge,  
and a Jury.

20 APPEARANCES:  
 For the Plaintiff: MESSRS. FEDER & RINZLER;  
 By JACK RINZLER, ESQ.,  
 For the Defendants: LOUIS A. COWLEY, ESQ.

A Jury was accepted and sworn.

Mr. Rinzler opened the case to the Jury.  
Mr. Cowley opened the case to the Jury.

30 (Upon the conclusion of Mr. Rinzler's opening  
 to the Jury the following discussion took place.  
 Mr. Cowley: If your Honor please, that is not  
 within the province of the pleadings, the opening.  
 The pleadings state that there is a contract for the  
 full amount of the work for the \$1125. made direct-  
 ly with the defendants.

The Court: That was the opening, as I under-  
stood it.

40

*Salvatore Rosco—Direct—for Plaintiff.*

Mr. Rinzler: That is it exactly, sir. I simply  
gave the preliminary circumstances so that the  
jury might intelligently know the facts.

The Court: It all hinges on the contract that was  
made between the parties to this litigation at the  
time that counsel refers to, after the work has been  
begun. Part of it had been done; the plaintiff re-  
fused to go on with it. He then entered into a 10  
contract with the defendant in this case whereby  
he agreed to go on and finish the job, and the de-  
fendant agreed, in consideration of his doing that,  
to pay him.

Mr. Cowley: \$725?

Mr. Rinzler: That is right.

The Court: Pay him whatever it was agreed to.  
That will come out in the evidence. That is as I  
understand it. 20

Mr. Rinzler: Exactly, sir.

Mr. Cowley: Well, that is not as I read it, if your  
Honor please.

(Mr. Cowley thereupon opened the case to the  
Jury).

SALVATORE ROSCO, the Plaintiff, called as  
a witness in his own behalf, being duly sworn, tes-  
tifies as follows: 30

Direct-examination by Mr. Rinzler:

Q. Where do you live, Mr. Rosco? A. 6 Charles  
Street, Lodi.

Q. You will have to speak loudly. A. 6 Charles  
Street, Lodi.

Q. How long have you lived in the Borough of  
Lodi? A. Four years. 40

*Salvatore Rosco—Direct—for Plaintiff.*

Q. What is your business? A. Builder and contractor.

The Court: A little louder.

A. Builder and contractor.

Q. For how many years have you been engaged in the building and contracting business? A. Fourteen years.

10 Q. And where during those fourteen years were you engaged in that business? A. Part in Passaic and part in Bergen County; Passaic and Bergen County.

Q. Passaic and Bergen County for a period of fourteen years? A. Yes, sir.

Q. Did you do any construction work in the erection of a building owned by the defendants Frank Figaro and Annie Figaro? A. Yes, sir.

20 Q. What kind of construction work did you do in the erection of that building? A. The entire brick work.

Q. The entire brick work? A. Yes, sir.

Q. With whom did you talk; which of the Figaros, Mr. Frank Figaro or his wife, about doing that job? A. The job was given to me through another party, Mr. Waskevitz.

Q. I mean when you finally got to the Figaros whom did you talk to? A. I talked to them.

30 Q. Either Mr. Figaro or Mrs. Figaro? A. I didn't know Mrs. Figaro; I know Mr. Figaro the first time.

Mr. Cowley: I object. I should think, if he is going to testify to a verbal contract, he should testify to a contract without counsel substituting the name of the party with whom he talked.

40 The Court: I think there is no objection in asking which one he talked to of the two.

*Salvatore Rosco—Direct—for Plaintiff.*

Mr. Cowley: I should think he ought to establish his contract, if your Honor please.

The Court: He is getting to that. I will allow it.

Q. Your contract with the Figaros was not a written one; it was a verbal one, wasn't it? A. Yes, sir. 10

Q. Now, in making that verbal contract with whom did you make it; with whom did you talk, with Mrs. Figaro or Mr. Figaro? A. The first time to the general contractor.

The Court: No, no.

Q. I am talking about the Figaros now. A. Oh, Mr. Figaro.

Q. Mr. Figaro? A. Mr. Figaro, yes.

Q. And where did you have that first conversation with Mr. Figaro about that contract? A. Over my house. 20

Q. At your home? A. Yes, sir.

Q. And who was present during that conversation with Mr. Figaro? A. A fellow by the name of Mr. Mattera.

Q. Who? A. Mattera.

Q. Mattera? A. Yes.

Q. That gentleman is your brother-in-law, is he not? A. Yes, sir. 30

Q. Was he working on that job with you? A. Yes, sir.

Q. When you made that agreement with Mr. Figaro had you already done part of the brick work on that building? A. Yes, sir.

Q. Just what was your agreement between yourself and the Figaros, or the conversation that you had with Mr. Figaro? What did you say; what 40

*Salvatore Rosco—Direct—for Plaintiff.*

did he say? A. Mr. Figaro came to my house. I had quit the job already. I seen there was no money coming, and I had my people rushing me every Saturday morning. I had to go begging for money. I am a poor man. I am not a millionaire. And I give him to understand; I said, "Mr. Figaro, I want to do your work but, my dear man, I can't pay the people if someone don't pay me." I said, "If you don't pay me I can't do the work here," I said, "because, according to the Union rule, a man has to be paid on Saturday before twelve o'clock." He said, "You come to do the work there, and I will pay you." I didn't want to go. He begged the life out of me.

Q. And if you were to finish the job from that time on, to finish the brick work, how much would he have to pay you; how much was due you? A. Why, it was about \$400, something like that.

Q. That is what you already got? A. Yes.

Mr. Cowley: Now, if your Honor please—

The Court: Do not lead.

Mr. Rinzler: I withdraw that.

Q. Did you already get \$400, or is that the balance that—

Mr. Cowley: I—

The Court: That is practically the same question.

A. I had received four hundred—

The Court: Wait a moment. He has not finished the question yet.

Q. You just said you received what? A. \$450.

Q. So that if you should finish the job how much more was coming to you? A. \$725.

40

*Salvatore Rosco—Direct—for Plaintiff.*

Q. And is that the amount that Figaro agreed to pay you? A. Yes, sir.

Q. Now you said that you had already done some work, some brick work, on that building. For whom did you do that brick work? A. What I done it for was for Waskevitz, and then I quit.

Q. You quit? A. Yes, sir.

Q. Waskevitz was the general contractor? A. Yes, sir.

Q. When you quit you had already got how much money? A. \$450.

By the Court:

Q. From whom? A. From Waskevitz.

Q. \$450? A. Yes, sir.

By Mr. Rinzler:

Q. Now, when you quit how long was it that Waskevitz had not given you any money? A. Two weeks.

Q. Two weeks? A. Yes, sir.

Q. And had you gone to Waskevitz and demanded that he pay you? A. Yes, sir; a few times.

Q. Did you get any more money? A. No, sir.

Q. What was the reason, then, for your quitting? A. Because there was no money.

Q. Did you serve any notice? A. Yes, sir.

By the Court:

Q. Just a moment. How much more were you to get? You got \$450. What was the balance? A. \$725 was for the—complete job.

Q. \$725? A. Yes.

Q. And that is what you told Mr. Figaro? A. Yes, sir.

Q. And he agreed to pay you \$725? A. Yes, sir.

40

*Salvatore Rosco—Direct—for Plaintiff.*

Q. Well, was the work that you had done up to that time worth more than \$450, the amount that you had been paid? A. Yes, sir.

Q. How much was the value of the work that you had completed up to the time that you had this arrangement with Mr. Figaro? A. That is about seven hundred and some odd dollars.

10 Q. About \$700 worth of work already done? A. Yes, sir.

Q. So that Mr. Figaro promised you that he would pay you the amount that was already due you and something in addition to that? A. Yes, sir.

Q. If you would finish the job? A. Yes, sir.

Q. Is that right? A. Yes, sir.

By Mr. Rinzler:

20 Q. So that for a period of two weeks you and your son had done brick work on that job and received no pay? A. No, sir.

Q. And then it was that you served the notice on Figaro? A. Yes, sir.

Q. I show you a notice purporting to be signed by you and addressed to Frank Figaro and Annie Figaro, owners, just handed to me by counsel. Is this the original of a copy that you served upon the 30 Figaros? Is that a notice such as you served upon Mr. and Mrs. Figaro? A. Yes, sir.

Mr. Rinzler: There is no objection, I suppose, to this going in evidence, is there?

The Court: Let it be received and marked. (Paper marked Exhibit P. 1).

Q. So that when you gave that notice, Exhibit P. 1, to Mr. Figaro and his wife, you had already 40

*Salvatore Rosco—Direct—for Plaintiff.*

done about \$700 worth of work? A. Yes, sir.

Q. And you had only received \$450? A. Yes, sir.

By the Court:

Q. Well, had you received \$450? A. I had received \$450, but I had about a little over \$700. I see in two weeks I had no more money coming, and my men were rushing me. That is why I did not want to go back on the job. 10

Q. Why didn't you tell us that you had received \$450? A. \$450 I did receive.

Q. The statement attached to this shows that you only received \$425. Which is correct? A. Well, I couldn't exactly remember some things, see, because—

Q. Well, do not say if you can't remember. A. Well, something might slip out of my head, because really I can't remember everything, Judge, your Honor. 20

Q. So you received \$450, did you? A. Yes, sir.

Q. All right. This says \$425.

By Mr. Rinzler:

Q. Now, when was it Mr. Figaro made the contract with you to the effect that you should finish the job and, if you would, he would pay you the balance of \$725? Was it before or after you gave this notice, P. 1, to Mr. Figaro? A. After. 30

Q. After? A. Yes, sir.

Q. And after you served this notice, P. 1, on Figaro did you finish the job? A. Yes, sir.

Q. And did you demand payment from Figaro? A. Yes, sir.

Q. Did he pay you? A. The money was not ready, he said. 40

*Salvatore Rosco—Cross—for Plaintiff.*

Q. What did he say about the money? A. He said that—that I was not entitled to the money until the building was entirely complete, so I took his word for it.

Q. Took his word for it. Then when the building was completed did you demand payment? A. Yes, sir.

10 Q. Did he pay you? A. No.

Q. What did he say? A. He said, "I ain't got nothing to do with you."

Q. Did he ever give you any money? A. He never did.

Cross-examination by Mr. Cowley:

Q. What was the contract that you made with Figaro? A. The contract I made with Figaro was  
20 ———

Mr. Rinzler: Will you pardon me, your Honor?

A. (Continuing) was the beginning—

The Court: Just a moment.

Mr. Rinzler: I think the jury will be interested in what this paper is.

The Court: You may tell them what it is.

30 (Mr. Rinzler reads Exhibit P. 1 to the jury.)

The Court: What is the date of that, please?

Mr. Rinzler: October, 1925.

The Court: No date other than that?

Mr. Rinzler: No, your Honor, there is no date on the paper—Oh, yes. Will you let me have the notice that was served upon him  
40 subsequently?

*Salvatore Rosco—Cross—for Plaintiff.*

By Mr. Rinzler:

Q. In December, 1925, did you receive from Waskevitz a notice similar to the one I now show you, dated December 2nd, 1925? A. Yes, sir.

Mr. Rinzler: You do not object to this going in evidence, do you?

(Paper marked Exhibit P. 2.)

10

(Mr. Rinzler reads Exhibit P. 2 to the jury.)

Mr. Cowley: There is no proof of service. There is only the date of the notice.

By Mr. Rinzler:

Q. Now, referring to Exhibit P. 1, the notice that you served upon the Figaros, can you tell us approximately what date you served it upon them? You notice there is no date in it excepting the month. A. I don't remember.

20

Q. Do you know what month it was? A. In October, the late part of October some time.

Q. What year? A. 1925.

Q. And this notice that Mr. Waskevitz served upon you, dated December, did you get that in the month of December or not, to the best of your recollection? A. I guess I did. In December some time. I do not remember the date when it was received, but it was in December.

