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New Jersey State Library

Notice of Appeal.

(Filed December 4, 1916.)

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF HUDSON.

10

KATHARINE FERBER, *Plaintiff*, *vs.* PASQUALE CONA, *Defendant*.	On Contract.

20

To the above named Plaintiff, or
John N. Platoff, Esq., her Attorney:

Take notice that the defendant, Pasquale Cona, hereby appeals to the New Jersey Supreme Court from the whole of the judgment of the District Court of the First Judicial District of the County of Hudson, rendered in the above stated action on the 22nd day of November, 1916, in favor of the plaintiff and against the defendant.

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Dated, November 27, 1916.

Respectfully yours,

McDERMOTT & ENRIGHT,
Attorneys of Defendant.

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Grounds of Appeal.

(Filed December 14, 1916.)

NEW JERSEY SUPREME COURT.

KATHARINE FERBER, *Plaintiff-Respondent*, *vs.* PASQUALE CONA, *Defendant-Appellant.*	On Appeal from District Court.

10

The appellant in the above entitled cause herein specifies the following as the grounds of appeal herein:

1. Because of the denial of the Judge of the District Court of defendant's motion for a non-suit on the pleadings.

20

2. Because the trial Court sustained plaintiff's objection to the question: "Now, when that contract was signed you did not have any definite plans; you simply had a vague idea as to the size?"

3. Because the trial Court sustained plaintiff's objection to the question: "And later on you were to arrange about the details for the garage?"

4. Because the trial Couut sustained plaintiff's objection to the question: "Was there anything said at the time the agreement was drawn as to the size or location of the windows?"

30

5. Bcause the trial Court sustained plaintiff's objection to the question: "Was there anything said at the time the contract was drawn up as to size of kind of wood to be used for the garage?"

6. Because the trial Court sustained plaintiff's objection to the question: "Was there anything said when the contract was signed as to the details of the construction?"

40

Grounds of Appeal.

7. Because the trial Court sustained plaintiff's objection to the question: "And you were not willing to pay $300 were you?"

8. Because the trial Court denied defendant's motion for non-suit.

9. Because the trial Court refused defendant's motion for judgment for the defendant.

10. Because there was no evidence on which the trial Court could lawfully fix the damage at $500. **10**

11. Because plaintiff did not sustain the burden of proof on the question of damages.

12. Because there was no evidence as to the cost of building a brick garage according to the contract Exhibit P-1.

13. Because the judgment is contrary to the clear weight of the evidence. **20**

14. Because the evidence clearly indicated an abandonment of the contract Exhibit P-1.

McDermott & Enright,
Attorneys of Defendant-Appellant.

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Record of Judgment.

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF HUDSON.

Before:

FRANCIS H. MCCAULEY, Esq.,

Judge.

10 STATE OF NEW JERSEY, } ss.:
Hudson County. }

No. 6806.

KATHARINE FERBER,
Plaintiff,

vs.

PASQUALE CONA,
20 *Defendant.*

Upon Contract Demand $500.00. John N. Platoff, Plff.'s Atty. McDermott & Enright, Deft.'s Attys.

COSTS.

	Al.
Summons, Copy	$1.50
Service and return	.60
Mileage	.10
Trial fee	1.50
Transcript of Judgment and Proceedings	4.50
Attorney fee	25.00
Constable fee	.70
Total costs	$30.20

30

A Summons was issued tested April 13, A. D. 1915, Returnable April 23, 1915, at ten o'clock in the forenoon at the Court Room of said Court in the Town Hall, Town of Union. The Constable re-
40 turned the summons as follows, viz: I return the

within summons this seventeenth day of April, A. D. 1915, having served same on the defendant Pasquale Cona by reading same to him and delivering to him a copy thereof.

JOSEPH A. CONWAY,
Constable.

Plaintiff's demand was filed April 13, A. D. 1915. Defendant's offset was filed April twenty-third A. D. 1915. This cause was called at ten o'clock in the forenoon and adjourned to April 30, 1915 when the case was heard and judgment was rendered for plaintiff in the amount of $500.00. Case was reopened and set down for November 22, 1916. **10**

Mr. Richardson was sworn as stenographer.

On the part of the plaintiff. Philip Ferber, John N. Platoff.

On the part of the defendant Pasquale Cona. **20**

Whereupon it is on this Twenty-second day of November A. D. 1916, by this Court considered and adjudged that said Katharine Ferber plaintiff recover against said Pasquale Cona defendant the sum of Five hundred and thirty dollars and twenty cents cost of suit.

HENRY BENDER, Clerk of the District Court of the First Judicial District of the County of Hudson.

FRANCIS H. MCCAULEY, Esq., Judge, do hereby certify that the foregoing is a true copy of the record of a judgment of said Court. **30**

IN WITNESS WHEREOF, I have hereto set my hand as Clerk of said Court and affixed the seal of said Court, this Fourth day of December, nineteen hundred and sixteen.

(Seal)

HENRY BENDER,
Clerk.

40

State of Demand.

(Filed April 13, 1915.)

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT—HUDSON COUNTY.

KATHARINE FERBER, *Plaintiff,* *vs.* PASQUALE CONA, *Defendant.*	On Contract.

10

Plaintiff demands of the defendant the sum of Five Hundred ($500) Dollars for that plaintiff and defendant entered into a written contract dated the fifteenth day of November, Nineteen hundrd and twelve, a true copy of which is hereto annexed and made a part hereof, wherein and whereby defendant agreed to erect for the plaintiff, on or before the first day of April, then next on the rear of premises known as street number 200 Highpoint Avenue, in the Township of Weehawken in the County of Hudson and State of New Jersey, a one-story brick or stucco garage twelve (12) feet wide by eighteen (18) feet deep and at least ten (10) feet in height in the clear and to have a window in each of the north, south and west sides and to have a suitable double door and entrance on the east side, and the floor to be of cement, and the sidewalk to be properly graded before the entrance; that the plaintiff requested defendant to perform said contract before the first day of April then next and many times since then, but that the said defendant refused to perform said contract according to its terms and conditions or in any other manner and has continued to refuse to the plaintiff's damage in the sum of Five Hundred ($500) Dollars.

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30

40

JOHN N. PLATOFF,
Attorney of Plaintiff.

State of Demand.

This Agreement, made this fifteenth day of November, one thousand nine hundred and twelve,

Between Pasquale Cona, of the Township of Weehawken, County of Hudson and State of New Jersey, party of the first part,

And Katharine Ferber, of the same place, party of the second part.

Witnesseth, that whereas Giovanna Cona and the said Pasquale Cona have by deed bearing even date herewith conveyed to the party of the second part the premises known as No. 200 Highpoint Avenue, in the Township of Weehawken aforesaid, for the sum of Thirteen Thousand Eight Hundred Dollars, and in addition to the conveying of the premises aforesaid the said party of the first part has agreed to erect for the said party of the second part on or before the first day of April, next, on the rear of the above described premises a one-story brick or stucco garage to be twelve (12) feet wide by eighteen (18) feet deep and to be at last ten (10) feet in height in the clear and to have a window on each of the north, south and west sides and to have a suitable double door and entrance on the east side. The floor to be of cement. The sidewalk is to be properly graded before the entrance. The roof of said building is to be hereafter agreed upon between the parties hereto.

It is mutually understood and agreed that said building shall be erected subject to the approval of the party of the second part.

In Witness Whereof, said parties have hereunto set their hands and seals the day and year first above written.

(Signed) Pasquale Cona, (L.S.)

(Signed) Katharine Ferber. (L.S.)

Specification of Defenses.

(Filed April 23, 1915.)

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF HUDSON.

KATHARINE FERBER, *Plaintiff*, *vs.* PASQUALE CONA, *Defendant.*	On Contract.

10

To John N. Platoff, Esq.,
Attorney of Plaintiff:

Please take notice that the following is a specification of defenses to be used by the defendant in above case.

20

1. Defendant denies that he refused to build a garage in the manner described in the State of Demand.

2. Defendant has offered and was always willing to build a garage in the manner described in the contract referred to in the State of Demand.

3. The contract referred to in the State of Demand is not a binding agreement because all the terms of the contract were not agreed upon at the time the agreement was signed or thereafter.

30

4. Defendant denies that plaintiff requested defendant to build a garage in the manner described in the contract referred to in the State of Demand.

McDERMOTT & ENRIGHT,
Attorneys of Defendant.

40

Testimony.

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT—HUDSON COUNTY.

KATHARINE FERBER,
Plaintiff,
vs.
PASQUALE CONA,
Defendant.
} On Contract.

10

Town of Union, N. J., November 22nd, 1916.

Before:

HON. FRANCIS H. MCCAULEY,
Judge.

APPEARANCES:

20

John N. Platoff, Esq., for the Plaintiff.

McDermott & Enright, Esqs., (Meyer Eichmann, Esq.) for the Defendant.

PHILLIP FERBER, sworn:

DIRECT EXAMINATION BY MR. PLATOFF:

Q. Where do you reside?

MR. EICHMANN: I want to move for a non-suit on the ground that the State of Demand, as filed, does not set up a cause of action against the defendant. The alleged contract annexed to the State of Demand upon which suit is brought recites that "the roof of said building is to be as hereafter agreed upon between the parties hereto" and that this contract was not a complete contract when executed.

30

40

(After argument of counsel).

THE COURT: I will deny your motion for a nonsuit and will allow you an exception.

MR. EICHMANN: I ask an exception.

Q. Mr. Ferber, where do you reside? A. 221 33rd Street, Woodcliff, New Jersey.

10 Q. Are you the husband of the plaintiff in this suit? A. Yes, sir.

Q. Are you acquainted with the defendant, Pasqual Cona? A. Yes, sir.

Q. Did you have any business transaction with him in the month of November, 1912? A. Yes, sir.

Q. What was that transaction? A. I purchased a piece of property from him, 200 Highpoint Avenue.

20 Q. And you purchased that property for your wife as her agent? A. Yes, sir.

Q. You were her agent in the entire transaction? A. Yes, sir.

Q. I show you a contract, dated November 15th, 1912, and bearing the signatures "Pasquale Cona" and Katharine Ferber; did you see Pasquale Cona, the defendant in this suit, sign this agreement? A. Yes, sir.

Q. Is that the signature which he signed? A.

30 Yes, sir.

Q. And the signature of Katharine Ferber, who signed that? A. I did.

Q. As her agent? A. Yes, sir.

Q. You saw him sign that agreement? A. Yes, sir.

MR. PLATOFF: I offer the agreement in evidence.

