INDEX.

WITNESSES FOR PLAINTIFF.

Witnesses for Defendant.

Testimony in Rebuttal.

Plaintiff's Exhibits.

New Jersey Supreme Court.

SARGEANT BROTHERS, INCORPORATED, a corporation, Plaintiff, vs. E. M. BRANCATI, Defendant.	Judgment Record. Action at Law. On Postea. T. Girard Wharton, Attorney.

E. M. Brancati, the defendant in this cause, was summoned to answer unto Sargeant Brothers, Incorporated, a corporation, the plaintiff therein, in an action at law, upon the following complaint:

(Summons issued December 5, 1928)

The plaintiff is a corporation of the State of New Jersey having its principal office on Main Street in the Borough of Somerville, County of Somerset and State of New Jersey and says that:

FIRST COUNT.

(1) At the times hereinafter mentioned the defendant was the owner of a plot of land situate at the northeasterly corner of George Street and Chelsea Boulevard being a lot approximately forty-five feet on George Street by one hundred feet on Chelsea Boulevard in the City of Plainfield, County of Union and State of New Jersey.

(2) On December 2nd, 1927, the defendant made a contract in writing with J. Theodore

Miller, hereinafter called the contractor, a copy of which is hereto annexed marked Schedule 1 and made a part of this complaint.

(3) On December 7th, 1927, the said contract together with the specifications accompanying the same and referred to therein was filed in the Office of the Clerk of the County of Union.

(4) Then and thereafter the contractor proceeded to perform the contract on his part and the plaintiff sold and delivered to him the materials mentioned in Schedule 2 hereto annexed and the contractor thereby became indebted to the plaintiff and promised to pay the said plaintiff the sum of $1,832.63 therefor.

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

(6) The contractor has not paid the said sum of $1,832.63 or any part thereof and the same is still due and unpaid.

(7) On March 24, 1928, and prior thereto, plaintiff demanded said sum of $1,832.63 from the contractor, and he then refused, and ever since has refused to pay the same.

(8) On March 29, 1928, plaintiff gave the defendant notice in writing of said demand and refusal, a copy of which notice is hereto annexed marked Schedule 3.

(9) The defendant at the time notice was given to him, as aforesaid was, and at all times since has been, satisfied of the correctness of the plaintiff's demand.

(10) The contractor, at all times after the making of the contract, duly performed all things by the said contract required to be performed, to entitle him to the payments therein stipulated for; and in the alternative plaintiff charges that the defendant, after performing such things as by the contract were required to be performed by the contractor and deducting the same from the funds so due the contractor, still had funds remaining due the contractor and answerable to plaintiff under plaintiff's aforesaid stop notice.

(11) On August 18, 1928, the sum of $1,832.63 became due and owing in accordance with the terms and conditions of said contract from the defendant to the contractor.

(12) Defendant has not paid the said sum of $1,832.63 so due to and demanded by the plaintiff.

(13) Defendant signed the contract hereinbefore referred to as E. M. Brancati and plaintiff has made diligent inquiry but is unable to learn the first name of defendnat and therefore sues him using initials as hereinbefore set forth.

Plaintiff demands the sum of $1,832.63 as damages with interest from August 18, 1928.

SECOND COUNT.

(1) At the times hereinafter mentioned defendant was the owner of a plot of land situate on the northerly side of George Street, approximately one hundred and fifty feet easterly from Chelsea Boulevard in the City of Plainfield, County of Union and State of New Jersey; the plot of land being approximately forty-five feet by one hundred and fifty feet deep; beginning point thereof being on

the northerly side of George Street one hundred and fifty feet easterly from the intersection of George Street with Chelsea Boulevard and extending therefrom in an easterly direction along the northerly side of George Street forty-five feet, running thence in a northerly direction at approximately right angles from George Street one hundred feet, running thence in a westerly direction parallel with the first course forty-five feet, running thence in a southerly direction parallel with the second course one hundred feet to the point or place of beginning.

(2) On December 2nd, 1927, the defendant made a contract in writing with J. Theodore Miller, hereinafter called the contractor, a copy of which is hereto annexed marked Schedule 4.

(3) On December 7th, 1927, the said contract together with the specifications accompanying the same and referred to therein was filed in the office of the Clerk of the County of Union.

(4) Then and thereafter the contractor proceeded to perform the contract on his part and the plaintiff sold and delivered to him the materials mentioned in Schedule 5 hereto annexed and the contractor thereby became indebted to the plaintiff and promised to pay the said plaintiff the sum of $1,790.38 therefor.

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

(6) The contractor has not paid the said sum of $1,790.38 or any part thereof and the same is still due and unpaid.

(7) On May 5th, 1928 and prior thereto, plaintiff demanded said sum of $1,790.38 from the contractor, and he then refused, and ever since has refused to pay the same.

(8) On May 5th, 1928, plaintiff gave the defendant notice in writing of said demand and refusal, a copy of which notice is hereto annexed marked Schedule 6.

(9) The defendant at the time notice was given to him as aforesaid was, and at all times since has been satisfied of the correctness of the plaintiff's demand.

(10) The contractor at all times after the making of the contract, duly performed all things by the said contract required to be performed, to entitle him to the payments therein stipulated for; and in the alternative plaintiff charges that the defendant, after performing such things as by the contract were required to be performed by the contractor and deducting the same from the funds so due the contractor, still had funds remaining due the contractor and answerable to plaintiff under plaintiff's aforesaid stop notice.

(11) On August 18, 1928, the sum of $1,790.38 became due and owing in accordance with the terms and conditions of said contract from the defendant to the contractor.

(12) Defendant has not paid the said sum of $1,790.38 so due to and demanded by the plaintiff.

(13) Defendant signed the contract hereinbefore referred to as E. M. Brancati and plaintiff has made diligent inquiry but is unable to learn

the first name of defendant and therefore sues him using initials as hereinbefore set forth.

Plaintiff demands the sum of $1,790.38 with interest from August 18, 1928.

CLARENCE E. CASE.
~~T. GIRARD WHARTON~~,
Attorney of Plaintiff.

SCHEDULE 1.

Articles of Agreement made the Second day of December, One Thousand Nine Hundred and Twenty-seven.

Between E. M. Brancati of the City of Plainfield County of Union and State of New Jersey party of the first part:

And J. Theodore Miller of the Borough of Bound Brook County of Somerset and State of New Jersey party of the second part:

Witnesseth, First, The said party of the second part does hereby for himself his heirs, executors and administrators, covenant, promise and agree to and with the said party of the first part, his executors, administrators or assigns that he said party of the second part, his heirs, executors or administrators shall and will, for the consideration hereinafter mentioned, on or before the 1st day of April, 1928, well and sufficiently erect and finish the new Building being a two and one-half (2½) story building on the northeasterly corner of George Street and Chelsea Boulevard, being a lot approximately forty-five (45) feet on George Street by one hundred (100), feet on Chelsea Boulevard

Schedule 1—Annexed to Complaint.

in the City of Plainfield, County of Union, and State of New Jersey, agreeably to the Drawings and Specifications made by J. Theodore Miller and signed by the said parties within the time aforesaid, in a good workmanlike and substantial manner, under the direction of G. H. Fisher, Jr. Architect to be testified by a writing, or certificate, under the hand of the said G. H. Fisher, Jr., Architect and also, shall and will find and provide such good, proper and sufficient materials of all kinds whatsoever, as shall be proper and sufficient for the completing and finishing all the plans and specifications, and other works of the said Building mentioned in the plans and Specification for the sum of Five thousand ($5,000.00) Dollars,

And the said party of the first part, does hereby, for himself, his heirs, executors and administrators, covenant, promise and agree, to and with the said party of the second part, his executors and administrators, that he the said party of the first part, his executors or administrators, shall and will, in consideration of the covenants and agreements, being strictly performed and kept by the said party of the second part as specified, well and truly pay, or cause to be paid unto the said party of the second part, his executors, administrators or assigns, the sum of Five thousand ($5,000.00) dollars, lawful money of the United States of America, in manner following: a first payment when foundation is in, frame up and sheeting on, and roof on, Twelve hundred ($1200.00) dollars, a second payment when fully inclosed, all rough plumbing in, heating apparatus in, flooring in, brown coat of plaster on, one coat of paint on exterior, Fifteen hundred ($1500.00) dollars; a third payment of the balance of Twenty-three hundred

($2300.00) dollars when the within contract is completed in all respects.

Provided, That in each of the said cases a certificate shall be produced, signed by the said G. H. Fisher, to the effect that the work is done in accordance with said Drawings and Specifications, said certificate, however, in no way lessening the total and final responsibility of the Contractor; neither shall it exempt the Contractor from liability to replace work if it be afterwards discovered to have been done ill or not according to the Drawings and Specifications either in execution or materials.

And it is Hereby Further Agreed by and Between the Said Parties:

SECOND: The Contractor, at his own proper costs and charges, to provide all manner of materials and labor, of every description, for the due performance of the work as per Specifications herewith submitted.

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

FOURTH: Should the Contractor, at any time during the progress of said work, refuse or neglect to supply a sufficiency of materials or workmen, the Owner shall have power to provide materials and workmen, after three days' notice in writing

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

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

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

SEVENTH: No alterations or extra work shall be done without a written order from the Owner approved by the contractor and an express agreement in writing as to the cost.

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

Schedule 1—Annexed to Complaint.

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

TENTH. The Contractor shall not without the written consent of the Owner, have authority to vary, alter, amend or change this contract, or any of the Plans or Specifications herein referred to.

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

TWELFTH: That the said Contractor shall produce and deliver to the Owner the release of all persons who may then have furnished materials or done work on said building, who may have a lien on such building and the land whereon the same is erected, releasing their lien on said building, and the land whereon the same is erected, with an affidavit by said Contractor thereto annexed, that no person or persons other than those named in said release have any lien upon such building or land for work done or materials furnished for the

erection thereof according to the statute in such case made and provided, said releases are to be furnished when each payment is made as hereinbefore stated.

Words erased before signing.

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

E. M. BRANCATI (Seal)
J. THEODORE MILLER (Seal)
_____ (Seal)
_____ (Seal)

Signed, Sealed and Delivered
in the Presence of
ERNST FIEDLY
(Endorsed)

SCHEDULE 1.

CONTRACT FOR BUILDING.

E. M. Brancati
with
J. Theodore Miller
Dated December 2, 1927
Filed, 19
Received
Union County Clerk's Office
Dec. 7, 11:12 A. M. 1927
Elizabeth, N. J.
William B. Martin, Clerk.

SCHEDULE 2.

Somerville, N. J., March 23, 1928

Mr. J. Theo. Miller, Dr.
Bound Brook, N. J.
To
Sargeant Bros., Inc.

#1 House—E. M. Brancati

	Dec.			
10	12/27.	52 Pcs. 2x10—12′ Fir		
		28 " " 14′ "		
		27 " 2x6 —10′ "		
		14 " 2x8 —10′ "		
		100 " 2x4 —18′ "		
	14	25 Bags Cement	Contract	
		7 " Limoid		
		5 Cellar Frames 2-10x1-9		
		40 Pcs. 2x8—12′ Fir		
		1675 Sq. Ft. 1x10 S.L. Roofers		
		45 Pcs. 2x6—16′ Fir		
20		130 " 2x4—18′ Fir		
		100 " " —16′ "	1067 Ft. @ 52.50	56.02
	20	250 Lin. Ft. 1x6 White Pine		
		4 Pcs. 5/4x6—16′ White Pine		
		100 Pcs. 2x4—12′ Fir	Contract	
		1000 Sq. Ft. 1x8 T&G Roofers		
		1500 Sq. Ft. 1x10′ S. L. Roofers		
	21	500 Lin. Ft. 1x2 Spruce Lath	10.00	5.00
		75 Fire Brick		
		1—36″ Damper		
		30 Pcs. 8x8 Flue Lining		
30		2—Lally Columns 6′—6		
		10 Lbs. Black Mortar Coloring @ .05		.50
		20 Bags Cement		
		7 " Limoid	Contract	
		450—Buff Vertical Wire Cut Brick		
	24	2000 Sq. Ft. ½x10 R. C. Siding		
		850 Sq. Ft. 1x3 B&B Flooring		
		230 Lin. Ft. 5/4x3 White Pine		
		20 Bags Cement		
		1 Door Frame 3-0x7-0		
		2 Door Frames 2-8x6-8		
40		5 Win. Frames 2-6x4-10		
		1 Mul. Frame 2-6x4-10		
	28	1 Triplet Frame 3-0x4-10		

Schedule 2—Annexed to Complaint.

	2 Triplet Frames 2-0x4-10			
	1425 Sq. Ft. 1x10 S. L. Roofers			
	1 Win. Frame 2-6x3-0			
	1 Mul. Frame 2-6x3-0			
	4 Win. Frame 2-6x4-6			
29	20 Bags Cement	Contract		
	6 Bags Limoid			
	4-3 Lt. Cellar Sash 2-10x1-9-1-⅛			
	1 Win. Frame 2-0x3-0			10
	5 Win. Frame, 2-6x4-6			
	1 Sing. Attic Frame 2-10x1-9			
	9 Win. 7 Lts. 2-6x4-6-1-⅜			
	3 " " 3-0x4-10			
	7 " " 2-6x4-10			
	1 " " 2-0x4-10			
	3 " " 2-6x3-10			
	1 " " 2-0x3-0			
	1 Sing. Sash 6 Lts. 2-10x1-9			
30	5 Win. 7 Lts. 2-0x4-10			
31	Part Contract		925.00	20
			986.52	

J. Theo. Miller Bill Continued:

	Amt. Brt. up		986.52	
Jan.				
9/28	8000—4′ Spruce Mason Lath—Contract			
	1 Keg 3d extra fine Blued Lath Nails	6.55		
23	56 Bags Neat Plaster, Paper 80 Lb. Contract			
	4 Pcs. Corner Bead 8′-0 32′ @ .04	1.28		30
31	Part Contract	125.00		
Feb.				
2/28	4 Pcs. 5/4x10-16′ Spruce			
	4 Pcs. 5/4x12-16′ Fir nosed			
	1 Pc. 5/4x12-16′ White Pine			
	150 Lin. Ft. 1x4 White Pine			
	300 Lin. Ft. Lattice			
	150 Sq. Ft. ½x4 N. C. Ceiling			
	3 Pcs. 5/4x10-16′ N. C.	Contract		
	1 Pc. 6x6-16″ Fir D4S			
	70 Lin. Ft. 4″ Crown Mldg.			40
	70 Lin. Ft. 2″ Bed Mldg.			
	35 Bags Tiger Lime			
	3 Bbls. Plaster Paris			

Schedule 2—Annexed to Complaint.

4	3 Pcs. Metal Corner Bead 24′ @ .04	.96	
7	150 Lin. Ft. 1x8 White Pine 30 Bags Cement	Contract	
	2 Lally Columns 6′-6 @ 3.00	6.00	
27	250 Lin. Ft. San. Base Mldg. Chestnut		
	250 " " Floor Base Mldg. "		
	350 " " 1x6 Base "		
10	180 " " Picture Mldg. "		
	80 " " Nosing "		
	400 " " San. Trim "		
	400 " " Back-band "		
	300 " " 1-⅝ Stop "		
	100 " " 1x4 D4S "		
	200 " " 1x4 D4S Cypress		
	250 " " San. Base Mldg. Cypress		
	250 " " Floor Base Mldg "		
	450 " " 1x6 Base "		
	200 " " Picture Mldg. "	Contract	
	40 " " Nosing "		
20	450 " " San. Trim "		
	450 " " Back-band "		
	310 " " 1-⅝ Stop "		
	5 Pcs. 1x12-16′ W. P. B.		
	1 Cellar Sash 2-10x1-9		
	3 Fir Doors 2-0x6-8-1-⅜ 2 Pan.		
	4 " " 2-6x6-8-1-⅜ 2 Pan.		
	4 " " 2-4x6-8-1-⅜ 2 Pan.		
	1 W. P. Bung. Door 8 Lts. 3-0x7-0-1¾		
	2 Fir Doors 4 Lts. 2-8x6-8-1-⅜		
	55 Plaster Bags @ .15		8.25
30	1 Pc. 6x6-16′ Fir 48′		2.55
29	Part Contract	550.00	

40

Schedule 2—Annexed to Complaint.

Mch. 6/28	750 Sq. Ft. ½x2 Cl. Pl. W. Oak Flg. 1 Pr. 30 Lt. 5-0x6-8 Chestnut Doors 1 Pr. 2 Pan. 2-6x6-8 Chestnut Doors 14 Pcs. 5/4x10-3′-0 Oak Nosed 14 Pcs. 1x8-3′-0 Chestnut D4S 1 Pcs. 1x8-12′-0 Chestnut D4S 1 Pcs. 1x8 8′-0 Chestnut D4S 2 Pcs. 1x10-16′-0 Chestnut D4S 1 Pcs. 6′-0 Oak Stair Rail 1 Pcs. 6′x6-4′-0 Paneled Newel Chestnut	Contract		
		1676.31 10.80	10.80	
		1665.51		

J. Theo. Miller Bill Continued:

	Amt. Brt. up	1665.51		
Mch. 15/28	1 Pc. 1x12-16′ White Pine 16′ @ 90.00	1.44		
	1 Pc. 2 Pan. Fir Doors 2-4x6-8 Exchange			
	1 Ironing Board Cabinet	13.50		
19	Balance Contract	164.56		
	Extras:			
	15 Bags Cement @ .75	11.25		
	Materials not used on contract:			
	50 Lin. Ft. 1x8 White Pine			
	100 Lin. Ft. ⅞ ¼ Round			
	200 Lin. Ft. Cove			
	15 Bags Neat Plaster			
	10 Bags Limoid		23.63	
		1856.26 23.63		
		1832.63		

SCHEDULE 3.

STOP NOTICE.

Notice by Journeyman, Laborer or Materialman to Owner to Retain Amount Due or to Become Due from Contractor or Master Workman.

To E. M. Brancati Owner of the building known as Number One House, being a two and one-half story house on the northeast corner of George Street and Chelsea Boulevard in the City of Plainfield County of Union and State of New Jersey.

Take Notice, That there is due to Sargeant Bros., Incorporated from J. Theodore Miller Contractor the sum of Eighteen Hundred Thirty-Two and 63/100 ($1832.63) Dollars for materials furnished by said Sargeant Brothers, Incorporated to him and used in the erection of the said building located on the said land (the land being approximately 45 feet front on George Street and 100 feet deep on Chelsea Boulevard) owned by you.

That I have demanded payment of said Contractor J. Theodore Miller and he has refused to pay Sargeant Brothers, Incorporated and I therefore notify you to retain the amount so due, out of the amount owing by you to said Contractor J. Theodore Miller or that may hereafter become due from you to said Contractor J. Theodore Miller for labor or materials used in the erection of said building and to pay the same to Sargeant Brothers, Incorporated.

A bill of items of the said sum so due and owing

to Sargeant Brothers, Incorporated is hereto annexed.

Dated March 24, 1928.

SARGEANT BROTHERS, INCORPORATED
(Signature) Bernhard Meyer, President.

Seal of Sargeant
Brothers, Incorporated

(Address)———————

(endorsed)

SCHEDULE 3.

STOP NOTICE

Notice to Retain Moneys.
from
Sargeant Brothers, Incorporated
Complainant
to
E. M. Brancati
Owner
Dated March 24, 1928.

This notice was received by me at Plainfield, N. J. at Home the 29 day of March A. D. 1 , at 12.30 o'clock in the P. M. noon.

———————————

Owner.

Schedule 3—Annexed to Complaint.

Somerville, N. J., March 23, 1928.

Mr. J. Theo. Miller, Dr.
Bound Brook, N. J.
To
Sargeant Bros., Inc.

#1 House—E. M. Brancati

Dec.					
10	12/27.	52 Pcs. 2x10—12′ Fir			
		28 " " 14′ "			
		27 " 2x6 —10′ "			
		14 " 2x8 —10′ "			
		100 " 2x4 —18′ "			
	14	25 Bags Cement		Contract	
		7 " Limoid			
		5 Cellar Frames 2-10x1-9			
		40 Pcs. 2x8—12′ Fir			
		1675 Sq. Ft. 1x10 S.L. Roofers			
		45 Pcs. 2x6—16′ Fir			
20		130 " 2x4—18′ Fir			
		100 " " —16′ "	1067 Ft. @ 52.50		56.02
	20	250 Lin. Ft. 1x6 White Pine			
		4 Pcs. 5/4x6—16′ White Pine		Contract	
		100 Pcs. 2x4—12′ Fir			
		1000 Sq. Ft. 1x8 T&G Roofers			
		1500 Sq. Ft. 1x10′ S. L. Roofers			
	21	500 Lin. Ft. 1x2 Spruce Lath	10.00		5.00
		75 Fire Brick			
		1—36″ Damper			
		30 Pcs. 8x8 Flue Lining			
30		2—Lally Columns 6′—6			
		10 Lbs. Black Mortar Coloring @ .05			.50
		20 Bags Cement			
		7 " Limoid		Contract	
		450—Buff Vertical Wire Cut Brick			
	24	2000 Sq. Ft. ½x10 R. C. Siding			
		850 Sq. Ft. 1x3 B&B Flooring			
		230 Lin. Ft. 5/4x3 White Pine			
		20 Bags Cement			
		1 Door Frame 3-0x7-0			
		2 Door Frames 2-8x6-8			
40		5 Win. Frames 2-6x4-10			
		1 Mul. Frame 2-6x4-10			

Schedule 3—Annexed to Complaint.

28	1 Triplet Frame 3-0x4-10			
	2 Triplet Frames 2-0x4-10			
	1425 Sq. Ft. 1x10 S. L. Roofers			
	1 Win. Frame 2-6x3-0			
	1 Mul. Frame 2-6x3-0			
	4 Win. Frame 2-6x4-6		Contract	
29	20 Bags Cement			
	6 Bags Limoid			
	4-3 Lt. Cellar Sash 2-10x1-9-1-⅛			10
	1 Win. Frame 2-0x3-0			
	5 Win. Frame, 2-6x4-6			
	1 Sing. Attic Frame 2-10x1-9			
	9 Win. 7 Lts. 2-6x4-6-1-⅜			
	3 " " 3-0x4-10			
	7 " " 2-6x4-10			
	1 " " 2-0x4-10			
	3 " " 2-6x3-10			
	1 " " 2-0x3-0			
	1 Sing. Sash 6 Lts. 2-10x1-9			
30	5 Win. 7 Lts. 2-0x4-10			20
31	Part Contract		925.00	
			986.52	

J. Theo. Miller Bill Continued:

	Amt. Brt. up		986.52	
Jan.				
9/28	8000—4′ Spruce Mason Lath—Contract			
	1 Keg 3d extra fine Blued Lath Nails	6.55		
23	56 Bags Neat Plaster, Paper 80 Lb. Contract			
	4 Pcs. Corner Bead 8′-0 32′ @ .04	1.28		30
31	Part Contract	125.00		
Feb.				
2/28	4 Pcs. 5/4x10-16′ Spruce			
	4 Pcs. 5/4x12-16′ Fir nosed			
	1 Pc. 5/4x12-16′ White Pine			
	150 Lin. Ft. 1x4 White Pine			
	300 Lin. Ft. Lattice			
	150 Sq. Ft. ½x4 N. C. Ceiling			
	3 Pcs. 5/4x10-16′ N. C.		Contract	
	1 Pc. 6x6-16″ Fir D4S			
	70 Lin. Ft. 4″ Crown Mldg.			40
	70 Lin. Ft. 2″ Bed Mldg.			
	35 Bags Tiger Lime			
	3 Bbls. Plaster Paris			

Schedule 3—Annexed to Complaint.

4	3 Pcs. Metal Corner Bead 24′ @ .04	.96	
	150 Lin. Ft. 1x8 White Pine	Contract	
7	30 Bags Cement		
	2 Lally Columns 6′-6 @ 3.00		6.00
27	250 Lin. Ft. San. Base Mldg. Chestnut		
	250 " " Floor Base Mldg. "		
	350 " " 1x6 Base "		
	180 " " Picture Mldg. "		
10	80 " " Nosing "		
	400 " " San. Trim "		
	400 " " Back-band "		
	300 " " 1-5/8 Stop "		
	100 " " 1x4 D4S "		
	200 " " 1x4 D4S Cypress		
	250 " " San. Base Mldg. Cypress		
	250 " " Floor Base Mldg "	Contract	
	450 " " 1x6 Base "		
	200 " " Picture Mldg. "		
	40 " " Nosing "		
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	450 " " Back-band "		
	310 " " 1-5/8 Stop "		
	5 Pcs. 1x12-16′ W. P. B.		
	1 Cellar Sash 2-10x1-9		
	3 Fir Doors 2-0x6-8-1-3/8 2 Pan.		
	4 " " 2-6x6-8-1-3/8 2 Pan.		
	4 " " 2-4x6-8-1-3/8 2 Pan.		
	1 W. P. Bung. Door 8 Lts. 3-0x7-0-1¾		
	2 Fir Doors 4 Lts. 2-8x6-8-1-3/8		
	55 Plaster Bags @ .15		8.25
30	1 Pc. 6x6-16′ Fir 48′		2.55
29	Part Contract	550.00	

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Schedule 3—Annexed to Complaint.

Mch.				
6/28	750 Sq. Ft. ½x2 Cl. Pl. W. Oak Flg.			
	1 Pr. 30 Lt. 5-0x6-8 Chestnut Doors			
	1 Pr. 2 Pan. 2-6x6-8 Chestnut Doors			
	14 Pcs. 5/4x10-3′-0 Oak Nosed			
	14 Pcs. 1x8-3′-0 Chestnut D4S		Contract	
	1 Pcs. 1x8 12′-0 Chestnut D4S			
	1 Pcs. 1x8 8′-0 Chestnut D4S			
	2 Pcs. 1x10-16′-0 Chestnut D4S			10
	1 Pcs. 6′-0 Oak Stair Rail			
	1 Pcs. 6′x6-4′-0 Paneled Newel Chestnut			
		1676.31	10.80	
		10.80		
		1665.51		

J. Theo. Miller Bill Continued:

	Amt. Brt. up	1665.51		20
Mch.				
15/28	1 Pc. 1x12-16′ White Pine 16′ @ 90.00	1.44		
	1 Pc. 2 Pan. Fir Doors 2-4x6-8 Exchange			
	1 Ironing Board Cabinet	13.50		
19	Balance Contract	164.56		
	Extras:			
	15 Bags Cement @ .75	11.25		
	Materials not used on contract:			
	50 Lin. Ft. 1x8 White Pine			
	100 Lin. Ft. ⅞ ¼ Round			30
	200 Lin. Ft. Cove			
	15 Bags Neat Plaster			
	10 Bags Limoid		23.63	
		1856.26		
		23.63		
		1832.63		

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SCHEDULE 4.