30

By Mr. Cowley:

Q. What were your agreements with Waskevitz as to payments? A. Payment? According to the work was progress.

Q. Well, that is not very definite. How were you to be paid according as the work progressed? A. Well, we do this way. Some time we work in

40

*Salvatore Rosco—Cross—for Plaintiff.*

a certain way. First the beams, we will get so much money, like they figure, paying about sixty or seventy per cent; second the beams, so much, eighty per cent.

Q. Was your contract with Waskevitz that, up to the first tier of beams, you would get sixty or seventy per cent? A. Verbal; not contract, not written contract; just verbal, talking. 10

Q. And he was to give you sixty or seventy per cent? A. And the second floor he was to give me about eighty per cent.

Q. Second floor, eighty? A. Second floor; because we go high with the building, I need more money, for more laboring.

Q. When did you start work? A. I started to work in—around the 10th or the 11th. I couldn't be sure of the date.

Q. Your papers here say that you made a contract with Figaro on June 10th. A. June the 10th? 20

Q. Yes. Didn't you inform your counsel that you had made an agreement with Figaro on June 10th? A. No, sir. No, sir; I never make no contract with Figaro.

Q. You never had? A. Never June 10th.

Q. How did your counsel get the information that you had agreed with Figaro on June 10th for \$1150 to do the mason work on that building? A. (No answer) 30

The Court: You do not know?

The Witness: I don't remember, Judge, your Honor.

Q. You never did make an agreement on June 10th? A. No.

Q. Your papers say you received \$450 from Fi- 40

*Salvatore Rosco—Cross—for Plaintiff.*

garo. Did you ever receive it? A. I received \$450 from Waskevitz.

Q. Waskevitz. Have you ever reduced your claim against Waskevitz?

Mr. Rinzler: I object to that. He is not required to do that. It is an original undertaking on the part of the plaintiff and defendants. 10

The Court: Objection sustained. I do not see that he has to do that.

Q. When did you start work, in August? A. August, middle part of August, something like that.

Q. When did you finish? A. In November some time.

Q. In November? A. Late part of October; I don't remember the date. 20

Q. Late part of October you finished? A. Yes.

Q. Now, how long after you had served this notice on Figaro did you have the contract with Figaro to complete the work? A. Yes, sir.

Q. How long after you served the notice? A. Why, near two weeks before I finish the job. I don't remember the date.

By the Court: 30

Q. You don't understand the question, I think. You served a notice on Mr. Figaro? A. Yes, sir.

Q. In October. And you think it was the latter part of October. There is no date on it. You say you think it was the last part of October; that is correct, isn't it? A. Well, it was the last part of October.

Q. It was not? A. It was.

Q. It was. Now you also say that it was after 40

*Salvatore Rosco—Cross—for Plaintiff.*

that, after you served the notice, that you made this contract by word of mouth with Figaro; that is correct, isn't it? A. It was after that.

Q. After that? A. A little bit after that.

Q. Now counsel asks you how long after. A. I couldn't remember, it was four days or three days; something like that.

10 Q. Was it a matter of a few days? A. A few days, because I didn't want to go back to the job.

By Mr. Cowley:

Q. You did not want to go back. And when did you say that your work was finished? A. In November some time. I couldn't remember the date.

Q. About what time in November? A. I don't remember the date. My house happened to be afire, and all my books destroyed. I have not any record  
20 whatever.

Q. You have not any records at all? A. I have not any record at all.

Q. Was it the first week in November? A. I couldn't remember.

Q. How much work did you say had been done on the building? A. A little over \$700.

Q. Before you made this contract? A. Yes, sir.

Q. And then you say that Figaro agreed to pay you \$725? A. Yes, sir.  
30

Q. Although there was only about \$400 worth of work yet to be done? A. A little over \$400.

Q. Your contract was for \$1150? A. \$1150, yes; right.

Q. You had received \$450? A. \$450, yes, sir.

Q. What? A. \$450 I received.

Q. But you had done about \$700 worth of work? A. Yes, sir.

Q. So that left \$450 worth of work yet to be  
40 done? A. More than that.

*Salvatore Rosco—Cross—for Plaintiff.*

Q. Well, your contract was \$1150? A. More than that. If I only received \$450, how could it be \$400 more?

Q. Your contract with Waskevitz was \$1150? A. Yes.

Q. That is what you said. At the time that you made the contract with Figaro you had already done about \$700 worth of work? A. Yes, sir. 10

Q. So that left \$450 worth of work still to be done? A. Yes, sir.

Q. And you say that Figaro agreed that if you would finish that work he would pay you \$725? A. Yes, sir.

Q. How was that sum to be paid? A. Well, sum to be paid. Maybe he would give me in two payments, maybe all at once. I took his word for it.  
20

By the Court:

Q. What was the word? What did he say about payment? A. He said, "Mr. Rosco, come over and finish my work, and I will be a man with you." That is the only way. We do not have a conversation for two or three days. It was only a few words.

By Mr. Cowley:

Q. Just tell us what he said. A. He said, "You come over and finish the job, and I will be a man with you. I can't get no money until the building is completed, building loan."  
30

Q. That was your agreement? A. That was my agreement, yes, sir.

Q. The entire agreement that you made with Mr. Figaro was, "You finish the job, and I will be a man with you"? A. Yes, sir.  
40

*Salvatore Rosco—Cross—for Plaintiff.*

Q. That was all? A. Yes, he will pay me.

Q. That was all, now? I am asking you what he said. A. Well, he said, "You finish the work, and I will pay you."

Q. Now he did not say, "You finish the work, and I will be a man with you"? A. Because he wanted to make me a present besides, that he was well satisfied with the work.

10 Q. Then after the work was finished he wanted to give you an additional present? A. Before that, he give me the promise he give me a present.

Q. If he was satisfied with the work? A. If he well satisfied with the work, after the \$725. He promised to give me a present besides because he was well satisfied with the work.

20 Q. Now I want to get in your words the exact agreement that you made with Figaro in regard to the completion of this work. You have testified that he said, "If you will finish the work, I will be a man with you." Now was that the entire agreement? A. That he wanted to make me a present.

Q. Was that the entire agreement? A. No, no.

30 Q. What was the agreement? A. \$725, that is the way we talked first. Then when he said the words, "I will be a man with you," and he wanted to make me a present because he was well satisfied with the work, then we speak about \$725. I told him, I said, "My dear man, remember I aint got no money, and if you want me to finish the work I have to go borrow the money by somebody else to pay these men."

Q. That was four or five days after you had served notice on Figaro? A. About three or four days, something like that.

40 Q. Three or four days after you had served the

*Salvatore Rosco—Cross—for Plaintiff.*

notice on Figaro that Waskevitz owed you \$725; is that right? A. I didn't get you.

Q. Well you stated that was three of four days after you received—after you had served this notice on Figaro that Waskevitz owed you \$725?

By the Court:

Q. You served a notice, didn't you? A. Yes.

Q. That your contractor owed you \$725? A. 10 \$725.

Q. And it was only four days after that that you made this contract with Mr. Figaro? A. Yes, sir.

Q. That is right, isn't it? A. Yes, sir.

By Mr. Cowley:

Q. If you had received that \$725 from Waskevitz you would have been entirely paid for your contract, wouldn't you? A. If he would give me the \$725. 20

Q. Yes; you would have been entirely paid? A. But I didn't get it.

Q. But now you state in the notice that you served that that money was due you. How could it have been due you if there was \$450 worth of work still to be done? A. The work was complete, part of the work, and it was just a little bit more to be done, about a day or two days' more work. I served a notice on him to make him understand that I got that coming because we make the agreement between Figaro and me. I said, "Remember, I am a poor man, I have not got any money. I have a family to support, and I am going to borrow three of four hundred dollars to finish that work." So I did. 30

Q. If I understand that remark that you have just made, when you served this notice upon Figaro that Waskevitz owed you \$725, he did owe you 40

*Salvatore Rosco—Cross—for Plaintiff.*

that amount with the exception of one or two day's work? A. Not the whole amount, because I didn't finish the work yet.

Q. Well, what did you just state?

Mr. Cowley: Will you read the answer to the question there, please?

(Previous answer read by Stenographer.)

10 Q. Now, is it true that when you served this notice the work was completed except for one or two days' work? It is not true? A. No.

Q. So that part of your answer you wish to correct? A. Certainly. I might have made a mistake.

Q. That is not right? A. When I served that notice the work was half done. When I served Mr. Figaro notice the work was half done. That is why we came to understand, he and I, that there was

20 \$725 due me if I completed the job for him.

Q. When you served the notice and you stated that "Daniel Waskevitz is justly indebted to me in the sum of \$725 for labor supplied by me in the erection of the brick work of your building," and that "I have demanded of said Daniel Waskevitz payment of the said sum, and he refused to pay it," that is not true either, is it? A. He did not refuse to pay me all the money, because he had given me part of the money, but the question—I was afraid this man would never pay me.

30 Q. When you said, "Daniel Waskevitz is justly indebted in the sum of \$725," that was not true, was it? A. Certainly, it was true.

Q. It was true? A. Yes, sir.

Q. But that money would only have been due when the building was completed? A. Yes, sir.

Q. But the building was not completed? A. But the building was not—the building was not complete—

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*Salvatore Rosco—Cross—for Plaintiff.*

Q. So that Daniel Waskevitz did not owe you the money? A. He owed me the money after the job was complete, but I was afraid. I only had \$300 to do the work in the building already. So I couldn't collect \$300 for the man; I might lose the work; I might as well lose \$300 than to lose it all.

Q. So you admit this statement is not correct? A. It might be a mistake.

10 Q. Daniel Waskevitz did not at that time owe you \$725? A. No, sir; part of it.

Q. He owed you part of it? A. Part of it, yes, sir.

Q. Now, when you went to Figaro there was no agreement between you and Figaro as to how the balance was to be paid? A. No, sir.

Q. He just said he would pay you if you would do the work? A. Yes, sir.

Q. And you did the work? A. I done it.

20 Q. And you have no records to show when you finished? A. I couldn't tell you when I completed it.

Q. But you did finish in the early part of November? A. Well, the last part of October, something like that. I don't remember exactly.

Q. The last part of October or early part of November you finished? A. Something like that.

Q. And you began in August? A. I began in August; right.

30 Q. And did you work steadily on this job? A. Well, I delayed a few days because, when I did not see no money coming, I might as well. I said, "I might as well go home and be done, and try to get something else."

Q. Did you have any other contract that was working at the same time? A. No.

Q. You worked from early in August— A. Yes, sir.

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*Salvatore Rosco—Cross—for Plaintiff.*

Q. —until the latter part of October for Waskevitz, when you served this notice? A. Not all the time.

Q. Not all the time? A. No, sir. I had other jobs of my own.

Q. What? A. I had other job to work on. I didn't work steady on that job all the time. I had other job.

10 Q. You had another job of your own? A. Yes, sir.

Q. Where was that? A. My own house.

Q. Who was the last contractor to work on that building? A. The last contractor. On that building there?

Q. Yes. Who finished the building? A. You mean the plumbing or steam heat or painting, or what? Give me to understand what you mean first, of all.

Q. Who finished the building? Who was the last workman to work on the building when it was completed? A. It could be the electrician.

Q. The painter? A. Electrician is the last get out of the building, or painter; one of the two.

Q. The mason work is completed long before the other part? A. The mason work was completed long before. I didn't have no plastering to do in that house; just to do the brick work; that is all I had.

Q. And your work was finished long before? A. The work was finished before completing the house, sure; finished pretty near a couple of weeks before that.

Q. A couple of weeks before? A. Yes, sir.

Q. And yet you did not finish your work until the early part of November? A. Yes, sir.

Q. Who was the architect on the job? A. Mr. Vigilanti.

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*Salvatore Rosco—Cross—for Plaintiff.*

Q. Do you know when those people moved into the building? A. I couldn't tell you.

Q. What? A. I don't know.

Q. Now, after you received the notice from Daniel Waskevitz to put your claim in judgment, what did you do with the notice? A. Well, I went to see Mr. Vigilanti, and speak to him. I said, "Mr. Vigilanti, remember," I said, "you made me lose \$725 when it is not my money," the architect. Then Mr. Vigilanti said to me, "Listen, Roscoe, through me you are losing money. I am sorry." Because he recommended me with Mr. Figaro. He said, "I am going to give you a bricklayer; you have not got nobody in town like him. He will give you a wonderful job, because he built my own home," the architect that was on the job, Vigilanti. "I put up the first building on Passaic Avenue. Look at my job here. And I am going to give you the same man to do the work." So Mr. Vigilanti said, "You better go to see Mr. Perretti, the lawyer of the Building and Loan, and he might give you a hand on it. He is a pretty nice man, and he considers that you done the work there." And I went to him.