(There being no objection the agreement is admitted in evidence and marked P-1.)

40

Q. Where were you at the time that agreement was executed? A. In Mr. Cona's house 138 Highpoint Avenue, Weehawken.

Q. When did you next see Mr. Cona after the execution of that agreement? A. Approximately two weeks later.

Q. Do you recall where that was? A. At Mr. Cona's house.

10

Q. At the same address? A. Yes, sir.

Q. Was there anybody else present besides you and Mr. Cona? A. I don't believe there was.

Q. Did you have any conversation with Mr. Cona concerning the contract? A. Yes, sir.

Q. What was that conversation? A. About the roof.

Q. About the roof? A. Yes, sir.

Q. And what was the conversation? A. The shape and what the roof was to be covered with.

20

Q. And did you and he agree upon the shape and what the roof should be covered with? A. Yes, sir.

Q. What about the shape of the roof? A. A pointed roof.

Q. What did you agree upon as to material? A. Tin.

Q. Did you see him again? A. Yes, some time later, and I asked him to get it ready and he said he would have it ready in the Spring.

30

Q. What did he say then? A. He said that the weather was too cold and he could not do anythink now.

Q. Did you ever speak to him again concerning the garage? A. Yes, sir.

Q. When was the next time that you saw him? A. About, I should imagine, two weeks after.

Q. Do you recall what your conversation was at that time? A. I asked him to build it and he said he was busy with another job, and that he had no men.

40

Q. Were there any other occasions that you spoke to him? A. Yes, sir, there were a number of them.

Q. And on those occasions did you request him to build the garage as called for in the agreement? A. Yes, sir.

Q. And do you recall what his replies were? A. He put me off with one excuse or another.

10

Q. And what was the excuse? A. Either that he had no money, or he had no time, or no men.

Q. Did he ever build the garage as provided for in the agreement? A. No.

Q. Did he ever offer to build it? A. No.

Cross Examination by Mr. Eichmann:

Q. In this agreement you signed your wife's name as her agent? A. Yes, sir.

20

Q. Now, when that contract was signed you did not have any definite plans; you simply had a vague idea as to the size?

Mr. Platoff: I object to that question because any ideas at the time or preceding the time that the agreement was signed would necessarily merge into the written agreement.

The Court: The agreement gives definite measurements, does it not?

30

Mr. Platoff: Yes, your Honor.

The Court: I will sustain the objection.

Mr. Eichmann: I ask an exception.

Q. And later on you were to arrange about the details for the garage?

Mr. Platoff: I object to that question as the same grounds as the preceding question.

The Court: I will sustain the objection.

Mr. Eichmann: I ask an exception.

40

Q. Was there anything said at the time the agreement was drawn up as to the size or location of the windows?

> Mr. Platoff: I object to that question on the same ground as to previous question.
> The Court: I will sustain the objection.
> Mr. Eichmann: I ask an exception.

10

Q. Was there anything said at the time the contract was drawn up as to the size or kind of wood to be used for the garage?

> Mr. Platoff: I make the same objection to that question as to one above.
> The Court: I will sustain the objection.
> Mr. Eichmann: I ask exception.

Q. Was there anything said when the contract was drawn up as to whether the garage should be built of brick or stucco?

20

> Same objection.
> The Court: Well, now, I think you have got a little different situation there. I think the contract says one story brick or stucco garage. I think I will allow that qustion.

Q. (last question repeated)? A. Yes, Mr. Cona at the time, that he should make it the one most convenient for him and that I would be satisfied with one or the other.

30

Q. Was there anything said when the contract was signed as to the details of the construction?

> Mr. Platoff: I object to that question on th ground that the contract is in evidence and speaks for itself, and secondly, on the ground that the question is too general.
> The Court: I think your question is too broad, Mr. Eichmann, in view of the fact that many of the details are in the contract and

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the only things left open are the roof and whether it shall be built of brick or stucco. I will sustain the objection to that question.

MR. EICHMANN: I ask an exception.

Q. Was there anything said after the contract was signed as to the details of the construction of this garage? A. I don't remember, but Mr. Cona at the beginning, those details were left to him; what I was after was a garage.

Q. Did you make any suggestions in regard to those details to him? A. What do you mean by details, Mr. Eichmann?

Q. Well, as to the details of construction?

MR. PLATOFF: I object to that question unless it is qualified as to time.

THE COURT: I think you ought to fix the time; you have asked two questions, one was for details.

Q. After the contract was signed did you make any suggestions to him as to the details of construction? A. What details do you mean, Mr. Eichmann, I don't get your point?

Q. Did you make any suggestion to him after this contract was signed with regard to the construction of the garage, the size, doors, etc? A. The height, yes.

Q. What did you tell him? A. I met my architect, Mr. Meystre.

Q. No, what did you tell Mr. Cona? A. I went to Mr. Cona about May, 1913, with the plan that Mr. Meystre made up for me and asked Mr. Cona how much more he would want to make the garage wider; I was satisfied with the length but I would like to have a bit wider, and I asked him how much he would want for that additional width and for him to charge me extra for making the garage wider.

Q. How much wider did you want him to build it than the contract called for? A. I believe it was about five or six feet; I don't remember the details now.

Q. Was it of the width as indicated on this plan? A. That is the plan, yes.

Q. Was it of the width as indicated on this plan? A. Yes, sir. **10**

Mr. Eichmann: I offer the plan for identification.

(There being no objection, the plan is marked D-2 for Identification.)

Q. And you asked your architect to indicate that width by preparing this plan? A. No, I told him I wanted a garage and I told him to draw up a plan for me, and that is what he drew up. **20**

Q. And that is what he drew up for you? A. Yes, sir.

Q. And when did he draw up this plan for you? A. I believe it was in May, 1913; there ought to be a date on the plan.

Q. And you gave Mr. Cona a copy of this plan? A. Yes, sir.

Q. And that is the copy you gave him? A. It looks like it.

Q. That is referring to D-2 for Identification? **30** A. Yes, sir.

Q. When did you give the plans to Mr. Cona? A. Shortly after I got them from Mr. Meystre; it was some time, I believe in May, 1913.

Q. You filed the original of these plans with the City?

Mr. Platoff: I object to that question as immaterial as to whether he filed the plans with the City. **40**

THE COURT: In the first place, let us get the thing straight; this is in Weehawken and that is a township.

(Question withdrawn.)

Q. Did you file the original of this plan with the Board of Tenement House Commissioners? A. I did not.

10 Q. Was it filed there? A. I believe it was.

Q. At your request? A. It is a long while ago; maybe so, but I don't remember.

Q. And you got a building permit after this plan was filed with the Board of Tenement House Commissioners? A. I suppose we did.

Q. And that permit was based on this plan?

MR. PLATOFF: I object to that question as it is beyond the witness' knowledge to know

20 that.

A. I cannot answer that question; Mr. Meystre did that and he can answer it.

Q. You requested Mr. Meystre to get a permit based on this plan? A. I requested him to get the plans for the garage and he got the permit and I left it entirely to him what to do there.

RE-DIRECT EXAMINATION BY MR. PLATOFF:

30 Q. Mr. Ferber, you said you did not remember whether or not you and Mr. Cona ever discussed the details of this garage after the execution of that contract; you testified on direct examination that about two weeks after the execution of the contract you discussed with Mr. Cona the construction of the roof; is that correct? A. Yes, sir.

Q. You know Mr. Meystre? Mr. F. J. Meystre? A. Yes, sir.

40 Q. He is an architect? A. Yes, sir.

Q. And he has an office? A. Yes, sir.

Q. Where is his office? A. In Hoboken.

Q. And he has been there for some little time to your knowledge? A. Yes, sir.

Q. Did you ever discuss with him the proposed garage that was to be built for you on Highpoint Avenue? A. Yes, sir.

Q. Do you recall when it was? **10**

Mr. Eichmann: I object to any conversation not in Mr. Cona's presence.

The Court: I will sustain the objection.

Q. Did you employ Mr. Meystre to prepare plans for you for this garage? A. Not detail plans; I did not care for those.

Q. You said that in May, 1913, you submitted plans to Mr. Cona for a garage of a wider width? A. Yes, sir. **20**

Q. Just tell us when and where or how that took place? A. It was some time in May, 1913, in Mr. Cona's house and I brought those plans to him there.

Q. What was your conversation with him? A. I said to Mr. Cona that Mr. Meystre said it should be a little wider, and I said if you will let me know how much more you will charge; I said I would pay him the difference.

Q. Did he tell you how much more? A. No, sir. **30**

Q. What did he say? A. He said he would let me know.

Q. Did you see him after that? A. Yes, several times?

Q. How many times? A. About a dozen times, I suppose.

Q. Did you ever speak to him again about this garage? A. Yes, I remember distinctly when he put up his own garage at the back of 130 Highpoint Avenue, I did. **40**

Q. When was that? A. I believe that was in February, 1914.

Q. Tell us of this occasion between May, 1913, and February, 1914? A. I don't remember the details, but every time I met him, I said let us get together and see how much you want for putting up the garage.

10 Q. Did he ever tell you how much he wanted for putting up the garage as you wanted it? A. No, sir.

Q. And then you saw him again in February, 1914? A. Yes, sir.

Q. What was he doing then? A. He was putting up a garage for himself.

Q. What kind of a garage? A. A portable garage.

Q. And he was putting it up on his own premises across the road? A. Yes, sir.

20

Q. Do you know the dimensions of the portable garage he was putting up for himself?

> The Court: Is that necessary, I think we will get into deep water and consume a lot of time about another partable garage.
>
> Mr. Eichmann: I object to the question as immaterial.

Q. What was your conversation with him at that time? A. I said, if you don't want to put up a larger one, why don't you put up one like you are putting up for yourself.

30

Q. Do you know the dimensions of the portable garage he was putting up for himself at that time? A. Well, it was about 8 feet by 12 feet or 9 feet by 12 feet; No, 9 feet by 12 feet, I should say.

Q. About 9 feet by 12 feet? A. Yes, it is a fairly small garage.

40

Q. And what kind of material was that garage made of? A. Iron.

Q. Galvanized iron? A. I believe so.

Q. Can you give us the approximate height of that garage? A. About ten feet.

Q. About ten feet? A. Yes, sir.

Q. What did Cona say to you when you made that request? A. He said, all right. 10

Q. He said all right? A. Yes, sir.

Q. Did he ever put it up? A. No, sir.

Q. Did you ever speak to him about the garage after that? A. Yes, sir once or twice.

Q. What was the conversation then? A. Why, he put me off as usual, and I got tired of that and then I came to you.

RE-CROSS EXAMINATION BY MR. EICHMANN:

20

Q. When you gave Mr. Cona these plans, referring to P-2 for Identification, you told him you wanted him to build a garage in accordance with those plans.