Articles of Agreement, Made the Second day of December One Thousand Nine Hundred and Twenty-seven.

Between E. M. Brancati of the City of Plainfield County of Union and State of New Jersey party of the first part;

And J. Theodore Miller of the Borough of Bound Brook County of Somerset and State of New Jersey party of the second part:

Witnesseth, First, The said party of the Second part does hereby for himself his heirs, executors and administrators, covenant, promise and agree to and with the said party of the first part; his executors, administrators or assigns, that he said party of the second part, his heirs executors or administrators shall and will, for the consideration hereinafter mentioned, on or before the 1st day of April, 1928, well and sufficiently erect and finish the new Building being a two story building on the northerly side of George Street approximately one hundred fifty (150) feet easterly from Chelsea Boulevard, in the City of Plainfield, County of Union, and State of New Jersey on a lot of land approximately forty-five (45) feet front by one hundred (100) feet deep.

agreeably to the Drawings and Specifications made by J. Theodore Miller and signed by the said parties within the time aforesaid, in a good workmanlike and substantial manner, under the direction of G. H. Fisher, Jr., Architect to be testified by a writing, or certificate, under the hand of the said G. H. Fisher, Jr., Architect, and also, shall and will find and provide such good, proper and sufficient materials of all kinds whatsoever, as shall be

proper and sufficient for the completing and finishing all the plans and specifications, and other works of the said Building, mentioned in the plans and Specifications for the sum of Five thousand ($5000.00) Dollars,

And the said party of the first part, does hereby, for himself his heirs, executors and administrators, covenant, promise and agree, to and with the said party of the second part, his executors and administrators, that he the said party of the first part, executors or administrators, shall and will, in consideration of the covenants and agreements being strictly performed and kept by the said party of the second part as specified, well and truly pay, or cause to be paid unto the said party of the second part, his executors, administrators or assigns, the sum of Five thousand ($5,000.00) Dollars, lawful money of the United States of America in manner following:

a first payment when foundation is in, frame up and sheeting on, and roof on, Twelve hundred ($1,200.00) Dollars; a second payment when fully inclosed, all rough plumbing in, heating apparatus in, flooring in, brown coat of plaster on, one coat of paint on exterior, Fifteen hundred ($1,500.00) Dollars; a third payment of the balance of Twenty-three hundred ($2,300.00) Dollars when the within contract is completed in all respects.

Provided, That in each, of the said cases a certificate shall be produced, signed by the said G. H. Fisher to the effect that the work is done in accordance with said Drawings and Specifications, said certificate, however, in no way lessening the total and final responsibility of the Contractor;

neither shall it exempt the Contractor from liability to replace work if it be afterwards discovered to have been done ill or not according to the Drawings and Specifications either in execution or materials.

And it is Hereby Further Agreed by and Between the said Parties:

Second. The Contractor, at his own proper costs and charges, to provide all manner of materials and labor, of every description, for the due performance of the work as per Specifications herewith submitted.

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

Fourth: Should the Contractor, at any time during the progress of said work, refuse or neglect to supply a sufficiency of materials or workmen, the Owner shall have power to provide materials and workmen, after three days' notice in writing being given, to finish the said works, and the expense shall be deducted from the amount of the contract.

Fifth: Should any dispute arise respecting the true construction or meaning of the Drawings or Specifications, the same shall be decided by G. H. Fisher and his decision shall be final and conclusive; but should any dispute arise respecting the

true value of the extra work, or of the work omitted, the same shall be valued by two competent persons—one employed by the Owner, and the other by the Contractor, and those two shall have power to name an umpire, whose decision shall be binding on all parties.

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

Seventh: No alterations or extra work shall be done without a written order from the Owner approved by the contractor and an express agreement in writing as to the cost.

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

Ninth: All work and materials delivered on the premises to form part of the work, whether actually incorporated therein or not, are to be considered the property of the Contractor until the same shall have been paid for, in accordance with the terms hereof; unless said Contractor shall, after receiving a payment thereon, have refused to proceed with the work in accordance with the terms of this

contract. And the Contractor shall have free access at all reasonable times to the said material and to the said work until the same shall have been fully paid for as provided for by this contract. The Contractor shall remove all surplus material after the completion of the work.

Tenth: The Contractor shall not without the written consent of the Owner, have authority to vary, alter, amend or change this contract, or any of the Plans or Specifications herein referred to.

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

Twelfth: That the said Contractor shall produce and deliver to the Owner the release of all persons who may then have furnished materials or done work on said building, who may have a lien on such building and the land whereon the same is erected, releasing their lien on said building and the land whereon the same is erected, with an affidavit by said Contractor thereto annexed, that no person or persons other than those named in said release have any lien upon such building or land for work done or materials furnished for the erection thereof according to the statute in such case made and provided, said releases are to be furnished when each payment is made as hereinbefore stated.

Words erased before signing.

In Witness Whereof, the said parties to these

presents have set their hands and seals the day and year above written.

E. M. BRANCATI (Seal)
J. THEODORE MILLER (Seal)
_____ (Seal)
_____ (Seal)

Signed, Sealed and Delivered
in the presence of
Ernst Fiedly

(endorsed)

SCHEDULE 4.

CONTRACT FOR BUILDING.
E. M. Brancati
with
J. Theodore Miller
Dated December 2, 1927
Filed, 19
Received
Union County Clerk's Office
Dec. 7, 11:12 A. M. 1927
Elizabeth, N. J.
William B. Martin, Clerk.

SCHEDULE 5.

Somerville, N. J., May 2, 1928.

Mr. J. Theo. Miller, Dr.
Bound Brook, N. J.
To
Sargeant Bros., Inc.

#2 House—E. M. Brancati

	Dec.		
10	27/27	33 Pcs. 2x10-14′ Fir	
		14 Pcs. 2x10-16′ Fir	
		13 Pcs. 2x10-20′ Fir	
		1 Pc. 2x10-10′ Fir	
		28 Pcs. 2x10-12′ Fir	
		36 Pcs. 2x6-16′ Fir	
		22 Pcs. 2x6-14′ Fir	
		28 Pcs. 2x6-12′ Fir	Contract
		45 Pcs. 1x10-16′ Roofers S. L.	
		10 Pcs. 1x10-12′ Roofers S. L.	
	28	100 Pcs. 2x4- 12′ Fir	
20		200 Pcs. 2x4- 12′ Fir	
		1615 Sq. Ft. 1x10″ Roofers	
	30	1000 Sq. Ft. 1x8″ T&G Roofers	
		1685 Sq. Ft. 1x10″ S. L. Roofers	
	31	Part Contract	475.00
	Jan.		
	7/28	1 Triplet Frame 2-6x4-6	
		3 Mullion Frame 2-6x4-10	
		4 Window Frame 3-0x4-10	
		6 Window Frame 2-4x3-6	
		3 Window Frame 2-6x4-6	
30		1 Single Frame 2-0x2-5	
		2 Door Frames 2-8x6-8	
		1 Door Frame 3-0x7-0	
		300 Lin. Ft. 1x6 White Pine	
		300 Lin. Ft. 1x4 White Pine	
		200 Lin. Ft. 1x8 White Pine	
		250 Lin. Ft. 5/4x8 White Pine	
		270 Lin. Ft. ½x2½ R. C. Panel	
		220 Sq. Ft. 1x4 Fir Flooring	Contract
		70 Lin. Ft. 4x6 Fir Gutter	
	12	500 Lin. Ft. 1x2 Spruce Lath @ 10.00	5.00
40		2000 Sq. Ft. ½x10″ R. C. Siding	

Schedule 5—Annexed to Complaint.

	1000 Sq. Ft. 1x3 B&B N. C. Flg.			
	6 Bags Limoid			
	1—36″ Damper 40″ over all			
18	4 Win. 7 Lts. 3-0x4-10			
	6 Win. 7 Lts. 2-6x4-10			
	6 Win. 7 Lts. 2-6x4-6			
	6 Win. Lts. 2-4x3-6			
	4 Cellar Sash 2-10x1-9			
	1 Single Sash 4 Lts. 10x12			
	75 Fire Brick			10
	35 Bags Cement			
	30 Pcs. 8x8 Flue Lining			
	3 Lally Columns 6′-6			
31	Part Contract		500.00	
Feb.				
2/28	1 Pc. 5/4x12-16′ W. P.			
	4 Pc. 5/4x10-16′ N. C. nosed			
	60 Lin. Ft. 5/4x12 Fir			
	250 Sq. Ft. ½x4 N. C. Ceiling		Contract	
	600 Lin. Ft. Lattice			20
	2 Pcs. Top & Bot. Rail 16′-0			
	100 Lin. Ft. Cove			
	7000—4′ Spruce Lath			
			$980.00	

J. Theo. Miller Bill Continued:

	Amt. Brt. up		$980.00	
Feb.				
2/28	1 Mul Frame 2-6x4-10		9.00	30
	2 Win. 7 Lts. 2-6x4-10	3.25	6.50	
7	50 Bags Neat Plaster Contract			
	50 Bags	.15	7.50	
29	Part Contract		100.00	
Mch.				
15/28	35 Bags Cement			
	30 Bags Tiger Lime			
	6 Bags Plaster Paris	Contract.		
28	10 Bags Tiger Lime			
	2 Bags Plaster Paris			
31	Part Contract		60.00	40

Schedule 5—Annexed to Complaint.

Apr.				
3/28	9 Pcs. 3′-ON.C. Saddle		.15	1.35
	3 Pcs. 1x8-16′ Chestnut D4S			
	6 Pcs. 1x12-12′ W. P.			
	2 Pcs. 1x10-16′ Chestnut D4S			
	3 Pcs. 1x12-16′ Chestnut D4S			
	12 Pcs. 5/4x10-3′ Oak nosed			
	300 Lin. Ft. San. Trim Chestnut			
	300 " " 1x6 Base Chestnut			
10	150 " " 1x4 D4S Chestnut			
	175 " " San. Base Mldg. Chestnut			
	175 " " Floor Mldg. Chestnut			
	300 " " 1¾" Stop Chestnut			
	35 " " Nosing Chestnut			
	300 " " Back-band Chestnut			
	150 " " Picture Mldg. Chestnut			
	16 " " Door Saddle Oak			
	400 " " San. Trim Cypress			
	350 " " 1x6 Base Cypress			
	150 " " 1x4 D4S Cypress			
	175 " " San. Base Mldg. Cypress			
20	175 " " Floor Mldg. Cypress			
	170 " " 1¾" Stop Cypress			
	55 " " Nosing Cypress			
	150 " " Picture Mldg. Cypress			
	400 " " Back-band Cypress			
	2 Sash Doors 4 Lts. 2-8x6-8-1⅜			
	1—15 Lt. Fir Door 3-0x7-0-1¾			
	2—15 Lt. Fir Door 2-8x6-8-1⅜			
	3 Fir Doors 2-0x6-8-1-⅜, 2 panels			
	3 " " 2-4x6-8 " "			
	4 " " 2-6x6-8 " "			
30	1 " " 2-8x6-8 " "			
20	1 Tudor Ironing Board			7.50
	1 Win. 7 Lts. 2-4x3-6			2.45
	1 Cellar Sash 2-10x1-9			1.25
	12 Lin. Ft. Stair Rail Chestnut 752 Sq.Ft. ½" Cl.Pl.W.Oak Flg.		Contract	
24	1 Brown Ash Door 2-4x6-8, 2 Pan.			8.50
	2 " " 2-6x6-8, 2 Pan.		8.50	17.00
	2 " " 15 Lts. 2-6x6-8		15.50	31.00
	30 Bags Cement—Contract			
30	Balance Contract			525.44
40	*Extra*			
	100 Lin. Ft. 1x4 White Pine 34′		85.00	2.89
May				
3/28	40 Bags Cement		.75	30.00
				$1790.38

Schedule 6—Annexed to Complaint.

SCHEDULE 6.

STOP NOTICE

Notice by Journeyman, Laborer or Materialmen to Owner to Retain Amount Due or to Become Due from Contractor or Master Workman.

To E. M. Brancati, Owner of the building known as Number Two House, being a two story house on the Northerly side of George Street, approximately 150 feet East from Chelsea Boulevard in the City of Plainfield County of Union and State of New Jersey.

Take Notice, That there is due to Sargeant Bros., Incorporated from J. Theodore Miller Contractor the sum of Seventeen Hundred Ninety and 38/100 ($1790.38) Dollars for materials furnished by said Sargeant Brothers, Incorporated to him and used in the erection of the said building located on the said land (the land being approximately 45 feet front on George Street and 100 feet deep) owned by you.

That I have demanded payment of said Contractor J. Theodore Miller and he has refused to pay Sargeant Brothers, Incorporated and I therefore notify you to retain the amount so due, out of the amount owing by you to said Contractor J. Theodore Miller or that may hereafter become due from you to said Contractor J. Theodore Miller for labor or materials used in the erection of said building and to pay the same to Sargeant Brothers, Incorporated.

A bill of items of the said sum so due and owing

Schedule 6—Annexed to Complaint.

to Sargeant Brothers, Incorporated is hereto annexed.

Dated May 5th 1928.

SARGEANT BROS. INC.
(Signature) Bernhard Meyer Pres.
(Address) .....

Seal of Sargeant
Brothers, Incorporated.

(Endorsed)

SCHEDULE 6.

STOP NOTICE
Article to Retain Moneys.
from
Sargeant Brothers, Incorporated,
Claimant,
to
E. M. Brancati
Owner
Dated May 5th 1928
This notice was received by me at
Plainfield, N. J.
the 5th day of May A. D. 1
at 5:30 o'clock in the P. M. noon.
.....
Owner.

Schedule 6—Annexed to Complaint.

Somerville, N. J., May 2, 1928.

Mr. J. Theo. Miller, Dr.
Bound Brook, N. J.
To
Sargeant Bros., Inc.

#2 House—E. M. Brancati

Dec.			
27/27	33 Pcs. 2x10-14′ Fir		10
	14 Pcs. 2x10-16′ Fir		
	13 Pcs. 2x10-20′ Fir		
	1 Pc. 2x10-10′ Fir		
	28 Pcs. 2x10-12′ Fir		
	36 Pcs. 2x6-16′ Fir		
	22 Pcs. 2x6-14′ Fir		
	28 Pcs. 2x6-12′ Fir	Contract	
	45 Pcs. 1x10-16′ Roofers S. L.		
	10 Pcs. 1x10-12′ Roofers S. L.		
28	100 Pcs. 2x4- 12′ Fir		
	200 Pcs. 2x4- 12′ Fir		20
	1615 Sq. Ft. 1x10″ Roofers		
30	1000 Sq. Ft. 1x8″ T&G Roofers		
	1685 Sq. Ft. 1x10″ S. L. Roofers		
31	Part Contract	475.00	
Jan.			
7/28	1 Triplet Frame 2-6x4-6		
	3 Mullion Frame 2-6x4-10		
	4 Window Frame 3-0x4-10		
	6 Window Frame 2-4x3-6		
	3 Window Frame 2-6x4-6		
	1 Single Frame 2-0x2-5		30
	2 Door Frames 2-8x6-8		
	1 Door Frame 3-0x7-0		
	300 Lin. Ft. 1x6 White Pine		
	300 Lin. Ft. 1x4 White Pine	Contract	
	200 Lin. Ft. 1x8 White Pine		
	250 Lin. Ft. 5/4x8 White Pine		
	270 Lin. Ft. ½x2½ R. C. Panel		
	220 Sq. Ft. 1x4 Fir Flooring		
	70 Lin. Ft. 4x6 Fir Gutter		
12	500 Lin. Ft. 1x2 Spruce Lath @ 10.00	5.00	
	2000 Sq. Ft. ½x10″ R. C. Siding		40

Schedule 6—Annexed to Complaint.

		1000 Sq. Ft. 1x3 B&B N. C. Flg.		
		6 Bags Limoid		
		1—36″ Damper 40″ over all		
	18	4 Win. 7 Lts. 3-0x4-10		
		6 Win. 7 Lts. 2-6x4-10		
		6 Win. 7 Lts. 2-6x4-6		
		6 Win. Lts. 2-4x3-6		
		4 Cellar Sash 2-10x1-9		
		1 Single Sash 4 Lts. 10x12		
10		75 Fire Brick		
		35 Bags Cement		
		30 Pcs. 8x8 Flue Lining		
		3 Lally Columns 6′-6		
	31	Part Contract		500.00
	Feb.			
	2/28	1 Pc. 5/4x12-16′ W. P.		
		4 Pc. 5/4x10-16′ N. C. nosed		
		60 Lin. Ft. 5/4x12 Fir		
		250 Sq. Ft. ½x4 N. C. Ceiling		Contract
		600 Lin. Ft. Lattice		
20		2 Pcs. Top & Bot. Rail 16′-0		
		100 Lin. Ft. Cove		
		7000—4′ Spruce Lath		
				$980.00

J. Theo. Miller Bill Continued:

		Amt. Brt. up		$980.00
	Feb.			
	2/28	1 Mul Frame 2-6x4-10		9.00
30		2 Win. 7 Lts. 2-6x4-10	3.25	6.50
	7	50 Bags Neat Plaster Contract		
		50 Bags	.15	7.50
	29	Part Contract		100.00
	Mch.			
	15/28	35 Bags Cement		
		30 Bags Tiger Lime		
		6 Bags Plaster Paris		Contract.
	28	10 Bags Tiger Lime		
		2 Bags Plaster Paris		
40	31	Part Contract		60.00

Schedule 6—Annexed to Complaint.

Apr.				
3/28	9 Pcs. 3'-ON.C. Saddle	.15	1.35	
	3 Pcs. 1x8-16' Chestnut D4S			
	6 Pcs. 1x12-12' W. P.			
	2 Pcs. 1x10-16' Chestnut D4S			
	3 Pcs. 1x12-16' Chestnut D4S			
	12 Pcs. 5/4x10-3' Oak nosed			
	300 Lin. Ft. San. Trim Chestnut			
	300 " " 1x6 Base Chestnut			
	150 " " 1x4 D4S Chestnut			10
	175 " " San. Base Mldg. Chestnut			
	175 " " Floor Mldg. Chestnut			
	300 " " 1¾" Stop Chestnut			
	35 " " Nosing Chestnut			
	300 " " Back-band Chestnut			
	150 " " Picture Mldg. Chestnut			
	16 " " Door Saddle Oak			
	400 " " San. Trim Cypress			
	350 " " 1x6 Base Cypress			
	150 " " 1x4 D4S Cypress			
	175 " " San. Base Mldg. Cypress			20
	175 " " Floor Mldg. Cypress			
	170 " " 1¾" Stop Cypress			
	55 " " Nosing Cypress			
	150 " " Picture Mldg. Cypress			
	400 " " Back-band Cypress			
	2 Sash Doors 4 Lts. 2-8x6-8-1⅜			
	1—15 Lt. Fir Door 3-0x7-0-1¾			
	2-15 Lt. Fir Door 2-8x6-8-1⅜			
	3 Fir Doors 2-0x6-8-1-⅜, 2 panels			
	3 " " 2-4x6-8 " "			
	4 " " 2-6x6-8 " "			30
	1 " " 2-8x6-8 " "			
20	1 Tudor Ironing Board		7.50	
	1 Win. 7 Lts. 2-4x3-6		2.45	
	1 Cellar Sash 2-10x1-9		1.25	
	12 Lin. Ft. Stair Rail Chestnut)	Contract		
	752 Sq.Ft. ½" Cl.Pl.W.Oak Flg.)			
24	1 Brown Ash Door 2-4x6-8, 2 Pan.		8.50	
	2 " " 2-6x6-8, 2 Pan.	8.50	17.00	
	2 " " 15 Lts. 2-6x6-8	15.50	31.00	
	30 Bags Cement—Contract			
30	Balance Contract		525.44	40
	Extra			
	100 Lin. Ft. 1x4 White Pine 34'	85.00	2.89	
May				
3/28	40 Bags Cement	.75	30.00	
	(Filed Dec. 22, 1928).		$1790.38	

Answer.

Filed Dec. 20, 1928.

Defendant denies each allegation set forth in the plaintiff's complaint.

FIRST SEPARATE DEFENSE.

Defendant, by way of further defense says there is no privity of contract between plaintiff and defendant; that there was no contractual obligation on the part of the defendant to pay plaintiff any sum or sums of money.

SECOND SEPARATE DEFENSE.

Defendant, by way of further defense says that J. Theodore Miller, the person who contracted to erect the buildings on premises in question for him, did erect same contrary to plans and specifications, and in an unworkmanlike manner, and that there is nothing due said J. Theodore Miller for work done by him.

EUGENE A. LIOTTA,
Attorney for Defendant.

Reply.

Filed Jan. 7, 1928.

Plaintiff denies every allegation in the answer.

CLARENCE E. CASE.
~~T. GIRARD WHARTON,~~
Attorney for Plaintiff.

Order Amending Complaint.

Due notice having been given to the above named defendant of a motion to amend the complaint by adding thereto and making a part thereof a Third and Fourth Count, and the same coming on for argument in the presence of T. Girard Wharton, attorney of the plaintiff, no one appearing for the defendant, notwithstanding said notice;

And it appearing to the Court that the matters set forth in the said proposed Third and Fourth Counts are pertinent, relevant and material to the said action, on motion of the said attorney of the plaintiff it is on this 2nd day of April, A. D., Nineteen Hundred and Twenty-Nine;

ORDERED that the said complaint be and hereby is amended by adding thereto a Third and Fourth Count, copies of which Third and Fourth Counts are attached hereto and made a part hereof. Defendant may have fifteen days to file answer to amended complaint. Copy of this order certified as a true copy by the attorney for plaintiff may be served.

RULIF V. LAWRENCE,
Supreme Court Commissioner
(Somerset County)

Amended Complaint.

Filed April 2, 1929.

THIRD COUNT.

1. Plaintiff repeats Paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the First Count.

2. The defendant was on the 18th day of August, 1928, and still is indebted to the said contractor in a large sum of money, to wit:

$1832.63 for work done and materials for the same provided, of the fair value of $1832.63, by the contractor for the defendant, at the latter's request in and about the buildings constructed by the contractor for the defendant on the lands mentioned and described in the first paragraph of the First Count, which work and materials and the buildings on and in which the same were placed were then and there accepted by the said defendant and the said defendant afterwards on the day and year aforesaid, in consideration of the premises promised to the contractor to pay him the said moneys on request; yet the defendant has disregarded his said promise and has not paid any of the said moneys, although requested by the said contractor so to do;

Wherefore the said defendant is indebted to the said contractor in a large sum of money, to wit, $1832.63.

3. On August 18, 1928, the sum of $1832.63 became due and owing from the defendant to the contractor.

4. Plaintiff repeats Paragraphs 12 and 13 of the First Count.

Plaintiff demands the sum of $1832.63 as damages with interest from August 18, 1928.

Amended Complaint.

FOURTH COUNT.

1. Plaintiff repeats Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 9 of the Second Count.

2. The defendant was on the 18th day of August, 1928, and still is indebted to the said contractor in a large sum of money, to wit:

$1790.38 for work done and materials for the same provided, of the fair value of $1790.38, by the contractor for the defendant, at the latter's request in and about the buildings constructed by the contractor for the defendant on the lands mentioned and described in the first paragraph of the Second Count, which work and materials and the building on and in which the same were placed were then and there accepted by the said defendant and the said defendant afterwards on the day and year aforesaid, in consideration of the premises promised to the contractor to pay him the said moneys on request; yet the defendant has disregarded his said promise and has not paid any of the said moneys, although requested by the said contractor so to do;

Wherefore the said defendant is indebted to the said contractor in a large sum of money, to wit, $1790.38.

3. On August 18, 1928, the sum of $1790.38 became due and owing from the defendant to the contractor.

4. Plaintiff repeats Paragraphs 12 and 13 of the Second Count.

Plaintiff demands the sum of $1790.38 damages with interest from August 18, 1928.

Answer to Amended Complaint.

Filed April 9, 1929.

Defendant denies each and every material allegation set forth in plaintiff's complaint.

FURTHER DEFENSE.

Defendant, by way of further defense says that J. Theordore Miller, the person who contracted to erect the buildings on premises in question for him, did erect same contrary to plans and specifications, and in an unworkmanlike manner, and that there is nothing due said J. Theodore Miller for work done by him.

Defendant says that he made no contract with plaintiff whatsoever for any purpose; no contractual relations whatsoever with plaintiff and this defendant ever existed as stated in said complaint. That he did not agree to pay for any labor or materials used in the erection of the buildings mentioned in plaintiff's complaint or assume to pay plaintiff anything therefor; that plaintiff never had nor has it now a lien against the building and lands mentioned in said complaint or against this defendant.

Defendant says that the alleged agreement between one Miller and himself attached to plaintiff's complaint is not legally enforceable against this defendant; there is no privity of contract between plaintiff and defendant; that said alleged agreement was not made for the benefit of plaintiff; that whatever remedy plaintiff has, if any, lies solely between plaintiff and the person that contracted with this plaintiff for any labor or materials in this behalf.

The alleged agreement on the part of this defendant and Theodore Miller by and under which

plaintiff claims defendant assumed legal, enforceable and valid mechanics' liens for labor and materials used in the erection of said buildings, so far as the defendant is concerned is wholly without consideration and void in law.

Plaintiff never had any legal, valid and enforceable mechanics' liens for labor and materials used in the erection of the buildings mentioned in the complaint against this defendant.