Q. You went to Mr. Perretti? A. I did, yes, sir.

Q. With the notice that you had received from Waskevitz? A. Yes, sir.

Q. Now, did you tell Mr. Perretti at that time that you had an agreement with Figaro by which Figaro was to pay you for the completion of the building? A. Yes, sir.

Q. You did? A. I did.

Q. Didn't you tell Mr. Perretti that Waskevitz owed you money on another job? A. No, sir.

Q. You did not? A. No, sir.

Q. Didn't you say to Mr. Perretti that "We are

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*Salvatore Rosco—Cross—for Plaintiff.*

both Italians, and we better stick together"? A. I never said that word.

Q. Didn't you tell Mr. Perretti that "At least get me fifty per cent, and you can keep the other fifty per cent"? A. No, sir. I said, "Mr. Perretti, if you can help me on this case, certainly I will pay you for your service."

10 Q. Didn't you say to Mr. Perretti, "If you get this money for it you can keep fifty per cent"? A. I did not mention it. I did not make no price with Mr. Perretti.

Q. Did you say that? A. No, sir. I don't know what a lawyer charges for any services. What could I make any price with him? He never said nothing to me about a dollar. Only he said to me, "Roscoe, I can't handle this case because I am the lawyer for the Building and Loan, and I can't  
20 stick for you or stick for him. I have—"

Q. Isn't it true that you told him Waskevitz owed you money on another job? A. No, sir.

Q. You say you told him you had a contract with Figaro? A. Yes, sir.

*Redirect-examination by Mr. Rinzler:*

Q. You went to Mr. Perretti. Did you request his services as a lawyer for you? A. Well, I went  
30 there and I explained the matter to him.

Q. You knew he was a lawyer? A. I said, "Will you give me a hand?" Sure, he is a lawyer.

Q. You knew he was a lawyer? A. Why, certainly.

Q. You wanted him as a lawyer to collect this money for you? A. I did so.

Q. Then he told you he could not handle it? A. He could not handle it.

*Salvatore Rosco—Redirect—for Plaintiff.*

Q. Did he tell you why? A. He said, "Rosco, I can't handle this case because I am the lawyer for the Building and Loan.

Q. The Building and Loan that had a mortgage on this property? A. Yes, sir.

Q. Now you stated something about fire and about records. What fire are you speaking about?

A. No; I lost the records of all my books because  
10 my house happen to be on fire last year.

Q. You mean your house was destroyed by fire? A. Yes, sir. It happen another building and my own to be on fire, and it happen the first thing my records were burned.

Q. The records went with them? A. I have not got nothing to show.

Q. When you first came to the office of Feder & Rinzler,— A. Yes, sir.

Q. —the law office of which I am a member, did  
20 you speak to me or Mr. Feder, or either of us, or whom? A. No.

Q. Whom did you talk to? A. One of the fellow that works for you. I am not sure if he is in the office. He must be one of your representatives or something in there.

Q. You gave him whatever particulars you had? A. Yes, sir.

Q. You did not talk to me? A. (Witness shakes  
30 head in the negative.)

Q. And you did not talk to Mr. Feder? A. No, sir.

*Recross-examination by Mr. Cowley:*

Q. Did you tell that young man that you made a contract with Figaro on June 10th?

*Salvatore Rosco—Recross—for Plaintiff.*

Mr. Rinzler: I object. It has already been gone into on direct examination, Sir.

A. No, sir.

The Court: I will let his answer stand. Is there anything more?

10 Q. When you had this conversation with Mr. Figaro was there any other member of his home present, his household? A. No, sir.

Q. Wasn't his wife there? A. No, sir.

Q. And this was in Mr. Figaro's house? A. In my house.

Q. Oh, in your house? A. In my house. He come over to see me personally, all alone. There was no one with him.

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JOHN MATTERA, called as a witness on behalf of the Plaintiff, being duly sworn, testifies as follows:

Direct-examination by Mr. Rinzler:

Q. Where do you live, Mr. Mattera? A. 349 Passaic Street.

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The Court: You will have to talk louder than that.

A. (Continuing) 349 Passaic Street.

Q. Lodi? A. Lodi.

Q. You are a brother-in-law of Mr. Rosco, are you not? A. Yes, sir.

Q. Did you assist your brother-in-law Rosco in the construction of the brick work on this particular job? A. Yes, sir.

40

Q. Were you present at the home of your brother-in-law when Mr. Figaro, a defendant in this case,

*John Mattera—Direct—for Plaintiff.*

spoke to him about the completion of the brick work on this property? A. When I see him in—

Q. Just answer the question.

The Court: Yes or no.

Q. Were you present or not? A. Was I present? Yes, sir.

Q. Did you hear the conversation that was held at that time between Figaro and Rosco? A. What I hear— 10

Q. Did you hear it? A. Yes, sir.

Q. Now tell us what you heard both Mr. Rosco say and Mr. Figaro. A. What I heard is—I just walked into the house, and I heard him saying, "You complete the job."

Q. You heard who say? A. Mr. Figaro, that is. "You complete the job, and I will pay you." And that is what I heard. 20

Q. What did Mr. Rosco say? A. Well, he says, "All right."

Q. And did you assist Mr. Rosco in completing the job after that? A. Yes, sir.

Q. And was the brick work finished on that job? After that conversation that you heard was the brick work on this job finished? A. Yes, sir.

Cross-examination by Mr. Cowley: 30

Q. When was that, do you know? A. When I heard the conversation?

Q. Yes. A. Some time in, I think it was, the month of October. I am not positive about it. Part of October some time, when I heard that.

Q. Who was present while this conversation was held? A. Why, I was there, Mr. Rosco and Mr. Figaro, and Mr. Rosco's wife was around the house, children; that is about all. 40

*John Mattera—Cross—for Plaintiff.*

Q. You worked on the job, did you, after that?

A. Yes, sir.

Q. Where do you live? A. 349 Passaic Street, Lodi.

Q. Where does Mr. Rosco live? A. 6 Charles Street, Lodi.

Q. Where did he live at that time? A. 6 Charles Street, Lodi, he lived at that time.

Q. What time of the day was the conversation held? A. Why, in the morning.

Q. In the morning?

The Court: The answer is "Yes." Do not shake your head. Speak up.

The Witness: In the morning, yes.

Q. What time in the morning? A. I wouldn't—I couldn't tell the time.

Q. What day of the week? A. Well, I don't remember.

Q. Don't remember that? A. No, sir.

Q. You did remember particularly those words that you heard? A. Those words that I heard?

Q. Yes. A. Why, just I heard him say, "As long as you finish the job," that "I will pay you." Rosco says, "All right, then, I will complete it."

By the Court:

Q. How much was he going to pay him? A. I don't know. I didn't—

Q. Were not there any amounts mentioned? A. Why, the only amount I heard once on the job—

Q. No; I mean at this conversation. A. Well, that I didn't hear.

Q. You did not hear that? A. No, sir.

*John Mattera—Cross—for Plaintiff.*

By Mr. Cowley:

Q. You say that was in the morning? A. Yes, sir.

Q. Was it a week-day? A. Yes, sir.

Q. You were not working that day? A. No, sir. We were supposed to go to another job that morning because he had quit that job down there.

Q. You do not know what time? A. No.

Q. Was it before working hours? A. No; it was in the morning, that is all. It was—I couldn't tell you what time before noon; before noon.

Q. Any time between nine and twelve o'clock? A. Oh, between nine and twelve, yes. It was between there sometime.

Q. What did you go there for that morning? A. We were supposed to go to work on another job. He told me to be at his house.

Q. You got there some time between nine and twelve? A. Between that, yes, sir.

Q. To go to work on another house? A. Yes, sir.

Q. You do not know where that other house is? A. No, sir.

Q. Do you usually report for work between nine and twelve? A. What is that?

Q. Do you usually report for work between nine and twelve? A. No, no; just that morning I was there.

Q. Just that morning? A. Yes.

Q. You just happened to be in that time? A. Yes, sir. We start to work at eight other mornings.

Q. Did you have an appointment with Mr. Rosco to go to work that morning? A. That morning, yes, sir.

*John Mattera—Cross—for Plaintiff.*

Q. No special time? A. No. He just told me to be there in the morning.

Q. Any time between nine and twelve? A. He told me to be there in the morning, and I got there before nine—I mean before twelve.

Q. It was all right? A. Was all right.

10 Q. Did you go to work on the other job that morning? A. That morning?

Q. What did you do? A. We stayed off that day; started the next morning, the following morning after that conversation between them two, Mr. "Ferraro" and Rosco.

Q. What name do you call him? A. Mr. "Ferraro".

Q. "Mr. Ferraro"? A. Well, I don't know his name.

20 Q. You do not know his name? A. It sounds something like it, Ferraro or Figaro.

Q. You say you worked on the job afterwards? A. Yes, sir.

Q. Where is this building? A. Malcom Avenue, Garfield.

Q. What number? A. Well, I don't remember the number. I don't know what the number is.

Q. Near what street? A. Why, it is right near Charles Street.

30 Q. Right near Charles Street? A. Yes; about four houses away from Charles, on Malcom.

Q. What side of Malcom Avenue? A. To the right. It is on the left hand side of the street, going up towards the woods.

By the Court:

Q. To the right, on the left hand side of the street? A. Well, was going down Charles; down Charles Street you turn to the right on Malcolm.

40

*John Mattera—Cross—for Plaintiff.*

It would be on the left hand side, that is all.

Q. All right.

By Mr. Cowley:

Q. About how many houses from Charles? A. Four or five houses away from Charles Street.

By the Court:

Q. A brick house? A. Yes, sir. 10

By Mr. Cowley:

Q. You do not know the number of it?

The Court: No?

A. No, sir.

Redirect-examination by Mr. Rinzler:

20 Q. You say that on the job you heard them talk about the amount? A. Yes.

Q. What was the conversation you heard? A. Why, I heard there almost the same as I heard home. He said, "You go ahead and finish the job, and I will pay you, because the architect has got the money." That is what I heard him.

Q. You did work with your brother-in-law Rosco on other jobs? A. Yes, sir.

30 Q. Now do you know the man Figaro, whether his name is as you pronounce it or not? Do you know the defendant in this case, the mere defendant? A. Do I know them?

Q. Yes. A. Yes, I know them.

Q. Is he in court? A. Yes, sir.

Q. Will you point him out? A. Mr. and Mrs. Figaro (pointing).

Q. Are you referring to the lady and gentleman sitting in the front? A. Yes, sir. 40

*John Mattera—Cross—for Plaintiff.*

Mr. Rinzler: Are these the defendants, Mr. Cowley?

Mr. Cowley: Yes.

Mr. Rinzler: Identifying the defendants. That is all.

By the Court:

10 Q. How long did you work on the job after this conversation before it was finished? A. Why, a week or a couple of weeks.

Q. A week or two; is that right? A. (Witness nods head.)

Q. How much of the job was unfinished when you quit it before this conversation? A. Why, they had the top of the front to put on and finish up a little of the sides on the top.

20 Q. It was mostly all done; is that right? A. Yes, sir.

ANTHONY COLLETTI, called as a witness on behalf of the Plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Rinzler:

Q. Are you a member of Rosco's family? A. No, sir.

30 Q. Are you related to him in any way? A. No, sir.

Q. What is your work? A. Painting and decorating.

Q. Did you have any painting work on this particular job? A. Yes, sir.

Q. Did you do any where Mr. Rosco was working? A. Not while the frame of the building was going up, because they were not ready yet to do it.