MR. PLATOFF: I object to that question as not proper re-cross examination.

THE COURT: (After argument.) You may answer the question "yes" or "no".

A. Not exactly, I wanted a wider garage, providing we could get together. 30

RE-DIRECT EXAMINATION BY MR. PLATOFF:

Q. You mean you would agree to pay him the increase price?

MR. EICHMANN: I object to that question as leading.

A. Exactly.

Q. What do you mean by your last statement. 40

A. Providing we could make a satisfactory agreement for the difference.

Q. You mean providing the price suited you, you would want him to build a garage in accordance with those plans? A. Yes, sir.

JOHN N. PLATOFF, ESQ., sworn:

10

DIRECT EXAMINATION BY MR. PLATOFF:

I am the attorney for the plaintiff in this suit. Mr. Ferber called on me early in the month of February, 1915, and retained me to prosecute a cause of action upon which this suit is based. On February 6th, 1915, I caused to be sent a letter of which this is a carbon copy; a few days later Mr. Cona called on me at my office and we
20 discussed the contract in question; we came to no definite conclusion. I next wrote to him on March 8th, 1915, and a few days after that I called him up, or he called me up, on the telephone; I recognized his voice, and he said to me on the telephone that he was Mr. Cona; I said to him, that the plaintiff in this suit would be satisfied if he would build a portable garage in settlement of the suit, and I do not remember the exact words but as I recall, the fact was that he
30 would not do it and he did not do it. I recall this, that I personally interviewed him in February, 1915. and I said to him, that he build some kind of a garage and that the demands of the plaintiff were not for anything elaborate, and that is as much as I remember of the personal interview.

CROSS EXAMINATION BY MR. EICHMANN:

Q At any of these conversations did Mr. Cona
40 discuss the plans which had been prepared for Mr. Ferber? A. I think they were.

Q. And he said that he would not build according to those plans? A. I do not remember exactly; it is probably that he stated so. But he spoke about those plans and said that he would not build according to those plans. I then communicated with the plaintiff and as a result of my communication with the plaintiff, I then said to Cona, that if he would even build a partable garage, not elaborate, the matter could be settled and adjusted. 10

Mr. Platoff: We are now up to the point where the expert on the cost of the garage should testify and if we can stipulate, we may avoid delay.

Mr. Eichmann: We can do that later on.

Pasquale Cona, sworn: 20

Direct Examination by Mr. Eichmann:

Q. I show you a receipt, dated November 15th, 1912, does that refresh your recollection or help you to remember on what date you signed the deed for the property at 200 Highpoint Avenue, and the contract is dated the same day; was the contract signed the same day that it was dated? A. No, two weeks later. 30

Mr. Platoff: I ask to have the question and answer stricken out.

Mr. Eichmann: It simply fixes the date of the subsequent transaction.

The Court: How can I sustain the motion to strike out? I will allow the question and answer to stand.

Q. Now, Mr. Cona, when did you first speak to Mr. Ferber regarding the garage, after the contract was signed; how soon after? A. After 40

the contract was signed, it was about three weeks, three or four weeks after.

Q. And what did you say and where was this talk? A. It was in front of my house on Highpoint Avenue.

Q. And what was said at that time? A. I spoke with him, he just come down on the job and we
10 had a long talk, and I said, "Mr. Ferber, I am ready to build the garage" and he said, "go ahead, or otherwise I can't do anything," and he said, "Cona I have details", and I said, "why spend that money;" I said, "we have got a contract and that speaks for itself", and he said, "the plans don't cost me anything, that architect is a friend of mine, and it don't cost me anything."

Q. And after that did he have plans prepared? A. Yes, after that in May, I think the 19th of
20 May, I don't remember exactly the date, he came to my house with plans.

Q. Are these the plans that he showed you? A. He had two sets of plans, one is with the tenement house approval and one was not, and he left that and took the copy with him.

Q. This was a copy of the other one? A. Exactly.

Mr. Eichmann: I offer this plan in evi-
30 dence at this time.

(Plan marked Exhibit D-2.)

Q. Now, what was said at that time? A. He left the plans at my house and I told him, Mr. Ferber, I got no time to look at the plans to-day, but Sunday I will look at the plans, and see what you got there, and so I did look at the plans on Sunday morning and it was different altogether.

Q. I show you the contract and plans; will you
40 show me just how these plans differ from the con-

tract? A. The contract says 12 feet width and 18 feet long, and the plans show 13 feet 8 inches by 24 feet 4 inches and I found a lot of things in the contract.

Q. Put in the plans and not in the contract? A. Yes, and one door is not in the contract and also the roof is more expensive.

Q. What kind of a roof is mentioned on this plan? A. It say on the plan, a shingle roof. 10

Q. And what kind of a roof is it usual to put on a garage? A. Well that depends on what the owner wants to spend.

Q. Is that a more expensive roof than you would have to put on to comply with this contract? A. Yes.

Q. In what other respects do these plans differ from the contract? A. I see in these plans that the footing is very deep, it showed three feet deep and the garage we put only six inches concrete in. 20

Q. Now then, you say you looked over these plans on a Sunday morning? A. Yes, sir.

Q. And you found all these differences? A. Yes.

Q. And when did you next meet him after you found these differences? A. I remember I met him about two or three days after; he passes my place every morning; we are near by and I met him in front of my house and I told him, Mr. Ferber, I looked at the plans and I see the plans are not in accordance with the contract; your plan is more expensive; and if you will stand that money according to the contract, I can do it easily for three hundred dollars, and he said, "I don't want to spend that money," he said "I don't want to spend so much money." 30

Q. What else did you say? A. He said, "I don't want to spend that much money because it cost me so much"; I said, "why don't you get 40

one like mine; it is portable, that is 10 feet by 14 feet and he walked away.

Q. What did he say; did he say that he would pay the three hundred dollars? A. No, sir; he did not want to spend that money at all, and he walked away.

Q. Did he say that he wanted it built accord-
10 ing to that plan? A. He says, the garage must be according to the plan; that is what I brought down the plan for.

Q. Well, after that, when did you next speak to Mr. Ferber about the garage? A. After that, I think in July, in front of his house, and he said, I remember well, and in front of my house and he was in his machine, and his son was with him, and he stopped me and he said, "Mr. Cona when do you want to build the garage?"

20 Q. Well, what was said then? A. And he says, "I will have build a garage, but you will have to build the garage according to the plans;" I said, "I will not," and he said, "I will go and see my counsellor," and he went ahead and started his machine and that is the last time I spoke to him.

Q. Now, then, did you have a talk with his counsellor, Mr. Platoff? A. Yes, once in his office.

Q. And what was said there? A. I was there
30 and I brought—

Q. Did you bring the plan with you? A. Yes, I brought the plan with me and I go there and show him the difference in the contract and plan, and I told him I don't build the garage according to this plan, because it is so much more expensive.

Q. What else did you tell him? A. And I asked him if he wanted to go in accordance to his contract; I am willing to do that, and he said,
40 he would let me know, and he did not do so.

Q. The garage in the contract is not a portable garage, is it? A. No, sir.

CROSS EXAMINATION BY MR. PLATOFF:

Q. Mr. Cona, when did you build that portable garage of yours? A. In the winter time of 1913 or 1914, I don't remember exactly.

10

Q. Do you know whether or not it was 1913 or 1914? A. I can't settle that very well, because I don't remember whether it was 1913 or 1914, but I remember that it was in the winter time.

Q. Was it 1915? A. No, sir.

Q. You say you talked to Mr. Ferber in July, 1913, when he was in front of his house in his automobile; that was the occasion in which he had his automobile in front of his house; is that so? A. Yes, sir.

20

Q. Are you sure that at that time you had already built your portable garage? A. Yes, sir.

Q. Now, you are sure you built your portable garage in the winter of 1913? A. Yes, sir.

Q. Before July of 1913? A. Yes, sir.

Q. You are sure about that? A. Yes.

Q. You gave Mr. Ferber an estimate that you would charge him three hundred dollars to build a garage according to the plans. A. Yes, not in writing.

30

Q. He never accepted that offer, did he; he never agreed to pay you three hundred dollars? A. No, he didn't want to pay it.

Q. Don't you remember Mr. Ferber telling you to take that pole down yourself and he would pay you extra for it? A. No, I don't remember that, no.

Q. Now, you remember the time you came and saw me at my office? A. Yes.

40

Q. That was in February, 1915? A. I can't tell.

Q. You had an office at that time with Mr. Weber at 294 Summit Avenue, West Hoboken, and you received your mail down there? A. Yes, sir.

Q. I wrote you several letters? A. One.

Q. One or two? A. I remember one, maybe two, but I can only remember one.

10 Q. After the first letter you called at my office? A. Yes, sir.

Q. And don't you remember after that I talked with you on the telephone? A. I did see you as I was passing, your office, that is all I remember.

Q. You have no recollection of talking to me on the telephone and you have a recollection that you talked to me on one occasion? A. Yes, in your office on Bergenline Avenue.

20 Q. You never talked to me over the telephone or at any other time? A. No, sir.

Q. Do you remember that you ever promised that you would build a portable garage? A. Yes, I offered to Mr. Ferber, if he wants it, but he refused it.

Q. A portable garage is not as expensive as the garage called for in that contract?

Mr. Eichmann: I object to that as immaterial.

30 Mr. Platoff: I will withdraw the question.

Q. Do you remember that you offered me that you would build a portable garage for Mr. Ferber? A. No, sir.

Q. Do you remember that I asked you to build a portable garage to settle the thing up? A. No, sir.

Q. You never built any garage of any kind for Mr. Ferber? A. I remember I offered you fifty 40 dollars in cash and let me go, because it cost me fifty dollars.

Q. You mean I said to you that he would rather take nothing than to settle for fifty dollars? A He said, he didn't want that fifty dollars.

Q. You never built any kind of a garage for Mr. or Mrs. Ferber, did you? A. No, sir.

RE-DIRECT EXAMINATION BY MR. EICHMANN:

Q. At the time you signed the deed, or right before that; how much did you get for that property?

10

> MR. PLATOFF: I object to that question on the ground that it is not re-direct examination, and further that it is immaterial what consideration he got from the property.
>
> MR. EICHMANN: It is something that was brought out in rebuttal.
>
> THE COURT: I don't know where it is going to land us; is it something that you think is essential to the case?
>
> MR. EICHMANN: I will withdraw that question.