That the alleged agreement between one J. Theodore Miller and this defendant is void in that Miller has failed to perform his agreement with defendant, and that said alleged agreement is void and of no legal effect whatsoever and especially of no legal effect or benefit to the plaintiff.

Plaintiff cannot maintain any action at law under said alleged agreement annexed to its complaint.

Plaintiff in law cannot claim any benefit arising through said alleged agreement.

Plaintiff has no legal right or status under said agreement against the defendant either at law or in equity.

Said alleged agreement was not designed or intended for the benefit of plaintiff, and plaintiff cannot maintain any action against this defendant thereunder.

EUGENE A. LIOTTA,
Attorney for Defendant.

Reply.

Filed April 10, 1929.

Plaintiff denies every allegation in the answer to plaintiff's amended complaint.

T. GIRARD WHARTON,
Attorney for Plaintiff.

Judgment.

This case was tried before Judge Ruliff V. Lawrence with a jury at the Somerset Circuit, on October 1st and 2nd, 1929.

The jury rendered a verdict against the defendant and in favor of the plaintiff as follows:

On the First Count the sum of One Thousand Nine Hundred Fifty Six and 32/100 Dollars ($1,956.32);

On the Second Count the sum of One Thousand Seven Hundred Eighteen and 70/100 Dollars ($1,718.70).

Whereupon it is adjudged that the plaintiff Sargeant Brothers, Incorporated, a corporation, do recover of the said defendant E. M. Brancati, on the first count the sum of One thousand nine hundred and fifty-six dollars and thirty-two cents damages and on the second count the sum of One thousand seven hundred and eighteen dollars and seventy cents damages together with its costs which have been taxed at the sum of Sixty-six dollars and sixty-six cents making in the whole the sum of Three thousand seven hundred and forty-one dollars and sixty-eight cents.

$1956.32	1st Count
1718.70	2nd Count
$3675.02	
66.66	
$3741.68	

Judgment signed and entered October 4, 1929.

Clerk's Certificate.

I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

In Testimony Whereof I have set my hand and the seal of said Court at Trenton, this Twentieth day of November A. D. Nineteen Hundred and Twenty-nine.

(Seal)

WILLIAM C. GEBHARDT,
Clerk.

Postea.

NEW JERSEY SUPREME COURT.

SOMERSET COUNTY.

SARGEANT BROTHERS, INCORPORATED, a corporation, Plaintiff, vs. E. M. BRANCATI, Defendant.	Action at Law. Postea.

This case was tried before Judge Rulif V. Lawrence with a jury at the Somerset Circuit, on October 1st and 2nd, 1929.

The jury rendered a verdict against the defendant and in favor of the plaintiff as follows:

On the First Count the sum of One Thousand Nine Hundred Fifty Six and 32/100 Dollars ($1,956.32);

On the Second Count the sum of One Thousand Seven Hundred Eighteen and 70/100 Dollars ($1,718.70).

(Signed) RULIF V. LAWRENCE,
Judge.

Notice of Appeal.

NEW JERSEY SUPREME COURT.

SARGEANT BROTHERS, INCORPORATED, a corporation, Plaintiff-Appellee, vs. E. M. BRANCATI, Defendant-Appellant.	On Appeal. Notice of Appeal.

The defendant, E. M. Brancati, true name Ercoli M. Brancati, appeals to the New Jersey Court of Errors and Appeals from the judgment entered in the above stated cause, in the New Jersey Supreme Court, October 2, 1929.

Dated: October 5, 1929.

EUGENE A. LIOTTA,
Attorney for Defendant-Appellant.

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

SARGEANT BROTHERS, INCORPORATED, a corporation, Plaintiff-Appellee, vs. E. M. BRANCATI, Defendant-Appellant.	On Appeal. Grounds of Appeal.

The defendant, E. M. Brancati, true name Ercoli M. Brancati, appeals from the judgment entered in the above stated cause to the New Jersey Court of Errors and Appeals upon the following grounds:

1. The Supreme Court had no jurisdiction to try the issues involved in the above entitled cause.

2. The court committed err in refusing to nonsuit the plaintiff.

3. The court committed err in refusing to direct a verdict in favor of the defendant.

4. The court committed err on the charge to the jury in instructing them that the burden was on the defendant to show that the plaintiff did not substantially perform its contract.

EUGENE A. LIOTTA,
Attorney for Defendant-Appellant.

Testimony.

NEW JERSEY SUPREME COURT.

SOMERSET COUNTY.

SARGEANT BROTHERS, INC.,
Plaintiff,

vs.

E. M. BRANCATI,
Defendant.

Action at Law.

Somerville, N. J., October 1st, 1929.

Before: HON. RULIF V. LAWRENCE, Judge,
and a jury.

APPEARANCES:

T. GIRARD WHARTON, ESQ., *and* RUSSELL E. WATSON, ESQ., for the Plaintiffs.
EUGENE A. LIOTTA, ESQ., for the Defendant.

Mr. Liotta: I move to dismiss the case of Sargeant Brothers against Brancati on the ground this Court has no jurisdiction to try the issue. This suit is brought in the Supreme Court by reason of an act of the legislature applying to mechanic's lien claim. But it is not brought, this suit, entirely as a mechanic's lien suit, but it is brought within the provision of the act to secure the mechanic and other payments for their labor and materials in erecting any building. This suit as started is

entirely a statutory proceeding. The suit was brought by reason of this statute. That is only because the legislature saw fit to allow suits of this kind to be brought in the Circuit Court and the District Court. It has not at any time conferred jurisdiction in the Supreme Court. If jurisdiction is conferred in the Supreme Court by reason of the act of the legislature, then the Supreme Court would have a right to determine the issue. Otherwise, the remedy would be a statutory remedy and not a common law remedy and the plaintiff must rely upon the statutory provision. Under section 23, page 3307 in compiled statute 3 provides that when a claim is filed agreeably to the provision of this act upon any lien created thereby the same may be enforced by suit in a Circuit Court of the County where such building is situated.

The Court: What do you think is the significance of the potential "may be"?

Mr. Liotta: In this case it's compellable.

The Court: Of course, I agree with you generally the mechanic's lien suits are brought in the Circuit undoubtedly.

(Argument)

Mr. Liotta: I therefore respectively submit at this time the proceedings should be dismissed by reason of lack of jurisdiction of this Court.

(Argument by Mr. Watson)

The Court: I am interested in another phase of this matter. What period? What is this suit, a stop-notice to ascertain whether there was any balance due which may be applied to the account of the material men, the amount disputed?

Mr. Liotta: This suit is brought by reason of

the provision of the statute and I dispute the claim in the entirety; in other words, my client had absolutely nothing to do with the plaintiff in this issue.

The Court: What I have in mind is this, I am trying to shorten it. I have been through these things before; I only have two weeks here; I want to try this calendar and if this involves complicated accounts over a long period of time I am going to refer it.

Mr. Liotta: We are satisfied to have it referred as to accounts and as to the legal questions—

The Court: No, I will pass on the legal questions. That's my function. I don't want to sit here four or five days hearing what a pound of nails cost and where they went.

Mr. Liotta: If the Senator will say these requirements were the requirements claimed in this job I won't dispute it. If he give me his word that the goods were delivered and those goods as stated in the complaint were actual goods used, I will agree to it.

The Court: As to the liability of the lumber, no dispute about that?

Mr. Liotta: There will be no dispute about the items delivered.

The Court: The issue then will be to whether there was anything left in the owner's hands?

Mr. Liotta: No, the issue is this, as shown in the complaint. In the first place, we had nothing to do with the plaintiff. In the second place, there was no substantial performance. In the third place, the provisions of the contract, which you see in full, were not complied with. The only thing we will admit is that the goods alleged in the complaint were delivered on the premises.

Motion to Dismiss.

The Court: You disclaim liability?

Mr. Liotta: We disclaim liability.

The Court: I am inclined to the view that this motion which goes to the jurisdiction of the Court in the circumstance should be denied for the reason that it is now represented to the Court that the case rests in part and resorted to by the plaintiff, on a portion of the mechanics' lien act known to it, involving the right of the material men to serve a stop-notice on the owner as against the balance of the building contract remaining in his hands or before it became due. I am not sure that this is a suit on mechanics' lien which would prevent the Supreme Court from taking jurisdiction in the circumstances. The motion for that reason will be denied. You may have an exception.

(Exception allowed and sealed)

The Court: I will allow the sheriff to return a panel now if Counsel thinks that this does not involve four or five days trial—

Mr. Watson: I think this will be disposed of in two or three hours.

Mr. Liotta: I beg to differ with Counsel but we will see.

The Court: All right.

Thereupon a jury being found satisfactory were duly sworn.

Thereupon Mr. Wharton opened to the jury in behalf of the plaintiff.

Thereupon Mr. Liotta opened to the jury in behalf of the defendant.

ABRAM B. HOLCOMBE, sworn on behalf of the plaintiff, testifies as follows:

Direct-examination by Mr. Watson:

Q. Where do you live? A. Somerville.

Q. Are you connected with Sargeant Brothers, the plaintiff in this case? A. I am.

Q. In what capacity? A. Secretary.

Q. Were you during the time this Miller account on houses in course of construction by E. M. Brancati? A. I was.

Q. Familiar with the details of that transaction? A. Entirely.

Q. Were the materials furnished by Sargeant Brothers to the general contractor, J. Theodore Miller? A. They were.

Q. These houses carried on your books by numbers, numbers 1 and 2? A. Number 1 and 2.

Q. Do you know which is which? A. Yes, number 1 is the house—well, I would say toward Plainfield, that is west.

Q. Now, as to house number 1, is the amount due, I am going to question this way—

The Court: I don't understand.

Q. Is the amount due on house number 1 for materials furnished $1832.63? A. That's correct.

The Court: And they were delivered to that house?

The Witness: Yes.

Q. And on house number 2, $1790.38? A. That's right.

Mr. Watson: I offer in evidence, if the Court please, a certified copy of the filed

contract between E. M. Brancati and J. Theodore Miller for house number 1.

The Court: No objection, it will be marked.

(Certified copy marked Exhibit P-1)

Mr. Watson: And contract on house number 2.

(Contract marked Exhibit P-2)

Mr. Watson: It's been agreed by Counsel to put in Mr. Brancati's copy of the plans and specifications. The original is filed in the County Clerk's office and could not be procured.

The Court: They may be marked.

The Court: Do I understand you to say with that regards that the act did not apply to plans and specifications?

Mr. Watson: I don't think the plans. Section 45 of the covenants act and instruments covered by the covenants act but these will serve our purpose just as well.

Mr. Liotta: No objection.

Mr. Watson: I offer the specifications of house number 1.

(Specifications marked Exhibit P-3.)

Mr. Watson: And specifications of house number 2.

(Specifications marked Exhibit P-4)

Mr. Watson: I offer these plans of number 1 with the exception that they bear marks made by the architect, Mr. Conrad, but not for purposes involving this suit as yet.

(Plans marked Exhibit P-5)

Mr. Watson: I offer these plans of number 2.

(Plans marked Exhibit P-6)

Mr. Watson: I offer in evidence the stop-notice served on the owner of house number 1, amounting to $1832.63 and served March 29th, 1928.

(Stop-notice marked Exhibit P-7)

Mr. Watson: And stop-notice on house number 2, amounting to $1790.38, served May 5th, 1928.

(Stop-notice marked Exhibit P-8)

The Court: You better offer your book in that subject so as to make it complete. Let the stenographer mark that.

Mr. Watson: House number 1, $1832.63—

The Court: No part has been paid?

The Witness: No.

Mr. Watson: House number 2, $1790.38—

The Court: No part of which has been paid?

The Witness: No.

(Marked as Exhibit P-9)

The Court: You also offer the delivery slips, you say?

The Witness: Yes, they are all here. Here are the delivery slips in two packages. House number 1—

(Marked as Exhibit P-10)

Mr. Watson: And house number 2.

(Marked as Exhibit P-11)

Q. And what is this? A. Sales ledger, month by month.

The Court: You better offer that.

(Ledger of 1927 marked as Exhibit P-12. Ledger of 1928 marked as Exhibit P-13)

Mr. Watson: That is all.

Mr. Liotta: No questions.
(Witness excused)

J. THEODORE MILLER, sworn on behalf of the plaintiff, testifies as follows:

Direct-examination by Mr. Watson:

Q. Mr. Miller, where do you live? A. Somerville.

Q. And your business? A. Builder.

Q. How long have you been in that business? A. Twenty-one years.

Q. You entered into two contracts with E. M. Brancati, P-1, both dated December 2nd, 1927, marked P-1 and P-2, for the construction of two houses on George Street in the city of Plainfield? A. I did.

Q. Do you refer to these houses as 1 and 2? A. Yes.

Q. In the same way Mr. Holcombe does? A. Correct.

Q. Is the house number 1, Mr. Miller—are you familiar with the plans and specifications of that house? A. I will have to see them.

Q. Well, this is a set produced by Mr. Brancati. Those are the plans? A. Those are not the plans we worked by.

Q. Did they differ otherwise than by these yellow notations? A. The measure in here is not quite correct. The plans should be 26 by 24 where this plan is 24 by 22.

Q. Where is your copy of the plans? A. I have none. Those were filed.

Q. What did you work by? A. Just a sketch that we had.

Q. Was it copied from the files? A. It was, yes.

Q. And this is the floor plan or foundation plan you are referring to? A. Yes.

Q. And this one in evidence which is P-5 calls for what dimensions? A. Calls for 24 by 26.

Q. What did you use to work by? A. 24 by 26. This is 26 by 22.

Mr. Liotta: Who gave Mr. Brancati these plans?

The Witness: Mr. Brancati came to my house, I said I had no original but I had something they were copied from.

Q. This plan in evidence gives the foundation plans of 26 by 22? A. 26 by 22.

Q. What you worked by was 26 by 24? A. Yes.

Q. Did you build it 26 by 24? A. Yes.

Q. Was this bigger than what this called for? A. Yes.

Mr. Watson: All right, we are taking a chance on that.

Q. Now, are these the specifications of house number 1? A. They are.

Q. That's Exhibit P-3. Is this Exhibit P-6 the plans of house number 2? A. With the exception of a few changes which was in the specifications.

Q. The plans are modified by the specifications? A. Yes.

Mr. Watson: We won't go into that now unless it becomes material.

Q. Are these the specifications of house number 2, Exhibit P-4? A. That's right.

Q. Now, Mr. Miller, did you perform the work of constructing house number 1?

Mr. Liotta: I object to that on the ground it calls for a conclusion.

The Court: Not necessarily; sometimes it sounds like a conclusion when it is a statement of fact. He may state directly what he did; when he commenced the work, when he finished it, whether he followed the plans and specifications; it means five questions instead of one.

Q. When did you start the work on number 1? A. The latter part of January, 1927.

Q. Did you finish it? A. I did.

Q. When did you finish it? A. Along in, I am not sure whether the last of March or sometime in April.

Q. Of what year? A. 1928.

Q. Did you follow the plans and specifications in the construction of that building? A. I did.

Q. Did you complete it according to the plans and specifications? A. I did.

Q. What was the contract price? A. $5,000.00.

Q. How much of that was paid? A. One of $1200.00 and one of $1500.00.

Q. The first and second payments as stipulated in the contract? A. Yes.

Q. There is a balance due you on that? A. There is.

Q. Of how much? A. $2300.00.

Q. Now, as to house number 2, when did you begin that? A. About the same time, within ten days of the first house.

Q. Did you complete it? A. Not completed, no.

Q. What did you do, Mr. Miller? A. Why, I did everything with the exception of installing the plumbing fixtures and finishing of the floors.

Q. Why didn't you complete those two items? A. Because Mr. Brancati served a notice on me.

The Court: To do what?

The Witness: Unless I finished within ten days, he would take it over.

The Court: Was it a ten day notice or three day notice?

The Witness: I think two, if I remember right, one ten and one three.

The Court: At the time you quit the house, how much had you been paid on number 2?

The Witness: A $1200.00 and $1500.00 payment.

The Court: $2300.00 remaining unpaid?

The Witness: Yes.

The Court: And what would have been the reasonable cost of finishing the work that you say you did not do?

The Witness: Because we can't agree—

The Court: I understand, but what would be the reasonable cost of finishing that?

The Witness: Why, if I understand it right, the plumber got something between three and four hundred to finish, which was agreed between the plumber and Mr. Brancati. And to finish the floors, perhaps would amount to about $30.00.

The Court: Was that a $5000.00 contract too?

The Witness: It was.

The Court: You have been paid $2700.00

and the unfinished work as you left it would represent the plumbing and the finishing of the floors, $430.00, that right?

The Witness: All right.

Mr. Watson: The plumbing cost $334.40. We agree upon that.

Q. Except for those two items of plumbing and finishing the floors, did you follow the plans and specifications in the construction of house number 2? A. I did.

Q. Did you pay Sargeant Brothers the amount due them? A. I did not.

Q. Do you agree on these two items, on house number 1 of $1832.60 and $1790.38? A. I do.

Q. Did they make a demand upon you for the payment of those sums? A. They served a notice on me at the time Mr. Brancati did.

Q. And you didn't pay it? A. No.

Mr. Liotta: I object to that, Counsel is testifying. I would like to know what happened.

The Court: Mr. Watson may ask him as to whether he disputed the Sargeant bill or not.

Q. Do you dispute these bills? A. I do not.

The Court: Were they correct?

The Witness: They were.

The Court: You went over them, did you?

The Witness: I did.

The Court: Material had been delivered to the two jobs as indicated in the separate accounts, that right?

The Witness: Right.

Q. Now, Mr. Miller, the plans and specifications were drawn by you, were they? A. They were.

Q. Do you know Mr. G. H. Fisher, Jr.?

The Court: I may suggest to Counsel that all we have to do is to prove a prima facie case here and quit, subject to the right of rebuttal. That will shorten it very much.

Mr. Watson: I will do that, sir. We rest.

Cross-examination by Mr. Liotta:

Mr. Watson: I just want to say to the Court that Counsel for the defendant in his opening to the jury mentioned the absence of an architect's certificate. This is the first time that question has been raised. It doesn't appear in the pleadings anywhere. I want to say to the Court—

The Court: Let him struggle with that.

Mr. Watson: I don't want to be subjected to what he said on that score.

Q. Mr. Miller, did you get an architect's certificate? A. I did not.

Q. Did you ever furnish Mr. Brancati with an architect's certificate on either job? A. I did not.

The Court: Was there an architect on the job, Mr. Miller?

The Witness: There was not.

Mr. Liotta: The contracts speak for themselves.

The Court: Was there actually an architect?

The Witness: No, sir.

Q. Now, did you say you finished house number 1? A. I did.

Q. Did you measure these rooms that you constructed? A. We measured the rooms as the building proceeded.

Q. Did you measure them as to heighth and width? A. I did.

Q. Mr. Miller, did you do the work provided for in the plans and specifications? A. On which house?

Q. Did you complete your work on both houses? A. Which house?

Q. House number 1? A. Yes.

Q. As to house number 2? A. No.

Q. How many times were you served with stop-notices? A. Two.

Mr. Watson: Object to that.

The Court: I don't know what he means by stop-notices.

Mr. Liotta: Complaint notices.

The Court: How many times were you served?

The Witness: Twice.

Q. Did you ever refuse to pay the plaintiff in this action? A. I don't quite get you.

The Court: Did you ever refuse to pay the plaintiff in this action, Sargeant Brothers?

The Witness: No.

The Court: The reason you didn't pay, you didn't have the money?

The Witness: That's true.

Q. This is the plans for house number 1? A. That's not the plans, no.

Q. You say these are not the plans under which you worked? A. No, sir.

Q. Who gave these plans to Mr. Brancati? A. I did.

Q. Were these the plans you gave to Mr. Brancati? A. They are.

Q. Did Mr. Brancati ask you for plans for his house? A. He asked me for plans.

Q. You gave him these? A. Yes.

Q. In other words, the house was not constructed in accordance with this plan? A. Not these plans, no.

The Court: Why?

The Witness: Because they are not the right copy of the house, as I explained to Mr. Brancati when he got them. They are smaller than the house he did build.

Q. Why did you give them then? A. He didn't ask me—he wanted the plans anyway. He told me he wanted the plans to build another house by.

Q. Where are the plans for this house? A. Filed.

Mr. Liotta: If the Court please—

Mr. Watson: I want to say to the Court that we subpoenaed these plans of the Clerk of Union County and he notified us that he would not respond to it. He said he refused to respond to the subpoena because it was against the practice to permit file records out of the office. So we find ourselves in this position and as to this particular

plan the witness says he built a larger house than this plan called for.

The Court: What I will allow you to do is this: you better get access to the filed plan and then Counsel may agree as to how the filed plan differs from this plan that has been offered.

Mr. Watson: We will go further than that. We will show the clerk the statute and demand that he respond.

Mr. Liotta: At this time I am not prepared to go ahead with my cross-examination if you are not going to allow this plan to go in, because my cross-examination will be regarding these plans and specifications. That is house number 1. The house was to be 27 foot 6 wide; it was 26 feet wide.

The Court: Now you may examine Mr. Miller, the contractor, on that very question.

Mr. Liotta: I am not going to open the door to prove a different set of plans and specifications.

The Court: I don't think you are entitled to that, because after all you can't get away from the final plans excepting as this witness may say whether he did or did not complete the construction of the building. Let him look at your plans and ask him what size he used.

Q. What was the width of house number 1? A. 26 feet.

Q. What was the heighth of the ceilings on the first floor?

Mr. Watson: Now,—

A. I can't say without referring to the specifications.

The Court: The specifications control that?

Mr. Watson: May I say as to that, the width of the house, size of rooms were inconsistent with the specifications, though entirely complied with. The heighth of the ceiling we admit that in house number 1 on the first floor the specifications provide for a ceiling eight foot six inches high. The actual heighth is eight foot five and a half inches, a variation of one half inch on the first floor.

Mr. Liotta: That is not so.

The Court: You are going to show that, but he is telling what he may concede.

Mr. Watson: House number 2, we concede the specifications call for a ceiling on the first floor eight foot six inches in heighth, and the heighth is conceded to be eight foot and a half inch, a difference of five and a half inches. The second floor, the specifications call for a ceiling eight foot high and we admit that they were constructed seven foot nine and a half inches, a difference of two and a half inches.

The Court: It will be so understood.

The Court: These figures given by Mr. Watson are correct as to the heighth of ceilings?

The Witness: I can't say about house number 2 because I had a foreman that laid that out.

The Court: It is correct as to number 1?

The Witness: He measured it, I didn't.

Q. Now, Mr. Miller, I think you are correct about that. Now, Mr. Miller, did you complete the house as provided for in the plans and specifications, knowing now that in house number 1 you deviated five and a half inches as to the heighth of the ceiling on the first floor?

Mr. Watson: That's house number 2.

The Court: He says he knows nothing about that; this foreman did that.

Q. How much would it cost to build house number 2, or to repair house number 2 so it is constructed in accordance with the plans and specifications? Five inches in difference? A. It would have to be raised off the foundation and lower beams dropped, it would be approximately $200.00.

Q. What would you have to do in order to raise the ceiling on the first floor or lower the floors? A. You would not raise the ceiling, you would drop the floors.

Q. You would have to remove the floors? A. No, sir.

Q. What would you have to do? A. Just jack the house up and leave the floors where they are.

Q. You would raise the elevation of the rooms? A. Just pull it apart, just raise the second floor right up from the first floor and leave the first floor room as it is.

Q. How about the second floor? A. Raise the roof off the top.

Q. In other words you lower the foundation? A. Not lower the foundation, just raise the building off the foundation.

Q. How many days would it take to do that? A. It would take a moving man approximately three days to do that.

Q. You mean you could raise the roof and lower the floor as you say for $200.00? A. Yes.

Q. That's a reasonable cost? A. Yes, sir.

Q. As a matter of fact, you would have to tear down the entire house? A. Absolutely not.

Q. How much would it cost you to give the house the width as provided in the plans? A. On these plans? In other words—

Mr. Watson: I object to that.

Mr. Liotta: I am referring—

The Court: He said he made it the width.

Mr. Liotta: We find conditions to be different.

The Court: That's a matter of dispute. You are cross examining.

A. It is larger than this plan.

Mr. Liotta: That is in the plan submitted in evidence by the plaintiff. The plans specifically show the house should have been 27 feet 6 inches wide. Now, this witness testified the house was 26 feet wide a variance of one and a half feet.

The Court: All right, I will allow you to ask him, of course, why he didn't make it the width you indicate.

A. In the first place it don't call for 27 feet 6 inches, it only calls for 26 feet.

Mr. Watson: Let's find out what it calls for.

Q. Now, measure for me the distance between this point and this point? (Indicating) A. We are not talking about that point. That has nothing to do with the house.

Q. What does this mean? A. That's an outline. This is your house line. (Indicating)

The Court: That's not an elevation?

The Witness: No, the floor plan. You get 10, 13 and 3, which is 26.

Q. What does that mean? A. Now, part of the house—

Q. What does that mean? A. That means from this point to that point, the front of the house, just a line drawn along, which is shown by most architects.

Q. What are your dimensions from here to here? A. That doesn't mean anything about the house. Here is the house lines, right here.

Q. Now, your bedrooms are supposed to be 11 by 13, are they not? A. No, not in the clear.

Q. Well, these plans provide in the clear, don't they? A. What are you going to do with your partitions?

Q. Aren't the partitions to be separate from what the size of the room is? A. Absolutely not.

Q. If you agree to give me a room 11 by 13 it should be 11 by 13? A. You have got to do something to lay your sills by.

Q. Will this room be 11 by 13? A. Not in the clear.

Q. There is no difference in the plan you speak about and this plan as to the width of the rooms? A. The filed plans will tell you about those questions I can't properly answer.

Q. Now, as to house number 1, how much would it cost; what would you have to do to make the ceilings the heighth as— A. It's out of question on this amount of half an inch.

Mr. Watson: I object to that.

The Court: He says it's immaterial.

Q. So that as far as you are concerned it amounts to nothing?

The Court: That's his answer.

Q. But how much would it cost to raise the elevation of the ceiling another half inch? A. I don't think that should be answered.

The Court: Well, categorically you can answer, how much would it cost?

The Witness: The half inch?