40 Q. Did you hear Mr. Rosco and Mr. Figaro talk

*Anthony Colletti—Direct—for Plaintiff.*

*Anthony Colletti—Cross—for Plaintiff.*

to each other on the job? A. Well, I happened to go through there for a payment one day, and looked—

Q. Payment that was due you? A. For a payment for another job. Excuse me.

Q. Oh, another job? A. Yes. And I happened to be there one morning looking for Daniel Waskevitz for a payment, and I heard a little conversation between Rosco and the owner, that he would pay, will pay Mr. Rosco. That is the only thing I heard of. Of course I was there for my payment, and I couldn't find the man. 10

Cross-examination by Mr. Cowley:

Q. This was a conversation on the job? A. Well, they were discussing. I don't know what they were arguing about. 20

Q. This was a conversation on the job? A. They were arguing about the money.

Q. It was a conversation on the job?

Mr. Rinzler: On this particular job, on this property?

A. Yes, right there; right out to the front of the building.

Mr. Cowley: That is all. 30

Mr. Rinzler: That is all. We rest.

Mr. Cowley: If your Honor please, I do not see how counsel can prevail. I would like to make a motion of dismissal on the ground that the testimony is at variance with the pleadings.

The pleadings allege an agreement made 40

*Motion to Dismiss.*

on June 10th, and it is for the entire job, and they allege payments of \$450 by the defendants, leaving a balance of \$725.

The Court: On or about.

Mr. Cowley: June 10th.

The Court: Yes. You figure October is too far remote from that?

10 Mr. Cowley: Especially in so much as it has no relation to it; as the contract testified to is not the one alleged in there.

The Court: Oh, yes, it has.

Mr. Rinzler: He did not demand a bill of particulars.

20 The Court: It says to perform. It is clear from this complaint that this was not a new job, but was the completion of other work, because the word is used there, to "complete" the work. Now I do not feel that it is very material as to what the date was. You see in paragraph 3, "On or about the aforesaid date the said plaintiff proceeded to complete said brick work."

Mr. Cowley: Yes, but that is only what the plaintiff did; but the agreement is alleged in Paragraph 2.

30 The Court: Yes, the agreement is that on or about the aforesaid date he agreed to do certain work.

Mr. Cowley: To do and perform the bricklaying work.

Mr. Rinzler: No.

Mr. Cowley: That is what it says.

40 The Court: There is no variance in the testimony with that. There is no variance in the testimony in reference to the third paragraph. The only variance in the testi-

*Motion to Dismiss.*

mony is with respect to the date and with respect to the amount paid. He testifies that the contract was for \$1150 and that he has been paid \$450. His summons—

Mr. Cowley: By the defendants.

The Court: He says that he has been paid \$425.

Mr. Cowley: He said he was paid \$425 by the defendant. 10

The Court: By the defendant.

Mr. Cowley: Yes.

The Court: He only contends for \$725. It is true that his testimony is not that he was paid the \$425 by the defendants. He was paid it. Now there is a variance there with respect to who paid him that. There are two variances in the proof; first, that he was not paid by the defendants in this case at all, anything, but by somebody else, namely, 20 this contractor; and that he was paid \$450 instead of \$425. But the real variance that you first spoke of is in the date. I think that is immaterial.

Mr. Cowley: If your Honor please, I also would like at this time to make the objection that the testimony except as to the sum of \$450, the balance due, is not legal evidence, on the ground that it is an obligation 30 to pay the debt of another.

He has testified that at the time that this agreement was made with Figaro about \$700 worth of work had already been done, and that Figaro agreed to pay him for \$725, the balance due. Insofar as it was beyond the sum of \$450, it would be an agreement to pay the debt of another, which must be in 40

*Motion to Dismiss.*

writing. And we say that it is invalid as to that portion.

The Court: Because the Statute of Frauds was not complied with?

Mr. Cowley: Yes.

The Court: Did you plead that?

10

Mr. Cowley: No, it has not been pleaded because it has not been asserted, do you not see, in that part of it, because, you see, there is one of the faults of the pleadings. They allege a straight contract for \$1150, which we have answered, denying. Now if they had alleged that we undertook to pay the debt of another, of course, then, I could have pleaded it. It is at variance in that respect.

(Argument)

20

The Court: I feel that it is not within the Statute of Frauds. I feel that it was not a contract for the debt of another. One of the contracting parties was the owner of this building.

Mr. Cowley: Yes, I suppose he could pay a thousand dollars to finish it if he wanted to.

The Court: He might have. He could have. Motion denied.

30

Mr. Cowley: Your Honor will allow me an exception to your ruling on the pleadings, that there is a variance between them and the testimony?

The Court: You may have an exception to both rulings.

Mr. Cowley: I do not want the other.

The Court: Very well.

40

*Frank Figaro—Direct—for Defendants.*

## DEFENDANT'S CASE.

FRANK FIGARO, one of the defendants herein, called as a witness on behalf of the defendants, being duly sworn, testified as follows: (Through the Interpreter)

Q. Your name is Frank Figaro? A. (Speaking in English) Yes. 10

The Court: Tell him not to answer in English. If we are going to have a conversation with this man in both languages we will never get through. Tell him to wait until you have interpreted, and then to answer you only in Italian.

A. (Through the Interpreter) Yes, Frank Figaro.

Q. You and your wife own the property at 141 Malcolm Avenue, Garfield? A. Yes. 20

Q. In June, 1925, you made a contract with Daniel Waskevitz to build a house? A. Yes, the contractor.

Q. Was Daniel Waskevitz to do all the work? A. Yes, all the work, and when he was—

Q. And the sum was \$8,000 the contract price?

Mr. Rinzler: I do not think that is relevant, your Honor. 30

A. Yes, the contract price was for \$8,000, and I said to him, "After you finish the house—"

Mr. Rinzler: I object to that.

The Court: Objection sustained.

Q. When was the work started on your building?

A. I think it was the month of June.

The Court: 1925?

The Witness: Last year. 40

*Frank Figaro—Direct—for Defendants.*

Q. When was the work finished? A. The last of this here month (The Interpreter: Meaning October).

Q. The last of what month?

The Court: October.

October month.

The Interpreter: October month.

10 Q. When did you move into the building? A. In the month of November I rented the house.

Q. What date in the month of November did you rent the house? A. I moved in about the first of November, and the rooms I think I rented on the 4th or 5th of November.

Q. How many families in that house? A. Two families.

Q. Two families. Who did the mason work on the house? A. I don't know who did it.

20 Q. Do you know Salvatore Rosco? A. Don't know him at all.

Q. Did you do any work yourself on the building while it was being erected? A. No, I did not do any work, and I do not know who did any work, because I went to work at 5:30 in the morning and got home about six in the evening.

Q. Where do you work? A. Forstmann & Hoffman Mill in Passaic, in the boiler house.

30 Q. Did you work there while your building was being erected? A. Yes.

Mr. Cowley: He says yes?

The Interpreter: Yes.

Q. Did you work every day in the week? A. Every day.

Q. Sundays too? A. Up to today—

Q. Sundays too? A. (Speaking in English) 40 Sometimes.

*Frank Figaro—Direct—for Defendants.*

The Court: Keep to Italian.

A. Some Sundays I worked and some Sundays I don't work.

Q. Now, did you ever visit Salvatore Rosco's house? A. I went to his house one time because there was a wheelbarrow missing. I saw him at his house, and I asked him to return the wheelbarrow he had taken. Instead of him returning the wheelbarrow he had taken he returned me a broken wheelbarrow in its place. 10

Q. Is that the only time you were ever in his house? A. That is all, the only time.

Q. Did you ever visit his house one morning in the latter part of October, 1925? A. No, sir.

Q. Did you ever make a contract with him in which you agreed to pay him \$725 if he would finish the mason work on your house? A. No. Upon my conscience, I never said a word of this kind to him. 20

Q. Do you know this man sitting here, Mr. Mattered? A. Don't know him.

Q. Did you ever meet him in Salvatore Rosco's house? A. No, never met him.

Q. Did you ever say in his presence that if Rosco would finish the mason work you would pay? A. No, no; never said nothing to him; only spoke to the contractor. 30

Q. I show you a paper marked P. 1 and ask you if you ever saw that paper before? A. No, sir, I never saw this card signed.

Q. You never saw it signed. Was this served at your house? Was this left at your house? A. Never saw a paper at my house.

Q. Didn't you give this paper to Mr. Perretti? A. Only that stop notice came there, and I sent it to Mr. Vigilanti. 40

*Frank Figaro—Direct—for Defendants.*

Q. And is this the stop notice? A. I don't know if this is the paper.

Q. You don't read English? A. I can't read.

Q. Who gave you the paper which you gave to Mr. Vigilanti? A. It came in an envelope.

Q. By mail? A. By mail. And then I took it to Mr. Vigilanti, and Mr. Vigilanti must have given it to Mr. Perretti.

10 Q. Now, at the time you received this notice by mail what was the condition of your house? Was the work finished?

Mr. Rinzler: That is a little leading.

The Court: It is a little leading, but I will allow it.

A. The house was finished.

Q. And where were you living at the time you received this notice? A. Malcom Avenue, 139.

20 Q. 139. What is the number of your house? A. 139.

Q. Not 141; 139? A. (Speaking in English) 139.

Q. That is the only house you own, 139? A. (Speaking in English) Yes, yes, 139.

Q. Is that the house Mr. Waskevitz built for you? A. The house that he built, I rent that out. I live in the rear of that house. That is a separate house.

30 Q. Do you live in the rear of the house now? A. I still live in the house, in the rear.

Q. Now you have two families in the new house? A. Two families.

Q. At the time that you received this notice was that new house occupied? A. Yes, there was families in there.

Q. Families in there. You said, as I believe, you went in your house on November 1st, and that the

40

*Frank Figaro—Direct—for Defendants.*

other family went in about November 4th or 5th. What house did you mean when you said you went in on November 1st? A. I said that they moved in maybe the 1st of November, the 4th or 5th of November. I don't know exactly when the families moved in there, because I went to work early.

Q. You do not live in the new house? A. No.

Q. Now, after you received this notice which you turned over to Mr. Vigilanti was there any more mason work done on your house? A. There was no other work to be done on the house.

Q. The building was completed? A. Completed.

Q. Now, have you paid all of the contract price to Daniel Waskevitz?

Mr. Rinzler: I object. That is not relevant.

The Court: Objection sustained.

Q. After you received this notice did you go to Salvatore Rosco's house and ask him to finish the mason work? A. No, sir.

Q. Do you know Mr. Colletti? A. Don't know him.

Q. Did you ever have a conversation with Rosco on your job in which you told Rosco that you would pay? A. Don't know anything about this affair.

Cross-examination by Mr. Rinzler:

Q. How long are you in this country? A. (Speaking in English) Twenty-one years.

Q. Twenty-one years? A. (Speaking in English) Twenty-one years.

The Court: Speak to the Interpreter.

40

*Frank Figaro—Cross—for Defendants.*

Q. Did you ever have a house built before? A. The one where I live in.

Q. So this is the second house you had built? A. Yes.

Q. And you had an architect for this particular job? A. Yes, sir. Mr. Vigilanti made the plan.

10 Q. Do you know who did the painting work on your property? A. No, I don't know who painted the house, because I got home at half past five, and the only person I saw was the contractor.

Q. Then the only person you saw was the contractor on the job? A. That is all.

Q. Do you know who did the plumbing work there? A. Don't know who did it. The contractor did everything.

20 Q. Do you know who did the plastering there? Himself? A. Yes. The contractor, plumbing work.

Q. Didn't have any men working on that job? A. I don't know.

Q. How long did it take him to do the job? A. They began to dig the cellar in the month of May, and finished the house in the latter part of October.

Q. And it is a two-family brick house? A. Yes.

30 Q. Now you say, then, that you don't know who did the painting work, the plastering, the plumbing, the brick work, or any other work on that job, do you? A. No, I do not know, because I went to work at 5:30 in the morning; would get home at 5:30 or six o'clock at night; and the only person I saw was the contractor, when he wanted his payments.

Q. Did you know that Mr. Rosco did the brick work on your job, yes or no? A. How could I see him? I went to work at 5:30 in the morning and got home at six at night. Don't know.