20

Q. Now, Mr. Cona, were you always willing to build a garage according to that contract? A. Yes, sir.

> MR. PLATOFF: I object to that question on the ground that is not re-direct examination.
>
> THE COURT: It has been answered. I will allow it to stand.

30

Q. And have you ever refused to build it according to that contract? A. I never did.

Q. But you always refused to built it according to that plan? A. I did.

Q. That is all.

40

> MR. PLATOFF: I will call Mr. Ferber in rebuttal.

PHILIP FERBER, recalled in rebuttal:

DIRECT EXAMINATION BY MR. PLATOFF:

Q. Mr. Ferber, Mr. Cona has testified that on one occasion he told you he would charge you three hundred dollars to build a garage according to the plans? A. No, sir.

10 Q. Did he ever tell you that? A. No, sir.

Q. Did he ever offer to build for you a garage according to that contract? A. He offered to build right along, but he never did it.

Q. You asked him to build it? A. Yes, sir.

Q. Frequently? A. Yes, sir.

Q. Then, you mean he promised to build it?

MR. EICHMANN: I object to that question on the ground that I do not think it is proper

20 rebuttal.

MR. PLATOFF: I will withdraw the question and reframe it.

Q. Just what did you mean when you said, "He offered to build it right away, but he never did it?" A. He kept on saying, all right, I will build it, but the long and short of it is that he never did it.

Q. He kept on saying he would build it, but he never did so? A. Yes, sir.

30 Q. That is, he promised to build it? A. Yes, sir.

Q. Did you on any occasion tell him that you would not accept a garage built according to the contract in this suit? A. No, I didn't tell him that.

Q. Then you never refused to have him perform the contract? A. No, of course, not.

Q. You and he never agreed to build a garage

40 according to the plan marked P-2, did you? A. No, sir, you mean this plan?

Q. Did you ever insist upon the construction of a garage according to that plan? A. No, sir.

Q. Did you ever insist upon the construction of any garage of dimensions other than the dimensions stated in the written contract? A. I don't think I did.

Q. Did you ever prevent the defendant from erecting a garage in accordance with the terms of the written contract? 10

Mr. Eichmann: I object to that question as calling for a conclusion of law.

Mr. Platoff: Well, I will reframe my question.

Q. Did you ever refuse to permit the defendant to erect a garage on or before the 1st of April, 1913, constructed of brick or stucco, 12 feet wide by 18 feet deep by 10 feet in height with a window on each of the north, south and west sides and with a double door and entrance on the east side, the floor to be of cement and the sidewalk to be properly graded before the entrance and the roof of tin? A. No, sir. 20

Q. Did you at any other time after the first of April, 1913, refuse to permit the defendant to build a garage of those dimensions? A. No, sir.

30

Cross Examination by Mr. Eichmann:

Q. Mr. Ferber, did you speak to Mr. Cona about the garage about two weeks after the contract was signed? A. Yes, two weeks after.

Q. And did you tell him that you were going to have a sketch made? A. No, nothing of the kind.

Q. How soon after that conversation did you submit plans to Mr. Cona?

40

Mr. Platoff: I object to that question on

the ground that it has already been answered by both parties.

THE COURT: What is the object of that question?

MR. EICHMANN: Well, it is leading up to something.

THE COURT: Well, I will allow it for the time being.

10

A. My best recollection is that the only plans that were submitted were those ones and that it was in May.

Q. And at that time did he tell you that he would look over those plans? A. Yes, sir.

Q. And then three or four days later he met you in front of the house at 138 Highpoint Avenue? A. Yes, some time after that.

Q. Shortly after that? A. Yes, sir.

20

Q. And he told you that the plans did not correspond with the contract? A. He did not tell me that.

Q. You asked him what the difference amounted to, didn't you? A. Yes, sir.

Q. And he told you that the difference would amount to three hundred dollars, didn't he? A. He did not; he never stated any amount.

Q. And you were not willing to pay three hundred dollars, were you?

30

MR. PLATOFF: I object to that question on the ground that it is immaterial.

THE COURT: I think that that objection is good and I will sustain it.

MR. EICHMANN: I ask an exception.

Q. You remember that in July you were in your automobile with your son and you stopped and spoke to Mr. Cona about the garage? A. I spoke to him so many times that—

40

Q. Do you remember that occasion? A. No, sir.

Q. Do you remember his telling you to remove a pole? A. Yes, sir.

Q. Do you remember his telling you on that occasion that he would not build a garage according to the plans, do you remember that? A. Why, I can't answer it that way.

Q. Just answer the question "yes" or "no?" A. I will say, no. 10

Q. And do you remember getting angry on that occasion and telling him that you would see your lawyer? A. What occasion do you mean, Mr. Eichmann?

Q. The time that you were in your automobile?

> Mr. Platoff: I object; the witness has already testified that he does not recall that occasion.

20

Re-Direct Examination by Mr. Platoff:

Q. On one of those occasions Mr. Cona mentioned a pole? A. Yes, sir.

Q. What did he say about the pole? A. He told me to have the pole removed.

Q. And what did you say? A. I told him he could have that done and I would pay him extra for it.

> The Court: Counsel on both sides waive the placing of experts on the stand as to the cost of the garage in question and agree that if an expert were placed on the stand in behalf of the plaintiff, his testimony would be to the effect that a stucco garage of the dimensions in the contract in evidence, marked P-1, with a tin roof would cost $500 and, if an expert were produced and testified in behalf of the defendant, he would testify that such a garage would cost $290.75, and it is consented that this stipulation be treated the

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40

same as if their testimony were taken in the course of the trial.

MR. EICHMANN: In the first place, I want to make a motion for a non-suit immediately after the plaintiff's case is in, assuming that he has now put his expert on the stand and that now is the time to make the motion for
10 a non-suit. Now, I make that motion on the same grounds stated at the beginning, and also on the ground that there was an abandonment of the contract and that the testimony shows that, and Mr. Platoff, himself, said that Mr. Cona did state that he would not build a garage according to that plan and it is admitted that a portable garage is not the kind of garage called for in the contract.

20 I also ask for a judgment for the defendant on the ground that—

THE COURT: There is no objection, as I understand it, to Mr. Eichmann making an application for a non-suit at this time?

MR. PLATOFF: No, there is none.

THE COURT: Then I will rule on the motion for a non-suit. I will deny the motion.

MR. EICHMANN: I ask an exception.

THE COURT: All right.

30 MR. EICHMANN: Now, I move for a judgment for the defendant on the ground that there was a clear abandonment of the contract and a request by the plaintiff to build a garage in accordance with an immensely different plan. It is undisputed that the plan which Mr. Ferber submitted to Mr. Cona differs in many material respects; first, the length is 24′ and the width is 13′ under the
40 plan, and under the contract the length is 18′ and the width is 12′; there is an extra

door in the plan and the roof is a shingle roof. It is also in evidence that that is a more expensive garage.

THE COURT: I am going to deny the motion for a judgment for the defendant.

MR. EICHMANN: I ask an exception.

THE COURT: I can see no reason why a judgment should not go against this defendant in this case. As to the amount, I am inclined to think that it would be difficult to build a garage of these dimensions for less than $500 and I am going to enter a judgment for five hundred dollars in favor of the plaintiff and against the defendant. 10

MR. EICHMANN: I will take an exception.

Certification of Record.

I, WILLIAM B. RICHARDSON, a stenographer designated by the Court and sworn, do hereby certify that the foregoing is a true copy of the testimony of the proceedings on the trial of the suit of Katharine Ferber, plaintiff, against Pasquale Cona, defendant, in the District Court of the First Judicial District of the County of Hudson. 20

Dated, November 28, 1916.

W. B. RICHARDSON,
Stenographer.

30

To the Chief Justice of the Supreme Court:

I hereby certify the foregoing transcript of the testimony and of the proceedings in the above-mentioned case, made by the stenographer designated by me and sworn, to be used on the hearing of the appeal herein, as the state of the case in said cause.

December 6, 1916.

F. H. MCCAULEY,
Judge. 40

Opinion of Supreme Court.

NEW JERSEY SUPREME COURT.

KATHERINE FERBER, *Plaintiff-Respondent*, *vs.* PASQUALE CONA, *Defendant-Appellant.*	Appeal from District Court of the First Judicial District of the County of Hudson.

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Argued February Term, 1917, before Justices GARRISON, PARKER and BERGEN.

JOHN N. PLATOFF, for Plaintiff-Respondent.
McDERMOTT & ENRIGHT, for Defendant-Appellant.

Per Curiam.

20 This action was brought in the District Court for the First Judicial District of the County of Hudson to recover damages for non-performance of a written contract.

By the terms of this contract it appears that the defendant by deed bearing the same date as the contract, conveyed to the plaintiff a tract of land in consideration of the payment of $13,800, that for such consideration, in addition to the premises conveyed, the defendant agreed, "To erect for the
30 said party of the second part on or before the first day of April next on the rear of the above described premises, a one-story brick or stucco garage to be twelve (12) feet wide by eighteen (18) feet deep and to be at least ten (10) feet in height in the clear, and to have a window on each of the north, south and west sides and to have a suitable double door and entrance on the east side. The floor to be of cement. The sidewalk is to be

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properly graded before the entrance. The roof of said building is to hereafter agreed upon between the parties hereto. It is mutually understood and agreed that said building shall be erected subject to the approval of the party of the second part."

The defendant never erected any building in execution of this contract and the plaintiff brought this suit to recover for the breach. At the trial counsel for each side waived the calling of witnesses to prove the cost of erection of the garage in question, and agreed that if an expert was called as a witness on behalf of the plaintiff, his testimony would be "That a stucco garage of the dimensions in the contract in evidence marked P-1, with a tin roof, would cost $500, and, if an expert were brought and testified in behalf of the defendant, he would testify that such a garage would cost $290.75, and it is consented that this stipulation be treated the same as if their testimony were taken in the course of the trial."

There was proof that after the making of this contract the parties agreed that the roof of the building should be constructed of tin. The Trial Court found for the plaintiff and awarded her $500, from which judgment the defendant has appealed.

The first alleged error argued is a refusal to non-suit upon the ground that the State of Demand did not set forth a cause of action because the contract contained a covenant that the roof of the building was to be thereafter agreed upon, from which it is argued that it was not a final agreement but made in contemplation of a more definite arrangement and therefore not definite and certain. And cases are cited which hold that an agreement to be finally settled must comprise all the terms which the parties intended to be a part of the agreement, and if anything is left undeter-

mined so that the minds of the parties have not met, no contract exists.