The Court: Of course, the rule is substantial performance.

Mr. Watson: They are inconsistent as to both these variations.

The Court: What do you say?

The Witness: I didn't answer the question.

The Court: Well, can you answer it?

The Witness: Well, it would be very slight depending—you would have to take the floors out and drop them a little.

The Court: That would be what?

The Witness: Perhaps fifty dollars at the most.

Q. How much does it cost to hire a carpenter by the day?

The Court: In that neighborhood.

A. Cost $1.40 an hour.

The Court: Eight hours a day at $12.00 a day—beg your pardon, $11.00 a day, isn't it?

Q. How many days would it take to do this work? A. In that case it wasn't carpenter work. It means a moving man to jack it up.

Q. You would not require any carpenter work at all? A. A little.

Q. How many days would a carpenter have to work on the job? A. Perhaps two days.

Q. And what material would you have to use? A. Would not use any material, leave the floor the way it is.

Q. How are you going to fasten the ceiling to the wall? A. You don't have to fasten it.

Mr. Watson: I would like to say to the Court that none of this is cross examination. He is making the witness his own witness.

The Court: In a sense it is because he says he completed the job in accordance with the specifications. Now, Mr. Liotta is cross examining on what he means by that expression. He can go into detail to show he didn't complete it in anywise.

Q. Now, did you paper the walls? A. No, I did not.

The Court: Why didn't you?

The Witness: It was not called for.

The Court: Did you sandpaper the walls in house number 1?

The Witness: No.

The Court: Was it called for?

The Witness: No.

Q. Did you remove the rubbish from the premises? I will put that in my defense? A. What do you mean rubbish?

The Court: Debris, all broken lathe and so forth?

The Witness: Why, yes.

The Court: And removed it, did you do that?

The Witness: I did, broom clean.

Q. How about plastering you saw there? A. Not when I left it.

Q. Do you remember talking with Mr. Brancati to allow him fifty dollars for papering three rooms? A. No.

Q. Don't remember that conversation? A. No.

Q. Did you water-proof the cellars? A. No.

The Court: Why?

The Witness: Wasn't called for.

The Court: No water-proofing referred to in the specifications?

The Witness: No, not that I know.

Q. Did you rough grade the house? A. Yes, I did.

Q. You didn't do the plumbing work in the one house? A. I didn't finish the setting up of the plumbing. Did the rough plumbing.

Q. Did you do painting and decorating? A. I did.

Q. On one house? A. On both.

Q. Did you receive any architect's certificate? A. No, I did not.

Mr. Liotta: That's all.

(Witness excused)

Mr. Watson: I would like to recall Mr. Miller.

J. THEODORE MILLER, recalled:

Redirect-examination by Mr. Watson:

Q. You were asked a question as to whether you ever offered to Brancati $50.00 for papering some rooms and you said no. A. Yes, I did.

The Court: Is that correct?

The Witness: That's not correct.

The Court: What is the circumstance?

The Witness: When we got a settlement we were to allow $50.00 and get a settlement.

The Court: You had that conversation?

The Witness: The conversation passed.

The Court: Was there any requirements in the specifications or plans?

The Witness: No.

The Court: That seems to be all.

(Witness excused)

The Court: Does the plaintiff rest; proceed with the defense.

Mr. Liotta: At this time I ask for a non-suit on the ground that the plaintiff in this instance is substituted as the claimant in place of the contractor. In other words, his remedy lies solely upon the conditions to be performed by the contractor. In other words, it's the principle of subrogation, the plaintiff has subrogated the right of the contractor. The plaintiff would be allowed to recover if the contractor could recover and if the contractor could not recover the plaintiff could not recover. It is an admitted fact that the heighth of the ceiling in both houses are different than what

they are provided for in the contract. It also is an admitted fact that there was no architect's certificate given to the owner. (Argument)

The Court: I am inclined to the view that the recognized rule of law to be in this situation, the cardinal rule, of course, that if the contractor substantially complies and performs the contract and specifications he is entitled to be paid the contract price or whatever balance in the way of payments may remain. Should he fail to perform the contract in a substantial way then the owner is entitled to complete the contract and deduct from the balance of the contract price any sums which may reasonably be necessary to complete the contract in a substantial fashion in accordance with the terms of the contract and specifications. It does not necessarily mean that the contractor would not have the right to sue the owner for any alleged balance due him, the owner would be permitted to deduct from any such sum the reasonable cost of making good the work which was contemplated by the contract and specifications. Here we have a situation where two houses apparently were under construction by contract. The contractor did testify in behalf of the present plaintiff that as to one he substantially performed the work called for and was entitled to a specific sum. In the other he admits that he did not finish for the reason that he received a notice from the owner taking over the contract. If we take the statement as made by Mr. Miller that he performed under the terms of the contract and all he had to do was to finish the plumbing work and finish the floors, the reasonable cost of that the owner would be entitled to deduct from any balance in his hands to make good those matters which the contractor did not.

To his statement of cost which of course we must accept on this motion, there would be a balance still remaining subject to the stop-notice of the plaintiff company. So far as that aspect of the situation is concerned, therefore, it would seem that motion to non-suit should not prevail. With regard to the failure of the contractor to obtain certificate of the architect; while it appears in the contract or specifications that there is a gentleman referred to as Mr. Fisher, Mr. Miller says as a fact that the services of an architect were not actually used upon this job during the progress of the work. In other words, Mr. Miller says there was no architect and therefore his statement again, taking it as true, on this motion as to the services of an architect, and that the provisions of the contract would not apply to the present situation, for that reason, the motion for non-suit should not prevail and will be denied. You may have an exception.

(Exception allowed and sealed)

The Court: On your defense, of course, on that subject you can introduce what it would reasonably cost to complete, then if there is anything left Sargeant Brothers would be entitled to the balance.

CHARLES W. CONWAY, sworn on behalf of the defendant, testifies as follows:

Direct-examination by Mr. Liotta:

Q. What's your business? A. Architect.

Q. You have offices where? A. Newark, New Jersey.

Q. You have been an architect how many years? A. About twenty years, twenty-five years.

Q. Still practicing? A. Yes.

Mr. Watson: That's all, we are satisfied.

Q. Did you inspect these houses? A. I did.

The Court: And in doing so, did you have the plans and contract and specifications before you?

The Witness: I did, sir.

Q. Are these the plans that were before you? A. Yes, this is one.

Q. Which house is this? Is this the bungalow or larger house? A. This is your identification on here, bungalow.

The Court: Can you locate that by the street?

The Witness: I don't recall that now. It's been almost a year ago.

Q. But one of the houses—at any rate this is one of the houses? A. Yes.

Q. Now, did you see these houses after work was done or before Mr. Miller left? A. After it was finished.

Q. Now, was that house in accordance with the plans and specifications? A. The general material of the house was so far as the specifications was concerned was practically O. K.

Q. How about the plans? A. The only thing that seemed to be wrong was when you put a living room down and make it 12 by 22, it's 12 by 22. If you had a dining room and make it 11 by 14 you expect it to be 11 by 14 within plaster walls.

Mr. Watson: Just answer the question.

Q. Now, will you tell me whether or not that house was completed according to the plans and specifications; yes or no? A. No.

The Court: In what respect?

The Witness: It's off in dimensions.

The Court: Just give them.

The Witness: The living room is off approximately 9 inches in dimensions.

The Court: Length or breadth?

The Witness: Both ways. Off 9 inches in the living room all right. The dining room is approximately 9 inches either way.

The Court: Length and breadth?

The Witness: Yes. And the kitchen the same thing.

The Court: 9 inches?

The Witness: 9 inches. If you take the dimensions of the houses as they now stand it would make a house 27 feet 6 inches wide. As the house is built it is 26 feet wide. Off a foot and a half.

The Court: What else?

The Witness: Their bedrooms are the same way. They are short about 9 inches.

The Court: How many are there?

The Witness: Four.

The Court: Well, of course, that carries up naturally by reason of the scantness of the first floor.

The Witness: Yes.

The Court: Now, anything else?

The Witness: I think on the second floor of this house was about three inches low. The second floor three inches low; the first

floor was roughly about six inches.

The Court: Low?

The Witness: Yes, sir.

The Court: Taking the ceilings now?

The Witness: Yes, sir.

The Court: Yes, what else?

The Witness: So far as workmanship of the house goes everything was O. K.

The Court: You have no criticism about that?

The Witness: Not so far as the work is concerned. As an architect, I mean, with experience of course.

The Court: Anything else.

The Witness: The cellar didn't look to be so good.

The Court: What's the matter with that?

The Witness: Seemed to be very little cement down there.

The Court: What depth of cement was called for?

The Witness: Only a depth of about four inches on cinder concrete.

The Court: Did you make a test of this cellar?

The Witness: No.

The Court: What was the matter?

The Witness: It's poor, you can see that.

The Court: How?

The Witness: Cracked from one end to the other. One inch of depth will never crack. No cracking of the consistency is shown there.

The Court: Anything more?

The Witness: That's about all.

The Court: Now, did you figure what

would be the reasonable cost to make changes which would comply as you say with the specifications?

The Witness: The changes could not be made except to wreck the house.

The Court: Tear the house down entirely?

The Witness: That's the only thing. Either do that or take the whole house and move it.

The Court: And put another one there?

The Witness: That's the only way.

Q. Will you kindly show the jury the construction of the house on a sheet of paper; how different timbers and posts joined together? Just illustrate it the best you can? A. (Witness draws diagram)

Q. Now, will you kindly illustrate to the jury what you have done there and what the effects are on the jointure of the different timbers? A. Well, the whole condition is—the first thing you start off with an 8 inch concrete wall. On top of that you have a cap piece or sill piece usually of two sets of 6 by 6 framed together. That runs continuously around the wall of the house. The next thing to the frame was 2 by 4 studs. Then you cap it at the top. Then you come along the side for your floor beams. Your floor beam is nailed and nailed this shape. (Illustrating) Then you spike down the sill piece and in turn spike the side. Now, the gentleman just said before he could cut this floor and drop it down. This floor could not be cut. There's only one thing to do to the house and that is to wreck it or move it. In other words, a frame house can't be cut off and drop the floor down. The same thing holds good with the roof.

You can't cut the roof and raise it up very well.

The Court: You say you can't raise the roof?

The Witness: Not very well. Not over 2 inches or 3 inches, shingle lath, there's nothing to it. You couldn't hold it.

The Court: What have you to say, Mr. Witness, would you regard 2 inch discrepancy, would you regard that as a substantial compliance with the contract?

The Witness: No, not 2 inches.

The Court: You see that—

The Witness: There's room for an argument and I didn't see—

The Court: In other words, your idea of substantial compliance or failure to comply substantially is a situation which develops any question?

The Witness: Standard practice is one inch.

The Court: And that's regarded as substantial compliance.

The Witness: Yes.

The Court: But 2 inches is not?

The Witness: No.

Q. What have you to say as to 6 inches? A. That's out of the question.

Q. Now, Mr. Miller testifies to the fact it would cost $200.00 to place that house in condition as provided for in the contract. Can that be done? A. Sign up the contract with him again.

Q. How much would it cost?

The Court: That's hardly an answer.

What have you got to say about that; put it on record.

The Witness: It can't be done.

The Court: For any such sum?

The Witness: No.

Q. What would be necessary in order to put the house in condition provided for in the plans? A. A new house.

The Court: You see his answer presents a different story. The witness testifies in his opinion the defects and failure to observe the provisions here of the contract and specifications and plans amount to total failure on the part of the contractor to complete. Therefore he is not entitled to collect anything. That's your point? Now, of course that becomes an issue of fact for the jury.

Mr. Watson: We contend 5 inches is substantial.

Q. What have you to say as to 6 inches lower floor? A. 6 inches is out of the question.

Q. Can you argue that point? A. No, I would not argue it, just simply refuse to accept it.

The Court: What would be the reasonable cost to make good in that respect, in accordance with the plans and specifications?

The Witness: There's no way to fix a house of that type but to wreck it.

The Court: You would tear it down?

The Witness: Tear it down or move it.

Q. Now, what effect, taking this house into con-

sideration, what effect would the lessened heighth of the ceiling on the first and second floor have to the people living in the house in case they moved in? A. It would be humid in the winter time and stuffy.

The Court: Would not be proper ventilation?

The Witness: No.

The Court: By the way, where are these properties?

The Witness: In Plainfield.

The Court: It just occurred to me about taking the jury over there and let them look it over.

Mr. Watson: I am satisfied. I want to cross examine this witness first.

Q. How much would it cost to put the cellar in the condition called for? A. About twenty cents a square foot.

Q. How many square feet are there? A. About 625 square feet, and a fifth, about $125.00.

Q. Now, the other house, house number 2.

Mr. Watson: I thought we agreed on the other house.

The Court: Let him adopt any numbers he pleases. You have been talking about number 1, now what about number 2. You have been talking about number 1; now, what about number 2.

A. So far as drawings and specifications I would say it was O. K.

The Court: You think there was substantial compliance there?

The Witness: Yes.

Q. You say one of the houses are O. K. and one not O. K.? A. This one here, whichever that is.

The Court: Now, why don't you identify them so the witnesses can adopt your number? House number 1 he is talking about is located where with reference to the street?

Mr. Watson: This floor plan is house number 1 and marked number 1.

Mr. Liotta: Number 1 is near the corner and the other one is next to the corner.

The Court: Now what one have you been talking about?

The Witness: Number 1, according to the distinction here.

The Court: Now, will Counsel agree on which one that is?

Mr. Watson: We call that number 2. It makes no difference. He said what variation in one house, that there is a variation in one house and none in the other.

The Court: I don't think I would waste time on that.

Q. Is the other house you saw a variation of about a half an inch? A. Yes.

Q. Did you inspect the other and was that substantial compliance to the contract? A. Yes.

Q. Now, did you inspect the roof on that house for a leak, a small leak in one of the houses over the sun porch? A. I think it was.

Q. How much would it cost to repair that leak? A. That's a matter for a roofer.

The Court: You are not able to say?

The Witness: I would not say.

Q. How about the cellar; was that done in good workmanlike manner or proper material? A. There's dampness shown in the cellar.

Q. Are the cellars in both houses alike? A. Both the same workmanship.

Mr. Liotta: That's all.

Cross-examination by Mr. Watson:

Q. Now, Mr. Conway, we are evidently confused as to house number 1 and number 2. How are the living rooms located in these two houses? A. In which respect?

Q. Are the two house alike? A. No, different plans.

Q. In the house that has the low ceilings, which way does the living room run? A. It's beyond me now.

Q. You don't remember? A. I have even looked at that plan right now and don't remember.

Q. Now, if you can remember—if you do remember which house has low ceilings, why can't you tell which way the living room runs? A. (No response)

Q. Now, the jury is going there soon, now just testing your powers of observation; you say the low ceiling house is the one in which the living room is on the side of the house? A. Yes, to the best of my knowledge.

Q. Now, let's take this plan, Mr. Conway, of the one you say is the low ceiling house; according to that plan, what's the foundation width of that house, 26 feet? A. 22 feet 4 inches.

Q. Mr. Conway, haven't you said the width of

the house over-all is 26 feet? A. That is the dimension figure.

Q. And you agree with that? A. Yes.

Q. Now, how wide is the living room according to the plan? A. About 11 foot 3—

Q. No, that's your notation. How wide does the plan call for? A. 12 feet.

Q. Now, the room on the right is the dining room? A. Right.

Q. How wide, what width does the plan call for in that room? A. 14 feet.

Q. Now, 14 and 12 are 26? A. Right.

Q. And the house is 26 feet wide? A. Right.

Q. Now, if you have a 12 foot room inside measurement and a 14 foot room inside measurement in a house 26 feet— A. It can't be done.

Q. Where would be the partition? A. Can't be done.

Q. Wouldn't you now, as a reasonable man, Mr. Conway, with no particular interest in the outcome of this case as an expert, but just a reasonable disinterested person looking at this plan and knowing that it calls for a width of a house over-all of 26 feet and finding the living room labeled 12 feet wide and dining room labeled 14 feet wide, you would conclude these measurements include the partitions, wouldn't you; in other words, that 12 foot would include the partitions? A. Oh no.

Q. Well, where would you put the partitions in a 26 foot house? Withdraw the question. Do you contend this plan calls for a 12 foot living room inside measurements? A. I contend the plan calls for the labeled dimensions of the room.

Q. And what is that? A. 12 by 22.

Q. We are just talking about the width now? A. 12 foot wide.

Q. So when you say 12 feet, you think it means 12 feet? A. I don't think so, I know it.

The Court: Inside dimensions?

The Witness: That's standard.

Q. Now, look at the dining room, what's the width? A. 14 feet.

Q. You think that means inside measurement? A. Absolutely.

Q. Now, what do you say the width of the whole house is? A. 26.

Q. Where would the partitions be? A. That's just the point, they are not there. The allowance is not made for them.

Q. Now, you knew that these plans were drawn by Mr. Miller, did you? He's a contractor and builder, and not a trained architect? A. I don't know what he is.

Q. You saw him on the stand. Assuming that he is a builder and not a trained architect like yourself, and I ask you if you would not reasonably conclude if the width over-all is 26 feet and the rooms call respectively for 12 and 14, that he intended to give inside measurements and include partitions?

Mr. Liotta: I object to that.

The Court: Oh, it goes to the interpretation of the existing plan.

Q. You can't say—

Mr. Liotta: How can this witness determine what somebody else intended?

A. The reasonable construction of this plan so far as dimensions go indicate the whole plan is in error so far as dimensions go.

Q. Yes, there's an error somewhere? A. Yes.

Q. Now, isn't it reasonable to conclude that he would intend that this room measurements would include the partitions? A. No.

Q. What? A. No.

Q. Well, if you don't conclude it, where would he put the partitions? A. Well, assume the 26 foot figure is wrong?

The Court: On that plan it calls for a width of 26 feet?

The Witness: Yes.

The Court: You say it calls for a width of 12 feet for the room?

The Witness: Yes.

The Court: Now the point is to make—apparently your statement is to make that 12 foot room it would mean to increase the width of the house because you have got to have your walls?

The Witness: Absolutely.

The Court: So instead of 26 feet, it would be—

The Witness: 27 feet 6.

The Court: Well, which measurements would you take to control, the outside or the inside?

The Witness: The client buys the size of the room.

The Court: You think he buys the room inside of the exterior?

The Witness: Absolutely. If you want to buy a room you want to buy the room.

Q. That's sufficient, Mr. Conway. We will just let it go at that. Now, you say in one of these houses you think the ceilings on the first floor is five and a half inches short? A. Yes.

Charles W. Conway—Cross.

Q. And on the second floor how much under? A. Three inches.

Q. How did you ascertain that, Mr. Conway? A. There was a wall section furnished with one of these houses.

Q. What's a wall section? A. Just a section right down through the front of the house, giving dimensions.

Q. Were you in the house? A. Yes.

Mr. Liotta: If the jury is to inspect the house they can take the plans with them.

The Court: I am not going to send them out now because so many live in various parts of the country.

Mr. Liotta: I think it would be a good idea to postpone this case until tomorrow—

The Court: No, get the record.

Q. Now, you said you discovered it by a wall section that was furnished you? A. Yes, practically an elevation.

Q. Is that a plan? A. A drawing.

Q. A section made down through the front? A. From the roof.

Q. That pencil and paper? A. Yes. The dimensions I had was backward.

Q. How did you discover the actual dimensions? A. By a six foot rule.

Q. By measuring it? A. Yes.

Q. When was this section that you speak of furnished you? A. That was part of these drawings that I had seen.

Q. So you went to the house; why did you measure it, Mr. Conway, with a rule? A. There's no other way to measure but with a rule.

Q. You could tell with your eye? A. Absolutely never.

Q. You mean to tell me you went in that building and couldn't tell that the ceiling was five and a half inches short? A. How high is that door?

Q. I ask you; how high is it? A. About 7 feet.

Q. Mr. Conway, I don't know how high the door is. I can't tell with my eye, I can't say whether that was 6 foot 6 or 7 foot or 7 foot 6, I will say between 6 foot 6 and 7 foot 6, what would you say? A. I estimate 7 feet.

Q. Estimate 7 feet? A. Yes.

Q. Can't you tell exactly? A. I tell you the reason why I can't tell exactly, because there's two depths of doors made.

Q. You are not doing it by looking at it; you are thinking about stock doors? A. Six or seven in those houses.

Q. All right; but you don't know which one of the stock that is? A. No.

Q. Can you tell whether that's 6 foot 9—what did you say the next one was? A. Seven.

Q. Can you tell me whether that's 6 foot 9 or 7? A. No.

Q. Can you tell me whether it's 6 foot 6 or 7 by looking at it? A. No.

Q. You can't? You didn't know when you went in that room whether the ceiling was 8 foot and a half inch or 8 foot 6 inches; you had to get your rule out and measure it? A. Absolutely.

Q. And on the second floor a difference of only two and a half inches you couldn't tell without measuring it? A. No.

Q. You saw the cellar but didn't test the floor? A. I didn't go and chop in that, no.

Mr. Watson: That's all.

(Witness excused)

ERCOLE M. BRANCATI, sworn on his own behalf as defendant, testifies as follows:

Direct-examination by Mr. Liotta:

Q. Mr. Brancati, you are the defendant in this suit? A. Yes, sir.

Q. Did you contract to buy any goods from Sargeant Brothers? A. No.

The Court: It is admitted?

Mr. Watson: Yes.

The Court: It is admitted there was no contractual relation between Brancati and Sargeant Brothers.

Q. Do you own these two houses now? A. Yes.

Q. Where are these two houses located at? A. In George Street, Plainfield.

Q. Near what corner? A. Near Chelsea Park.

Q. Which is house—do you know the street numbers of those houses? A. We don't have street numbers. I don't know, I tell the truth,—

Q. Could you tell the difference between house number 1 and number 2 by looking at the plans? A. Absolutely.

The Court: Suppose you speak of the one nearest the corner?

The Witness: Yes.

Q. Which one is this nearest the corner and what is the other one? A. I can't tell from the foundation, I will look—

Q. Now, can you tell me what's wrong with the house nearest the corner? A. The house near the corner—not near the corner but on the corner.

Q. At the corner? A. The house at the corner,

the only trouble is, it's beginning to show the cement in the cellar. The cement I show to a representative of Sargeant Brothers when he came up there, we broke the cement and the cement was only a quarter of an inch.

Mr. Watson: Who was that representative?

The Witness: The secretary and lawyer.

Mr. Watson: This gentleman?

The Witness: Yes, and the architect and contractor. He broke the cement and saw that. The cement was about a quarter of an inch to almost an half inch thick. No bottom, only a shell on top and I seen water that day, everything came up around the shell. That's on both cellars. They are there at the present time that anybody can see it.

Q. Now, anything else wrong with that house? A. Well, the roof leaks. We had the walls all dirt and we had the plaster falling down from the walls.

Q. How much plaster fell down? A. Oh, a long stretch, but narrow; about that thick. (Indicating) From the first floor to the second floor.

Q. Have you had an estimate on what it would cost to fix that roof and plaster? A. I have no idea, I can say it will cost quite some money.

Q. Now, as to the other house? A. Oh, the other house, the roof is in worse condition. It was such condition that all the plaster fell off the walls, and on the sun parlor and front room and also the other room and dining room, the plaster fell off, is there yet. Anybody can be shown anytime they want. Also the cellar is in the same condition and another took notice about the size of the rooms

when we have a buyer. He came up there and we showed the house and as soon as he looked at the house he said—

Mr. Watson: Object to that as hearsay.

The Court: Well, I think you have it, the ceiling was low; first and second floor?

The Witness: Yes.

Q. Now, did Mr. Miller finish the job? A. No, sir.

Q. Did you have any trouble with Mr. Miller? A. Plenty.

Q. When did Mr. Miller leave the job? A. When he left the job? He left the job along in April.

Q. April, nineteen what? A. 1928, I guess.

Q. '27 or '28? A. '27, I guess. '28.

Q. Now, did you serve Mr. Miller with any three day notices? A. I did.

Q. How many? A. Two; two times.

Q. Did he come to finish the job? A. He never did. I had the house there seven months that I can't get a buyer. Seven months without finishing the house and I went to Mr. Miller three or four months to finish the house.

Q. Did you ask Mr. Miller to come and finish the house anytime? A. I wanted him to complete it, went over to Cranford or Westfield, wherever he was working.

Q. What did he say to you? A. He would come tomorrow, the next day, and he would come over, but the houses remained in the same condition they was.

Q. Did you have any work done other than what Mr. Miller did? A. After we gave him the three days notice, by suggestion by my lawyer, he told me to complete the premises.

Q. I hand you a batch of papers, probably these can refresh your recollection. Now, what work did you do? A. On the first place, I had to get a plumber. It was some plumber that had the plumbing work and he says no he got two other plumbers and they refused to fill the work—

Mr. Watson: We admit the plumbing.

The Court: What did it cost you to have that plumbing done?

The Witness: The plumbing was $334.40.

Q. What else did you have to pay?

Mr. Watson: That was which house?

The Witness: That is number 2.

Q. That's the one nearest the corner? A. No, the other.

Q. What else did you have to do? A. Rough grading. The premises was left the way they were and they had to be rough grading.

The Court: What did that cost?

The Witness: $95.50.

Q. What house was that on? A. On both houses.

Q. Did you have to do anything else? A. Sure, plenty to do. I had to dig out the trenches around the cellar and have them replastered because the cellar was getting full of water.

Q. Did you see the plaintiff, or this gentleman here? (Indicating) A. I told him all about it.

Q. And was he there—did you speak to him about that cellar? A. Yes, everything, they know all about it.

Q. What did they say to you, if anything, at that time? A. They passed some remark that Mr. Miller put them in a hole or so. There's another

bill; that's the painter, $165.00 for painting, finishing the floors.

The Court: Which house?

The Witness: On both houses.

The Court: Both houses was not finished the painting?

The Witness: That's $21.75 to take the rubbage away because it's original that Mr. Miller was to take the rubbage away but he didn't come back to the property, so the statement is all true.

The Court: That's both houses?

The Witness: Both houses.