40 Q. I want an answer. Then you do not know

*Frank Figaro—Cross—for Defendants.*

that Mr. Rosco did the brick work on that job? Oh, yes or no, now. You didn't know, did you? A. No, I didn't know. The contractor would say, "This is what we done today, and that is what we done yesterday," and that is all I know.

Q. When did you go to his house, Rosco's house, for the wheelbarrow? A. In the night time, about six o'clock. 10

Q. What month? A. I didn't go to his house. I even went into a saloon to inquire for him.

Q. Where did you talk to him? A. In the beer saloon.

Q. You went to a beer saloon and you talked to him about the wheelbarrow there?

The Court: No, he did not say that. He went into the beer saloon to find out where he was. 20

Q. Where was it that you spoke to Mr. Rosco about the wheelbarrow? That is what I want to know. A. In the beer—in the saloon.

Q. In the beer saloon.

The Court: You were right.

Q. And you asked him about the wheelbarrow? A. And I said to him, "Why don't you bring me back the wheelbarrow?" He did not return me that one, but he returned me another. 30

Q. That is the first time you ever saw or spoke to Mr. Rosco, is it? A. That is all.

Q. Well, how did you know that Mr. Rosco had your wheelbarrow when you didn't know that he did any work on your property? A. My children. My little children told me.

Q. Well, do they know Rosco? A. Sure, the children know him. 40

*Frank Figaro—Cross—for Defendants.*

Q. Did they tell you that Rosco did the brick work on the property? A. They said to me, "The bricklayer came here, took the wheelbarrow and went away."

Q. Did they tell you who the bricklayer is? A. They just said the bricklayer took it, but they did not know his name, because they were children.

10 Q. What is that?

(Answer read)

Q. Well, if they did not know his name, and they only told you that the bricklayer took it, and you didn't know who the bricklayer was, or that Mr. Rosco did the brick work, or any work on your job, how did you know he was the man to find, to go seek him as the man who took your wheelbarrow? A. I want to say that I saw him in the beer saloon.

20 Q. When you saw him in the beer saloon how did you know that he was the bricklayer, when you did not know that he did the brick work on your job? A. The contractor told me. The contractor told me his name.

Q. Well, who told you, then, the children or the contractor? A. The contractor told me. He said, "That is his name. Go there and you will find him."

30 Q. Well, then, the children did not tell you that the bricklayer took the wheelbarrow, did they? Oh, yes, or no. I am entitled to a yes or no answer. A. They told me that the bricklayer took it, but did not tell me his name.

Q. And that was while the job was going on, was it? A. No, there was no one there. They had gone to another job.

40 Q. Why did you say before, Mr. Figaro, that you did not know who did the brick work on your property? A. I didn't know at that time when they were putting up the building, but after the work

*Frank Figaro—Cross—for Defendants.*

was completed I said to the contractor, "How comes that, that my wheelbarrow is missing?" And he told me who the bricklayer was.

Q. Now, I want to get this clear. Was it at Mr. Rosco's house that you spoke to him about this wheelbarrow or was it at the saloon? A. In the beer saloon.

Q. Then you never were to his house, were you? 10  
A. No.

Q. And you never spoke to him at his house about the wheelbarrow, did you? A. No, not in his home.

Mr. Rinzler: If your Honor please, may I have reference to the direct examination on that subject?

The Court: What about?

Mr. Rinzler: My recollection is as I noted it on this paper, that he went to his home be- 20  
cause there was a wheelbarrow missing.

The Court: He did.

Mr. Rinzler: He said he went to his home.

The Court: That is my recollection.

Mr. Rinzler: On direct examination.

Mr. Cowley: That is what he said.

Mr. Rinzler: That is what he said, isn't it, Mr. Cowley?

Mr. Cowley: Yes. 30

Q. Why is it that on direct examination, when your lawyer, Mr. Cowley, asked you questions, that you said that you went to Mr. Rosco's home when you asked him about the missing wheelbarrow, when now you say you never were to his home? A. I did not go to his home.

The Court: No, that is not the question. Ask the question, why he said in answer to 40

*Frank Figaro—Redirect—for Defendants.*

his counsel's question that he did go to Mr. Rosco's home.

The Witness: They said that the beer saloon was his.

Q. Did you speak to him in his home or in a beer saloon; which was it? A. In the beer saloon.

10 Q. Then you were not to his home, were you?  
A. No, I was not to his home.

Q. Did you get the wheelbarrow back or get another one back? A. He did bring me another wheelbarrow, but it was not mine. The one he took me to my home was broken. It is in the yard, and I cannot use it.

Q. Now you got this notice from Mr. Rosco that he wanted you to pay him the \$725, didn't you?

20 Mr. Rinzler: Your Honor please, I think I ought to have an answer to that, whether he got it or not.

The Court: Ask him again. Tell him we want a direct answer, not a speech. Did he get it or didn't he get it.

The Witness: No, sir.

Q. Then you didn't get one. All right; that is all.

30 Redirect-examination by Mr. Cowley:

Q. Where is Mr. Rosco's saloon? A. Where I met him was at the corner of Charles Street.

Q. The corner of Charles Street and what other street? A. On a corner there, in front of the cemetery.

40 Q. Did they tell you that Mr. Rosco owned that saloon?

*Frank Figaro—Recross—for Defendants.*

Mr. Rinzler: I object. That is hearsay, your Honor.

The Court: Well, he has already testified that he was told that that was his home and his saloon.

Mr. Cowley: Yes.

Q. Do you know whether Mr. Rosco lived in the same building where the saloon is? A. No. They 10  
said the saloon was his but he did not live there.

Recross-examination by Mr. Rinzler:

Q. He didn't live in that building, did he? A. I don't know. I saw him there in the beer saloon.

Q. Well, you just said that he did not live there in that house?

The Court: No; he said he was told he 20  
didn't live there.

Mr. Rinzler: Told he didn't? Oh.

The Court: He does not know where he lives, as I understand his testimony.

Q. By the way, you never had a fight with this man Colletti did you? You never had any trouble with him? A. No, sir.

Q. Never knew the man? A. I saw him once 30  
painting a house, but I don't know who told him to do it.

Q. Oh, then you did see him paint the house, didn't you? A. I saw him there one night about half past five with a pail. I don't know whether he was painting a door or what.

Q. Why, didn't you talk to Mr. Colletti about the painting work that was due him, \$17, for that work there? A. Yes. He met me one time on Monroe Street. He had been to buy some paint. 40

*Peter N. Perretti—Direct—for Defendants.*

Q. And he even signed a release for you, for his claim on that particular job, didn't he? A. He didn't sign anything for me. The only thing he told me, that this contractor owed him \$17.

10 PETER N. PERRETTI, called as a witness on behalf of the Defendants, being duly sworn, testifies as follows:

Direct-examination by Mr. Cowley:

Q. Mr. Perretti, you are a counsellor at law of this State? A. Yes, sir.

Q. And you know both the plaintiff and the defendants, do you not? A. Yes, I do.

20 Q. You represent a Building and Loan that placed a mortgage loan on these premises? A. I do.

Q. Of Figaros'? A. Yes.

Q. I show you an exhibit marked P. 1. Did you see that paper? Have you seen that paper before (handing paper to witness)? A. Yes, I have.

Q. How did that come to your notice? A. Either directly through Mr. Figaro or from the architect, Mr. Vigilanti.

30 Q. Now, I show you another paper marked P. 2, addressed to Salvatore Rosco. Did you ever see that before? A. Yes, I did.

Q. How was that brought to your attention? A.

By Mr. Waskevitz.

Q. By Mr. Waskevitz? A. Yes, sir.

Q. Have you ever seen this notice before (handing paper to witness), notice signed by Daniel Waskevitz? A. Yes, sir, I have.

40 Q. Who brought that to your attention? A.

*Peter N. Perretti—Direct—for Defendants.*

This notice was attached to another notice that was served on Rosco, of the same date.

Q. This was not the one that came to you? A. No.

Q. Now, did Mr. Rosco come to your office and bring you a copy of that notice? A. Yes. He came into my office with his copy.

Q. Is this the copy, so far as you are aware? A. 10 Well, it was identically the same, because I told him that I had one, that Mr. Waskevitz had given me one.

Q. Yes. Now, did you have any conversation with Mr. Rosco in regard to that claim? A. Mr. Waskevitz?

Q. Mr. Rosco? A. Oh, Mr. Rosco? Yes.

Q. What was the conversation? A. He told me that Mr. Vigilanti had sent him over to me, Vigilanti, the architect on the building, and asked me 20 if I couldn't do something for him to get him some money. Well, I told him that my position was such that I represented the Building and Loan; and I had to look out for the interests of the Building and Loan; that inasmuch as he had been served with notice to reduce his claim to a judgment, he would have to do that; I couldn't pay out any money until the law was followed.

30 He then told me that he would like to give me the case, and he was willing to give it to me on a fifty-fifty basis. I told him that I couldn't, under the circumstances, do it, because of the position I was in. He begged me. He thought that, being I was an Italian, and he was, that I ought to do something for him.

Q. Now, whom did he tell you owed him the money? A. Waskevitz.

Q. Waskevitz? A. Yes. 40

*Peter N. Perretti—Direct—for Defendants.*

Q. Did he say anything to you about any contract with Figaro? A. Never mentioned anything about it. Never mentioned anything about Figaro having said anything. In fact, he told me that Waskevitz owed him some money for another job which he had worked on.

By the Court:

10 Q. Did you represent Figaro? A. I represent the Building and Loan Association.

Q. Did you represent Mr. Figaro? Was Figaro a client of yours? A. No.

Q. You only represented him incidentally as you represented the Building and Loan? A. That is all.

Q. All right.

By Mr. Cowley:

20 Q. He told you that Waskevitz owed him money on another job? A. Yes.

Q. And he didn't say anything to you about any agreement with Figaro? A. Not a thing.

Q. At the time did you know whether or not the building was finished? A. Yes, the building—I had the money all ready for the full payments. The architect had given me the certificate for the disbursements, but I had to hold the money out until such time as the law had been complied with.

30 Q. When was the first time that you ever heard about any contract between Rosco and Figaro?

Mr. Rinzler: I object. That is not relevant. A hundred million people in the United States may not have heard it.

The Court: Objection sustained.

*Peter N. Perretti—Cross—for Defendants.*

Q. Did you have any more conversations with Mr. Rosco concerning it? A. Never saw him any more after that.

Q. That is all you know about it? A. That is all.

Cross-examination by Mr. Rinzler:

Q. Mr. Perretti, when Mr. Cowley in his statement or opening address to the Court and jury referred to the fact or to the contention that Mr. Rosco went to you, the lawyer for the owner, was he right or wrong? 10

Mr. Cowley: I don't remember making that statement. Maybe I did say it.

Mr. Rinzler: I recall your making it, Mr. Cowley. 20

Q. Was he right in making that reference? A. Well, I don't—if he made that reference I don't think he was right.

Q. So that you were not the attorney for the owner, even incidentally? A. I was not.

Q. You are now? A. No, I am not.

Q. Why, wasn't it you that referred this case to Mr. Cowley? A. No.

Q. Weren't you retained in this matter by the owners? A. I was not. 30

Q. Didn't you refer this case to Mr. Cowley to file an answer? A. I did not.

Q. Didn't you expect that you were going to be a witness in this case? A. Expect to be a witness?

Q. Yes. A. I didn't expect to be, no.

Q. Although you knew that Mr. Rosco was making a claim which was contrary and directly opposite to his conversation with you, you didn't have 40

*Peter N. Perretti—Cross—for Defendants.*

any expectation of being a witness in this case? A. I never expected the case to come up until I saw the summons.

10 Q. But when you saw the summons didn't you expect to be a witness in the case, knowing that you had positive knowledge in your own mind about the facts with which Mr. Rosco had a directly opposite view, as he told them to you? A. Well, I presumed that I might have to be called as a witness.