None of the cases cited are applicable, for here the minds of the parties did meet and the contract was carried out in part, the plaintiff having paid the entire consideration, and there was evidence that they subsequently agreed as to the character
10 of the roof. There was no error in refusing to non-suit.

The next point urged is that the Court improperly overruled questions put to a witness of the plaintiff on cross examination. This witness was the husband of the plaintiff and acted as her agent in the negotiations leading up to the contract and signed her name for her. Five of these questions relate to negotiations preceding the signing of the contract, one of them being, "Q. Now, when that
20 contract was signed you did not have any definite plans, you simply had a vague idea as to the size?" The contract itself gives the size in precise terms, and if this question had been answered in the affirmative its effect would be to vary the written agreement; therefore it was properly excluded. All the defendant was bound to do was to put up the garage of the size and character which the contract required, and this applies to all of the questions overruled relating to the negotiations for, and
30 interpretation of, the contract. The only other objection to ruling on admission of testimony was the overruling of this question: "Q. And you were not willing to pay $300, were you?" If the overruling of this question was error, it was harmless because in answer to the next preceding question the witness denied tthat the defendant had ever asked him to pay $300 for the erection of a garage of different proportions. It appears that the
40 plaintiff had a plan prepared and submitted it to the defendant and asked him what additional sum

he would require to build such a garage, but the witness testified that the defendant never stated any amount.

The next point is that the plaintiff abandoned the contract. This is based upon the fact that the plaintiff had a plan prepared by an architect for a garage of different dimensions than the one the contract called for, which he submitted to the defendant and said, "If you will let me know how much more you will charge, I said, I would pay him the difference."

10

According to the testimony of the plaintiff no agreement was ever reached to build according to the new plan, the plaintiff constantly urging the defendant to build such a garage as his contract required, and that the defendant was told by the counsel of the plaintiff she would be satisfied if the defendant would build a portable garage in settlement of the suit. Under the testimony in the case the Court was justified in finding that there was no abandonment of the contract and therefore there was no error in refusing to direct for the defendant upon the ground that the contract was abandoned.

20

The next point made is that there was no lawful evidence to support the judgment. The stipulation made in open court furnished the testimony upon which the Trial Court relied in assessing the damages. This agreement was, in order to dispense with the calling of experts, that it be assumed that the plaintiff had produced witnesses who testified that the cost of building the garage mentioned in the contract would be $500 and that the defendant had produced witnesses who testified that the cost would be $290.75. The defendant assails this stipulation because it does not mention the names of the proposed witnesses.

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The criticism contained in the brief of the defendant on this point is, "Upon this testimony the Court determines the cost of the garage to be $500 without any evidence before it of the names of any particular experts who would so testify."

This is absurd, for the defendant stipulated to certain facts as if proven by witnesses, and the
10 names of such witnesses is entirely immaterial. The stipulation was as to the facts proven pro and con, without any reservation as to the character or credibility of the witnesses. This disposes of all the questions raised except defendant's claim that the proof as to cost related entirely to stucco, no estimate appearing as to the cost if built of brick.

The case was tried upon the theory that stucco should be used and no question was raised below
20 that brick was cheaper.

The expert testimony agreed to related entirely to stucco and defendant made no claim that such material was not the cheapest of the two provided for in the contract and it is now too late to raise it.

The judgment will be affirmed with costs.

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Judgment of Affirmance.

NEW JERSEY SUPREME COURT.

KATHERINE FERBER, *Plaintiff-Appellee*, *vs.* PASQUALE CONA, *Defendant-Appellant.*	On Appeal.

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JOHN N. PLATOFF, Attorney.

Judgment entered this fifteenth day of September, A. D., nineteen hundred and seventeen, for the sum of five hundred and thirty dollars and twenty cents damages and costs below and nineteen dollars costs in Supreme Court.

Damages and costs below	$530.20
Costs, Supreme Court	19.00
	$549.20

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WM. S. GUMMERE, C. J.

I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing it a true copy of the judgment entered in above stated cause which said judgment is recorded in this office in Vol. 10 of judgments, page 318.

30

In testimony whereof, I have hereunto set my hand and the seal of said Court at Trenton, this twenty-first day of September, A. D., nineteen hundred and seventeen.

WM. C. GEBHARDT,
Clerk.

(SEAL)

40

Notice of Appeal.

(Served Sept. 25, 1917; filed Oct. 2, 1917.)

NEW JERSEY SUPREME COURT.

KATHERINE FERBER, *Plaintiff-Respondent,* *vs.* PASQUALE CONA, *Defendant-Appellant.*	Action at Law:

10

To JOHN N. PLATOFF, ESQ.,
Attorney of Respondent.

Please take notice that the above named defendant hereby appeals to the New Jersey Court of Errors and Appeals in the last resort in all causes from the decision of the New Jersey Supreme Court, entered September 15, 1917, affirming in all things the judgment of the District Court of the First Judicial District of Hudson County in favor of the plaintiff and against the defendant.

20

The following are the appellant's grounds of appeal:

(1) Because the Supreme Court affirmed the judgment of the District Court of the First Judicial District of Hudson County whereas it should have reversed the judgment of said District Court.

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(2) Because of the denial of the Judge of the District Court of defendant's motion for a non-suit on the pleadings.

(3) Because it was error for the Supreme Court to hold that it was not error for the District Court to deny defendant's motion for a non-suit on the pleadings.

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(4) Because the District Court sustained plaintiff's objections to the following questions:

(a) "Now, when that contract was signed you did not have any definite plans; you simply had a vague idea as to the size?

(b) "And later on you were to arrange about the details for the garage?

(c) "Was there anything said at the time the agreement was drawn as to the size or location of the windows? **10**

(d) "Was there anything said at the time the contract was drawn up as to size or kind of wood to be used for the garage?

(e) "Was there anything said when the contract was signed as to the details of the construction?"

(5) Because it was error for the Supreme Court to hold that it was not error for the District Court to sustain plaintiff's objections to said questions. **20**

(6) Because the District Court sustained plaintiff's objection to the question: "And you were not willing to pay $300, were you?"

(7) Because it was error for the Supreme Court to hold that it was not error for the District Court to sustain plaintiff's objection to said question.

(8) Because the District Court denied defendant's motion for non-suit.

(9) Because the Supreme Court did not hold that it was error for the District Court to deny defendant's motion for non-suit. **30**

(10) Because the District Court refused defendant's motion for judgment for the defendant.

(11) Because it was error for the Supreme Court to hold that it was not error for the District Court to refuse defendant's motion for judgment for the defendant.

(12) Because there was no evidence on which the court could lawfully fix the damages at $500. **40**

(13) Because it was error for the Supreme Court not to hold that there was no evidence on which the District Court could lawfully fix the damages at $500.

(14) Because plaintiff did not sustain the burden of proof on the question of damages.

10 (15) Because it was error for the Supreme Court not to hold that the plaintiff did not sustain the burden of proof on the question of damages.

(16) Because there was no evidence before the District Court as to the cost of building a brick garage according to the contract, Exhibit P-1.

(17) Because the Supreme Court did not hold that there was no evidence before the District Court as to the cost of building a brick garage

20 according to the contract, Exhibit P-1.

(18) Because the evidence before the District Court clearly indicated an adandonment of the contract, Exhibit P-1.

(19) Because it was error for the Supreme Court to hold that the evidence before the District Court did not indicate an abandonment of the contract.

Respectfully yours,

McDermott & Enright,

30 Attorneys of Appellant.

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New Jersey Court of Errors and Appeals.

KATHERINE FERBER, *Plaintiff-Respondent*, *vs.* PASQUALE CONA, *Defendant-Appellant.*	On Appeal from Supreme Court.

10

BRIEF OF APPELLANT.

This appeal brings up for review a judgment of the Supreme Court affirming a judgment of the District Court of Hudson County in favor of the plaintiff and against the defendant.

20

Plaintiff claimed in the State of Demand that on November 15, 1912, she entered into a written contract with the defendant for the construction of a garage by him; and that the defendant had refused to perform his part of the contract. There was annexed to the State of Demand and made a part of it the written contract (p. 7, State of the Case); the contract itself was offered in evidence as Plaintiff's Exhibit I (p. 10).

30

The defense was (1) that the State of Demand did not set up a cause of action since the contract was not complete; and (2) that the defendant was willing to build for the plaintiff a garage as nearly in accordance with the contract as possible and had always been willing to do so, but that plaintiff had insisted on a garage of considerably larger dimensions than the contract called for.

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New Jersey State Library

POINT I.

The State of Demand did not set forth a cause of action.

The second, third, eighth and ninth grounds of appeal bring up the question as to whether or not the plaintiff's claim as set forth in the State of Demand constituted a cause of action. Defendant
10 moved before any testimony had been taken for a non-suit on the ground that the State of Demand did not set up a cause of action against the defendant and excepted to the Court's refusal to so hold (p. 10). Defendant moved for a non-suit at the conclusion of the plaintiff's case (p. 32). Defendant's motion was made on the same grounds as at the opening and also on the ground that there was an abandonment of the contract, and this motion was also denied.

20 The State of Demand alleges that the plaintiff and defendant entered into a written contract, a copy of the same being attached. This contract recites

> "the said party of the first part (Pasquale Cona, the defendant) has agreed to erect for the said party of the second part—a one-story brick or stucco garage to be twelve feet wide by eighteen feet deep and to be at least 10 feet in height in the clear, and to have a window on each of the north, south and west
> 30 sides, and to have a suitable double door and entrance on the east side; the floor to be of cement; the sidewalk is to be properly graded before the entrance. *The roof of said building is to be as hereafter agreed upon between the parties hereto.*"

The last sentence of the above quotation shows that this was not a final agreement, but was simply made in contemplation of further, more definite arrangements to be made between the par-
40 ties; it is not definite and certain.

In *Shaw v. Woodbury Glass Works,* 52 N. J L., 7, at 9, the Court quotes with approval from *Ridgeway v. Wharton,* 6 H. L. Cas., 268, as follows:

> "An agreement, to be finally settled, must comprise all the terms which the parties intended to introduce into the agreement. An agreement to enter into an agreement, to be afterwards settled beween the parties, is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled. Unil those terms are settled, he is perfectly at liberty to retire from the bargain."

This case was affirmed by the Court of Errors, 53 N. J. L., 666. See note, 12 L. R. A., 463. Also 9 Cyc., 281:

> "If anything is left open or undetermined so that the minds of the parties have not met, no contract exists."