Q. This one, $70.55? A. That's for house number 2, for two doors, for molding, no floor plates, $5.50 complete. Cellar steps and door $4.50, build coal bin $8.00.

Q. Now, Mr. Brancati—

The Court: What is that other?

The Witness: Sand paper walls. They was in such condition, that uneven that if you would paste them they would not cover, the condition of the walls, so I had to get a man to sand paper just to get them half way decent. $10.00 on that. And cleaning the fire place. They smoked it when they was cold. They burnt wood in it and the room and the chimney was black, as a railroad engine. So I got that cleaned.

Mr. Watson: We admit the figure in the items.

Mr. Liotta: I offer these in evidence. (Marked as Exhibit D-1)

Q. Outside of what you have told us, was there anything wrong with the other house? A. Was there anything else wrong? He left the place, the cellar and about the dimensions of the heighth.

Q. Was anything else wrong?

The Court: That all?

The Witness: Well, that's what I know.

Q. Now, when did you first find out about the dimensions of the building? A. The heighth?

Q. Yes? A. Well—

Q. Approximately when? A. When I had the first and second buyer.

Q. When was that? A. Well, that was, oh say, about four or five months after Mr. Miller quit the job. Both made that remark about the heighth of the room.

Q. Did you see Mr. Miller after that? A. Yes, I did.

Q. Did you tell him about the heighth of the ceiling? A. Many times.

Q. What did he say to you? A. He walked away and I won't see him any more. I went for the plans and those are the plans that Mr. Miller gave to me.

Q. When he gave you the plans, what did you ask him for? A. I asked him that I wanted the plans of the two houses because we have it in file and we have none; and perhaps he was to give those plans, perhaps to build two more houses, otherwise Mr. Miller won't give the plans, and he done everything.

Q. And did he tell you these were the plans? A. They were the plans of the other two houses.

Cross-examination by Mr. Watson:

Q. Houses both rented?

Mr. Liotta: Object to that as immaterial.

The Court: He may answer.

A. Yes, sir.

Q. Collecting the rent? A. Yes, sir.

Q. They are rented two months? A. One rented the last two months and the other one about seven or eight months. They were pretty near a year or half a year being rented.

Q. Who is Ralph David? A. I don't know.

Q. Who is F. Hammon? A. I don't know that.

Q. Know a man named Hector? A. Hector what?

Q. Hector? A. That's his first name. If you tell me the one name I may know. As far as I know, Hector is the first name.

Q. Do you know a man named A. B. Hector? A. No, I do not. I have a son and his name is Hector.

Q. Do you know a man named Unata? A. Yes.

Mr. Watson: That is all.

Redirect-examination by Mr. Liotta:

Q. Do you know the names of the people that done work on your job? A. Yes.

Q. All of them? A. Every one.

Q. Now, probably this will refresh your recollection, as I did before? A. Yes.

Q. Now, looking at these names, tell me whether you know now? A. Sure I do know, every one. But this Mr. Hector, he is my son.

Q. A. B. Hector, who is that? A. What does that mean, my son, I don't know.

Q. Who wrote this?

The Court: Would the other fellow have his name?

A. Well, I don't know what he put down.

Q. Is Hector the same thing here as the other names, did you check over? A. I can make explanation of everybody on it.

Q. All right, explain every figure? A. (No response)

Recross-examination by Mr. Watson:

Q. Now, did I understand the first time referred to here is work done by your son? A. Yes.

Q. And you paid your son? A. Yes.

Q. And is that your son's too? A. Yes.

Q. Did you pay him with cash? A. Absolutely.

Q. With money? A. I pay.

Q. And how did you pay him, with money or your check? A. What is the difference?

The Court: No, did you pay him?

The Witness: I paid him, yes.

The Court: How did you pay him?

The Witness: In cash.

Mr. Watson: That's all.

(Witness excused)

The Court: We will adjourn until tomorrow morning at ten o'clock.

Thereupon the Court adjourned until October 2nd, 1929, at ten o'clock in the forenoon.

Colloquy.

Somerville, N. J., Wednesday,
October 2nd, 1929.

Trial Resumed.

Mr. Watson: Yesterday we conceded that house number 2, the specifications called for ceiling heighth of 8 foot 6 inches on the first floor and the actual heighth of 8 foot and a half inch and 7 foot on the second floor with an actual heighth of 6 foot 9 and ½ inches. That concession, if the Court please, was based upon Mr. Brancati's copy of the plan. I explained to you that we had subpoenaed the original plans and had been unable to produce them because the County Clerk was not willing to respond to the subpoena. In the circumstance, we went to look at the original plan this morning and found they were not filed in the County Clerk's office but were filed at the Building Department in Plainfield. The said department gave them to Mr. Holcombe and we first brought them here and these plans show the first floor heighth to be 8 feet and the second floor to be 7 foot 10 inches. My concession was made under a misapprehension. I desire to withdraw it and produce evidence showing the true facts when the time comes.

Mr. Liotta: I understand the dispute is the plans as shown by us, the plans we were interested in were the plans given us by the builder in this matter. Now I understand also the original plans are on file with the County Clerk.

The Court: No.

Mr. Liotta: Is your copy of the plans filed with the County Clerk?

Mr. Watson: No.

Mr. Liotta: The, if the Court please, the only

thing I can possibly do is to repeat whatever I said and reopen the entire case entirely.

The Court: No, I am not going to do that. The fact is I may ascertain what plans were actually used on the job and Mr. Miller, as I understand it, testified that he used the plans that were offered here yesterday.

Mr. Watson: No, he said he did not use that one.

The Court: I will allow you to put in affirmative proof of just what plans were used.

Mr. Liotta: May I be allowed to withdraw my defense until they put in their full case?

The Court: I will protect you by sur-rebuttal, if necessary.

CHARLES W. CONWAY, recalled.

Further Direct-examination by Mr. Liotta:

Q. Now, Mr. Conway, I ask you to look at this plan and ask you what width, rather what house is called for in that plan? A. Exterior dimension was 26 feet, interior was 27 feet 6 inches.

Q. And what are the actual exterior dimensions? A. 26 feet.

Q. In the rear, what are they? A. 26 feet.

Q. I show you a marking that you made over here. What does this mean? A. 22 feet, that's the side of the house.

Q. What were the dimensions required in the plan? A. According to this, it should be 23 feet.

Mr. Liotta: That is all.

Cross-examination by Mr. Watson:

Q. One of these houses is a two and a half story

and the other is a one and a half story, isn't it? A. Yes.

Q. Which is the two and a half story house? A. I do not recall.

Q. Do you recall whether this alleged ceiling shortage is in the two and a half story house or the one and a half story house? A. There was the boss present I think and that was the two and a half story house.

Q. And when you say the boss— A. The owner.

Q. Brancati? A. Yes.

Q. Do you know where he got it from, this plan? A. It was part of the building—

Q. Do you know whether it was part of the original plans or whether he got it out of his head? A. That I don't know.

Q. Had the rest of the diagram been furnished to you by Brancati, the source of which you do not know? A. It was not complete print.

Q. Something that he says somebody else drew? A. Apparently.

Q. Now, this drawing from which you have just been testifying. Is that house number 1 or 2? A. House number 1, according to identification.

Q. Is it the two and a half story house or one and a half? A. I don't recall; show me the elevations. They are both two story houses so far as I am concerned.

Q. But you know they are two and a half and one and a half? A. With me they are both two stories.

Q. Are they exactly alike? A. In plans, no.

Q. Did you examine them? A. Yes.

Q. Intending to come here as an expert witness? A. One year ago.

Q. You can't tell us whether one house is high

er than the other? A. Outside of the foundation, they went to that one house.

Q. Can you tell me whether it is the higher or lower house? A. It was this house here that everything was in. That is where it was off six inches.

Q. And that's the lower house of the two in heighth?

Mr. Liotta: I think you will help this jury and the witness if you would be—

Mr. Watson: You don't want the jury to know how little he knows about it.

Mr. Liotta: I think it's fair to have the jury know how much he knows about it.

The Witness: Where are the elevations of the house?

The Court: Show it to him.

Mr. Watson: Here is everything in evidence, you know it and you produced it, or Mr. Liotta did.

The Witness: May I lay this out on the table?

Mr. Watson: Yes, sir.

Mr. Watson: You have what you want now, have you?

The Witness: Yes, sir.

Q. (Question read)

The Court: Is that right?

A. This house I figure 8 foot 6 inches in heighth and this 8 foot, first floor. That's a two story house.

Q. Where is the figure, 8 foot 6 inches? A. Right there, backwards.

Q. Now, is that the house the one on the corner or the one nearest to the Brancati house? A. I do not recall.

Q. Now, this is marked number 1, isn't it? A. Yes, sir.

Mr. Watson: May I have an identification number to the drawing?

The Court: Mark it "Conway-A".

(Drawing marked Exhibit "Conway-A")

Q. Now, this sheet which you now refresh your memory is marked "Conway-A"? A. Yes.

Q. Now, this is the house in which you say there's a ceiling shortage? A. 8 feet; 6 inches short.

Q. Very well. Now, is that the lower or the higher of the two houses? A. That is the two story house.

Q. The two and a half story house? A. Yes, two and a half, if you so desire to call it a two and a half story house.

Q. Well, tell us the difference between the two houses. Is there a first floor in both? A. Absolutely.

Q. Is there a second floor in both? A. Absolutely.

Q. Is there a third floor in both? A. Let me see the elevations.

Q. Now you want something else. Withdraw the last question. Instead of showing you the third floor, I won't take any trouble. A. There should be an attic in both.

Q. I don't care what there should be. Is there an attic in both? A. There is an attic in both.

Q. These two houses are the same heighth? A. No, not necessarily.

Q. Are the two houses the same heighth? A. They are not.

Charles W. Conway—Recalled—Cross.

Q. Now, we got to that point. One is higher than the other? A. Yes.

Q. Now, is this house represented on this sheet marked "Conway-A", is that the higher or the lower of the two houses? A. This is the higher.

Q. And that's the house in which you say there is a ceiling shortage? A. Yes, sir.

Q. That's house number 1? A. Number 1; "Conway-A".

Q. It's marked number 1, isn't it? A. Yes, sir.

Q. Is that the house next to the Brancati or the house nearer the corner? A. I do not recall.

Q. Yesterday it was testified that house number 1 was the house nearer to the corner? A. Near to which corner; they are both near corners.

Q. Well, the one further from the Brancati house? A. I don't recall.

Mr. Watson: That is all.

(Witness excused)

HECTOR BRANCATI, sworn on behalf of the defendant, testifies as follows:

Direct-examination by Mr. Liotta:

Q. Mr. Brancati, you are the son of the defendant in this action? A. I am.

Q. Did you go over the plans and specifications with Mr. Conway? A. Yes, sir.

Q. Can you tell us which house this is? Let's clear up the muddle now.

Mr. Watson: Just tell the witness what you have shown him.

Q. Which house, referring to Exhibit— A. I don't know what numbers are on it. I can tell you by the elevations.

Q. Referring to Exhibit—

Mr. Watson: One was marked "Conway-A", which is an elevation and a floor plan, is that marked "Conway-B"?

Q. Which house is that? A. That's the house on the corner.

Q. The corner of what? A. Chelsea Boulevard and George Street.

Q. What type house is that?

The Court: He doesn't know what you mean by type.

A. I would say semi-colonial.

Q. Is that a bungalow? A. No.

Q. Did you take the actual measurements with Mr. Conway? A. I did myself once and I did with Mr. Conway.

Q. What are the ceiling heighths in the sun parlor? The actual ceiling heighth from your measurement? A. In this house here?

Q. Yes? A. I don't remember accurately, but I think—

Q. Don't tell us what you think, tell us what you know. A. 8 foot 4 inches.

Q. Upstairs or downstairs? A. Downstairs.

Q. Did you make a memorandum to show what the ceiling heighths were? A. I did at the time but I don't know what became of that.

Q. Is this the house where you alleged there's a shortage of five inches? A. No.

Q. Which house do you allege a shortage of five inches? A. The other one, nearer our house.

Q. Is this the house? (Showing witness a plan) A. Yes.

Mr. Watson: May I have the sheet just shown the witness marked "Brancati-A"?

The Witness: Yes.

(Sheet marked "Brancati-A")

Q. Did you measure this house with the architect of the plaintiff; this gentleman here? A. I?

Q. Yes? A. No.

Q. Do you know whether or not this gentleman measured this house? A. No, I don't.

Q. Which house do you say is the one that has a shortage of six inches? A. What do you mean, in ceiling heighth?

Q. Yes? A. This one here.

Q. Referring to what? A. Referring to house number 2, "Brancati-A".

The Court: Is that the one nearest your father's?

The Witness: Yes, this one here.

The Court: And "Conway-B", is that the other one?

The Witness: Yes.

Q. Now, do you know the condition of the cellar in that house? A. Which one are you talking about?

The Court: Either one; anything the matter with the cellar?

The Witness: Yes.

The Court: Which one?

The Witness: Both. Both cements is very poor workmanship and not much cement; very little, in fact.

Q. Anything happen to these cellars? A. Yes, all cracked and full of water when it rains.

Q. How about the roofs of these houses? A. They leak, decidedly so.

Mr. Liotta: That is all.

Cross-examination by Mr. Watson:

Q. Then Mr. Conway was wrong in his distinction of these two houses?

The Court: I would not bother with that.

Mr. Watson: Does your Honor think it's clear enough?

The Court: Yes.

Q. Is number 1 the two and a half story house? A. That's the one on the corner?

Q. Yes? A. Two and a half.

Q. And number 2 the bungalow type, one and a half? A. It's a bungalow type, yes.

Redirect-examination by Mr. Liotta:

Q. Is there an attic in both houses? A. No.

Q. Attic in one? A. Yes.

Mr. Liotta: That is all.

(Witness excused)

PETER C. V. VAN NEYS, sworn on behalf of the defendant, testifies as follows:

Direct-examination by Mr. Liotta:

Q. Mr. VanNeys, what is your business? A. Architect.

Q. Did you examine these houses? A. Yes.

The Court: We have been talking about 1 and 2. Which is testified as the corner, number 2 nearest Brancati's? Will you look at and check over Sargeant's bills, which one is account for house number 1 and account number 2.

Mr. Watson: The bill for $1832.63 is account number 1 and the bill for $1790.38 is account number 2; and the last witness said it's number 2 in which the alleged ceiling shortage is.

The Court: Go on.

Q. Did you examine these houses? A. Yes.

Q. Did you examine the plans? A. At that time, do you mean?

Q. When your attention was called to the fact that there was a claim of shortage in the ceiling. You went down there to examine the premises, did you not? A. If my recollection serves me right, there was a set of plans there that day.

Q. I say, did you examine the ceiling? A. Yes.

Q. What plans did you see that day? A. It would be pretty hard to identify them here.

Q. Would you say you used these plans or you did not use these plans? A. I would not say definitely. It's probable I did, if they are the ones Mr. Brancati had.

Q. Referring to Exhibit "Brancati-A", what house is that? A. I will say that is house number 1.

Q. Where is that house located? A. At the corner of Chelsea Avenue and George Street, is that right?

Q. What are the requirements, according to the plans for the ceiling heighth in that house? A. My recollection is the ceiling heighth is given in the specifications.

The Court: That's not responsive. He asked what is required in that plan.

The Witness: Nothing here. Have you the elevations that would show it, or sections?

Q. Is that an elevation of the house? (Handing witness a plan) A. I think it is.

The Court: Now, what are the heighths shown here for the ceilings, is the question.

The Witness: 8 foot 6 and 8 feet.

Q. What was the actual heighth of the ceiling on the second floor? A. If I may refresh my memory; I have a memorandum. I think there was nothing claimed about that at the time in reference to the ceiling heighth.

The Court: Answer the question. What was the heighth?

The Witness: I have no measurement on those.

The Court: Then you didn't take that?

The Witness: No.

The Court: Tell him so.

Q. What was the actual heighth of the ceiling on the first floor of that house? A. The ceiling 8 foot 5½ inches. That's the first floor.

Q. You gave your attorney figures as to the heighth of the ceiling in both houses, did you not? A. In regard to house number 1, I have only the

ceiling heighth of the first floor and cellar.

Q. What is the ceiling heighth of the first floor? A. 8 foot 5½ inches.

Q. And house number 2, what is the heighth of the first floor? A. 8 foot and a half inch.

Q. Now, is this house number 2? A. No, that is house number 1.

Q. Was this house number 2? A. That doesn't appear natural to me. It's marked house number 2.

The Court: It's marked house number 2, but he doesn't recognize it. It doesn't appear natural to him, he says.

Q. Which house is this; the semi-bungalow or the house? (Showing witness a plan) A. I would have to have the elevation.

Q. Is this the elevation of the house? A. This is elevation of house number 2. It's the bungalow type. Let me see the side elevation?

Q. What's this? A. That's the second floor.

Q. Of which house is that? A. That would be of the number 2.

Q. Now, will you put these where these belong? A. This is house number 2, the bungalow type.

Q. Will you separate the plans for each house so I can refer to each house individually? A. That's house number 2. I don't know whether these are all of them or not. This is house number 1.

Q. Now, what is the required elevation of the ceilings in this house?

Mr. Watson: Which is it, so the jury knows.

The Witness: Well, its' house number 1. They are marked house number 1.

Q. On house number 1? A. 8 feet 6 inches for the first story and 8 feet for the second.

Q. What is the actual elevation? A. 8 feet 5½ inches for the first story.

Q. What for the second? A. I haven't a memorandum of that.

Q. Now, as to house number 2, what is the actual elevation for house number 2; first floor? A. From the plans?

Q. In the house? A. As I measured it?

Q. Yes? A. 8 feet and a half inch for the first floor.

Q. What is the required elevation in the plan? A. I don't see any.

Mr. Liotta: May I have the specifications of this plan?

Q. Is this the specifications for house number 1 or house number 2? A. It's marked as number 1 and marked as number 2.

Q. Do the specifications show the required ceiling heighths?

Mr. Watson: Have you ever read these specifications, Mr. VanNeys?

The Witness: There was specifications I looked at when I was on the job, yes.

Mr. Watson: Look at page 3. I think I know where it is. There it is; read it?

The Witness: Well, it says all measured heighths of stories and other dimensions see drawing. The figures in no case to be taken in preference to scale. All material and so on.

The Court: No heighth is given in these specifications?

The Witness: Not these specifications.
The Court: Referred to drawings?
The Witness: Yes.

Q. Which house is this? A. Marked for both. I don't know.

Q. Now, as to these specifications, what do they call for? A. These specifications give the heighth of the cellar, 6 feet in the clear; first floor 8 foot 6 inches in the clear; second floor 8 feet in the clear.

Q. And is that specification for house number 1?

Mr. Watson: It's marked that way.

A. It's marked as number 1. I have no means of identifying that.

Q. Now, this is also house number 1, is it not? A. Yes.

Q. And that is the actual required heighth as shown by the specification, 8 foot 6 inches, is it not, as to that house? A. Yes.

Q. And the actual heighth is 8 foot what? A. 8 foot 5½ inches.

Q. And on the second floor? A. I have no measurements of that. There was no complaint made about it at the time and I did not measure it.

Q. Now, on your notation—everything you give in this case refers to notations, is it not? A. Yes, I am going by my notes very largely.

Q. Now as to the other house. The specifications require what as to heighth? A. This is marked as number 2?

Q. Yes? A. This, as I said before, did not show the actual heighth, the plans do not.

Q. Well, do the specifications show? A. Cellar

6 feet in the clear, first floor 8 foot 6 inches in the clear and second floor 8 feet in the clear.

Q. What are the actual heighths? A. House number 2, first floor 8 feet ½ inch. There's a difference of 5½ inches.

Q. Now, on the second floor? A. 7 feet 9 and a half inches, that is a variation of 2 and a half inches.

Mr. Liotta: That is all.

Cross-examination by Mr. Watson:

Q. Now, Mr. VanNeys, as to house number 1, the specifications calls for 8 foot 6 inches in the first floor and the actual heighth is 8 foot 5½ inches? A. Yes.

Q. The second floor you did not measure? A. No, I did not measure that.

Q. So the only difference is a half inch?

Mr. Liotta: We agree to that house.

The Court: Very well, go on.

Q. Now, as to house number 2?

Mr. Watson: The first expert called had the houses turned around and Mr. Brancati, Jr. had a shortage in the wrong house.

Q. Now, Mr. VanNeys, as to house number 2 the drawings which are in evidence and which were just shown to you by Mr. Liotta, and they are marked Exhibit P-6, give no ceiling elevations, do they?

Mr. Liotta: We admit that; but the specifications do.

The Court: He wants to put it on the record.

A. They do not show any ceiling heighth.

Q. Now, the specifications—that's house number 2? A. Yes.

Q. The specifications of house number 2, which are marked P-4, contain a provision on page 3, cellar heighth 6 feet in the clear, first floor 8 foot 6 inches in the clear; second floor 8 feet in the clear? A. Yes.

Q. Now, in house number 2, is that where you find the measurements actually to be 8 foot and a half inch? A. Yes, sir.

Q. And 7 foot 9 and ½ inches? A. Yes.

Q. A shortage of 5 and a half inches and 2 and a half inches? A. Yes.

Q. Now, referring to those same specifications, specifications for house number 2, there's another clause on page 2 which reads "for the conditions of the ground heighths of stories and all other general dimensions, see drawings. All figures in all cases to be taken in preference to measurements by scale." That's correct, is it not? A. Yes.

Q. So that there are two references in the specifications to story heights? A. On house number 2.

Q. There are two references to specifications? A. Yes.

Q. One gives the specific heighth of 8 feet 6 inches and 8 feet? A. Yes.

Q. And the other refers to the drawings for such dimensions? A. Yes.

Q. Now, those drawings in evidence, P-6, which were produced by the defendant, Brancati, do you know whether these are the drawings you had before you went and inspected these houses? A. No, I can't testify in regard to that.

Q. Not certain? A. No.

Q. When did you make that inspection? A. I have no date; it was along in May, April or May.

Q. Of this year? A. Yes.

Q. May, 1929? A. Somewheres about that time.

Q. Who were with you? A. Mr. Holcombe and Mr. Widemer.

Q. Mr. Wharton? A. Yes, Mr. Wharton.

Q. You had a set of plans for house number 2, whether this set in evidence is the set or not, you are not certain; but you had a set? A. There was a set of plans for house number 2. I remember the specifications particularly.

Q. Now, this morning, did you go to the County Clerk's—

Mr. Liotta: This witness is my witness.

The Court: Not proper cross-examination.

Mr. Watson: I am going to explain this plan.

The Court: Just save time, that's all.

Q. Mr. VanNeys, this morning did you go to the County Clerk's office to see the filed plan of house number 2? A. Yes, I did.

Q. Did you find that there? A. Not in the County Clerk's office.

Q. They were not on file? A. The specifications were filed, but not in the file.

Q. Where did you go then? A. To the Building Department in Plainfield.

Q. Did you find the plans there of house number 2? A. We did.

Q. I show you a set of plans, are these the set of plans you found in the Building Department this morning? A. These are the plans that were filed in the Building Department for house number 2.

Q. Were you permitted to bring them here? A. Yes, by giving a receipt for them, they were given to Mr. Holcombe.

Q. And this is that same set? A. This is the set.

Mr. Watson: I offer them in evidence.

The Court: Is there any objection to marking these? They may be marked for identification.

(Plans marked P-14 for identification)

Redirect-examination by Mr. Liotta:

Q. Mr. VanNeys, do you know who filed these plans? A. I do not. I understood—

Q. Do you know? A. I said I did not.

Q. So that as far as you are concerned, either Mr. Brancati or Mr. Miller filed the plans? A. Might have. I found them on file. That's as far as my knowledge goes.

Q. By looking at these plans, would you say the house is wrong from this set of plans?

The Court: Having in mind now, the inspection you made.

A. Yes, I would say it was.

Q. Now, would you say the house was not built according to either set of plans?

Mr. Watson: P-6.

A. The two elevations shown seem to be alike. May have either been used.

The Court: The answer is the two elevations shown seem to be alike, they might either have been used.

Q. Now, did you inspect the premises from the plan as shown to you by Mr. Brancati; bearing in mind the fact you inspected the house? A. That's not quite clear to me.

The Court: When you went there to inspect; did Brancati produce a set of plans?

The Witness: I am not sure about the plans. They produced specifications, I could swear to.

Q. And you used these in making your investigation? A. Yes.

Q. Now, would you say there was no difference in the layout of the houses in both set of plans? A. The first and second plans appear to be the same.

Q. In other words, everything is the same in those plans but the fact that one mentions the ceiling heighth and the other one doesn't? A. And the specifications.

Q. And you went by the specifications entirely, did you not? A. I am not sure about that. I made my measurements. I remember the specifications, I do not say whether plans were there or whether they were not.

Q. Now, from looking at these plans, you would not say which one of the set of plans applied to this particular house? A. They may either or both.

Mr. Liotta: That is all.

Recross-examination by Mr. Watson:

Q. Now, Mr. VanNeys, the Brancati set, P-6. does not say any ceiling heighth? A. No, it does not.

Q. So therefore house number 2 conforms to it in floor plan? A. Yes.

Q. And layout? A. So far as I could tell from examination.

Q. Now, this set from the Building Inspector's office, marked P-14 for identification, does show ceiling heighth? A. Yes.

Q. In other words, in conformance with the Brancati set? A. Yes.

Q. Now, are the ceiling heights of the house as constructed like those in the Plainfield set?

Mr. Liotta: I object to any testimony in reference to the plans of either house until the plans are actually in evidence and before the plans are actually in evidence, I would like to have an opportunity of examining Mr. Miller.

The Court: I will allow you to do that. You may withdraw this witness for the moment. Mr. Miller recalled.

J. THEODORE MILLER, recalled.

Cross-examination by Mr. Liotta:

Q. Now, Mr. Miller, who filed—

Mr. Watson: Just a minute, this is my part of the case. May I examine him direct first?

The Court: I will allow you to, your witness.

Direct-examination by Mr. Watson:

Q. Mr. Miller, when did you first know that it

was alleged that house number 2 was short in ceiling heighth? A. Yesterday.