Q. Weren't you solicited by Figaro to represent them? A. No, I was not.

Q. Were you subpoenaed to be here today? A. I was not.

Q. Who asked you to be here? A. Mr. Cowley.

Q. Did not Mr. Figaro ever ask you to represent him? A. No, he did not.

20 Q. When was the last time you spoke to Mr. Cowley about the matter? A. This morning, come over from Passaic.

Q. Previous to this morning. A. Oh, about two or three weeks ago.

Q. He did solicit your information, all you knew about the matter? A. Concerning these papers which had been served upon me.

30 Q. Yes. Now you knew that Mr. Rosco, from the notice that was served upon Figaro, claimed that he was not paid, is that correct? A. Yes, sir.

Q. Are you rather systematic in your office? A. Well,—

Q. In your own judgment? A. Fairly so.

Q. Did you make a record of what information was imparted to you by Mr. Rosco? A. No record of it, no.

40 Q. Now, Mr. Perretti, when Rosco came to you, he came to hire you as his lawyer, didn't he? A. No.

*Peter N. Perretti—Cross—for Defendants.*

Q. Why, he wanted you to represent him in the collection of the claim, whether it was from Figaro or from Waskevitz, didn't he? A. He didn't come originally for that intention.

Q. Whether he came originally or at a subsequent interval or finally, he did request you to represent him as his counsel, to represent the claim, didn't he? A. After I refused to pay him. 10

Q. Didn't he, whether you refused or not? A. When he first came in he did not come in to retain me as counsel.

Mr. Cowley: Let him answer the question.

Q. One moment, sir. You are a lawyer and you know better. Will you answer the question, please? Regardless of when it was, paying him or upon what occasion, Mr. Rosco solicited your services as counsel to collect this claim for him didn't he; 20 yes or no? A. After I refused to pay.

Q. Regardless of when, Mr. Perretti, did he or not? A. He did.

Q. And although he talked to you in that confidential manner, you, as proposed counsel, come here to testify against him, don't you?

Mr. Cowley: If your Honor please, I object. This is a matter of argument. 30

The Court: Objection sustained.

Mr. Cowley: You can attack the testimony when you want to.

Mr. Rinzler: Well, I have a right to object to it. I prefer not to.

The Court: Proceed.

Q. The Rosco against whom you are testifying this morning is the same Rosco that solicited your 40

*Salvatore Rosco—Rebuttal, Direct—for Plaintiff.*  
services as counsel for the collection of this claim,  
isn't he? A. Yes.

Mr. Rinzler: That is all.  
Mr. Cowley: That is all.  
That is our case.

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PLAINTIFF'S REBUTTAL.

SALVATORE ROSCO, the plaintiff, recalled as  
a witness in his own behalf, in rebuttal, testifies as  
follows:

Direct-examination by Mr. Rinzler:

Q. Mr. Rosco, did Mr. Figaro ever come to you  
to have a conversation about a wheelbarrow? A.  
20 No, sir.

Mr. Rinzler: That is all.

Mr. Cowley: What was the question?

The Court: The question was, denying  
that Mr. Figaro ever came to him and had a  
conversation about a wheelbarrow. The an-  
swer is no.

Cross-examination by Mr. Cowley:

30 Q. Where did you live in relation to the saloon?  
A. What?

Q. Where did you live in relation to the saloon?  
A. There was never a saloon there. It was a saloon  
years ago, but then it turns out to be a store.

Q. Didn't you have a saloon in 1925? A. There  
was no saloon there.

Q. Didn't you have a saloon there? A. A store.  
I rented a store.

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*Salvatore Rosco—Rebuttal, Redirect—for Plaintiff*  
*Salvatore Rosco—Rebuttal, Recross—for Plaintiff.*

Q. Didn't you have a saloon? A. No saloon  
there.

Q. Didn't you live on the corner of Passaic and  
Charles Streets? A. Right near, yes.

Q. You lived on the corner of Charles? A. Yes.

Q. Hasn't it been a saloon for years? A. It was  
a saloon, but not then.

10

Q. Not then? A. Not when I bought the build-  
ing. When I bought the building I turned the  
building into a different line, whatever they wanted  
for it. They had it for candy and other line of  
business. I don't know what they ever done in  
there. I was only collecting rent.

Redirect-examination by Mr. Rinzler:

Q. You rented it out to somebody else? A. That 20  
is all. I went in there when I received the rent. I  
don't go in at all.

Q. Did you live in the building where the store  
was or the next building? A. The next building.

Recross-examination by Mr. Cowley:

Q. Do you tell the Court you never ran the  
saloon? A. I did not run the saloon. I own the  
building and rent it. Some people from Asbury 30  
Park.

Q. Who ran the saloon? A. I never ran the  
saloon.

Q. Wasn't the license in your name? A. Never  
a license in my name. I am a builder; never a  
saloon keeper.

Testimony closed.

40

*Motion to Dismiss.**Charge to the Jury.*

Mr. Cowley: Now I renew my motion for the dismissal of the complaint on the ground that there is a variance.

The Court: Motion denied. You may have an exception.

Mr. Cowley summed up the case to the Jury.

Mr. Rinzler summed up the case to the Jury.

10

The Court charged the Jury as follows:

## CHARGE TO THE JURY.

The Court: Members of the Jury: This case that you have been trying is one brought by Salvatore Rosco against Frank Figaro and Annie Figaro. The legal points involved are not very extensive and can be covered very briefly and shortly. It is a fact case, purely and simply, and all facts must be determined by the jury. That is the function of the jury. It is the duty of the Court to explain the law governing the case, but you must find the facts.

20

It seems from the testimony that the defendants were the owners of a piece of property on which they built a two-family brick dwelling. It also seems that they entered into a contract with a general contractor to build it. He is not here; he is not a party to this suit; and we do not know anything about him. He does not enter into this situation. It seems that the general contractor who was to build this building called on the plaintiff in this case, Mr. Rosco, and asked him to do certain of the work, the bricklaying, not all of the mason work even, because, I think the testimony was that he was not to do the plastering.

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*Charge to the Jury.*

The plaintiff says that along in October of 1925, this work having been begun in August of 1925, he was unable to get any money from the man that hired him to work, so he quit, took his men off; that he had been paid up to that time \$450, and there was due him the difference between that and \$1150, the amount of his contract, which had not been paid to him; that at that time the work was partly done, about \$700 worth was done and completed, but there was several hundred dollars worth of work still to be done, the difference between seven hundred odd dollars that had been completed and the contract price. He says that he was waited upon at his home one evening by the defendant, Mr. Figaro, and he says that his brother-in-law was present. I have forgotten his name.

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Mr. Rinzler: Mattera.

20

The Court: Mattera.

He says, in effect, the owner of this property said, "You have tied up the job; you have gone away, there is nothing being done, and I want you to come back," and the plaintiff said, "I have not been paid," and the defendant said, "Well, come on back, and I will pay you; and if you do the work to my satisfaction I will give you, in addition to that, a present." That is the testimony of the plaintiff in the case. There was no writing about it, but he did promise to pay him, not only for the work that was yet to be done, but the entire amount that was due for work that he had done, plus the work that he was to do. That is his testimony, that he would pay him. He is corroborated in that to the extent, at any rate, that there was a verbal contract, by his brother-in-law. The brother-in-law does not give as many details

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*Charge to the Jury.*

as does the plaintiff, but he says that he was there and he heard the defendant promise to pay if he would finish the work.

Under the law a contract is the meeting of the minds of individuals on a given proposition, an offer and an acceptance. Here was one man that wished his house built, here was another man that  
 10 was a builder; and the owner of the house said, "Please come and do my work," and the builder said, "But I must be paid. If you will pay me for finishing the job that I have started, plus the amount of money that is due me. I will come and finish the job," whereupon the owner of the building said, "All right; do that, and I will pay you." Now that is the position of the plaintiff. All of these things were not said. I am not trying to  
 20 quote the language exactly of what was said. But that, in effect, as I understand it, is what occurred; whereupon a contract, if that is true, arose; there was a meeting of the minds of these two people. One man wanted his house built and the other man agreed to build it under certain conditions. There was nothing said about it when it was to be paid, as I recall it, although there may have been. You will recall that. But the main thing was that there was a promise on the part of the plaintiff and a  
 30 promise on the part of the defendant. The promise on the part of the plaintiff was that if he did the work he would pay for it. He says he did do the work, and he finished it, and he says he has never been paid.

Every suit is started by a summons and complaint. The complaint sets forth the cause of action, gives the facts. The complaint in this case, which was served on the defendant and which he  
 40 answered by denying it, says that on or about June

*Charge to the Jury.*

10th, 1925, Mr. Rosco, the plaintiff, was a builder and contractor, and that on or about that time he agreed to do certain work for the defendant and that the defendant agreed to pay him certain money to do certain work. And he says that in accordance with the arrangement then made he did complete said work for \$1150, on which sum the  
 10 said defendants paid said plaintiff the sum of \$425, leaving a balance due and owing of \$725. He says that he has demanded payment of this sum, and it has not been paid.

The proofs in this case are not in accordance with that in these respects. First, there has been no proof in this case that the \$425 mentioned in the papers, of the \$450 referred to by the plaintiff as having been received by him, were paid by the  
 20 defendant. On the contrary, the proof is that they were paid by the contractor. The second variance is in the date. The papers say on or about June, whereas the proofs in the case are on or about the latter part of October of 1925 this verbal contract was entered into. Now we do not know how it came that these papers were drawn in this way. I am referring to it specially because counsel made a point of it, counsel for the defense. It may be that the attorney who drew this, or the attorney  
 30 who took the instructions, was either misinformed or misunderstood the facts as related by Mr. Rosco. Mr. Rosco may have said that he entered into a contract in June with the general contractor, and he may or may not have said when he entered into the contract with the defendants in this case. I do not know. There is nothing here to show it. It is true that the papers were not drawn in accordance with the facts as developed here, and we do  
 40 not know why.

*Charge to the Jury.*

But the fact in the matter is that my ruling is that it is not material when the contract was made. The real fact to be decided is, was there a contract made? Is it true, as alleged by the plaintiff in this case, that a contract existed, not between him and this general contractor, because we are not concerned with that, but was there a contract existing between him and the defendant? That is the issue.

There was a contract existing between him and this general contractor whose name I have forgotten, and he proceeded and did a lot of work on it. That is his story. And then he stopped because he was not being paid, and he only went on to finish the work, he says, because he entered into a new contract, which he had a right to do, with the owner, and it was in pursuance of that new contract that he finished the job, he says, and expected to be paid, and has not been paid. Another corroboration of the plaintiff's testimony is that this painter says that he was on the job one day painting when the owner came to the place, and he overheard a conversation between them, to the effect that he would pay the mason. Now that is, as I recall it, all the testimony that there is.

The defendant comes here and he says, "This is all wrong; that is not true at all. I hired a contractor to build my house and agreed to pay him \$8000 for doing it, and I was engaged in my work from 5:30 in the morning," or "I was away from my home from 5:30 in the morning until supper time," I have forgotten what time,—half past five. I don't know who was doing the work on the house. I was not there when they were working. I was daily employed at the Forstman Mills and away from the place, and I don't know anything about

*Charge to the Jury.*

this man Rosco. I never hired him, and I never made any contract with him at all. My contract was with the general contractor." And for all we know he may have paid the general contractor. That is not important. He may have paid half a dozen men for doing the same work, for all we know. Of course he did not do that. But he may have paid this general contractor. The general contractor may have skipped with the money. We do not know. It may be; but we do not know why he is not here. I do not know that it is necessary to bring him here, but he is not here. The issue is not whether this defendant has paid twice for doing this work or whether he is going to be obliged to pay twice if you hold against him. The issue is whether he made this contract. That is all. If he did, the judgment should be against him and in favor of the plaintiff. If he did not, this action cannot lie because, even though the work might have been done by the plaintiff on his house and he may have gotten the benefit of it, if he did not ask him to do it and did not hire him to do it, and made no contract for him to do it, he cannot look to him for payment; he must look to the man who hired him. So that the only theory on which this action can be maintained is that there was a contract between the parties, not, as I have said, simply because this defendant got the benefit of his work, or not because the defendant has already paid somebody else for doing it. The whole case must be decided by you on the question of fact that you will find from the evidence, as to whether or not there was a contract between these parties, as is maintained by the plaintiff.