Also, 53 L. R. A., 295, note citing *Watts v. Weston,* 62 Fed., 136. In that case, a trustee of a colliery agreed to deliver the entire output of the colliery for a period of years at a price to be agreed upon from month to month. It was held that the contract was unenforceable.

In *Dayton v. Stone,* 111 Mich., 196, also referred to in this note, plaintiff sold defendant the entire stock of goods and fixtures. The goods, which had been damaged, were to be taken at prices to be agreed upon. It was held that the contract was uncertain and incomplete and could not be enforced.

See also *Donnelly v. Currie,* 66 N. J. L., 388, holding that if it was agreed that the contract was to be reduced to writing there was no contract until that was done, even though all the other terms had been settled. In the present case, one of the terms of the contract, the construction of the roof, was left to further agreement. This

agreement was accordingly no completed contract and cannot be considered as a proper basis for suit.

The contract is incomplete in the following respects: The roof is left to further agreement. The contract fails to specify the size and location of the windows, the kind of wood for and the height of the door, the thickness of the walls and all the usual details of the interior and exterior
10 construction of a garage.

To constitute a complete building contract, the language used must be such that it is possible to ascertain specifically and intelligibly what work is to be done. 9 Corp. Jur., 697, title, "Building and Construction Contracts." In 9 Corp. Jur., 698, note 69, the editor quotes with approval from *Nave v. McGrane,* 19 Ida., 111, at 121:

> "If the plans and specifications were not
> 20 definite and certain as to the kinds and qualities of materials to be used, the class of workmanship &c., * * * and other matters, the bid to construct the building would only indicate a willingness to negotiate further in regard to the matters not specified, and its acceptance would express a like willingness but would not bind either party."

The Supreme Court meets our contention that the terms of the agreement were not all settled by its assertion that our cases are not applicable
30 because here plaintiff paid the entire consideration. The Court assumes that the $13,800 consideration paid for the deed referred to in the contract (Ex. P-1) also paid for the garage to be erected, and probably reasons that plaintiff, having paid a consideration which is complete and inseparable, defendant should not be permitted to set up as a defense that the terms of the agreement have not been settled, for to favor this defense would preclude plaintiff from recovering
40 on a quantum meruit for money had and received,

since he would be unable to separate the consideration. The fallacy here is that the Court is mistaken in its assumption of fact. There is nothing in the agreement (Ex. P-1) nor any evidence in the case to the effect that the $13,800 consideration paid for the deed also paid for the garage. The agreement recites that the consideration for the deed is $13,800, and in addition to this defendant has agreed to erect a garage without stating what the consideration of the latter agreement is. The agreement in suit was signed two weeks after defendant signed the deed (State of Case, p. 21, line 22). The fact is that the agreement (Ex. P-1) with respect to the garage was a separate agreement and its consideration was $50, which was paid in addition to and distinctly separate from the consideration of the deed. After plaintiff insisted on a garage different from the agreement defendant offered to return $50 to Mr. Platoff and this offer was declined (State of Case, p. 36, line 39). Plaintiff can recover this $50 on a quantum meruit and defendant was always and still is willing to return this sum to plaintiff. Consequently the fact that the consideration was paid on plaintiff's part should not prevent defendant from setting up the defense that the agreement is incomplete, because a complete remedy can be had either on a quantum meruit or by accepting from the defendant the return of the consideration paid.

The Supreme Court also meets our contention that the terms of the agreement were not all settled by its assertion that the written agreement was supplemented and rendered complete by an oral agreement as to the character of the roof. The suit is on a written agreement as complete in itself. The State of Demand does not allege that the contract consisted of the written agreement plus a subsequent verbal agreement. The State of Demand refers solely to the written

agreement, annexes it and makes it a part of the State of Demand. Nor did plaintiff seek to amend the State of Demand by setting up a later verbal agreement. Consequently plaintiff must stand on the completeness or incompleteness of the written agreement as set out in the State of Demand. That this is incomplete is obvious from the fact that the Supreme Court relies on the subsequent oral agreement to complete the con-
10 tract. The failure to amend the State of Demand of defendant so as to set up the oral agreement resulted in substantial harm to the defendant, for had the State of Demand been so amended defendant would have been entitled to bring out on cross-examination all the oral testimony as to the details of the construction of the garage to show what the complete agreement was, and defendant's questions of this character could not under such an amended State of Demand have
20 been overruled by the Trial Court. On the other hand, if the State of Demand set up a complete written agreement defendant could not either on cross or direct examination introduce oral testimony which in any way tended to vary or contradict the written agreement. Consequently it was harmful error for the Supreme Court to have relied upon the oral agreement with respect to the roof to meet our contention that the terms of the written agreement in suit were not all settled at
30 the time the agreement was signed.

But even if the oral agreement were relied on to complete the contract, the agreement was still undetermined in various essential details, as previously pointed out.

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POINT II.

The Trial Court improperly sustained plaintiff's objections to questions asked by defendant on cross-examination relating to conversations regarding the details of construction of the garage.

Defendant's grounds of appeal Nos. 4 and 5 relate to questions asked by defendant on the cross-examination of Philip Ferber and overruled by the Court. 10

The plaintiff's principal witness, Philip Ferber, testified that he was the husband of the plaintiff and that he acted in the entire transaction as the agent of the plaintiff (p. 10); it is probable that he was the equitable owner of the property in question, and that he is virtually the real plaintiff in the case; he speaks in reference to the purchase of the property by saying "I purchased," &c. (p. 10); and the plan which he had prepared for the garage (Defendant's Exhibit 1) shows that the garage was to be built for him. 20

The witness Ferber testified on direct examination that he purchased the property upon which the garage was to be erected; that the agreement concerning the garage was signed in his presence. The witness was then asked:

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> "Q. Now, when that contract was signed you did not have any definite plans; you simply had a vague idea as to size?"

To this question, the plaintiff objected and the Court sustained the objection, to which the defendant excepted. The witness was then asked the following questions:

> "Q. And later on you were to arrange about the details of the garage?
>
> "Q. Was there anything said at the time the agreement was drawn up as to the size or location of the windows? 40

"Q. Was there anything said at the time the contract was drawn up as to the size or kind of wood to be used for the garage?

"Q. Was there anything said when the contract was signed as to the details of the construction?"

Plaintiff objected to each one of these questions and the Court sustained the objections, to which rulings the defendant excepted (Grounds of Appeal, Nos. 4 and 5; Testimony pp. 12, 13).

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The witness on direct examination had proved the contract; had testified that he was present at its execution and had entire charge of the transaction. The cross-examination questions were clearly proper as developing the situation at the time the contract was drawn up and signed as bringing out the full transaction, and as indicating that the parties had not intended the instrument Exhibit P-1 to be a final agreement,

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but that it was merely made in contemplation of further more definite arrangements to be entered into between the parties.

The witness had identified a contract very obviously incomplete. The written agreement sued on left the roof to be agreed on later and was vague in a number of other essential elements such as the thickness of the walls, size and location of the windows, kind of wood for and height of the door and all the usual details

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of construction. Since the contract was incomplete and vague, oral evidence was admissible to show that the contract was not intended to be final, that it was too vague to be carried out and that it was intended not only to leave the roof to further agreement but also all the essential details of construction. The criticism of the Supreme Court that these questions tended to vary the written contract, does not apply because the contract was incomplete and vague

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and oral evidence in such cases is admissible.

POINT III.

The trial court improperly sustained plaintiff's objection to the question asked by defendant on cross-examination, "And you were not willing to pay $300. were you?"

This point takes up grounds of appeal numbers 6 and 7. The witness Ferber had admitted that he submitted plans to the defendant for a garage of a wider width than the contract called for (p. 15, p. 17) and that he was willing to pay something to the defendant on account of the change (p. 17). The defendant testified that he wanted $300. to build the garage according to the plan and Mr. Ferber would not pay this sum (p. 23, p. 24). In rebuttal, Mr. Ferber denied that Cona said he would charge $300. to build a garage according to the plans (p. 28). On cross-examination, Ferber was then asked:

> "Q. And he told you that the plans did not correspond with the contract? A. He did not tell me that.
> "Q. You asked him what the difference amounted to, didn't you? A. Yes, sir.
> "Q. And he told you that the difference would amount to three hundred dollars, didn't he? A. He did not; he never stated any amount.
> "Q. And you were not willing to pay three hundred dollars, were you?"

To the latter of these questions plaintiff objected and the Court sustained the objection, to which plaintiff excepted (Ground of Appeal, No. 7). The object of the question was to break down the witness' testimony that the defendant had refused to build a garage according to the contract and was also aimed at the witness' credibility. The question was improperly overruled.

40 Cyc 2484;

Butler v. Flander, 12 Jones & S. 531;
Pullen v. Pullen, 5 Atl. Rep., 639;
Prout v. Bernards Land & Sand Co., 77 N. J. L., 719, 73 Atl. Rep., 486, 25 L. R. A. (N. S.), 683;
Eames v. Kaiser, 142 U. S., 488;
Green v. Skoquist, 57 N. J. L., 617; 31 Atl. Rep., 228;
Gaunt v. State, 52 N. J. L., 178.

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POINT IV.

Plaintiff's testimony shows a clear abandonment of the contract.

The witness Ferber admitted on cross examination that in May 1913, he had plans prepared for a garage of different dimensions than the contract called for; that his architect, Mr. Meystre, prepared the plan which was filed with the Board of Tenement House Commissioners and that the architect obtained a permit from the Board. A copy of this plan was given to Mr. Cona and Cona was told that the garage was to be made wider (pp. 14-16).

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Mr. Platoff testified for plaintiff about his negotiations for a settlement with the defendant.

On cross examination, Platoff testified (p. 20):

> "Q. At any of these conversations did Mr. Cona discuss the plans which had been prepared for Mr. Ferber? A. I think they were.
>
> "Q. And he said that he would not build according to those plans? A. I do not remember exactly; it is probably that he stated so. But he spoke about those plans and said that he would not build according to those plans, I then communicated with the plaintiff and as a result of my communication with the plaintiff, I then said to Cona, that if he would even build a portable garage, not elaborate, the matter could be settled and adjusted."

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Ferber testified in rebuttal, (p. 28):

"Q. Did he ever offer to build for you a garage according to that contract? A. He offered to build right along, but he never did it."