Q. Did Mr. Brancati ever call it to your attention or complain about it? A. Never.

Q. Who called it to your attention yesterday? A. Right here in the Court Room.

Q. Were you at Mr. Wharton's office? A. Yes, before we came over.

Q. Now, last night did you look for your original drawings? A. I did.

The Court: Did you find them?

The Witness: I did.

Q. Are these the original working drawings? A. They are the drawings or tracings that the blueprints were made from of house number 2.

Mr. Watson: I offer those in evidence.

The Court: Are they the plans from which you worked?

The Witness: Yes, they are.

The Court: Actual working drawings?

The Witness: Yes.

Cross-examination by Mr. Liotta:

Q. Now, Mr. Miller, you say that these are the actual working drawings? A. They are.

The Court: For house number 2?

The Witness: Yes.

Q. Did you have different sets of plans as to this type house at your home? A. Not exactly that type; similar type.

Q. Now, would you mind telling me whether there's any difference with the exception of the mentioning as to ceiling heighth in the original

drawing and the plans that you gave to Mr. Brancati? A. Yes, there are some differences.

The Court: What are they?

A. (Continued) In the first place it shows the rooms in this plan here—

The Court: What about the heighth of the ceilings?

The Witness: Does not show on this plan.

The Court: Does it show on your working plan?

The Witness: It does. And also the rooms are not marked to size on this plan.

Mr. Watson: Brancati's plan?

The Court: Well, what is the difference. Why should there be any difference at all?

The Witness: Because we didn't use this plan. This plan should not be used.

The Court: In other words, you say you did not agree with Brancati to use this plan?

The Witness: Yes.

The Court: And you did agree on this other?

The Witness: Yes.

Q. Didn't you give Brancati these plans? A. I did, and explained to him at the time these plans were not exact as the ones we worked on.

Q. Why didn't you give Brancati these plans when he called for them, the original drawings? A. I didn't like to give the original drawings away, and I had no blueprint. This was the only blue print there was.

Q. What did you use on the job? A. Those you have in your hand.

Q. Did you have these plans on the job day in and day out? A. No, sir, I did not.

Q. Did you refer to these plans on the job from time to time? A. Yes.

Q. How many people handled these plans besides you? A. Only the foreman.

Q. Only the foreman and you? A. Yes.

Q. How many times were these plans handled? A. Once a week for three weeks.

Q. How many times were they handled by you? A. At home or where?

Q. At home? A. Only for to get the drawings and what measurements I would want to take off in the evening to take to the job.

The Court: The working plans may be marked as an Exhibit. That is the plans indicated by the white.

(Plans marked Exhibit P-15)

Mr. Watson: We offer the blueprint from the Building Department office.

The Court: I will allow that to be marked too. I see no objection to that.

Mr. Liotta: I would like to know who filed the blueprint?

The Court: Ask him.

Mr. Liotta: Who filed the blueprint?

The Witness: I did.

The Court: You yourself?

The Witness: Yes.

Mr. Liotta: Was Mr. Brancati with you?

The Witness: I can't say as to that.

The Court: What else did you file?

The Witness: I filed the plans only at that time.

The Court: Not the specifications?

The Witness: No, they were filed there.

Q. In other words, you filed these plans so the Building Inspector could pass on them? A. Yes.

Q. In compliance with the Building Ordinance? A. That's the rules in Plainfield.

Q. These plans were filed solely for the benefit of the Building Department? A. Yes.

Mr. Liotta: I object.

The Court: I will allow them to be marked if it is turning on what plans were actually used; that's the contention.

(Plans marked Exhibit P-14)

The Court: Often times I think you may take notice of the fact—I will ask Mr. Miller, the department set are filed with the Building Department to get approval?

The Witness: Get the permit to go on.

The Court: If you did not apply for that permit—and these plans are not always in exact detail?

The Witness: They are supposed to be.

The Court: Are they?

The Witness: Yes.

The Court: I thought sometimes you had to file one for formal approval?

The Witness: No, you had to file the original plans you work from.

The Court: That is the set in Plainfield?

The Witness: Yes.

Q. You always file the exact plan with the Building Department? A. The exact plan is on file.

Q. Do you file them always? A. I have been in the habit of doing it. The architect can do it if there is an architect.

J. Theodore Miller—Recalled—Redirect.

Q. At any time, did you file any plans different from the exact plans? A. Never.

The Court: In the contract or specifications there is an architect's name, one Fisher.

Mr. Watson: That's not causing dispute. As a matter of fact Fisher was never supervising that work as architect.

The Witness: Fisher was never on the job.

The Court: And no certificates were ever called for or given?

The Witness: No, sir.

The Court: Or applied for?

The Witness: No, sir.

The Court: To Fisher?

The Witness: No, sir.

The Court: Well, go on, anything more?

Redirect-examination by Mr. Watson:

Q. Did Brancati tell you that this set of plans marked P-6 was for use in building other houses for him? A. He did.

Q. Did that have anything to do with you giving him this set of plans marked P-6? A. No, sir.

Recross-examination by Mr. Liotta:

Q. When did you give him this other set of plans? A. Why along in—must be about April.

Q. That was after you left the job? A. Yes, sir.

Q. And how many times did he come to you to finish these jobs? A. He didn't come to me; he sent me a notice.

Q. How many times did he send notices to you? A. Twice.

Q. When you made the contract with Brancati, you gave him no plans at all, did you? A. Gave him these plans that were filed.

Q. You gave him these plans that were filed? A. These plans we agreed upon when the contract was done.

Q. Did you or did you not give Mr. Brancati these plans? A. These plans were with this when the contract was filed.

The Court: As a matter of fact you didn't give or leave—

The Witness: I couldn't leave them with him.

The Court: You didn't leave with him these plans?

The Witness: No.

The Court: But you had them and showed them to him?

The Witness: Yes.

Q. But you gave him these specifications then, didn't you? A. Yes.

Q. You drew the plans and specifications? A. I did.

Q. Now, the specifications show an elevation of 8 foot 6 inches in the ceiling. Did Mr. Brancati read the specifications? A. I suppose he did. Not before me.

Q. Yes, and did you know what these specifications provided for. I withdraw that. Why didn't you build 8 foot 6 inches? A. Because the measurements in the specifications call for no partitions.

Q. Did you leave the specifications with Brancati? A. Yes.

Q. And didn't leave the plans with him? A. I had none to leave him.

Q. You didn't leave him a set of plans?

The Court: He says he didn't. Why argue?

Q. Why didn't you leave a set of plans? A. Because they had to be filed.

Q. When did you draw these plans? A. I can't tell you; no date on them.

Q. Well, did you have these in your home prior to the time you built the Brancati house? A. I did.

Q. And did you copy these plans from the originals that you made? A. No, some of them has been taken from them.

Q. Now let me ask you; when did you make these notations on your own plans? You had control of this all the time? A. I made these when the plans were drawn.

Q. And when was that? A. That was in 1927, along in November.

Q. And you used these on the job all the time? A. I did; during the construction.

Q. Now, did the foreman use these plans while working, during construction? A. Only when I brought them to him.

Q. And did he use any details or anything else? A. Yes.

Q. While working? A. Yes.

Q. And that detailed the heighth of the ceiling? A. Perhaps.

Q. And he used these plans while working? A. He used them about three or four times.

Q. By the way, is your foreman here? A. No, sir.

Q. Why didn't you bring him here?

Mr. Watson: This is not his case.

Q. Who was your foreman? A. A man by the name of Cole.

The Court: Where is he from?

The Witness: He lives in Bound Brook.

Q. Cole? A. K-o-h-l.

Q. And who made the blueprints for you? A. Mr. Smith, in Plainfield.

Q. Who made this other blue print for you? A. I can't say who made these, they are too old.

Q. Now, do you give all your work to Mr. Smith? A. No, I do not.

Q. Who else do you give work to? A. I have done a lot of my own blueprinting and had the Courier do some.

Q. You say you do some of your own? A. Yes.

Q. Did you do your own blueprinting in this case? A. No.

Q. Is it more cheaper to do your own than someone else? A. No, it depends on the sun. If there's no sun you give it to somebody who has electricity; if you are in a hurry.

Q. Were these done in a hurry? A. Yes.

Q. When did you first start to talk to Mr. Brancati about building these houses? A. I think October or November.

Q. Of what year? A. 1927.

Q. When did you start working on the buildings? A. We started around the latter part of December.

Q. And you were speaking with Mr. Brancati

for about two months before you got the job? A. Quite awhile before he could decide on what to build.

Q. When did you decide on what to build? A. Shortly before the contract was drawn up.

Q. When? A. I can't say as to the date.

Q. Have you any record to show when you decided to build the house? A. No.

Q. Now, let me ask you, did you make a contract with Sargeant Brothers before you accepted the work as to taking this particular job? A. I don't think I did.

Q. Well, you ought to know? A. You don't give a contract for material before you have a job to build.

Q. Didn't you get an estimate from lumber people before you started to build? A. Yes.

Q. Did you ask for one in this case? A. Yes.

Q. When did you ask for an estimate? A. I can't say as to dates.

Q. How long before you agreed on the job? A. I can't say.

The Court: Anything more?

Mr. Liotta: That is all.

Redirect-examination by Mr. Watson:

Q. You say you gave Brancati, P-6, you gave that to Brancati in April or May? A. In April, 1928, or about that time.

Q. When was the houses finished? A. They were finished about that time, or a little before.

Q. And you gave that set to Brancati long after the work started? A. After the work was finished.

Mr. Liotta: When did you file these plans with the Building Department? It says here December 14th, 1927. That is all.

(Witness excused)

PETER C. V. VAN NEYS, recalled.

Further direct-examination by Mr. Liotta:

Q. Kindly tell this jury when these plans were filed? A. They were marked approved the 14th of December, 1927, signed Wallace Apgar, Acting Inspector of Buildings.

Q. I show you the contract, what is the date of the contract? A. Contract dated December 1927.

Q. I show you a bill by Sargeant Brothers; what date is that? A. December 12th, 1927.

Q. Two days before filing of the contract? A. Yes.

Q. Filing of the plans, rather? A. Yes.

Mr. Liotta: That is all.

(Witness excused)

TERESA BRANCATI, sworn on behalf of the defendant, testifies as follows:

Direct-examination by Mr. Liotta:

Q. Mrs. Brancati, were you with your husband when the contract was made with Mr. Miller? A. Yes, sir.

Q. Did Mr. Miller show Mr. Brancati a floor plan? A white paper, something like this? (Showing witness a paper) A. No, we always see

a blueprint. We never saw any drawings like that.

Q. Mr. Miller says that you agreed to a set of plans drawn on white paper, is that so? A. No, I never saw white paper at all. I always knew blueprints; that's what I knew by plans.

Q. When you two figured on the job, did you start figuring by reason of a blueprint? A. Why, certainly.

Q. What was the condition of the cellar after the job was finished? A. It was leaking all over the place there and we didn't know what was the trouble because we exclusively told Mr. Miller we wanted a right job because there was a lot of trouble around the neighborhood.

The Court: Low land there?

The Witness: No, it isn't low exactly because the house sets up on a little terrace. Mr. Miller knew that section of Plainfield, it's a wet section, and I know my neighbors, they dig out their foundations a number of times.

Q. Is that the reason why you had inserted in the specifications, the entire building must be guaranteed perfectly water-tight for four years? A. Yes, I made it exclusively plain to him that it was one principle condition of his work.

Q. Now, what was the condition of the roof? A. Well, they leaked, I seen places and under the walls and windows, I called his attention to that, that the plaster was all wet.

Q. After Mr. Miller left the job, was the job finished? A. Why, no.

Q. Did you try to get in touch with Mr. Miller any time? A. I know Mr. Brancati did quite a

number of days, he lost quite a number of days trying to locate him.

Q. Did he come back to the job any time after he left? A. He came and promised to come the next day or another day on account his men were working somewhere else and it got dragging along quite some time.

Cross-examination by Mr. Watson:

Q. When you and Mr. Miller and Mr. Brancati were together you say he had a set of blueprints like this? A. Yes, sir.

Q. Showing witness P-14. A. No, I don't know that was the set.

Q. I didn't say that set; like that? A. Yes, blueprints.

Q. You say people around there have a lot of trouble with wet cellars? A. Yes, there has been some trouble with wet cellars.

Q. In the Netherwood section? A. That's why we spoke about this clause—

Q. That's why you brought up this clause in the specifications? A. Yes.

Q. When the cellar leaked, what did you do about it? A. We went over to Mr. Miller and tried to see him—

Q. Well, Mr. Miller did come, what did Mr. Miller do, anything? A. Well, Mr. Miller did nothing.

Q. What else did your husband do about it? A. Why, he had men dig around there and had some work done. I didn't live there; I lived two blocks away.

Mr. Watson: Is that part of the files you put in yesterday?

Mr. Liotta: No, that's not part of the files. That's what Mr. Conway testified to; re-plaster the cellar.

Q. Well, how are the cellars now? A. They are wet.

Q. Wet today? A. Well, yes, in different places.

Q. How much water in them? A. Well, I haven't been in. I can't go in and bother the tenants every five minutes.

Q. You live right next door? A. No, I live two blocks away.

Q. You knew the case was being tried today? A. I knew the case was being tried.

Q. You knew we have had two or three rainy days? A. Yes.

Q. And you did not look to see how they are now? A. No, I did not.

Mr. Watson: That's all.
(Witness excused)

ERCOLE M. BRANCATI, recalled:

Further direct-examination by Mr. Liotta:

Q. Mr. Brancati, did Mr. Miller show you these floor plans at any time? A. Never saw these things.

Mr. Liotta: That is all.
(Witness excused)

IN REBUTTAL.

CHARLES C. WIEDERMER, sworn on behalf of the plaintiff, testifies as follows:

Direct-examination by Mr. Watson:

Q. You are a builder in Somerville? A. Yes.

Q. How long have you been in such business? A. Twenty years.

Q. Did you look at these houses last April or May? A. In May, I did.

Q. By the instance of Mr. Holcombe? A. I did.

Q. Went there with Mr. Holcombe? A. Yes.

Q. And Mr. Miller? A. Yes.

Q. Did you examine the cellars? A. Yes.

Q. Cellar bottoms? A. Yes.

Q. Will you tell the Court and jury about it, please? A. Well, I went in the house number 2, as they call it, and Mr. Brancati asked if I wanted to see the thickness of the concrete. Well, I told him that I didn't mind and got either a pick or hammer, I don't just remember, something, and had quite a job to break a place to show us in the concrete. The shell, as he calls it, the top, was about three-quarters of an inch thick. I would consider it good concrete.

Q. Did you have any trouble to break it? A. We didn't break it with one hit.

Q. What about the wetness of the cellar? A. It was perfectly dry.

Q. Had there been a rainy spell before? A. Why, I think we did have rain before.

Q. Well, last spring was generally quite rainy. At that time of year would you say if there was any wetness, it would have shown up in the cellar, and you found none? A. No, sir, absolutely dry.

Q. Did you go to both cellars? A. Both cellars.

Q. Mr. Holcombe was with you? A. He was.

Mr. Watson: That's all.

Cross-examination by Mr. Liotta:

Q. Did you examine anything else there? A. Yes, sir.

Q. Do you work with plans? A. I don't know whether there was plans or not.

Q. Work with specifications, do you not?

Mr. Watson: I called this witness for a specific purpose.

The Court: Only as to the cellar. I will allow you to interrogate him as to the requirements of the specifications of the cellar and whether there had been a substantial performance or not. That's the point here.

Q. Now, what did the specifications say as to the cellar? A. I can't remember that. I read a good many specifications during my time since May.

Q. You went over the cellar bottom pretty thoroughly, did you not? A. Yes, I did as far as workmanship is concerned.

Q. How thick was the cement in the cellar? A. It was three-quarters of an inch deep there.

Q. What was the bottom there? A. I can't say. Mr. Brancati didn't dig down far enough. He just showed us the top of it, in one cellar in the front.

Q. Now, you say the top part was three-quarters of an inch thick? A. It was, at that spot.

Q. Now, show me what the specifications provide?

Mr. Watson: One inch.

Q. Well— A. You must understand—

Q. Don't tell us what to understand. Tell us what the specifications provide for? A. Well, it calls for one inch.

Mr. Liotta: That is all.

(Witness excused)

Mr. Watson: We rest.

Mr. Liotta: I would like to recall the plaintiff engineer or architect and want to ask him a line of questions on one particular line.

The Court: You may.

PETER C. V. VAN NEYS, recalled:

Further direct-examination by Mr. Liotta:

Q. Mr. VanNeys, what would be necessary in order to elevate the heighth of the ceiling from 8 feet and a half inch to 8 feet 6 inches? A. I don't think it would be advisable to attempt a thing of that kind and every different man would attempt to do a thing of that kind would do it in a different manner.

The Court: Well, it is done, isn't it? Don't they raise roofs and ceilings?

The Witness: Almost anything might be done.

The Court: Do they practically do that sort of thing? Ever see it done?

The Witness: To raise a house because of that?

The Court: Yes.

The Witness: No, I never did.

Q. Now, what would it cost in your mind to raise the ceiling heighth from 8 foot and a half inch to 8 foot 6 inches?

Mr. Watson: I submit this witness is not qualified to do that.

The Court: He says he doesn't do it.

Q. You are an engineer? A. I am an architect.

Q. You supervise certain plans? A. Yes.

Q. You estimate different jobs for different people? A. I do not estimate. I furnish plans and specifications and contractors do the estimating.

Q. Potential builders come to you and you approximate the cost?

The Court: Suppose you get it through. What would be the reasonable cost to raise that building to give the cellar heighth or ceiling heighth in accordance with the specifications?

The Witness: I could only give you a guess.

The Court: Then it would not be an estimate.

The Witness: It would not.

Q. What in your mind would be necessary to do in order to raise the ceilings?

Mr. Watson: I object to that. The wit-

ness said he didn't know. He never seen it done.

The Court: We can save time, allow him to answer it. Repeat the question.

Q. (Question read) A. Well, it could probably be done by raising the ceiling and the siding 6 inches and then patching up down below.

Q. Now, isn't the house, this particular house you was at one entire mass of work? A. It's all nailed together, it could be cut loose.

Q. How much work would it necessitate to cut that loose? A. Now, you are asking for an estimate again, aren't you?

The Court: Do you know?

The Witness: No, I do not.

Mr. Liotta: That is all.

(Witness excused)

The Court: Is that the case? Now, I suggested yesterday that the jury be permitted to go and see these properties, but I think the issues have been pretty well defined here now and I don't see the necessity of that. It's a question of fact.

Mr. Liotta: I ask for a direction on the ground heretofore mentioned.

The Court: The same ruling; I consider it to be a question of fact in this case. You may have an exception.

(Exception allowed and sealed)

Thereupon Mr. Liotta summed up to the jury in behalf of the defendant.

Thereupon Mr. Watson summed up to the jury in behalf of the plaintiff.

Thereupon the Court adjourned until one-twenty P. M.

Charge of the Court.

After Recess.

Thereupon the Court charged the jury as follows:

SARGEANT BROTHERS, INC. vs. E. M. BRANCATI.	Charge.

LAWRENCE, *J.*, Members of the jury, the plaintiff is seeking to recover of the defendant in this suit for certain materials which it alleges were used in two certain buildings erected on land of the defendant under a contract or contracts entered into by him with one Miller, as builder. There appears in the case to be no dispute as to the aggregate amount of the bills of the lumber company, which you have heard stated involves house number one, as designated during the progress of the trial, for $1836.63. With regard to the second house, there is a charge involving materials for $1790.38. The plaintiff therefore is asking for a verdict in its favor for those sums, respectively, for the reason that it is charged that the materials represented by those bills were sold and delivered by the plaintiff company to the contractor, Miller, and used by him in the buildings being erected for the defendant.

I may say, as to that aspect of the case, that apparently there is very little dispute. As I heard counsel for the defendant say just before the noon recess, that it was conceded that such materials had been used in the construction of the buildings

in question, indicating that the concessions were not all on one side therefore, as suggested by counsel for the plaintiff. As I see the case, from the standpoint of the law, it would seem to be not a difficult one for the jury to determine. It rests in about this fashion: admittedly, the defendant entered into the contracts with Miller for the erection of the two dwellings in question and they were to cost $5000.00 each. Under the terms of the contract, Mr. Miller was entitled to certain payments as the work progressed, and it is admitted that Mr. Brancati did pay to Miller $2700.00 on each one of the buildings, leaving a balance on each contract in the possession, as it were, of Mr. Brancati of $2300.00. The plaintiff company now seeks to charge against those balances the respective bills, and alleges that it is entitled to be paid out of such balances the amount thereof with interest. In doing so, they resorted to the provision of the law known as the mechanics' lien act, which is substantially that if the contractor owes the material man, for example, sums of money for the materials which he uses in a building of the owner (as in this case, Brancati) and there are sums stipulated under the contract which are to fall due in the future, the law permits the material man to serve on the owner of the land, upon which the buildings are being erected, a notice to the effect that the contractor owes it (the material man; I am speaking now in the neuter gender for the reason that this is a corporation, the plaintiff) certain sums for the materials which the corporation had sold and delivered to the contractor, and which he had used in the work of building the buildings for the defendant owner. Then it is provided by the law that it becomes the duty of the owner

to retain out of the balances of the building contract sufficient money to pay the material man in the sums indicated in the stop notices. There is a further provision that the materialman must notify the contractor that he has given such stop notice to the owner. Thereupon, if the bill indicated in the notice is disputed by the contractor, he may give notice to the materialman, whereupon it would become the legal duty of the material man within the time stipulated in the statute to bring suit against the contractor to establish the correctness of the charge.

In this case that was not done for the reason that Mr. Miller, the contractor, did not dispute the correctness of the plaintiff's bill in either case. In other words, he testifies that the bill is correct and that in fact the materials had been used by him in the construction of the two buildings upon the land of the defendant. Therefore, you will not be concerned with the questions that might ordinarily arise in that respect. The fact, however, that the plaintiff here gave a stop notice to Brancati, as owner, does not necessarily mean that Brancati was obliged to pay the plaintiff here the amount of these bills, because he had rights accorded to him by the statute, and not only by the statute but by the law, and the rule is this, which he now seeks to take the benefit and advantage of in this case: if the contractor failed to perform the terms of the contract into which he had entered with the defendant, Brancati, Brancati would have the right to withhold from the contractor of the agreed contract price a sum which would enable him to make good work which Miller, the contractor, had failed to do under the terms of his contract; also defective work, if there be such. In other words, Bran-

cati had a right to hold Miller to the terms of his contract and require him to perform it in a good and workmanlike manner in substantial compliance with the terms of the contract and the plans and specifications accompanying it. Now there the controversy arises in this case. Brancati testifies and claims in his pleadings that as a matter of fact Miller had failed almost wholly with regard to house number two, and in certain respects indicated as to number one, to perform in a substantial way the terms of the contract as contemplated by it and the plans and specifications; and therefore Brancati says as to house number two that it would cost him more than $2300.00, remaining under that contract, to do the work that Miller should have done and therefore there is nothing due which could be used to apply to the plaintiff's bill in regard to that house. With regard to house number one he alleges there are certain defects there, although you may find that they were of such a minor character as to not require very serious consideration from the jury. In any event, as to that house, he does offer some testimony and it is for you to say what weight and credence you will give to it, but he was obliged to incur some expense, and to award whatever it might be. I am not going to go into the details of the testimony, Counsel has done that and you will have your own recollection with regard to the testimony and the contradictions that may appear therein.

Now, I may say in a general way that if the plaintiff has shown here in a prima facie sense, as it appears to have, in fact, and I am referring to the amount that is in suit; that there were balances in those two contracts of $2300.00 each, which the plaintiff is entitled to have applied on

its respective bills, then you will be obliged to consider the defendant's claim here as to whether or not there had been a compliance on the part of Miller with the terms of the respective contracts and the plans and specifications. Of course, if Mr. Brancati has proven, as to house number two, that it will take more than the balance of the contract to make good the work that Miller should have done in substantial compliance with the terms of the contract, why you would then find there was nothing due as to house number two which could be applied, and no balance therefore which could be applied to the plaintiff's claim in that respect. You see it was obliged to keep separate these two bills with reference to house number one and number two, because the essential feature of the mechanics' lien act resorted to is that it must be shown by the plaintiff that materials were used in the particular house under which the terms of the stop-notice was to apply. Now, it becomes a question of fact for the jury to determine whether Mr. Brancati, the defendant, has shown you by a fair preponderance of the proof that Mr. Miller failed to perform the work called for by the contract in question in a substantial way. Of course, the Courts do not say, nor is it a rule of law that the builder or contractor must perform literally; that is not the rule. If it appears under the greater weight of the evidence that there was a substantial performance on the part of the builder (in this case Miller) then the owner will not be heard to complain, and it would seem that the Court is not required to indicate to you what a substantial performance means. If you were thinking in terms of percentages, for example, using the unit of one hundred per cent. as total compliance, and it ap-

pears in the case by evidence by a fair preponderance of the proof that there had been ninety-nine and three-quarters per cent. performance and a failure with regards to one-quarter per cent., to the average reasoning mind you would be inclined to say that such a percentage was a substantial compliance with the terms of the contract. Now, what is the complaint here? Of course, I am merely using that as an illustration. You can resort to your own so far as regards substantial compliance. It must be just what it says, and that eliminates trivial objections, those which the Court would not stop to consider. A charge here was failure to put up the ceilings, for example, to a heighth called for by the plans or specification, and the question arises whether it would make any appreciable difference with that which was actually done. There must be a failure to substantially comply. That is the expression of the rule.