The defendant takes the stand and denies that he

*Charge to the Jury.*

had any dealings with this man except once, with relation to a wheelbarrow, and then he says that he spoke to his general contractor about it, a missing wheelbarrow, and was told that Mr. Rosco was the mason who did the work there, and that he took the wheelbarrow, so he went and hunted him up; and he also said his children told him that the mason took the wheelbarrow. He hunted him up to get back a wheelbarrow. He said that is the only time that he was ever at his house. And then he says it was what he supposed was his house, where a saloon was. He understood the man lived there.

In addition to that there was an attorney in this case who represented the Building and Loan Association. Apparently there was a Building and Loan mortgage on this property. The attorney represented the Building and Loan Association when it was paying out the moneys to the people to whom it was due, working with the architect and with the contractors. He says that this plaintiff called on him one day and told him he wanted his money, and he said that he had not been paid, and he wished this attorney to take this case and collect this money. The attorney said he could not do it, and he could not do it because he was attorney for the Building and Loan, and it would not be proper for him to take the case. Now the attorney says at that time this plaintiff, Mr. Rosco, did not say anything about having had a contract with the owner of the building, but was seeking to engage him to collect the money from the contractor.

In addition to that there are some notices that were filed in this case, and each counsel has made some comment on the language of those notices, as

*Charge to the Jury.*

evidential of their respective viewpoints. Counsel for the defendants says that the testimony is that at the time that this notice was served the work was not completed, and yet the notice demands full payment as though the work had been completed. The language of the notices is that there is due and owing so much money. The attorney for the plaintiff reads you another part of the notice which is susceptible of an entirely different interpretation, wherein the words used convey the thought that the building is in process of construction and that the contract price is so much, and says nothing about the work all having been completed. You will examine that notice, if you care to, and it speaks for itself. I did not examine it, and perhaps I am not quite correct in my statement as to just what the testimony is on that point.

You must take into consideration, however, that there are some other facts with respect to when this work was begun and when it was finished. When the work was started, I think it was testified it was in June of 1925; and when this contract was made between the parties to this suit, according to the plaintiff, it was in the latter part of October of 1925. Now this work was the mason work, the bricklaying. The defendant says, "That cannot be so because the job was entirely finished and the building was occupied the first part of November, and it could not have been finished, as the plaintiff says, during the short space of time that elapsed from the time that he made the contract with me, at which time he says the work was not done, and the time when I was in possession of the property and had tenants in it." That is another matter for you to take into consideration in deciding where the truth lies, because it may be that they are mis-

*Charge to the Jury.*

taken in the dates. This was not reduced to writing; this was a year ago that this happened. It has been further testified that the books of the plaintiff have been destroyed. I have forgotten just what he said. I think he said his house burnt up, in which his books were, or his office. At any rate, he says he has not any books.

10 The plaintiff and the defendant are interested in this suit. They are interested parties. You may take into consideration, in weighing their testimony, the fact that they are interested parties. You may take into consideration that interest, if any, other witnesses may have who testified. You must take into consideration not only the spoken word but their manner of testifying, and these other bits of evidence that have been introduced, in the way of these notices,  
20 and when they were served, when they were dated, in order to ascertain what the facts are.

If the Court has erred in referring to any testimony, disregard it. You must decide this case from your own recollection, not from what the Court says about the testimony. I have not taken any notes, and I may be wrong. I may leave out some things that you may think very important. Do not disregard those things that I leave out just  
30 because I have left them out. Do not place too much reliance in what I may have emphasized. In other words, decide the case from your own recollection of the testimony, and give the testimony the weight that you think it should be given.

When you have decided the facts your duty with respect to the verdict will be perfectly clear because, if you find the facts to be that there was a contract, as the plaintiff has testified, and as his brother-in-law testifies, and you believe that there  
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*Charge to the Jury.*

has been nothing paid on that contract, then your duty is clear, and you must bring in a verdict for the amount still owing on that contract. If, on the other hand, you do not find that to be so, but find that there was no such contract, then, irrespective of whether the plaintiff ever got paid for his work or whether he did not, you must find for the defendants. Of course, if you find for the plaintiff,  
10 you must find for him a judgment, even though you may also figure or think that he has already paid someone else for this work. There is no testimony that he has. It would not be material. It was sought to be introduced, and it was ruled out. It does not make any difference.

Keep this in mind also, that the burden of proof is on the plaintiff. He asserts that there was a contract. He comes in here and alleges that there was a contract, that there was a violation of the contract, and that there is so much due him under that contract. Now the burden of proof, under the law, is on him. He must show you by the clear weight of the testimony; he must satisfy you by the preponderance of the testimony, not the number of witnesses, necessarily, but the quality of the testimony, that what he contends for is correct. If he has so satisfied you the verdict must be in his favor. If he has not, as I have indicated, the verdict must be against him. You may take the case.  
20  
30

While I have said that the testimony was that he had received \$450 on account, and his stop notice says \$425, and his complaint says \$425, there was no discrepancy in his testimony that the amount due and owing at this time is \$725.

(The Jury retired).

Exhibit P-1.

To Frank Figarro & Annie Figarro, Owners

10 You are hereby notified that Daniel Waskevitz, contractor for your two-story building under course of construction at #141 Malcolm Avenue, Garfield, N. J., is justly indebted to me in the sum of Seven Hundred and Twenty-five (\$725.00) Dollars, balance due me as per statement below for labor supplied by me in the erection of the brick work, etc. of your building, and that I have demanded of said Daniel Waskevitz payment of the said sum of money owed to me, and he refused to pay it.

20 You are, therefore, notified to retain the said sum of Seven Hundred Twenty-five (\$725.00) Dollars out of any money due or to become due said Waskevitz on your building, and upon being satisfied of the correctness of my demand to pay said money directly to me.

Dated October 1925

SALVATORE ROSCO

STATEMENT

Agreement to complete brick work and building at #141 Malcolm Avenue, Garfield, N. J. \$1150.00

Accounts received:

30	Check .....	\$150.00
	Cash .....	200.00
	Cash .....	50.00
	Cash .....	25.00

Total .....\$425.00

Balance due \$725.00.

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Exhibit P-2.

To Salvatore Rosco (Claimant)

You are hereby notified that I dispute your claim of \$725. whereof you have served the following notice upon Frank Figarro and Annie Figarro (Owners).

To Frank Figarro & Annie Figarro, Owners

10 You are hereby notified that Daniel Waskevitz, contractor for your two story building under course of construction at #141 Malcolm Avenue, Garfield, N. J. is justly indebted to me in the sum of Seven Hundred and Twenty-five (\$725.) Dollars, balance due me as per statement below for labor supplied by me in the erection of the brick work, etc. of your building, and that I have demanded of Daniel Waskevitz payment of the said sum of money owed to me, and he refused to pay it.

20 You are, therefore, notified to retain the said sum of Seven Hundred and Twenty-five (\$725.) Dollars out of any money due or to become due said Waskevitz on your building, and upon being satisfied of the correctness of my demand to pay said money directly to me.

Dated October 1925

STATEMENT

Agreement to complete brick work and building at #141 Malcolm Avenue, Garfield, N. J. \$1150.00

Accounts received:

30	Check .....	\$150.00
	Cash .....	200.00
	Cash .....	50.00
	Cash .....	25.00

Total ..... \$425.00

Balance due \$725.00

You are therefore, requested to establish your said claim by judgment.

DANIEL WASKEVITZ. 40

Dated Dec. 2, 1925

### Rule for Judgment.

Judgment entered November 5, 1926.

#### BERGEN COUNTY CIRCUIT COURT.

10	SALVATORE ROSCO, Plaintiff,	}	Action at Law Rule for Judgment.
	vs.		
	FRANK FIGARO and ANNIE FIGARO, Defendants.		

20 This case was tried before Honorable Newton H. Porter, Judge, with a jury, in this Court, on October 26th, 1926.

The jury returned a verdict in favor of the plaintiff and against the Defendants in the sum of Seven Hundred Sixty-one Dollars and Twenty-five (\$761.25) Cents.

Nov. 1, 1926.

NEWTON H. PORTER,  
Judge.

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### New Jersey Court of Errors and Appeals

SALVATORE ROSCO, Plaintiff-Appellee,	}	Action-at-law. On appeal from Bergen County Cir- cuit Court.
vs.		
FRANK FIGARO AND ANNIE FIGARO, Defendants-Appellants.		

#### POINTS FOR DEFENDANTS-APPELLANTS.

##### Facts.

In June, 1925, defendants were the owners of a tract of land on Malcolm Avenue, Garfield, N. J. They contracted with one Daniel Waskevitz, a building contractor, for the erection of a brick building thereon. The contract was filed. The laying of the brick was sub-contracted by Waskevitz to the plaintiff for Eleven Hundred and Fifty (\$1150.00) Dollars. During the last week in October, 1925, Rosco served a stop-notice on ~~com-plainant~~ <sup>defendant</sup>, claiming a balance due of Seven Hundred and Twenty-five (\$725.) Dollars from said Waskevitz, and acknowledging receipt of Four Hundred and Twenty-five (\$425.) Dollars on his contract.

Waskevitz served a notice on Rosco disputing his claim and requesting that it be established by judgment. No action was taken by Rosco on this notice.

In February, 1926, plaintiff sued defendants alleging a contract with them on or about June 10, 1925, wherein he agreed to do the brick work on

said job and they agreed to pay him Eleven Hundred and Fifty (\$1150.) Dollars and acknowledging receipt from them of Four Hundred and Twenty-five (\$425.) Dollars. The defendants made a general denial.

In October, 1926, the case went to trial before Hon. Newton H. Porter, Judge and a Jury.

In opening, plaintiff's counsel, Mr. Rinzler, stated that suit was brought on a contract made between plaintiff and defendants in the latter part of October or early part of November, 1925; that plaintiff originally contracted with Waskevitz for the brick work at the price of Eleven Hundred and Fifty (\$1150.) Dollars; that Waskevitz did not meet his payments; that plaintiff thereupon served the stop-notice on defendants; that the brick work was not then completed; that the said sum of Seven Hundred and Twenty-five (\$725.) Dollars demanded in the stop-notice was not in fact due; that about Three or Four Hundred Dollars more work needed to be done before said sum of Seven Hundred and Twenty-five (\$725.) Dollars would be due on said contract; that he stopped work; that the owner Frank Figaro visited him and urged him to finish the job and promised to pay him Seven Hundred and Twenty-five (\$725.) Dollars if he would resume work and finish the job; that he did finish it in the early part of November, 1925, and the sum of Seven Hundred and Twenty-five (\$725.) Dollars was due and unpaid.

### POINT I.

#### The Court erred in refusing the motion for dismissal at close of plaintiff's case.

The motion was on the ground of a variance between the pleadings and the proofs.

It will be observed that plaintiff took three different positions. First, he claimed under a stop-notice. Then under a contract for the entire work. Then under a contract for a part of the work. The different positions are irreconcilable. In the first two, time is not important. In the last it is vital in relation to the proofs.

Were it known that plaintiff would allege a contract for brick work only made in the latter part of October, and completed in the first week in November, defendants would have prepared their defense showing the building was completed and occupied November 1, 1925. The architect who supervised the building, the plumber and plasterer and other workmen whose work on a building follows the brick work, the tenants who took possession November 1, could have been produced. As it was only the testimony of the owner haltingly given because of unfamiliarity with language and surroundings was available. The variance was therefore of vital importance.

"It is sound law and sound reason that there must be no variance to the prejudice of the adverse party between the case declared upon and the case proved and that recovery must be *secundum allegata et probata*."

*Jordon v. Reed*, 77 N. J. L. 584.  
Citing *Hallock v. Commercial Ins. Co.*,  
26 N. J. L. 268; *Martinez v. Runkle*, 57  
N. J. L. 111.