On cross examination, he stated:

"Q. Mr. Ferber, did you speak to Mr. Cona about the garage about two weeks after the contract was signed? A. Yes, two weeks after * * *. 10

"Q. How soon after that conversation did you submit plans to Mr. Cona? * * * A. *My best recollection is that the only plans that were submitted were those ones and that it was in May.*

The following testimony of the defendant is not denied by plaintiff (p. 22).

"Q. And what was said at that time? A. I spoke with him, he just come down on the job and we had a long talk, and I said, 'Mr. Ferber, I am ready to build the garage,' and he said, 'Go ahead, or otherwise I can't do anything,' and he said, 'Cona, I have details,' and I said, 'Why spend that money;' I said 'We have got a contract and that speaks for itself,' and he said, 'The plans don't cost me anything, that architect is a friend of mine, and it don't cost me anything. 20

"Q. And after that did he have plans prepared? A. Yes, after that in May, I think the 19th of May, I don't remember exactly the date, he came to my house with plans. 30

"Q. Are these the plans that he showed you? A. *He had two sets of plans, one is with the tenement house approval and one was not, and he left that and took the copy with him.*

"Q. This was a copy of the other one? A. Exactly.

"Mr. Eichmann: I offer this plan in evidence at this time.

"Plan marked Exhibit D-2.

"Q. Now, what was said at that time? A. He left the plans at my house and I told him, 40

Mr. Ferber, I got no time to look at the plans to-day, but Sunday I will look at the plans, and see what you got there, and so I did look at the plans on Sunday morning and it was different altogether."

Mr. Cona then pointed out in what respect the contract differed from the plans (pp. 22-23):

"Q. I show you the contract and plans; will you show me just how these plans differ from the contract? A. The contract says 12 feet width and 18 feet long, and the plans show 13 feet 8 inches by 24 feet 4 inches and I found a lot of things in the contract.

"Q. Put in the plans and not in the contract? A. Yes, and one door is not in the contract and also the roof is more expensive.

* * * * *

"Q. In what other respects do these plans differ from the contract? A. I see in these plans that the footing is very deep, it showed three feet deep and the garage we put only six inches concrete in."

It will be noticed from the admission of plaintiff's witness that the plan, Exhibit D-2, was the only plan that was ever prepared or submitted to Cona; that the plan was filed with the Board of Tenement House Commissioners and a permit was issued by the Board. The agreement annexed to the state of demand (p. 7) shows that the garage was to be erected on the same lot as the house, 200 Highpoint Avenue, Weehawken.

This building is a tenement house and this fact is not denied by plaintiff. That this building is a tenement house is obvious from the fact that the architect filed plans for the garage with the Board of Tenement House Commissioners and obtained a permit. There is a presumption that the State Board in accepting these plans and issuing a permit acted according to law and they could not legally have acted as they did unless the building on the same lot with the garage was

a tenement house. 4 *Compiled Stat.* (1910) p. 5349 Sec. 182.

Under this statute it would have been illegal for the defendant to build a garage contrary to the plans which were filed with the Board of Tenement House Commissioners and on which a permit was issued. The plan, Exhibit D-2, is a copy of the only plan which was ever filed for the construction of the garage in question and this plan was entirely different from the contract on which suit was brought.

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The filing of this plan by the plaintiff which made it unlawful for defendant to proceed under the contract is conclusive evidence that plaintiff prevented defendant from building a garage according to the contract and defendant was therefore entitled to treat the contract as abandoned.

Ferber v. Cona, 97 Atl. Rep., 720 and cases cited.

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At the close of the case defendant moved for judgment for defendant on the ground that there was a clear abandonment of the contract. The Court denied the motion and defendant's exception forms the basis of grounds of appeal, numbers 10, 11, 18 and 19.

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POINT IV.

Where the only evidence as to an essential element in a case is a stipulation that witnesses for both sides would differ on the fact and the court has no knowledge as to the names, credibility or character of the witnesses who would so testify the court cannot properly weigh the evidence on the disputed fact.

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The stipulation which is the only evidence on the question of damages reads as follows: (p. 31):

> "THE COURT: Counsel on both sides waive the placing of experts on the stand as to the cost of the garage in question and agree that if an expert were placed on the stand in behalf of the plaintiff, his testimony would be to the effect that a stucco garage of the dimensions in the contract in evidence marked P-1, with a tin roof would cost $500. and if an expert were produced and testified in behalf of the defendant he would testify that such a garage would cost $290.75 and it is consented that this stipulation be treated the same as if their testimony were taken in the course of the trial."

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The stipulation does not mention the names of the experts who would testify as to the value of a stucco garage, nor is there any other evidence before the Court on the question of value. The Supreme Court in its opinion states this contention is not sound because the stipulation is evidential. This would be true where the evidence stipulated is undisputed, or where there is other evidence in the case or corroborating circumstances, but where the stipulated facts are disputed and there is no other evidence in the case, the Court must have some basis for determining

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that one set of facts is more worthy of belief than another. This basis is the character and credibility of the witnesses. But here there are no witnesses nor even the names of any witnesses and there is no evidence on the question of value except both sides stipulate they would respectfully prove that a stucco garage cost $290.75 and $500. The court cannot say the stipulation of plaintiff is more trutnful than that of defendant in such a case without taking judicial notice that a garage of that character cost $500 to build, and it is clear that this is not a case where the fact may be judicially noticed. 10

Suppose a suit was brought for breach of contract and the only evidence before the Court as to performance or non-performance was a stipulation that unknown witnesses on both sides would respectively testify that the contract was performed and not performed, and there were no surrounding circumstances to help the Court. How could the Court properly exercise its duty to weigh the evidence and determine which is the more credible? 20

The Supreme Court probably relied on a statement in appellee's brief in the Court below that the trial court was informed that the plaintiff's expert was Paul Grillo and that the court was acquainted with him. Not only is there no evidence in the record to that effect but appellee is mistaken and his statement would have been denied by us had appellee's brief in the court below been submitted to us in time. Mr. Carpenter, who argued the appeal in the Court below was not present at the trial of the case and was unable at the argument either to admit or deny this statement but relied on the record. The fact is after the stipulation was prepared 30 40

and before it was accepted the court asked the defendant's attorney whether he would agree to provide in the stipulation the names of experts who would so testify. Defendant's attorney stated that he would refuse to enter into any such stipulation if the names of any particular experts were inserted. The plaintiff's attorney then agreed to accept the stipulation as it was. The only purpose the stipulation can serve the plaintiff is as an admission on plaintiff's part that a stucco garage costs $290.75 and that admission is the only evidence in the case on the question of value.

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The court cannot properly determine the relative credibility of the disputed facts in the stipulation and consequently plaintiff has failed to sustain the burden of proof on the question of damages. (Grounds of appeal 12 to 15 inclusive).

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POINT VI.

In the case of an alternative agreement plaintiff must prove the damages under both alternatives or that the damages under one alternative are less than under the other and he is entitled to recover damages on the least beneficial alternative.

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The agreement, Exhibit P-1 (p. 7), provides for the construction of "a one story *brick or stucco garage.*" The witness Ferber was asked on cross examination (p. 13).

> "Q. Was there anything said which the contract was drawn up as to whether the garage was to be built of *brick or stucco?* A. *Yes, Mr. Cona, at the time, that he should make it the one most convenient for him and that I would be satisfied with one or the other.*"

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This is an alternative agreement. In such case the measure of damages is the value of the least beneficial alternative.

> "The rule in that case, as will be seen, is that the plaintiff recovers compensation for the less valuable alternative, on the supposition that had the defendant performed, he would have taken upon himself the discharge of the least onerous obligation."
>
> 1 Sedgwick on Damages (8th Edition, p. 606, Sec. 421).

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See also 2 Sedgwick on Damages page 286, Sec. 635.

The only evidence on the question of damages is contained in the stipulation at page 31. This stipulation deals with the cost of a stucco garage and there is no testimony whatever as to the cost of a brick garage, nor is there any evidence whether a brick garage is cheaper or more expensive than a stucco garage. Under the rule of the least beneficial alternative plaintiff should have shown the cost of both a brick and a stucco garage and the damages, if any, could then have been computed on the least beneficial alternative.

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The criticism of the Supreme Court on this point is that the case was tried upon the theory that stucco should be used. There is nothing in the record to warrant this assertion. The Supreme Court probably relied upon a statement in appellee's brief in the court below that such was the understanding and that it was agreed by counsel and the trial court that the cost of a stucco garage under the contract would be less than the cost of a brick garage. Not only is there no evidence in the case to that effect but appellee is mistaken, and this would have been denied by us had the brief of the appellee in the court below been presented to us in time to deny it. As previously stated, Mr. Carpenter of this

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firm who argued the appeal orally was not present at the trial of the case and was unable either to admit or deny this assertion but relied on the record.

The further criticism of the Supreme Court is that no claim was made by defendant that brick was cheaper. It was not necessary for defendant to do this. It was the duty of the plaintiff to establish the damage under both alternatives or to show which alternative was the cheaper. There is therefore, no evidence to support the judgment for $500 (p. 33) and this judgment forms the basis of grounds of appeal, numbers 12 to 17 inclusive.

We respectfully submit that the judgment of the Supreme Court should be reversed for the foregoing errors.

McDermott & Enright,
Attorneys for Appellant.

Telephone 1697 Worth THE WEIBEZAHL PRINT 25 Elm St, N. Y.
—1917—

New Jersey Court of Erorrs and Appeals.

KATHERINE FERBER, *Plaintiff-Respondent,* vs. PASQUALE CONA, *Defendant-Appellant.*	On Appeal from Supreme Court.

BRIEF OF RESPONDENT.

This appeal brings up for review a judgment of the Supreme Court affirming a judgment of the District Court of the First Judicial District of the County of Hudson.

On the first trial of this case, the judgment of the District Court of the First Judicial District of the County of Hudson, was reversed. 97 Atl. 720. The ground of reversal was the exclusion by the Trial Court of the following questions asked by the defendant's counsel of the plaintiff's witness on cross-examination:

> "Q. Your idea was simply to file the plan drawn up with the City and then build something else?
>
> "Q. Will you state whether or not the only requirement you were going to carry out with the architect's plan, was simply as to the size of the garage?
>
> "Q. At what time did you file the plan, Mr. Ferber?"

This Court held that these questions were proper in view of the other testimony of the wit-

ness, because they might tend to show an abandonment of the contract on the part of the plaintiff and thereby relieve the defendant from further performance.

This Court makes no reference to the other questions excluded, in the opinion.

The case was tried again and judgment was again entered by the trial court against the defendant.

Plaintiff proved a written contract between the parties, dated November 15th, 1912, and that the defendant never performed the same or made any effort to perform the same, although frequently requested to do so.