Now, as to house number one, you heard the architect produced by Mr. Brancati state that he had really no criticism in regard to the work done thereon by Mr. Miller, the contractor. It does appear, however, that there was some expenditure made by Brancati in making good some work Miller should have done; and if you find as against the $2300.00 of the contract price remaining on house number one that there are articles for which Brancati should be given credit and benefit, give that to him. If you find that involved failure on the part of Miller to substantially perform the contract for that house and that Brancati was put to the expense in making good such defects, and having ascertained what the reasonable cost of such expense was, if you find the fact to be that there was a failure as claimed by him in respect to house

number one, give him a deduction from that contract price, and whatever remains as to house number one with regard to the balance of $2300.00 would then be included in the verdict to the plaintiff company for such sum as might then remain; you figuring, however, what sum is due the plaintiff company with interest. In other words, you could not give a verdict in this case to the plaintiff for the full amount of its claim on either house, with interest, if it exceeds the balance that be remaining in the hands of the defendant of the contract price. Now, Brancati can only be required to account, as it were, for the want of a better term, for the balance of that contract price to be applied to the plaintiff company's claim and he cannot be required to account for any more than you find is actually remaining due after any deductions you further might find he is entitled to, to make good work which Miller should have done by the latter's failure to substantially perform the terms of the contract in accordance with the plans and specifications. Now, there is some question here about plans. An issue of fact was raised as to whether the plan filed with the Building Department of the City of Plainfield was the plan actually used by Mr. Miller and agreed upon by him and Brancati in working upon the job of building these houses. I am going to leave that question to you, with the qualification that, as the plaintiff company claims, the plans filed in the City Building Department indicated a certain heighth of ceiling, for example, which Miller actually observed and put in the construction. Brancati claims as a matter of fact that plan was not used at all. That Miller gave him a blueprint of plans which indicates a different heighth of ceiling

and he claims they were not the ones agreed upon which accompanied the contract and specifications. Now, which one you will say was the one the parties agreed upon and actually used in constructing the buildings, with the understanding and consent that it should be so used, I am leaving to you. Whether Miller is right or Brancati is right becomes a question of fact and you will determine that, because if it should appear that Miller is right as to the plan that was used—you will observe the plan filed was a blueprint; while he produced in Court here a drawing on white paper and says he used it with the knowledge and consent of Brancati—it shows the heighth of the ceiling which he (Miller) claims was used as the measurement in putting up house number two, as to which I understand the real controversy arises. Now, which set of plans did accompany the contracts will depend upon how you find the state of the evidence to be. In other words, since Brancati claims it was not the plan, he must show you by the fair preponderance of the proof which it was; that the plan he indicates was the one that was actually agreed upon. Now, if you should find that the plan as actually used was the one agreed upon and that that plan calls for heighth of ceilings which was actually put in that building, namely number two, by Miller, and that Brancati was wrong in claiming that Miller substantially failed to perform, or on the other hand if you find failure to perform was not of a substantial nature or character, or of a nature justifying the objection, then you would not charge up against the balance of the account the reasonable cost of making good in that respect, because it would not be an objection based upon a substantial defect or failure to per-

form on the part of Miller. On the other hand, if you find there was failure on the part of Miller to build that second house in accordance with the plans and specifications agreed upon, bearing in mind that is the test, and that it would cost a certain sum of money, whatever the evidence may indicate, to make good the defects, if it be so found by you under the fair preponderance of the proof, of course it would be your duty to allow to Brancati whatever it would cost to make good in that respect.

Now, I have not gone into figures. For example, it is estimated the plumbing was not done by Miller and that Brancati paid $334.40 for that plumbing. If he is entitled to that credit; you must give it to him. There are other items there as to which I have not referred in figures; for example, he has offered in evidence certain figures which involve expenditures by him for various items and if you find that he was justified in making those expenditures because of Miller's failure and that failure indicates substantial failure on the part of Miller, then of course Mr. Brancati would be entitled to any reasonable expenditure in that regard to make good what Miller should have done, provided you find that to be a failure of the character, that is, a substantial failure to perform. In these cases it is not unusual that architects apparently differ just as doctors differ and I will say lawyers always differ; you find the architect produced by the defendant stating that house number two was not built in compliance with the specifications at all and his remedy would be to wreck it. Of course, if that be so and Miller's failure was as utter as that, why then there would be no balance left in that contract for the plaintiff company here. Of

course, you are not concerned with anything as to the plaintiff excepting its right to recover its bills from the ascertained balance if there be such remaining of the contract price in the custody or possession of Brancati. Now, as to the other architect produced by the plaintiff; he says he inspected house number two and he didn't find anything the matter with it. That is substantially what he said. Of course I am not quoting him literally. Your recollection must prevail. Perhaps I ought to qualify it by saying there were certain things he found there that he refers to as very minor detail and not of a substantial character at all. So there you have the two experts, and which one you believe I am unable to say; although I may say if you conclude there is no evidence under the fair preponderance of the proof or greater weight of legal evidence of the claim of Brancati with regard to the failure of Miller as to house number two, why of course you would not accept the architect's statement in the circumstance anymore than you would accept the other architect's statement. In other words, that would not disqualify them; they are merely witnesses produced here and examined and it is for you to say what weight and credence you will give their testimony. That is your function and duty. Of course, if you believe under the fair preponderance of the proof there was such a failure as Brancati's architect says, then of course Brancati would not be obliged to pay as to house number two anything to the plaintiff.

The case is left with you for your consideration. I will say that there is evidence as to the floors in the cellar. The duty there of Miller was to lay the

floor in accordance with the plans and specifications and do it in a good workmanlike way in substantial compliance with such terms. It is urged here by Brancati that he didn't lay the surface of cement of the depth that was required by the specifications. There is some testimony to the effect that it would cost a certain sum of money to make good what Miller had failed to do in that respect. The same rule applies. Now, if these floors were not laid in substantial compliance with the contract and it would cost Mr. Brancati certain sums to make good, providing it be reasonable as ascertained by you under the proof, you will give him a reduction in that respect. So there are a number of items which you will have to take up and consider in ascertaining whether or not Miller failed to perform in a substantial way the contract for these two buildings; and if you find he failed, and ascertain what sums should be deducted from the balance of the contract price remaining with Mr. Brancati, of course you would give him the benefit of it and whatever remains would be returned in separate verdicts; for house number one so much in favor of the plaintiff and house number two so much in favor of the plaintiff; of course that is if you find anything due on house number two because of the failure to perform. If there was no such failure then the defendant can recover nothing for that house. It's only in the event you find a balance due under the two contracts that such sums can be applied to the plaintiff's bills under the stop-notices that were served. I do not know of anything else I should say to you. You bear in mind these cardinal rules. The plaintiff has proved a prima facie case here. The defense, as I take it, is that Miller did not perform in a sub-

stantial way. Now, since that is the defense and claimed by Mr. Brancati, it must appear under the fair preponderance of the proof. If it does appear, then you will ascertain what the balances are and whatever sums remain will be regarded in verdicts in favor of the plaintiff for the various sums. Mr. Brancati cannot be held in excess of the balances under these contracts, or indeed any sums unless you find they properly remain in these contracts as part of the contract price after you have considered whether the contractor in failing to perform will subject these sums to deduction, whether wholly or in part, as the case may be. Swear an officer.

I have been requested to charge that if verdicts are found for the plaintiff that the amounts do carry interest. That's correct, and of course, if you find sufficient balances under the contract price with regard to the two houses, and then your verdict will so indicate. But if there is insufficient sums in the hands of the defendant to pay in full, then it can only be paid to the extent of the balances so found.

As a result of certain exceptions interposed by Counsel for the defendant to the Court's charge, I may say that the defense interposed in this case by the defendant involves the charge of failure to perform on the part of the building contractor, Miller. Of course, in that respect, you put the burden of proof on him. I recharge what I said in my main charge that it must appear under the greater weight of the evidence in the case that there was a failure to perform in a substantial way the work called for by the respective contracts

in this case, and unless it so appears the defendant cannot receive the benefit therefrom. You cannot arbitrarily cut out of the respective contracts any sums unless you find evidence under the fair preponderance of the proof that would warrant such deduction. With regard to the statement of the architect for the defendant, that he found nothing the matter with house number one or the architect of the plaintiff that he found nothing the matter with house number two, that was a mere comment of the Court. If the testimony is not in accordance with your recollection as indicated in the Court's comment, you disregard my remarks, because you are the judges of the fact and it is your function to re-examine so far as you can through your memory, of course, and recollection what the several witnesses said. Now, where I said that the architect for the plaintiff said there was nothing the matter with house number two, it is for you to say whether the work was done in accordance with the specifications and plans and that is for your consideration. You will understand that that was a mere matter of comment by the Court to you. Now, in regard to any remarks by the Counsel for the plaintiff or defendant or the Court as to what witnesses said or didn't say or what the interference is, if there be such, is a question of fact for you. That is your duty. You consider the testimony and if I said anything that is not in accordance with your recollection of the evidence, disregard it. You may retire.

EXCEPTIONS.

Mr. Liotta: I wish to take an exception to that part of the Court's Charge in which he said that

the burden shifts on the owner if the plaintiff has made a prima facie case that the work was done in accordance with the terms of the contract or in a substantial manner.

The Court: Exception will be allowed.

(Exception allowed and sealed)

REQUESTS TO CHARGE.

SARGEANT BROTHERS, INC

vs.

E. M. BRANCATI.

Action at Law.

Requests to Charge.

1. If you find that the contractor, Miller, substantially performed his contract, even though he failed to do so in some minor particulars, the defendant is indebted to the contractor in the amount of the unpaid contract price less a fair allowance for the deviations from the terms of the contract and out of that fund, plaintiff is entitled to a verdict.

2. Whether the contractor, Miller, substantially performed his contract is a question of fact for you to decide.

3. The burden of proving deviations from the contract or defective work is upon the defendant.

4. What is a fair allowance for minor deviations from the contract or defective work, if you find that there are any, is a question of fact for you to decide.

Exhibit P-1.

Contract for House No. 1. Printed at end of Complaint, page 6.

Exhibit P-2.

Contract for House No. 2. Printed at end of Complaint, page 22.

New Jersey Court of Errors and Appeals

SARGEANT BROTHERS, INCORPORATED, a corporation, Plaintiff-Respondent,	Action at Law
vs.	On Appeal from Supreme Court.
E. M. BRANCATI, Defendant-Appellant.	

BRIEF OF DEFENDANT-APPELLANT.

This is an action brought in the New Jersey Supreme Court by the plaintiff against the defendant by reason of an act of the Legislature entitled "An Act to secure to mechanics and others payment for their labor and materials in erecting any building". Suit was brought under Section 3 of said act.

The grounds of appeal are:

1. The Supreme Court had no jurisdiction to try the issues involved in the above entitled cause.

2. The court committed error in refusing to non-suit the plaintiff.

3. The court committed error in refusing to direct a verdict in favor of the defendant.

4. The court committed error on the charge to the jury in instructing them that the burden was on the defendant to show that the plaintiff did not substantially perform its contract.

As to the first point, the Supreme Court had no jurisdiction to try the issues involved in the above entitled cause. A brief history of the case shows that two contracts were entered into between E. M. Brancati and J. Theodore Miller for the construction of two houses in the City of Plainfield, Union County, and State of New Jersey; that the contracts and specifications were filed in the County Clerk's Office for the County of Union (Case, p. 2, ll. 4-10), that the plaintiff delivered certain materials on the job, the delivery of which was not disputed; that a stop-notice was served by plaintiff to the defendant, E. M. Brancati which was not denied; that the plaintiff, Sargeant Brothers, Inc. did not receive payment from the contractor, J. Theodore Miller, which was not denied by the defendant.

Suit was thereafter brought in the New Jersey Supreme Court, plaintiff laying its venue in Somerset County; that before the jury was sworn, the defendant, through his attorney, sought to dismiss the complaint (Case, p. 47, ll. 30 to p. 50 inc.) on the grounds that the Supreme Court had no original jurisdiction to try the facts at issue. The court refused to dismiss the complaint, to which refusal to dismiss an exception was taken (Case, p. 50, ll. 20-21).

Law.

The defendant-appellant feels that the court below erred in refusing to dismiss the complaint on the grounds that the Supreme Court had no original jurisdiction. The remedy sought by the plaintiff in the above entitled cause is a statutory remedy. If it were not for the provisions of the act of the Legislature entitled: "An act to secure to

mechanics and others payment for their labor and material in erecting any building", the plaintiff would not have had a cause of action against the defendant, E. M. Brancati, because as between the plaintiff and the defendant there was no privity of contract.

The statute specifically provides that (*C. S. p. 3307, Section 23*) "When a claim is filed agreeably to the provisions of this act upon any *lien* created thereby, the same may be enforced by suit in the Circuit Court of the County where such building is situated, or any District Court of the County (providing the claim does not exceed $500.00, where such building is situated, and when suit is brought in the District Court the practice shall be as nearly as possible the same as now provided, or may hereafter be provided by law in district courts in action on contract, which suit shall be commenced by summons against the builder and owner of the land and building."

It was held by Vice Chancellor Van Fleet in *Dalrymple* vs. *Ramsey,* 45 Eq. 494: "Power to enforce the lien claim is vested exclusively in the circuit court of the county where the building is situated. Jurisdiction is given to no other tribunal."

It was also held, in an opinion written by Justice Magie in re *Cutter* vs. *Kline,* 35 Eq. 534, "that the circuit court is the only tribunal that has original jurisdiction in cases of mechanics' liens."

The jurisdiction of particular courts over proceedings to enforce mechanic's liens depends upon the particular provisions of the statutes applicable, and these differ so widely in the several states that no more definite rule can be stated than that if a particular court is designated to administer the remedy resport must be had to the court, and where the statute creating the remedy expressly

prescribes the court in which it shall be pursued, that jurisdiction is exclusive." 40 *C. J.* 367.

As to the second specification: the court committed error in refusing to non-suit plaintiff.

A motion for non-suit was made on the grounds that the plaintiff did not fulfill the terms of the contracts by producing an architect's certificate (Case, p. 70, l. 28 to Case, p. 72, l. 22). The contracts provide that "in each case of payment (Case, p. 8, ll. 3 to 17 inc.; Case, p. 23, l. 35 to p. 24, l. 8, inc.) a certificate shall be produced signed by George H. Fisher, Architect, to the effect that the work is done and in accordance with said drawings and specifications, and that should any dispute arise respecting the true construction or meaning of the drawings and specifications, the same shall be decided by G. H. Fisher, Jr. and his decision shall be final and conclusive. Should any dispute arise respecting the true value of the work omitted, the same shall be valued by two competent parties, one employed by the owner, and the other by the contractor, and those two shall have power to name an umpire, whose decision shall be binding on all parties" (Case, p. 9, ll. 10-19 inc.); Case, p. 24, l. 40; Case, p. 25, l. 10).

It is admitted by the contractor, J. Theodore Miller, the men in whose shoes the plaintiff's case depends, (Case, p. 59, ll. 27 to 30 inc.): "Q. Mr. Miller, did you get an architect's certificate? A. I did not. Q. Did you furnish Mr. Brancati with an architect's certificate on either job? A. I did not."

Law.

The defendant-appellant feels that the court below erred in refusing to non-suit plaintiff-appellee, because the proofs show that there were no architect's certificates given to the owner as provided for in the plans and specifications.

It was held in *Bryant* vs. *Sisters of Charity of the City of Elizabeth,* 45 L. p. 213: "Suit will not lie on a contract for moneys payable upon an architect's certificate without the production of such certificate or evidence that its production has been waived."

And it was held in re *Bradley Currier Co.* vs. *Bernz,* 55 Eq. 10, that a provision in the building contract that payments shall be made only on certificates of the supervising architect was not waived by making certain payments without certificate, or by the architect not supervising the construction.

It is the further contention of the defendant-appellant that the mere fact that suit was brought under the stop notice under the provision of the mechanic's lien act does not relieve the plaintiff-appellee from the duties conferred by reason of the contract upon the original contractor J. Theodore Miller.

It was held in re *Reeves* vs. *Elmendorf,* 38 L. 125, "if, by the terms of the contract the owner has a right to retain the moneys earned until the completion of the building, and then to make deductions from said sums on account of the delay of the work, such right will be of equal avail, whether the suit is at common law by the contractor, or under the statute by the workman or materialman."

It was further held in *Schweitzer* vs. *St. Leo's Catholic Church of Irvington,* 78 Atl. Rep. 400: "Where a contractor to paint a church failed to procure an architect's certificate, which the contract made a condition precedent to his right to payment of the contract price, and did not otherwise show that the work had been accepted, defendant in an action for the price was entitled to a non-suit".

As to the Third Point.

The defendant-appellant feels that the court below erred in refusing to direct a verdict (Case, p. 132, ll. 29-30) for the reasons hereinabove stated under the second point.

Conclusions.

In conclusion, it is apparent therefore that the Supreme Court had no jurisdiction to try the issues involved, and further that the defendant was entitled to non-suit and direction of verdict on the ground that the plaintiff did not produce architect's certificates, as provided for in the contracts.

The defendant-appellant therefore respectfully prays that the judgment of the lower court be reversed.

Respectfully submitted,

EUGENE A. LIOTTA,
Attorney for Defendant-Appellant.

New Jersey Court of Errors and Appeals

SARGEANT BROTHERS, INCORPORATED, a corporation, *Plaintiff-~~Appellee~~ Respondent*, against E. M. BRANCATI, *Defendant-Appellant.*	Action at Law. On Appeal from Judgment of the New Jersey Supreme Court.

Brief for the Plaintiff-Appellee

Facts

On December 2nd, 1927, defendant-appellant, Ercoli M. Brancati, and one J. Theodore Miller entered into two written contracts for the construction of two houses in the City of Plainfield, County of Union and State of New Jersey, upon lands and premises owned by the defendant-appellant. Thereafter, on December 7th, 1927, the said contracts, together with the specifications accompanying the same and referred to therein, were duly filed in the office of the Clerk of the County of Union. Plaintiff-~~appellee~~ respondent, Sargeant Brothers, Incorporated, a New Jersey corporation, then and thereafter sold and delivered to the contractor, J. Theodore Miller, certain materials (Schedules 2 and 5, Case, pp. 12, 28) which were used in the erection and construction of the buildings contracted for as aforesaid.

Each contract provided for the payment of $5,000.00 to the contractor in three installments, the first of $1200.00 when the foundation was in, frame up, sheeting on and roofing on, the second of $1500.00 when fully enclosed, all rough plumbing in, heating apparatus in, flooring in, brown coat of plaster on and one coat of paint on exterior, and the third of

$2300.00 when the contract was completed in all respects (Schedules 1 and 4, Case, pp. 6, 22). The contractor was duly paid the first and second installments on each contract, amounting to $2300.00 in each case. (Case, p. 56). Upon the failure of the contractor to pay for the materials sold and delivered to him the plaintiff-~~appellee~~ respondent served two stop notices, one under each contract, upon the defendant-appellant, on March 29th, 1928, and May 5th, 1928, respectively. (Schedules 3 and 6, Case, pp. 16, 31). This is not denied by the defendant-appellant.

The defendant-appellant having refused thereafter to pay the plaintiff-~~appellee~~ respondent the amounts claimed under the respective stop notices, suit was brought in the Supreme Court by the plaintiff-~~appellee~~ respondent to recover from the defendant-appellant the amount of its claims, under and by virtue of Section 3 of an act of the Legislature entitled, "An Act to secure to mechanics and others payment for their labor and materials in erecting any building," (Revision 1898) (C. S. 1910, pp. 3290 *et seq.*) with the various amendments and supplements thereto.

Law

I

The Supreme Court of the State of New Jersey has original jurisdiction to try cases arising under Section 3 of an act of the Legislature entitled, "An Act to secure to mechanics and others payment for their labor and materials in erecting any building," (Revision 1898) with the various amendments and supplements thereto.

1. Section 23 of an act of the Legislature entitled, "An Act to secure to mechanics and others payment for their labor and materials in erecting any building," (Revision 1898) with the various amendments and supplements thereto, hereinafter referred to as the Mechanics' Lien

Act, does not deprive a materialman or laborer, who has complied with the provisions of Section 3 of the Mechanics' Lien Act, of the right and privilege to bring suit in the Supreme Court of New Jersey to enforce his claim against the owner.

(a) It is the contention of the defendant-appellant in his brief that the rights of a stop notice claimant against an owner are a "lien" within the meaning of Section 23 of the Mechanics' Lien Act, and therefore must be enforced in the Circuit Court. But the defendant-appellant fails to recognize the fundamental and material distinctions in the legal relations between materialman and owner, depending upon the filing by the owner of the building contract in accordance with the terms of the statute.

Section 1 of the Mechanics' Lien Act (3 C. S. p. 3291) provides:

> "Every building hereafter erected or built within this state shall be liable for the payment of any debt contracted and owing to any person for labor performed or materials furnished for the erection and construction thereof, which debt shall be a lien on such building, and on the land whereon it stands, including the lot or curtilage whereon the same is erected. (P. L. 1898, p. 538)."

Section 2 of the Mechanics' Lien Act (3 C. S. p. 3293) provides:

> "Whenever any building shall be erected in whole or in part by contract in writing, such building and the land whereon it stands shall be liable to the contractor alone for work done or materials furnished in pursuance of such contract; provided, said contract, or a duplicate thereof, together with the specifications accompanying the same, or a copy or copies thereof, be filed in the office of the clerk of the county in which such building is situate before such work done or materials furnished; provided

further, that it shall not be necessary to file the plans for such building in said clerk's office, whether such plans are referred to in said contract or not. (P. L. 1898, p. 538, as amended P. L. 1910, p. 472)."

Section 3 of the Mechanics' Lien Act as amended (1 C. S. Sup. 1924, p. 1851, Plac. 126-3) provides:

"Whenever any master workman or contractor, or whenever any contractor under any master workman or contractor shall, upon demand, refuse to pay any person who may have furnished him material used in the erection of any such house or other building, or any subcontractor, journeyman or laborer employed by him in erecting or constructing any building, the money or wages due to him, it shall be the duty of such journeyman, laborer, materialman or subcontractor to give notice in writing to the owner or owners of such building and such master workman or contractor of such refusal, and of the amount due to him or them and so demanded, specifying said amount as nearly as possible, and the owner or owners of such building shall thereupon be authorized to retain the amount so due and claimed by such journeyman, laborer, materialman or subcontractor out of the amount owing by him or them on the contract or that thereafter may become due from him or them on such contract for labor or material used in the erection of such building, giving the master workman or contractor and any contractor under any master workman or contractor written notice of such notice and demand, and if the same be not paid or settled by said master workman or contractor, or such contractor under any master workman or contractor, such owner or owners, on being satisfied of the correctness of said demand, shall pay the same, and the receipt of such journeyman, laborer, materialman or subcontractor for the same shall entitle such owner or owners to an allowance therefor in the settlement of accounts between him and such master workman or contractor, or

> his representatives or assigns, as so much paid on account. (L. 1898, p. 538, as amended L. 1905, p. 311, L. 1910, p. 500, (C. S., p. 3294), L. 1917, c. 241, p. 821)."

A "lien" is defined as "a charge upon real or personal property for the satisfaction of some debt or duty." *Webster's New International Dictionary,* p. 1246. This is undoubtedly the meaning attached to the word as used in Section 1 of the Mechanics' Lien Act, *supra.* In *Ayres v. Revere,* 25 N. J. Law 474 (1856) the court interprets the legal effect of a "lien" accorded by the first section of the Act. The Court, on page 481, said:

> "The lien and the mode of enforcing it are creatures of the statute. They are unknown to the common law. The statute charges the property of one man with the debt of another. Though the owner may have paid the contractor in full for the erection of the building and for all the materials used in its construction, his property is nevertheless charged by the default of the contractor with the repayment of the debt. * * * It gives to the favored creditor a remedy not only against his debtor, but against an innocent third party, with whom he has never contracted, and for whom he has never labored. It gives him a cumulative remedy, which, if enforced, may compel the owner to pay a debt which he has once satisfied in full; and it may be, as in this instance, that this hardship will result from mere inadvertence in filing his contract, or from misapprehension of the precise meaning of a statute."

The object of Section 2 of the Act, *supra,* is to protect the owner against the "liens" referred to in Section 1, and gives the owner the privilege and power to extinguish a materialman's or laborer's right to a "lien" by filing the building contract. In *Mechanics' Mutual Loan Association v. Albertson,* 23 N. J. Eq. 318 (1873) the Court, referring to Section 2, on page 319, said:

> "It is clear that the object of the provision in question was to protect the owner, who, by filing his contract, was freed from all claims by mechanics or material-men, and could thus safely make his payments according to contract. Mechanics and material-men must take notice of such filing, and that by it they are deprived of their *lien* on the building, and must see to it that the contractor pays or secures his indebtedness to them." (Italics mine.)

Again in *Anderson Lumber Company v. Friedlander,* 54 N. J. Law 375 (1892), the Court, on page 378, said:

> "The second section, as it stood prior to 1890 and as now amended, provides a way in which the building may be protected from *lien,* except for the claims of the contractor.
>
> "The second section, neither before nor after its amendment, was intended to confer the right to *lien.* Its purpose was to limit the general right to *lien* conferred by section 1." (Italics mine.)

See also *Weaver v. Atlantic Roofing Company,* 57 N. J. Eq. 547 (1898).

Having extinguished the right to a "lien" under Section 1 in cases where the contract was filed as provided for in Section 2, *supra,* the Legislature created further rights and powers for the materialman and laborer by Section 3, *supra.* That the right to a "lien" conferred by the first section of the statute is distinctly different from the rights given to a stop notice claimant under the third section, is clearly pointed out by the courts in several decisions. In *Summerman v. Knowles,* 33 N. J. Law 202 (1868), the Court, on page 205, said:

> "The right to resort to this mode [stop notice] of obtaining a debt due by the contractor, for materials used in the erection of the building, out of the funds in the hands of the owner,

> is confined to cases where, by reason of the building having been erected by contract, in writing, and filed, *the materialman is deprived of a right to a lien.* In other cases, his remedy is by proceeding to file a *lien* under the first section of the act." (Italics mine.)

The Court of Errors and Appeals in the case of *Beckhard v. Rudolph,* 68 N. J. Eq. 315 (1904) is even more explicit in a learned opinion by Justice Pitney. The Court, on page 744, said:

> "In our opinion, this is too narrow a reading of the letter of the section, and fails to give due effect to the spirit of the act and to the antithesis that exists between the first and third sections. The first section gives a *lien* upon the building itself in ordinary cases (there being no filed contract) for any debt contracted and owing to any person for labor performed or materials furnished for the erection and construction of the building. The second section denies the benefit of the *lien* upon the building to all others than the contractor, where the building is erected by contract and the contract is filed. The third section supplies an alternative remedy where the contract is in writing and is filed, this remedy being by lien upon the fund in the hands of the owner owing by him to the contractor.
>
> "It has been repeatedly held that the remedy by stop notice under the third section is confined to those who are prevented from having a *lien* upon the building by reason of the filing of the contract." (Italics mine.)