### POINT II.

**The Court erred in holding (see State of Case, lines 10 to 20, page 38) that it is clear from the complaint that this was not a new job, but was the completion of other work, because the word is used there to complete the work.**

In paragraph Two of the Complaint (Page 5, State of Case) plaintiff alleges the agreement; it was to do the brick laying work only.

In paragraph Three of the Complaint, the allegation is that he proceeded to complete said brick work and did complete said work.

This is no more than an averment of performance on which plaintiff bases a demand for Eleven Hundred and Fifty (\$1150.) Dollars.

### POINT III.

**The pleadings should not be considered as amended to conform to the proofs.**

No application to amend was made by plaintiff. To amend now to conform to the proofs would be unjust to defendants.

*Jordan v. Reed, supra.*

In March of this year application was made to this court by defendant's counsel for a writ direct-

ed to Judge Porter requiring him to certify a motion directed to the opening of plaintiff's attorney and his ruling thereon. The application was denied. We think the refusal was because no exception was taken to Judge Porter's ruling on the motion, on the theory that if no exception be taken to the Court's ruling acquiescence will be presumed. The acquiescence is not an ascertained fact but is assumed as a legal consequence of failure to except. A reading of this case indicates clearly there was no intended surrender of defendant's rights. Yet the failure to except having a certain legal consequence, defendants must abide by it. But the same rule of logic in this case should apply to plaintiff's failure to amend.

*Had* When he moved to amend the trial court would have probably granted the motion upon terms. Defendants' counsel was under no obligation to ask for a continuance or allege surprise while the pleadings were unchanged, nor was he obliged to object to the evidence. *Stein v. Coleman*, 73 Conn. 529. In fact, the insistence was that the proofs were fairly within the written pleading.

If they were, this appeal must fail.

If they were not, this appeal should succeed.

But it would be unjust to amend the pleadings now.

LOUIS A. COWLEY,  
Attorney and of Counsel of  
Defendants-Appellants.

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**New Jersey Court of Errors and Appeals**

SALVATORE ROSCO, Plaintiff-Appellee,	}	ACTION AT LAW.
<i>vs.</i>		On Appeal from Bergen County Circuit Court.
FRANK FIGARO and ANNIE FIGARO, Defendants-Appellants.		

**BRIEF FOR PLAINTIFF-APPELLEE.**

**Statement of Facts.**

Defendants appeal from a judgment entered against them in favor of the plaintiff in the Bergen County Circuit Court on October 26th, 1926, on the verdict of the Jury for Seven Hundred Sixty-one Dollars and Twenty-five (\$761.25) Cents.

The verdict rested upon evidence which established the following facts. Defendants owned some land upon which they desired to erect a building and engaged one Waskevitz, as general contractor, to do the job, but the latter sub-contracted certain mason work to the plaintiff under an agreement to pay Eleven Hundred and Fifty (\$1,150.00) Dollars, in certain installments as the work progressed. After plaintiff had done a considerable part of the work, and having received only Four Hundred and Twenty-five (\$425.00) Dollars, he refused to go on with the work because the general contractor failed to meet the payments under his agreement with the plaintiff. After a lapse of some weeks the defendants (the owners), being desirous of having the work carried to a speedy

completion, agreed with the plaintiff, that if the latter would complete the job they (defendants) would pay him the amount due for the work already done (for which he had not been yet paid) as well as for the work he agreed to finish; in all Seven Hundred and Twenty-five (\$725.00) Dollars. Under that agreement the plaintiff completed the job, but defendants refused to pay him the Seven Hundred and Twenty-five (\$725.00) Dollars that ~~was~~ <sup>GREW</sup> due.

Thereupon this suit was brought to recover that amount with accrued interest. The defense was a general denial.

Defendants applied for and were allowed a rule requiring the plaintiff to show cause why a verdict should not be set aside. The rule contained a reservation of exceptions.

The grounds urged upon the application for a new trial were:

(1) That the verdict was against the weight of the evidence.

(2) Newly discovered evidence.

The Rule was discharged.

Appellants assigned nine supplemental grounds of appeal. In their brief they urge the following points *only*:

(1) The Court erred in refusing the motion for dismissal at close of plaintiff's case;

(2) The Court erred in holding that it is clear from the complaint that this was not a new job, but was the completion of other work, because the word is used there to complete the work;

(3) The pleadings should not be considered as amended to conform to the proofs.

The other grounds of appeal must be considered abandoned.

“Grounds of appeal not briefed will be considered as abandoned.”

*Wiesen v. Automobile Ins. Co. of Hartford, Conn.*, 126 Atl. 652, judgment affirmed 130 Atl. 921.

### POINT I.

**The Court did not err in refusing the motion for dismissal at close of plaintiff's case.**

The ground for the motion is embraced in the following:

“Mr. Cowley: Your Honor will allow me an exception to your ruling on the pleadings, that there is a *variance* between them and the testimony?” (Case, p. 40, ls. 30-34).

There is no reversible error because:

(a) There was no material variance.

(b) *There was no claim made AT ANY STAGE OF THE TRIAL that defendants were surprised, injured or misled;*

(c) *No request was made AT ANY STAGE OF THE TRIAL for an adjournment.*

(d) Waiver and implied consent to trial of case on the theory upon which it was tried.

(a) It is apparent. No discussion seems necessary.

(b) and (c) Variance alone is no ground for dismissal. To require dismissal, a variance must result in misleading defendants or producing surprise and injury.

The record shows:

(1) In his *opening* to the jury, plaintiff's counsel stated the nature of the contract relied upon—the gist of the action. Defendants' counsel was *then* (at the *beginning* of the trial) apprised of the alleged variance. Why did he not *at once* claim surprise or injury—or say that he was misled—or request an adjournment? He merely asserted that the opening “is not within the province of the pleadings”. The Court ruled that the complaint was broad enough to permit the cause of action embraced in the opening. *No exception was taken. No motion for nonsuit was made.* Instead: “(Mr. Cowley thereupon opened the case to the jury)” (Case, p. 8, ls. 18-40, and Case, p. 9, ls. 1-25).

(2) Plaintiff testified to the contract stated in his counsel's opening—the contract which defendants' counsel *knew* was a variance from the one pleaded, if he considered it such, and he says he did. Yet, the testimony was admitted *without* objection (Case, p. 11, bottom, and pp. 12, 13, and p. 14, ls. 1-20; p. 15, ls. 28-40, p. 16, ls. 1-10).

No motion was made to strike out any of the foregoing testimony. Counsel for defendants cross-examined plaintiff on that phase of the case (Case, pp. 21-26, ls. 1-20) as well as *generally* in respect to his testimony on direct.

Plaintiff's witness John Mattera testified to the contract substantially as plaintiff did (Case, p. 31, ls. 1-30). Still a variance? Yet no objection was made to the admissibility of the testimony; no motion was made to strike out the testimony. No request for an adjournment. No claim of surprise or injury—or that defendants were misled. Counsel for defendants himself again elicited the substance and nature of the new (?) contract on

cross-examination of Mattera, (Case, p. 22, ls. 1-30). See also redirect examination (Case, p. 35, ls. 20-28). Defendants' continue to participate in the trial.

The same situation occurred when Colletti testified (Case, pp. 36 and 37). No objection to the testimony; no motion to strike it out. No surprise or injury claimed or adjournment sought to *properly* prepare a defense to the contract embraced in the *opening* and established by three witnesses, (if counsel was *not* prepared).

AT THE CLOSE OF THE CASE, FOR THE FIRST TIME, COUNSEL FOR DEFENDANTS MOVED FOR A DISMISSAL BECAUSE “THERE IS A VARIANCE BETWEEN THEM (THE PLEADINGS) AND THE TESTIMONY.”

BUT STILL NO SURPRISE OR INJURY IS CLAIMED—NO REQUEST MADE FOR A CONTINUANCE—NO CLAIM THAT DEFENDANTS WERE MISLED.

The motion for dismissal was refused. Defendants presented their defense.

Our view of the case is sustained by the authorities.

“Variance between the pleadings and proof is immaterial, unless the party is misled and prejudiced by it.” *Hallock v. Insurance Co.*, 26 N. J. L., p. 268.

And in *Eannetta v. Delaware, L. & W. R. Co.*, 129 Atl. 232, we find the following:

“In action for death by reason of toppling over of crane used to lift steam shovel onto a work train, where evidence of defendant's negligent operation of crane, *though not alleged, came in without objection by defendant*, and insufficiency of complaint in such regard was not questioned, there was no error in submitting question of defendant's negligence in that respect to jury.

“Where original complaint rested on theory that defendant had furnished an unsafe and improper crane, and case proceeded to trial on double theory, failure of duty to supply proper crane, and negligence of railroad in handling it, *and evidence of negligent operation came in without objection of defendant, it was case in which pleadings, if necessary should be moulded to conform to issue actually tried.*

“*Counsel cannot permit issue to be raised, presented to jury in evidence, submitted to jury by judge, without objection, and then on rule for new trial complain that pleadings were insufficient to sustain verdict*” (Citing Cases.) (Italics ours.)

In *Bunting v. Allen*, 18 N. J. L. 299, the Supreme Court held:

“If the variance between a particular and the evidence offered under it, is such as would naturally mislead the party, the evidence ought to be rejected: otherwise the party objecting ought to satisfy the court by affidavit, that he had been misled by the particular.”

In *Chess v. Vockroth*, 70 Atl. 73, decided by this Court, the first syllabus reads:

“There is a distinction between an action for the recovery of damages for the vendor’s breach of an existing contract of sale, and an action for the recovery of a deposit paid upon a contract of sale, terminated by abandonment, repudiation or rescission. *Nevertheless, when evidence in support of a right to recover a deposit is offered, without a distinct and plain objection by the defendant, in an action which seeks damages for the breach of an existing contract, the objection will not avail, on error brought, that the evidence was outside of the issue made by the pleadings. In such case, the real question in dispute having been fairly tried, the declaration will be*

*amended so as to support the judgment.*”  
(Italics ours.)

(d) Waiver, and implied consent to trial of the case on the theory upon which it was tried is manifest from a reading of the record and authorities, *supra*.

Also:

When evidence is admitted without objection, a defect in the pleading will be overlooked.

*Morris v. Kettle*, 57 N. J. Law 218;  
*Baker v. Fogg & Hires Co.*, 112 Atl. 406.

## POINT II.

**The Court did not err in holding that it is clear from the complaint that this was not a new job, because the word is used there to complete the work.**

The complaint did allege “complete the work”.

No injury or harm is shown to result from the Court’s ruling.

No exception was taken to *that* ruling (Case, p. 38, ls. 15-25). Defendants are not, therefore, entitled to have the *alleged* error considered by this Court.

*Stickle, et al. v. Vreeland*, 123 Atl. 753  
(N. J. Err. & App.).

### POINT III.

**The pleadings should be considered as amended to conform to the proofs, or leave should now be given to amend.**

In *Chess v. Vockroth*, 70 Atl., p. 73, the syllabus reads:

“There is a distinction between an action for the recovery of damages for the vendor’s breach of an existing contract of sale, and an action for the recovery of a deposit paid upon a contract of sale, terminated by abandonment, repudiation, or rescission. Nevertheless, when evidence in support of a right to recover a deposit is offered, *without a distinct and plain objection by the defendant*, in an action which seeks damages for the breach of an existing contract, the objection will not avail, on error brought, that *the evidence was outside of the issue made by the pleadings*. In such case, *the real question in dispute having been fairly tried, the declaration will be amended so as to support the judgment.*” (Italics ours.)

In *Kapherr v. Schmidtt*, 121 Atl., p. 617, this Court held that:

“To sustain a verdict otherwise legal, an amendment will be ordered on appeal, if necessary to conform the allegations to the proof.” (Citing *Levensen Co. v. Gatti-McQuade*, N. J. L. 185, 107 Atl. 277; *Giardini v. Director General*, 93 N. J. L. 138, 107 Atl. 437.)

### Conclusion.

To sustain the verdict in the case at bar an amendment should be ordered by this Court on the appeal, *if necessary to conform the allegations to the proof.*

Respectfully submitted,

FEDER & RINZLER,  
Attorneys of Plaintiff-Appellee.

FEDER & RINZLER,  
of Counsel.