The defense was that the contract was not complete and therefore subjected the defendant to no liability threunder and did not create any obligation on the part of the defendant and that the defendant was willing to build the garage and offered to do so, but that plaintiff refused to permit him.

Before the commencement of the trial and at proper times during the course of the trial, the counsel for the parties and the court awaited the appearance of plaintiff's expert witness, who was to testify as to the cost of the construction of the garage and it was agreed that a stucco garage was less expensive than a brick garage, and the parties, in order to avoid delay and being familiar with the case, agreed that they would stipulate what the testimony of the plaintiff's expert witness would be. It was stated by the attorney for the plaintiff that Paul Grillo was the name of the witness and the court was acquainted with him theretofore. The stipulation (State of the Case, page 31) was stated by the court, which was intended to express the understanding of the parties in view of the conversations.

POINT I.

Plaintiff made out a cause of action both on the pleadings and on the proofs.

The contract attached to the State of Demand reads as follows:

"This Agreement made this fifteenth day of November, one thousand nine hundred and twelve,

"Between Pasquale Cona, of the Township of Weehawken, County of Hudson and State of New Jersey, party of the first part,

"And Katherine Ferber, of the same place, party of second part.

"Witnesseth, that whereas Giovanna Cona and the said Pasquale Cona have by deed bearing even date herewith conveyed to the party of the second part the premises known as No. 200 Highpoint Avenue, in the Township of Weehawken aforesaid, for the sum of Thirteen thousand eight hundred dollars and in addition to the conveying of the premises aforesaid the said party of the first part has agreed to erect for the said party of the second part on or before the first day of April, next, on the rear of the above described premises a one story brick or stucco garage to be twelve (12) feet wide by eighteen (18) feet deep and to be at least ten (10) feet in height in the clear and to have a window on each of the north, south and west sides and to have a suitable double door and entrance on the east side. The floor is to be of cement.

The sidewalk is to be properly graded before the entrance. The roof of said building is to be as hereafter agreed upon between the parties hereto.

"It is mutually understood and agreed that said building shall be erected subject to the approval of the party of the second part.

"In witness whereof said parties have hereunto set their hands and seals the day and year first above written.

Signed, sealed and
delivered in the
presence of

PASQUALE CONA, (L. S.)
KATHERINE FERBER, (L. S.)"

Plaintiff's witness, Philip Ferber (State of the Case, page 11) testified as follows:

"Q. Did you have any conversation with Mr. Cona regarding the contract? A. Yes, sir.

"Q. What was that conversation? A. About the roof.

"Q. About the roof? A. Yes, sir.

"Q. What was the conversation? A. The shape and what the roof was to be covered with.

Q. And did he and you agree upon the shape and what the roof should be covered with? A. Yes, sir.

"Q. What about the shape of the roof? A. A pointed roof.

"Q. What did you agree upon as to material? A. Tin."

9 Cyc, page 281, Note No. 94. *Lara* vs. *General Apothecaries Company,* 26 L. J. Exch. 225. "It has been held, however, that if the terms proposed by two parties to each other constituted a complete contract by which the one party has to do for the other a definite work at a definite time and to receive a specified rate of remuneration, it is not the less a binding contract which will subject a party who is to do the work to an action for not doing it, because at the time the terms were accepted something remained to be disclosed as to the nature of the work upon which it might depend whether there might not be a legal justification for refusing to perform it."

53 L. R. A. 290 Note citing case of.................................. vs. ...., 61 Pacific Reporter, page 1064, is a case in which the price was agreed to be $50.00 or $60.00 and the court held the price to be sufficiently certain and definite and the contract binding.

The contract is under seal, specifies the time within which it is to be performed and states all the details necessary for the intelligent performance thereof between the parties. It provides that "the roof of said building is to be as hereafter agreed upon between the parties hereto.

"It is mutually understood and agreed that the said building shall be erected subject to the approval of the party of the second part." The testimony shows that the roof was agreed upon and that the plaintiff approved the agreement.

The testimony clearly shows that the contract was regarded by the parties as binding, all the terms were fixed and there is no testimony to show that it was a mere negotiation and therefore does not come with the case of *Shaw* vs. *Woodbury Glass Works,* 52 N. J. L., page 7.

The contract in the case was entirely performed by the plaintiff and consideration passed to the defendant and therefore the case does not come within those cases in which the contracts were executory and under which neither party has received any actual consideration. The consideration of $13,800 was paid by the plaintiff to the defendant. This was the consideration for the premises contained in the deed and the garage to be built under this contract. Plaintiff's witness Ferber testified to this effect and defendant Cona testified that the contract, which was dated the same day as the deed, was actually signed two weeks later. This testimony on the part of defendant is immaterial because even assuming it to be true, it shows that the consideration was paid in full by the plaintiff to the defendant. However, the fact is that the consideration of $13,800 was the full consideration for the conveyance and for the contract in question.

In none of the cases cited by counsel for appellant was there a contract like the one in this case where all the terms were definite and agred upon beyond question and complete performance by one of the parties.

POINT II.

The trial court properly sustained objections to questions asked on cross-examination grounds of appeal Nos. 2 to 6.

Questions asked by defendant's counsel set forth in grounds of appeal Nos. 2 to 6 inclusive, were properly excluded on objection because obviously their only purpose was to vary the terms of the written contract. They could have no possible reference to the witness' credibility and were all questions which referred to conversations had,

and the state of mind of the parties, before or at the time of the signing of the written contract and were deliberately framed to change the terms of the written contract and the objection was sustained only as to those questions which would contradict or vary or change the contract in particulars where the contract itself is clear, specific and unambiguous. The objection to the question "Q. Was there anything said when the contract was drawn up as to whether the garage should be built of brick or stucco?" was over-ruled and the question was answered.

Naumberg vs. *Young,* 44 N. J. L., page 331: "Parol evidence will not be received to add or to alter the terms of a contract in writing"; 3 *Starkie on Evidence,* page 1002: "When the terms of the contract are reduced to writing, the document itself being constituted by the parties as the true and proper expedition of their demands and intentions, is the only instrument of evidence in respect of that agreement which the law will recognize, for the purpose of evidence * * * * All parol testimony of conversations held between the parties or of declarations made by either of them, whether before or after or at the time of the completion of the contract, will be rejected. *Jones on Evidence,* Section 440. "Where a writing, although embodying an agreement, is manifestly incomplete and is not intended by the parties to exhibit the whole agreement but only to define some of its items, the writing is conclusive as far as it goes. But such parts of the actual contract as are not embraced within its scope, may be established by parol."

These questions were asked on cross-examination on plaintiff's case. The court disregarded these questions when they formed the basis of reasons on appeal on the first appeal.

The basis for ground of appeal No. 7 is the sustaining of plaintiff's objection to the following question: "Q. And you were not willing to pay $300, were you?"

This question is immaterial, incompetent and irrelevant in view of the witness' testimony. He testified on direct cross-examination that the defendant had never offered to build the garage called for in the plan for the additional consideration of $300. This question was also improper cross-examination.

POINT III.

The testimony shows a plain refusal to perform by the defendant and a positive desire that the defendant perform, by the plaintiff.

Ferber testified that he told his architect, Meystre, that he was having a garage built and Meystre volunteered to submit a sketch; that in May, 1913, Ferber delivered the sketch to the defendant and requested the defendant to inform him what the additional cost would be to build the garage according to the sketch; that defendant promised to do so but never did; that defendant never stated the price and that the parties never agreed upon a price. The defendant testified that he requested $300 for the same but that plaintiff never agreed to pay him $300 or any other price for it. Ferber further testified that he repeatedly requested defendant to build the garage, called for in the contract, but that defendant refused and never did so, always making excuses; that he finally told the defendant he would be satisfied if, instead of building the garage called for by the contract, he would build a portable garage much

more inexpensive; that defendant promised to do so but never did. He also testified (State of the Case, page 29):

> "Q. Did you ever refuse to permit the defendant to erect a garage on or before the first of April, 1913, constructed of brick or stucco, 12 feet wide by 18 feet deep by 10 feet in height, with a window on each of the north, south and west sides, and with a double door and entrance on the east side, the floor to be of cement and the sidewalk to be properly graded before the entrance and the roof of tin? A. No, sir."
>
> "Q. Did you, at any time after the first of April, 1913, refuse to permit the defendant to build a garage of those dimensions? A. No, sir."

The plaintiff admitted that he offered to make a new contract with the defendant, in which event the contract in this case was to be rescinded; but the parties never agreed to the new contract or to a recision of the old one. The witness Platoff testified that he offered, for the plaintiff, to accept a portable garage much more inexpensive, in settlement of the suit, but that the defendant refused to build the same. Ferber testified that he knew nothing concerning the filing of the plan; that Meystre probably did so; no amended plan was filed because there was no necessity for it as the defendant refused to build *any* garage for the plaintiff.

POINT IV.

There was sufficient evidence for the court to assess damages.

The testimony with reference to the cost of constructing a brick or stucco garage, was understood between counsel and the court; there was a great deal of conversation regarding it; it was agreed that the plaintiff's testimony would be $500 and it was agreed that the court would have a right to be bound by it so far as the plaintiff's case was concerned. A stipulation was made in open court after this conversation and the court apparently refused to believe the defendant's testimony that a garage in compliance with the contract would cost $290.75. After the conversations, the court and counsel agreed that the cost of a stucco garage under the contract would be less than the cost of a brick garage.

It is bad faith upon the court for the defendant at this time to say that the court should not have found damages in the sum of $500, even though the stipulation were not broad enough to cover the case and the statements contained in appellant's brief, page 17, line 30, referring to the understanding of the trial court and counsel concerning damages and the costs respectively of brick and stucco are denied.

SUMMARY.

The appellant is limited to the defences set forth in the Specification of Defences. The questions excluded, reasons for appeal Nos. 2 to 6, cannot possibly refer to any of the defences specified.

All of the other points on appeal, except the assessment of damages, were before the court on the first appeal, 97 Atl. 720, and the court declined to grant relief under any of them, except those questions which might establish an abandonment of the contract and the former reversal which was purely on that ground.

The defendant had great latitude on the second trial in this connection and no questions were excluded which would in any way tend to show an abandonment by the plaintiff; on the contrary, testimony clearly shows that there was no abandonment, but that there was a refusal on the part of the defendant to perform his contract. The trial court used its discretion and on the testimony decided in favor of plaintiff.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed.

JOHN N. PLATOFF,
Attorney for Respondent.