It is respectfully submitted that much of the defendant-appellant's difficulty in understanding the true nature of the rights of a stop notice claimant under the third section is due to a description of the same, in some of the reported decisions of our courts, as "liens" or "inchoate liens."

That the materialman or laborer has a "lien" on the funds in the hands of the owner, see *Beckhard v.*

Rudolph, supra. For decisions describing the same as an "inchoate lien" see

Kreutz v. Cramer, 64 N. J. Law 648 (1903)

Person v. Herring, 63 N. J. Law 599 (1899)

Smith v. Dodge & Bliss Co., 59 N. J. Eq. 584 (1899)

Murphey-Hardy Lumber Co. v. Nicholas, 66 N. J. Law 414 (1901)

Harry Pinsky & Son Co. v. Wike, 101 N. J. Eq. 45 (1927); *aff'd* 141 Atl. 120 (1928).

But other decisions point out that the rights of a stop notice claimant under the third section of the act are not "liens" or "inchoate liens" but entirely different legal relations. In *Craig v. Smith,* 37 N. J. Law 549 (1875) the Court, on page 551, said:

> "On argument of the case in this court the plaintiff's counsel contended that the workman and materialman had a *lien,* or *quasi lien,* upon the contract price stipulated to be paid by the owner to the contractor, and that an assignment of the debt took it subject to such lien. If this were so, the more appropriate remedy would seem to be a proceeding in nature of a suit *in rem,* to enforce the lien upon the debt, which the assignee could only take *cum onere.* I have, however, already said that *the statute gives no such lien,* (italics mine) but simply confers upon the workman or materialman the right, by notice to stay, for his benefit, in the hands of the owner, moneys due from him to the contractor."

The Court of Chancery in *Wightman v. Brenner,* 26 N. J. Eq. 489 (1875), a case decided about the same time as the *Craig Case, supra,* on page 491, said:

> "It is insisted by the demurrants, that the effect of the notice is limited to the creation or raising of a right of action, and does not transfer any right of the contractor, or give the workman or materialman any right whatever to the debt due from the owner to the contractor. This

> view is manifestly unsound. It can only be supported on the theory that it was the legislative design to make one man pay another's debts. No such purpose can be imputed to the law. *On the contrary, I think the purpose most conspicuously expressed on its face is, to work a substitution or subrogation of creditor rights; in other words, to put the workman or materialman, whenever the condition of affairs contemplated by the statute exists, exactly in the position of the contractor, so that he can invoke not only the contractor's remedy, but his rights against the owner.''* (Italics mine.)

In *Taylor v. Reed,* 68 N. J. Law 178 (1902), the Court, on page 182, said:

> ''In short, by the construction uniformly adopted by all our courts, a stop notice under section three has no retroactive effect, *but operates from the time such notice is given to create a liability at law upon the owner to the extent of moneys then due or thereafter coming due to the contractor* * * *.'' (Italics mine.)

The theory that a stop notice claimant has an ''inchoate lien'' was thoroughly considered by the Court of Errors and Appeals in the case of *Mayer v. Mutchler,* 50 N. J. Law 162 (1887) and the Court, in disapproving of the same, on page 165, said:

> ''Now, it seems to me clear that if money becomes due to the contractor, as the price of the work done under his contract, at any time after the statutory notice given, the owner must hold such money in conformity with the statutory requirement. He cannot be called upon to pay before the money is due to the contractor, for he is entitled to stand, in respect to his liability, to pay the amount demanded, as well as any other part of the contract price, upon the strict terms of his contract with the contractor. But whenever the period arrives when the owner could

> be compelled to answer to the contractor for any portion of the contract price, he must respect the notice theretofore given."

Various other distinctions between a "strict mechanic's lien" and the rights of a stop notice claimant are illustrated by numerous decisions of our courts. Service of the notice by the materialman upon the owner in accordance with the provisions of Section 3 of the Act constitutes an assignment *pro tanto,* from the contractor to the claimant on moneys then due or thereafter to become due from the owner to the contractor on the contract. In *Kirkland v. Moore,* 40 N. J. Eq. 106 (1885) the Court, on page 110, said:

> "In a case where the statutory requisites exist, notice given according to the statute, works an assignment *pro tanto* to the workman or materialman of the rights of the contractor against the owner. Upon notice given, the workman or materialman, to the extent of his demand, takes the place of the contractor."

See also *Taylor v. Reed, supra*
Wightman v. Brenner, supra
Anderson v. Huff, 49 N. J. Eq. 349 (1892)
Bradley Currier Co. v. Bernz, 55 N. J. Eq. 10 (1896)
Commonwealth Roofing Co. v. Riccio, 81 N. J. Eq. 486 (1913)
De Masi v. F. W. Bowden Co., 99 N. J. Eq. 70 (1926)

While the serving of a stop notice may not, strictly speaking, create an "assignment *pro tanto,*" yet many of the legal relations arising from an assignment are created thereby. In *Brunetti v. Grandi,* 89 N. J. Eq. 116 (1918) the Court, on page 120, said:

> "Although the term 'assignment *pro tanto*' has been applied to the effect of these notices, the served notices have not all the qualities of assignments, for the owner cannot, in an action

> brought by the contractor against him, claim credit for the amount claimed by any of the notices unless he shall have in fact paid the amount claimed to be due."

Even if it be admitted that the service of a stop notice does not create an assignment *pro tanto* the defendant-appellant cannot maintain with reason that the "lien" given to the materialman by the first section of the act is in any wise akin to an "assignment *pro tanto.*"

Again, the basic nature of a suit upon a stop notice differs from that upon a strict mechanic's "lien". The former is against the owner alone and the judgment obtained a general one; an action *in personam. De Masi v. F. W. Bowden Co., supra.* The latter is against the contractor and the owner, with the judgment against the owner a special one; an action *in rem* or *quasi in rem.*

Gordon v. Torrey, 15 N. J. Eq. 112 (1862)

Washburn v. Burns, 34 N. J. Law 18 (1869)

Vreeland Building Co. v. Knickerbocker Sugar Co., 75 N. J. Law 551 (1907)

Shoemaker v. Maloney, 102 N. J. Law 363 (1925)

Furthermore, stop notice claimants are paid in the order of priority of service, whereas "lien" claimants are paid *pro rata.*

Smith v. Dodge & Bliss Co., supra

De Masi v. F. W. Bowden Co., supra

Vogel v. Sloan, 98 N. J. Eq. 300 (1925)

(b) Section 23 of the Mechanics' Lien Act says, in part:

> "When a claim is *filed* agreeably to the provisions of this act upon any *lien* created thereby, the same may be enforced by a suit in the Circuit Court of the county where *such building* is situated, or in any District Court of the county * * * where such building is situated * * *; *which suits shall be commenced by summons*

against the builder and owner of the land and building, * * * in the following or like form:

> The State of New Jersey, to (state the names of the defendants) You, A. B., *builder,* and C. D., *owner,* (or if the owner contracted the debt A. B., builder and owner) * * * are summoned to answer the annexed complaint of G. H. (the claimant) in an action at law in the Circuit Court * * * in and for the county of ———, *in which said G. H. claims a building lien on certain buildings and lands of said C. D. described in said complaint.''* (Italics mine.)

In the light of the foregoing discussion respecting the material distinctions between the rights of a ''lien'' claimant and a stop notice claimant, it cannot be said that Section 23, *supra,* lends support to the defendant-appellant's contention that a stop notice claimant's rights must be enforced in the Circuit Court. Section 23 begins ''when a claim is *filed.''* (Italics mine). Stop notice claimants never file their claims; they are precluded from so doing by Section 2 of the Act. Only ''lien'' claimants file their claims as required by Section 16 of the Act (C. S. p. 3304).

Again, Section 23, *supra,* provides, *''which suits shall be commenced by summons against the builder and owner of the land and building.''* (Italics mine.) The words *''which suits''* refer back to the previous provision of the same section which provides that ''the same [that is, the claims filed upon any lien] may be enforced by a *suit* in the Circuit Court.'' (Italics mine.) Therefore, the suits required to be instituted in the Circuit Court *''shall be commenced by summons against the builder and owner of the land and building.''* (Italics mine.) This part of Section 23 last above quoted clearly indicates the claims which must be instituted in the Circuit Court. Suits by stop notice claimants are never brought against the builder and owner, but against the latter

only. (See page 11, *supra.*) The only suits instituted against both builder and owner are those founded on "strict mechanic's liens", where the building contract has not been filed. The summons set forth in Section 23, *supra,* is proof of that fact:

> "You, A. B., builder, and C. D., owner, * * * are summoned to answer * * * the complaint of G. H. (the claimant) in an action at law, in the Circuit Court * * * *in which the said G. H. claims a building lien on certain buildings and lands of said C. D.* (*owner*) described in said complaint." (Italics mine.)

This form of summons, it is respectfully submitted, is a complete answer to the defendant-appellant's contention that the plaintiff-appellee should have sought its remedy in the Circuit Court instead of the Supreme Court.

2. The remedy of a materialman or laborer under Section 3 of the Mechanics' Lien Act is enforceable by an action at law in any of the Courts of Law of the State of New Jersey.

(a) Section 3 of the Mechanics' Lien Act (page 4, *supra*) is silent as to the *forum* wherein the materialman or laborer may have relief against the owner. While it does not direct the court or courts in which the stop notice claimant must proceed against the owner, as does Section 23 with regard to "lien" claimants, it does not prohibit an action in the Supreme Court.

The courts have uniformly held that, ordinarily, the stop notice claimant's rights are enforceable by an action at law.

Reeve v. Elmendorf, 38 N. J. Law 125 (1875)
Commonwealth Roofing Co. v. Riccio, supra
Brunetti v. Grandi, supra
De Masi v. F. W. Bowden Co., supra

In the *Commonwealth Roofing Company Case,* the Court of Errors and Appeals, on page 488, said:

> "That an action at law by the laborer or materialman against the owner is a proper method of enforcing the right given by this section [third] has never been a matter of doubt since the decision by this court in *Craig v. Smith,* 37 N. J. Law 549 as elaborated by Chief Justice Beasley in *Reeve v. Elmendorf, supra.* That it is the only method is clear, we think, from the extracts from the opinions cited; for, being the assignee *pro tanto* of the debt due from the owner to the contractor—taking the place of the contractor to the extent of his demand—the laborer or materialman is entitled to the same remedy for the collection of his debt, for the enforcement of his demand, that the statute gives the contractor, (except as otherwise provided by the statute) and to no other."

The defendant-appellant does not contend that the contractor could not sue the owner upon his contract in the Supreme Court, for this principal is well established in law. *Coppola v. Grande,* 88 N. J. Law 324 (1915). If the learned opinion of the Court of Errors and Appeals in the *Commonwealth Roofing Co. Case, supra,* is good law, and the plaintiff-appellee respectfully submits that it is, then the laborer or materialman is entitled to the same remedies for the collection of his debt and for the enforcement of his demand, that are accorded to the contractor, and this, by sound logic, includes the right to bring his action in the Supreme Court or in any other court of law in this State.

To the same effect is *Wightman v. Brenner, supra.* The Court, on page 491, said:

> "* * * I think the purpose most conspicuously expressed on its face is, to work a substitution or subrogation of creditor rights; in other words, to put the workman or materialman, whenever the condition of affairs contemplated by the statute exists, exactly in the position of the contractor, so that he can invoke not

only the contractor's remedy, but his rights against the owner."

The decisions cited by counsel for the defendant-appellant in his brief are not in conflict with the contention of the plaintiff-~~appellee~~. *Cutter v. Kline,* 35 N. J. Eq. 534 (1882) involved a proceeding to stay execution upon a judgment recovered in the Circuit Court on a "lien" filed under Sections 1 and 16 of the Mechanics' Lien Act. The court in holding that equity had no power to interfere with a judgment regularly obtained in a court of law said, at page 549:

> "But the judgment in question is in fact one of a peculiar character. It was rendered in proceedings taken to enforce a mechanics' lien claim. The right to such a lien is purely a creature of statute. However meritorious the claims of mechanics and materialmen may be, there is no such equity in them as requires them to be preferred as liens, except as provided by the statute. They are, however, thus afforded preference by way of lien, and such lien, when properly filed may be enforced by proceedings taken in the mode, within the time and before the tribunal designated by the statute. The tribunal provided by the statute for the enforcement of such a lien is the Circuit Court of the county in which the building is."

This decision is in harmony with the provisions of Section 23, *supra,* but like that section of the Act, is not authority sustaining the contention of the defendant-appellant (see page 12, *supra*). Similarly, in *Dalrymple v. Ramsey,* 45 N. J. Eq. 494 (1889) the sole question decided was that a lien filed under Sections 1 and 16 of the Mechanics' Lien Act was not enforceable against an equitable estate. The Court, on page 497, said:

> "Power to enforce the lien is vested exclusively in the circuit court of the county in which

> the building is situated. Jurisdiction is given to no other tribunal."

For the same reasons stated under the *Cutter Case, supra,* this case is not authority for the contention of the defendant-appellant.

To the effect that even the Court of Chancery will assume jurisdiction over cases involving the legal relations between a materialman and owner under certain fact situations, see *Brunetti v. Grandi, supra,* where the Court, on page 119, said:

> "Where there are several notices served and there is a question of priority or validity, or where there is a dispute as to the amount due from the owner to the contractor, the general practice is to seek relief in a Court of Equity on bill of interpleader or in the nature of a bill of interpleader."

3. Whenever there is a debatable question as to the proper construction of a statutory provision, the contemporaneous and long continued exposition exhibited in the usage and practice under it requires the construction thus put upon it to be accepted by the courts as the true one.

(a) The precise point as to the original jurisdiction of the Supreme Court in cases involving the rights of stop notice claimants has never been adjudicated by our courts. In the absence of express statutory enactment regarding the jurisdiction of the courts in stop notice cases, the long continued practice of instituting suit upon such claims in any of the law courts, and even in the Court of Chancery where the facts warrant the same being done, should be determinative of this issue. The Court of Errors and Appeals in the *Commonwealth Roofing Co. Case, supra,* on page 488, said:

> "* * * for whenever there is a debatable question as to the proper construction of a stat-

> utory provision, the contemporaneous and long continued exposition exhibited *in the usage and practice under it* requires the construction thus put upon it to be accepted by the courts as the true one." (Italics mine.)

An analysis of 69 cases involving the rights of stop notice claimants discloses that 46 were tried in the Court of Chancery, 12 in the Circuit Court, 4 in the Supreme Court, 4 in the District Court, 2 in the Common Pleas Court and 1 in the Court of a Justice of the Peace. A few of the decisions in each category are cited herewith:

Equity—
Beckhard v. Rudolph, supra
Weaver v. Atlantic Roofing Co., supra
Wix v. Frankel, 87 N. J. Eq. 467 (1917)
Brunetti v. Grandi, supra
Vogel v. Sloan, supra

Circuit—
Craig v. Smith, supra
Person v. Herring, supra
Mayer v. Mutchler, supra
Shoemaker v. Maloney, supra

Supreme—
Taylor v. Wahl, 69 N. J. Law 471 (1903)
Gardner & Meeks Co. v. Herold, 76 N. J. Law 524 (1908)
Builders' Material Supply Co. v. Schoen, 86 N. J. Law 290 (1914)
Campbell v. Lehocky, 83 N. J. Law 505 (1912)

District—
Van Nest v. Hirsch, 87 N. J. Law 336 (1914)
F. Bowden Co. v. Baier, supra
Taylor v. Reed, supra
Stone Post Co. v. Corcoran, 80 N. J. Law 549 (1910)

Common Pleas—

Brennen v. Building & Loan Association, 17 N. J. L. J. 203 (1894)

Bruce v. Pearsall, 59 N. J. Law 62 (1896)

Justice of the Peace—

Summerman v. Knowles, supra

In *Luce, The Mechanics' Lien Laws of New Jersey* (3rd Ed. 1923), on page 162, it is said:

> "The statute does not limit the [stop notice] claimant to any particular court and he may therefore bring his action in any of the courts of law."

(b) It has been held that since The Mechanics' Lien Law is not remedial in its nature it should be strictly construed.

Ayres v. Revere, supra

Associates v. Davidson, 29 N. J. Law 415 (1860)

Scudder v. Harden, 31 N. J. Eq. 503 (1879)

Wix v. Frankel, supra

Dalrymple v. Ramsey, supra

But this rule of law is limited to cases where the Lien Law "operates to charge the lands of a party with a debt not contracted by him, or for his ultimate benefit," *Associates v. Davidson, supra,* at page 422; that is, in "lien" cases. Where the rights of stop notice claimants are involved the courts have taken the opposite view and have uniformly held that the third section of the Act should be liberally construed. In *McNab & Harlin Mfg. Co. v. Paterson Building Co.,* 73 N. J. Eq. 929 (1907), Justice Dill, writing the opinion for the Court of Errors and Appeals, on page 932, said:

> "The question whether other provisions of our mechanics' lien law should be construed liberally or otherwise is not foreclosed by the decision in the Beckhard case, nor by this decision.

> It may be argued, and with force, that mechanics' lien laws are as a rule to be construed strictly against the claimant and in favor of the owner of the land in so far as they require the owner to pay a debt that he did not contract and for a consideration that he may have already paid the contractor. But, in our opinion, *no such strict construction should be given to the provisions of the third section of our mechanics' lien law.*
>
> "There is no reason for a strict construction of the provisions of this section beyond the inconvenience to which the owner is put by making the inquiry into the correctness of the claims served upon him." (Italics mine.)

In *Vogel v. Sloan, supra,* the Court, on page 303, said:

> "In other words, that section [third] of the Act should be liberally construed in favor of the stop notice claimant in order to effectuate the object of the statute so long as it does not work a hardship on the owner."

The purpose and object of the Mechanics' Lien Act is to secure to mechanics and others payment for their labor and materials in erecting any building. While the plaintiff-~~appellee~~ contends that the application of the rule laid down in the *McNab Case, supra,* as to liberal construction of the third section of the Act, is not absolutely necessary to sustain its right to institute suit upon its claim in the Supreme Court, yet the purpose of the statute will be fulfilled and the vested rights of the plaintiff-~~appellee~~ sustained by the further application of this rule to the instant case.

II

The court below did not commit error in refusing to non-suit the plaintiff-~~appellee~~ on the ground that the proofs failed to show the delivery of architect's certificates as provided for in the contracts.

While the contractor Miller admitted upon cross-examination by counsel for the defendant-appellant that he had not furnished the defendant-appellant with any architect's certificates under either contract (Case, p. 59, ll. 27 to 30 inclusive), yet immediately thereafter he testified as follows (Case, p. 59, ll. 31 to 40 inclusive):

"The Court: Was there an architect on the job, Mr. Miller?

The Witness: There was not.

Mr. Liotta: The contracts speak for themselves.

The Court: Was there actually an architect?

The Witness: No, sir."

In other words, the contractor testified that, although there was an architect named in the contract, none had ever been employed to supervise the construction of the houses, and it was for that reason that he failed to deliver architect's certificates to the defendant-appellant. His testimony is not denied nor is the failure to select an architect explained in any manner by the defendant-appellant.

The rule is well settled in New Jersey that under a building contract containing a clause requiring the production of an architect's certificate as a condition precedent to payment, the production of the stipulated certificate is a condition precedent to the institution of suit for money payable upon such contract while the provision remains in force.

Bryne v. Sisters of Charity of St. Elizabeth, 45 N. J. Law 213 (1883)

Kirtland v. Moore, 40 N. J. Eq. 106 (1885)

Bradner v. Roffsell, 57 N. J. Law 412 (1894)

Sheyer v. Pinkerton Construction Co., 59 Atl. 462 (1904) (not officially reported)

Schweitzer v. St. Leo's Catholic Church, 78 Atl. 400 (1910) (not officially reported)

Landstra v. Bunn, 81 N. J. Law 680 (1911)

Such conditions, however, may be waived by the owner in whose interest they are engrafted in the contract either by express words, relieving the build-

er therefrom, or waiver may be infered from such acts, conduct or declarations of the owner as are inconsistent with the purpose of exacting performance.

Byrne v. Sisters of Charity of St. Elizabeth, supra.

Federal Trust Co. v. Guiges, 76 N. J. Eq. 495 (1909)

Steelman v. Ludy, 77 N. J. Law 446 (1909)

Stone Post Co. v. Corcoran, 80 N. J. Law 549 (1910)

F. Bowden Co. v. Baier, 99 N. J. Law 361 (1923)

The defendant-appellant made two payments on each contract to the contractor without requiring architect's certificates. (Case, p. 56). Many jurisdictions have held that such conduct upon the part of the owner amounted to a waiver, but our courts have held otherwise. *Bradley Currier Co. v. Bernz,* 55 N. J. Eq. 10 (1896). But the plaintiff-appellee does not rely solely upon this fact as evidence of waiver; it contends that while one G. H. Fisher, Jr., was named as architect in the contracts (Case, p. 9, l. 9; p. 22, l. 36), such a person did not exist or at least was never employed as an architect (Case, p. 59, ll. 31 to 40 inclusive), and for that reason, it was impossible for the contractor to furnish the certificates required by the contract. Such provisions in building contracts are made for the protection of the owner, and may be waived if so desired. *F. Bowden Co. v. Baier, supra.* Two decisions of our courts have held that where there is in fact no architect employed to supervise the work, there is a waiver by the owner of the requirement of architect's certificates. In *F. Bowden Co. v. Baier, supra,* the Court, on page 364, said:

> "The appellant [owner] finally contends that no payments were due the contractor until the certificates required by the contract were produced and that the burden is on the contractor, or a person standing in his shoes, to prove the

production of said certificate, or a valid excuse for their non-production.

"The contract in the present case provided for certificates to be signed by a person to be selected by the parties, to be furnished to the owner. *No person appears to have been selected and no certificates appear to have been demanded by the owner when he made payment under the contract.* This provision of the contract was made for the protection of the owner. He could waive it if he so desired. Having waived the provision by making payments to the contractor without the production of the certificates, the owner cannot now set up the non-production of the certificates to defeat the action instituted against him upon a stop notice." (Italics mine.)

In *Federal Trust Co. v. Guiges, supra,* the Court, on page 503, said:

"This state of facts [the architects had been discharged by the owner] excuses Mr. Crouse [the claimant] from the production of any architect's certificate. In fact, there were no architects who could give him a certificate; certainly the architects agreed upon could not, and his claim will, therefore, be allowed."

In 9 Corpus Juris, on p. 760, it is said:

"Such waiver may be implied as well as express, as where the parties proceed without regard to the provision * * *."

For decisions from other states in accord with the *Baier* and *Guiges Cases,* see

Ryan v. Curlew Irrigation, etc., Co., 36 Utah 382, 104 Pac. 218

Ashland Lime, etc., Co. v. Shores, 105 Wis. 122, 81 N. W. 136

The facts in the instant case may be likened to those in *Turner v. Wells,* 64 N. J. Law 269 (1899).

There it was *held* that where the furnishing of releases was a condition precedent to recovery of the final payment upon a building contract, the plaintiff must produce evidence of furnishing the same, *unless, there was proof of the non-existence of any liens or claims to be released.* To the same effect, see *Titus v. Gunn,* 69 N. J. Law 410 (1903). The same reasoning may be applied where there is no architect from whom the contractor may procure certificates.

The court below properly refused to non-suit the plaintiff-~~appellee~~, because it could not say as a matter of law that the failure to produce architect's certificates under the circumstances testified to by the contractor and uncontradicted by the defendant-appellant, barred the plaintiff-~~appellee~~ of its right to recover. The question of what acts, conduct, declarations or circumstances constitute a waiver, is one of fact for the jury.

Byrne v. Sisters of Charity of St. Elizabeth, supra
Steelman v. Ludy, supra
Hoffmeier v. Trost, 86 N. J. Law 682 (1914)

And where a complete or substantial performance of the contract appears, as it did in the instant case at the time the defendant-appellant moved for a nonsuit (Case, pp. 70 to 72 inclusive), the purpose of a certificate, as evidence of that fact, being otherwise supplied, slight evidence of a waiver will be permitted to go to the jury rather than turn a meritorious case out of court. *Byrne v. Sisters of Charity of St. Elizabeth, supra.*

None of the cases cited by counsel for the defendant-appellant in support of his contention as to the requirements of architect's certificates in this case, are contrary to the position of the plaintiff-~~appellee~~. In the *Byrne, Bernz* and *Schweitzer Cases, supra, there was in fact an architect employed,* but the contractor, or one claiming under him, sought in each case to excuse production of the certificate upon some other ground.

III

The court below did not commit error in refusing to direct a verdict for the defendant-appellant.

The court below refused to direct a verdict for the defendant-appellant, (Case, p. 132, ll. 29 to 32 inclusive). That it was correct in so doing, the plaintiff-~~appellee~~ respondent respectfully submits for the reasons hereinabove set forth under Point II (*supra*, page 19, *et seq.*)

IV

Grounds of Appeal not argued by the Defendant-Appellant in his brief are presumed to be abandoned.

The plaintiff-~~appellee~~ respondent does not argue the defendant-appellant's fourth ground of appeal (Case, p. 46, ll. 30 to 33 inclusive) for the reason that the same is not argued in his brief, and is, therefore, presumed to be abandoned.

Cleaves v. Yeskel, 104 N. J. Law 497 (1928)

Hygrade Cut Fabric Co., Inc. v. United States Stores Corporation, 144 Atl. 605 (1929) (not yet officially reported)

Cropsey v. Cropsey, 144 Atl. 621 (1929) (not yet officially reported)

V

It is respectfully submitted that for the reasons which have been above presented and discussed, the judgment of the Supreme Court in favor of the plaintiff-~~appellee~~ respondent should be affirmed.

T. Girard Wharton,
Attorney for Plaintiff-~~Appellee~~ Respondent.

Russell E. Watson,
Of Counsel.